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# Twenty-Five Years of the “Prospective Waiver” Doctrine in International Dispute Resolution: *Mitsubishi*’s Footnote Nineteen Comes to Life in the Eleventh Circuit

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## I. INTRODUCTION

The recent decision of the U.S. Court of Appeals for the Eleventh Circuit in *Thomas v. Carnival Corp.*<sup>1</sup> has received substantial attention for going against modern policy favoring arbitration<sup>2</sup> and refusing to enforce an international arbitration agreement.<sup>3</sup> In a dispute between a cruise-ship employee and his employer, the Eleventh Circuit held that the parties’ agreement to resolve disputes by arbitration under Panamanian law in the Philippines violated public policy.<sup>4</sup> The *Thomas* case received much attention largely because the court based its holding on the “prospective waiver” concept, a doctrine by which a U.S. court may refuse to enforce contractual provisions that work as waivers of U.S.

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1. 573 F.3d 1113 (11th Cir. 2009), *cert. denied*, 130 S. Ct. 1157 (2010).

2. *See, e.g.*, *Hall Street Assocs. v. Mattel, Inc.*, 552 U.S. 576, 581 (2008); *Green Tree Fin. Corp. v. Randolph*, 531 U.S. 79, 91 (2000); *First Options of Chicago, Inc. v. Kaplan*, 514 U.S. 938, 945 (1995); *Rodriguez de Quijas v. Shearson/Am. Express, Inc.*, 490 U.S. 477, 479–81 (1989); *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614, 626 (1985); *Moses H. Cone Mem’l Hosp. v. Mercury Constr. Corp.*, 460 U.S. 1, 24 (1983); *Scherk v. Alberto-Culver Co.*, 417 U.S. 506, 519–20 (1974).

3. *See, e.g.*, Joseph R. Brubaker, *The Prospective Waiver of a Statutory Claim Invalidates an Arbitration Clause: The Eleventh Circuit Decision in Thomas v. Carnival Corp.*, 19 AM. REV. INT’L ARB. 309 (2009); Paul Friedland & Kirsten Odynski, *Eleventh Circuit Troubled by Choice of Law Not Choice of Arbitration in Thomas v. Carnival*, KLUWER LAW INTERNATIONAL, Aug. 26, 2009, <http://klowerarbitrationblog.com/blog/2009/08/26/eleventh-circuit-troubled-by-choice-of-law-not-choice-of-arbitration-in-thomas-v-carnival>; Kyriaki Karadelis, *Eleventh Circuit Decision on Public Policy Provokes Concern*, GLOBAL ARB. REV., Sept. 2, 2009, <http://www.globalarbitrationreview.com/news/article/18720/eleventh-circuit-decision-public-policy-provokes-concern>; Marc J. Goldstein, *U.S. “Public Policy” as Basis to Nullify Arbitration Agreement: Beyond the Bounds of Mitsubishi?*, Marc J. Goldstein Litigation & Arbitration Chambers, July 7, 2009, <http://arbblog.lexmarc.us/2009/07>; Alex C. Lakatos, *Declining to Compel Arbitration on Public Policy Grounds: Thomas v. Carnival Corp.*, Mayer Brown LLP, Jan. 19, 2010, <http://www.mayerbrown.com/publications/article.asp?id=8225 &nid=6>.

4. *Thomas*, 573 F.3d at 1124.

statutory rights, in violation of public policy.<sup>5</sup> The Eleventh Circuit's novel interpretation of this doctrine highlights the tension between, on one hand, the American judiciary's interest in protecting U.S. statutes from evisceration in arbitral and foreign-court adjudication, and, on the other hand, its interest in promoting international commerce.

A doctrine that has resulted in praise, criticism, and confusion over the past twenty-five years,<sup>6</sup> the prospective waiver concept in international dispute resolution stems from a footnote in the 1985 landmark U.S. Supreme Court decision of *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*<sup>7</sup> In *Mitsubishi*, the Court held that parties could resolve claims based on U.S. antitrust law through international arbitration.<sup>8</sup> By characterizing arbitration as an appropriate forum for statutory claims—a forum in which a party does not forgo substantive rights and reaps the benefits of simple and informal procedures<sup>9</sup>—the Court sent a message that lower courts could compel arbitral adjudication of most U.S. statutory claims.

In holding that claims under the antitrust statutes fell within the ambit of arbitrable disputes under the U.S. Federal Arbitration Act (FAA),<sup>10</sup> the Court issued a warning that has become the prospective waiver doctrine. In *Mitsubishi*'s footnote nineteen, the Supreme Court cautioned that parties may not use the freedom to select their dispute-resolution forum to evade the application of U.S. public policy recognized in federal statutes:

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>11</sup>

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5. *Id.* at 1120–24.

6. See, e.g., Thomas E. Carbonneau, *The Exuberant Pathway to Quixotic Internationalism: Assessing the Folly of Mitsubishi*, 19 VAND. J. TRANSNAT'L L. 265, 286 (1986) (claiming that the prospective waiver doctrine is inconsistent with the "policy favoring the recourse to arbitration, the principles of party autonomy and self-determination in contracts (especially international ones), and the need to avoid parochial determinations and to recognize the special requirements of transnational commerce"); Andreas F. Lowenfeld, *The Mitsubishi Case: Another View*, 2 ARB. INT'L 178, 185–87 (1986) (justifying the prospective waiver doctrine to protect mandatory U.S. law); Jacques Werner, *A Swiss Comment on Mitsubishi*, J. INT'L ARB., Dec. 1986, at 81, 83 (describing the doctrine as "an attempt to export U.S. substantive laws" as it allows the arbitration of statutory claims "so long as the arbitrators will, no matter what the law chosen by the parties for governing their dispute says, apply U.S. law").

7. 473 U.S. 614 (1985).

8. *Id.* at 628, 640.

9. *Id.* at 628.

10. 9 U.S.C. §§ 1–307 (2006).

11. *Mitsubishi*, 473 U.S. at 637 n.19.

Although the Court opened the door for the arbitration of federal statutory claims, it conditioned entrance upon the guarantee that those claims actually be adjudicated.

Since 1985, many U.S. courts have interpreted *Mitsubishi* footnote nineteen by reviewing this prospective waiver doctrine when determining whether to compel arbitration or enforce exclusive choice-of-court agreements.<sup>12</sup> When doing so, these courts have engaged in a delicate balancing act of respecting the expectations of business partners in international commerce while ensuring that the contractually selected fora would protect the public policy concerns addressed by the relevant federal statutes.<sup>13</sup> Indeed, the Supreme Court has referred to the prospective waiver doctrine as recently as 2009.<sup>14</sup>

The Eleventh Circuit's interpretation of *Mitsubishi* footnote nineteen is intriguing in many ways because of its strong stance on protecting the federal statutory rights in question. In refusing to compel arbitration of the plaintiff's claim under the Seaman's Wage Act,<sup>15</sup> the court explained that under the prospective waiver doctrine "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" by a U.S. court to ensure that the statutory claim was adjudicated.<sup>16</sup> Interestingly, the Eleventh Circuit previously decided both that claims under the Seaman's Wage Act could be resolved in arbitration<sup>17</sup> and that the choice of foreign law excluding federal statutory claims did not necessarily violate public policy.<sup>18</sup> But in *Thomas*, the court applied the prospective waiver doctrine and refused to compel arbitration of the plaintiff's claim under the Seaman's Wage Act,<sup>19</sup> finding that the parties' arbitration and choice-of-law clauses excluded the application of U.S. statutory law and that a U.S. court would not have a subsequent opportunity to review the arbitral award.<sup>20</sup>

At first blush, the prospective waiver doctrine appears pragmatic: even though parties may agree to resolve federal statutory claims outside

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12. Choice-of-court agreements have been referred to by various names, including "jurisdiction agreements," "choice-of-venue agreements," and "forum-selection agreements." When parties agree that litigation may be pursued in the courts of only one jurisdiction, the agreement is referred to as an exclusive agreement. *See, e.g.*, GARY B. BORN & PETER B. RUTLEDGE, *INTERNATIONAL CIVIL LITIGATION IN UNITED STATES COURTS* 435–36 (4th ed. 2007).

13. *See infra* Part II.C.

14. *See* 14 Penn Plaza LLC v. Pyett, 129 S. Ct. 1456, 1474 (2009).

15. 46 U.S.C. § 10313 (2006).

16. *Thomas v. Carnival Corp.*, 573 F.3d 1113, 1123 (11th Cir. 2009), *cert. denied*, 130 S. Ct. 1157 (2010).

17. *See* Lobo v. Celebrity Cruises, Inc., 488 F.3d 891, 893–94 (11th Cir. 2007).

18. *See* Lipcon v. Underwriters at Lloyd's, 148 F.3d 1285, 1299 (11th Cir. 1998).

19. 46 U.S.C. § 10313 (2006).

20. *Thomas*, 573 F.3d. at 1120–24.

of U.S. courts, they may not abuse this opportunity by contractually evading the application of the public policy codified in those statutes. The Eleventh Circuit's novel decision in *Thomas*, however, highlights two issues concerning the prospective waiver doctrine. The first issue is whether the prospective waiver doctrine provides an appropriate framework for protecting American public policy. The doctrine seeks to prevent parties from using arbitration or foreign courts, together with foreign law, to circumvent American public policy; but whether it actually does so is unclear. The second issue is whether this doctrine comports with international law—specifically, the United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards (the “New York Convention”).<sup>21</sup> Although the New York Convention addresses arbitral jurisdiction and not the substantive law applicable to the merits in arbitral proceedings, the prospective waiver doctrine conditions arbitral jurisdiction on the substantive law. An assessment of this issue may indicate how the U.S. judiciary will interpret the Convention on Choice of Court Agreements (the “Hague Convention”), a treaty signed but not yet ratified by the United States.<sup>22</sup>

Accordingly, this Article reviews the prospective waiver doctrine in the context of the Eleventh Circuit's decision in *Thomas*. Part II recounts the development of the doctrine in the Supreme Court's decision in *Mitsubishi* and its appellate court progeny. Part III analyzes the Eleventh Circuit's discussion of the prospective waiver doctrine and its application. Part IV assesses the merits of the federal judiciary's competing interpretations of the prospective waiver doctrine. Part V discusses whether this doctrine may be reconciled with international law. This article concludes that the prospective waiver doctrine may impinge upon the U.S. policy that favors allowing parties to resolve their disputes in arbitration or in contractually selected courts and that a more nuanced analysis may better serve to protect federal statutory claims if the prospective waiver doctrine is necessary at all.

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21. June 10, 1958, 21 U.S.T. 2517, 330 U.N.T.S. 38 [hereinafter New York Convention].

22. Convention on Choice of Court Agreements, June 30, 2005, 44 I.L.M. 1294 [hereinafter Hague Convention]. The European Union also has signed this convention. See Hague Conference on Private International Law, Convention of 30 June 2005 on Choice of Court Agreements, Status Table, [http://www.hcch.net/index\\_en.php?act=conventions.status&cid=98](http://www.hcch.net/index_en.php?act=conventions.status&cid=98) (last visited May 5, 2010).

## II. THE EVOLUTION OF THE PROSPECTIVE WAIVER DOCTRINE IN INTERNATIONAL DISPUTE RESOLUTION

### A. *The Supreme Court's Decision in Mitsubishi and Footnote Nineteen*

The Supreme Court's decision in *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.* introduced the prospective waiver concept into international dispute resolution.<sup>23</sup> The *Mitsubishi* dispute arose out of two sales and distribution agreements entered into by Japanese, Swiss, and Puerto Rican companies.<sup>24</sup> One of these agreements contained both an arbitration clause that provided for arbitration in Japan before the Japan Commercial Arbitration Association<sup>25</sup> and a choice-of-law clause providing for the resolution of disputes under Swiss law.<sup>26</sup>

A dispute arose after the new-car market slowed down in the early 1980s. The Puerto Rican distributor struggled to meet its expected sales volume and requested a delay or cancellation of the shipment of several orders.<sup>27</sup> In response, the Japanese manufacturer brought an action in the U.S. District Court for the District of Puerto Rico, seeking an order to compel arbitration under the FAA.<sup>28</sup> The Puerto Rican distributor denied the allegations and asserted various counterclaims, including violations of the Sherman Act.<sup>29</sup> The primary issue that the Court faced was "whether an American court should enforce an agreement to resolve antitrust claims by arbitration when that agreement arises from an international transaction."<sup>30</sup> In enforcing arbitration of the antitrust claims, the Court noted a secondary issue of whether exceptions existed to the enforcement of such arbitration clauses where the parties had agreed to apply foreign law.<sup>31</sup>

Addressing the primary issue of arbitrability, the Court followed a two-part test to resolve the dispute over the enforcement of the arbitra-

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23. 473 U.S. 614 (1985). The Court had considered the prospective waiver idea before *Mitsubishi*, albeit in separate contexts. See, e.g., *Alexander v. Gardner-Denver Co.*, 415 U.S. 36, 51 (1974) (ruling that "there can be no prospective waiver of an employee's rights under Title VII"); *Wilko v. Swan*, 346 U.S. 427, 438 (1953) (holding that an agreement to arbitrate certain securities controversies was void under the antiwaiver provision of the Securities Act), *abrogated* by *Rodriguez de Quijas v. Shearson/Am. Express, Inc.*, 490 U.S. 477 (1989). Since *Gardner-Denver*, the Court has issued other opinions on the issue of prospective waiver in the context of Title VII employment actions. See *Wright v. Universal Mar. Serv. Corp.*, 525 U.S. 70 (1998); *Gilmer v. Interstate/Johnson Lane Corp.*, 500 U.S. 20 (1991).

24. *Mitsubishi*, 473 U.S. at 616-17.

25. *Id.* at 617.

26. *Id.* at 637 n.19.

27. *Id.* at 617.

28. *Id.* at 618.

29. *Id.* at 619-20.

30. *Id.* at 624.

31. *Id.* at 637 n.19.

tion clause.<sup>32</sup> First, it inquired whether the parties agreed to arbitrate their dispute and whether the arbitration agreement encompassed the relevant statutory issues, including the U.S. antitrust law.<sup>33</sup> Second, the Court asked if any legal constraints external to the parties' agreement—that is, U.S. arbitration and antitrust law—foreclosed the arbitration of those claims.<sup>34</sup> Answering the first question positively and the second question negatively, the Court enforced the arbitration agreement and compelled the parties to submit their dispute, including antitrust issues, to arbitration.

In arriving at this conclusion, the Court recognized international arbitration as an appropriate forum for disputes regarding U.S. statutes. It sought to reassure skeptics that a party to such an arbitration “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>35</sup> The Court rejected the reasoning of a Second Circuit decision that parties should litigate rather than arbitrate antitrust claims.<sup>36</sup> Revealing “skepticism” toward this Second Circuit case,<sup>37</sup> the Court expressed inherent trust in arbitration as an institution, rejecting the idea that arbitrators may harbor innate hostility toward the constraints of antitrust law, declining to view arbitrators as incompetent, and brushing off the concern that international arbitrators may lack experience or exposure to U.S. law and values.<sup>38</sup>

The Court further reasoned that its decision was consistent with its earlier decisions in favor of arbitration and forum-selection clauses calling for adjudication abroad. Following its well-known precedents honoring international contracts, *Scherk v. Alberto-Culver Co.*<sup>39</sup> and *Bremen v. Zapata Off-Shore Co.*,<sup>40</sup> the Court 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 require that we enforce the parties' agreement, even assuming that a contrary result would be forthcoming in a domestic context.”<sup>41</sup> The Court specifically

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32. Because the dispute involved several parties and agreements, the district court resolved certain issues that were not subject to the relevant arbitration clause. *See id.* at 620 n.7.

33. *Id.* at 626–28.

34. *Id.* at 628.

35. *Id.*

36. *Id.* at 629 (citing *Am. Safety Equip. Corp. v. J.P. Maguire & Co.*, 391 F.2d 821, 827–28 (2d Cir. 1968)).

37. *Id.* at 632.

38. *Id.* at 634 & n.18.

39. 417 U.S. 506 (1974).

40. 407 U.S. 1 (1972).

41. *Mitsubishi*, 473 U.S. at 629.

cited *Scherk* to note the "emphatic federal policy in favor of arbitral dispute resolution"<sup>42</sup> and cited *Bremen* to recognize the "utility of forum-selection clauses in international transactions" as "an indispensable element in international trade, commerce, and contracting."<sup>43</sup>

Having decided that U.S. law permitted the resolution of antitrust claims in arbitration, the Court briefly turned to the second issue of whether this principle had any exceptions. The Court reasoned that "[w]here the parties have agreed that the arbitral body is to decide a defined set of claims," the arbitral tribunal "should be bound to decide that dispute in accord with the national law giving rise to the claim."<sup>44</sup> Thus, the Court concluded that the arbitral adjudication of federal statutory claims is permissible "so long as the prospective litigant effectively may vindicate its statutory cause of action in the arbitral forum," as this will ensure that "the statute will continue to serve both its remedial and deterrent function."<sup>45</sup> Between these two sentences, however, the Court inserted the now notorious footnote nineteen, which provides:

In addition to the clause providing for arbitration before the Japan Commercial Arbitration Association, the Sales Agreement includes a choice-of-law clause which reads: "This Agreement is made in, and will be governed by and construed in all respects according to the laws of the Swiss Confederation as if entirely performed therein." The United States raises the possibility that the arbitral panel will read this provision not simply to govern interpretation of the contract terms, but wholly to displace American law even where it otherwise would apply. The International Chamber of Commerce opines that it is "[c]onceivabl[e], although we believe it unlikely, [that] the arbitrators could consider Soler's affirmative claim of anticompetitive conduct by CISA and Mitsubishi to fall within the purview of this choice-of-law provision, with the result that it would be decided under Swiss law rather than the U.S. Sherman Act." At oral argument, however, counsel for Mitsubishi conceded that American law applied to the antitrust claims and represented that the claims had been submitted to the arbitration panel in Japan on that basis. The record confirms that before the decision of the Court of Appeals the arbitral panel had taken these claims under submission.

We therefore have no occasion to speculate on this matter at this stage in the proceedings, when Mitsubishi seeks to enforce the agreement to arbitrate, not to enforce an award. Nor need we consider now the effect of an arbitral tribunal's failure to take cognizance of the

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42. *Id.* at 631.

43. *Id.* at 629–30 (internal quotation marks omitted).

44. *Id.* at 636–37.

45. *Id.* at 637.



statutory cause of action on the claimant's capacity to reinitiate suit in federal court. We merely note that in the event the choice-of-forum and choice-of-law clauses operated in tandem as a prospective waiver of a party's right to pursue statutory remedies for antitrust violations, we would have little hesitation in condemning the agreement as against public policy.<sup>46</sup>

The last sentence of this footnote has since transformed into one of the most well-known aspects of the case—the prospective waiver doctrine—sparking curiosity, discussion, and controversy among practitioners and academics.<sup>47</sup> By “merely not[ing]” this point, the Court appears to have confined this statement to judicial dictum—something that adds an additional layer of uncertainty in debates over its interpretation. Two issues are worth mentioning.

First, the Court was not faced in *Mitsubishi* with choice-of-forum and choice-of-law clauses that were operating “in tandem.” As stated in footnote nineteen, Mitsubishi's counsel had conceded that U.S. law would be applied to the antitrust claims before the arbitral tribunal. How the Court would have reacted if counsel had not made such a concession is unclear. Although the Court indicates that U.S. antitrust law “otherwise would apply,” the Court may have detailed this analysis, considered whether Swiss competition law adequately protected American antitrust interests, or determined whether the arbitrators should construe the choice-of-law clause to determine if U.S. law would apply. Additionally, the Court may have clarified what “public policy” the Court referenced in the footnote as a basis for the prospective waiver doctrine. The cases cited by the Court after this statement all deal with antitrust claims, and the Court does not indicate whether it envisioned a specific public policy or a limit on the types of applicable public policy.

Second, the Court emphasized the procedural posture of the case. In the footnote, the Court remarked that the dispute was over the enforcement of an arbitration agreement, not over the enforcement of an arbitral award. Shortly after footnote nineteen, the Court cited Article V(2)(b) of the New York Convention to note that U.S. courts could serve as a safety net at the award-enforcement stage and, in what is commonly referred to as the “second look” doctrine,<sup>48</sup> ensure the proper application of U.S. antitrust laws at that time.<sup>49</sup> Perhaps this sheds light on the

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46. *Id.* at 637 n.19 (alterations in original) (citations omitted).

47. *See supra* note 6.

48. *See* GARY B. BORN, INTERNATIONAL COMMERCIAL ARBITRATION: COMMENTARY AND MATERIALS 293 n.9 (2d ed. 2001); 2 KLAUS PETER BERGER, PRIVATE DISPUTE RESOLUTION IN INTERNATIONAL BUSINESS: NEGOTIATION, MEDIATION, ARBITRATION 572 (2d ed. 2009). The merits of the second look doctrine are outside the scope of this article.

49. *Mitsubishi*, 473 U.S. at 638.

court's pronouncement of "public policy" in footnote nineteen. In his dissent, Justice Stevens read Articles II and V of the New York Convention together and indicated that awards stemming from agreements that need not be enforced under Article V(2) of the Convention may also be "incapable of being performed" under Article II(3).<sup>50</sup> But it is unclear if the majority considered this same scenario when it created footnote nineteen.

B. *The U.S. Supreme Court's Interpretation of Mitsubishi Footnote Nineteen*

The U.S. Supreme Court has cited the "operate in tandem" language of *Mitsubishi* footnote nineteen twice since 1985.

First, in *Vimar Seguros Y Reaseguros, S.A. v. M/V Sky Reefer*,<sup>51</sup> the Court ruled on a dispute between the insurer of a New York partnership and a Panamanian charterer regarding a bill of lading, which contained clauses providing that it "shall be governed by the Japanese law," and that any disputes "shall be referred to arbitration in Tokyo by the Tokyo Maritime Arbitration Commission (TOMAC) of The Japan Shipping Exchange, Inc."<sup>52</sup> When the Panamanian charterer moved to compel arbitration pursuant to the bill of lading, the insurer and the partnership argued that the arbitration clause was invalid under the Carriage of Goods by Sea Act (COGSA) because it lessened liability in violation of COGSA. Although the Court did not detail the differences between Japanese law and COGSA, it did recognize one possible difference: under the Japanese Hague Rules, carriers may have an additional defense based on the acts or omissions of stevedores hired by the shipper.<sup>53</sup> Thus, the Court had to decide if the arbitration clause in question was invalid under COGSA and, if so, whether the prospective waiver language from *Mitsubishi* footnote nineteen applied.<sup>54</sup>

Enforcing the arbitration clause, the Court held that "the relevant provisions of COGSA and the FAA [were] in accord, not in conflict," and that COGSA claims could be submitted to arbitration.<sup>55</sup> The relevant COGSA provision provides as follows:

Any clause, covenant, or agreement in a contract of carriage relieving the carrier or the ship from liability for loss or damage to or in connection with the goods, arising from negligence, fault, or failure in the duties and obligations provided in this section, *or lessening such*

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50. *Id.* at 659 & n.34 (Stevens, J., dissenting).

51. 515 U.S. 528 (1995).

52. *Id.* at 531.

53. *Id.* at 539.

54. 46 U.S.C. app. § 1300 (2006).

55. *Vimar*, 515 U.S. at 530.

*liability otherwise than as provided in this chapter, shall be null and void and of no effect.*<sup>56</sup>

In holding that the arbitral process did not lessen liability, the Court echoed certain themes from *Mitsubishi*. It noted that substantive liability under a U.S. statute is not analogous or necessarily related to the means (procedure and costs) of enforcing that liability.<sup>57</sup> The Court also cited comity and respect for international commercial agreements.<sup>58</sup>

The Court then addressed the argument that the bill of lading's arbitration and choice-of-law clauses operated as a prospective waiver of substantive rights under COGSA. The Court referred to the procedural posture of the case, noting that the parties only sought a ruling on the enforcement of the arbitration agreement.<sup>59</sup> Then the Court cited *Mitsubishi* footnote nineteen, stating that "[w]ere there no subsequent opportunity for review and were we persuaded that 'the choice-of-forum and choice-of-law clauses operated in tandem as a prospective waiver of a party's right to pursue statutory remedies . . . , we would have little hesitation in condemning the agreement as against public policy.'"<sup>60</sup> After this passage, the Court quickly observed that, as in *Mitsubishi*, the prospective waiver was only a hypothetical situation in this case. This was so because the Court held that the choice-of-law question "must be decided in the first instance by the arbitrator" under the basis that "mere speculation that the foreign arbitrators might apply Japanese law which, depending on the proper construction of COGSA, might reduce respondents' legal obligations, does not in and of itself lessen liability under COGSA § 3(8)."<sup>61</sup>

Second, in its 2009 decision of *14 Penn Plaza LLC v. Pyett*,<sup>62</sup> the Supreme Court had another opportunity to shed light on *Mitsubishi* footnote nineteen. An employment discrimination suit, the case involved a

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56. 46 U.S.C. app. § 1303(8) (2006) (emphasis added).

57. *Vimar*, 515 U.S. at 534 ("The statute thus addresses the lessening of the specific liability imposed by the Act, without addressing the separate question of the means and costs of enforcing that liability. The difference is that between explicit statutory guarantees and the procedure for enforcing them, between applicable liability principles and the forum in which they are to be vindicated.").

58. *See id.* at 539 ("If the United States is to be able to gain the benefits of international accords and have a role as a trusted partner in multilateral endeavors, its courts should be most cautious before interpreting its domestic legislation in such manner as to violate international agreements. That concern counsels against construing COGSA to nullify foreign arbitration clauses because of inconvenience to the plaintiff or insular distrust of the ability of foreign arbitrators to apply the law.").

59. *Id.* at 540.

60. *Id.* (second alteration in original) (quoting *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614, 637 n.19 (1985)).

61. *Id.* at 541.

62. 129 S. Ct. 1456 (2009).

collective bargaining agreement (CBA) that a labor union had entered into on behalf of security employees with a multiemployer bargaining association. The employees, who had been reassigned in their duties, brought action under the Age Discrimination in Employment Act (ADEA).<sup>63</sup> The Supreme Court had to decide whether ADEA claims could be resolved in arbitration and, if so, whether the prospective waiver doctrine applied.

Faced with the decision of whether an arbitration clause contained in the relevant CBA was enforceable, the Court was forced to inquire into whether Congress intended the substantive protection afforded by the ADEA to include protection against waiver of the right to a judicial forum.<sup>64</sup> The Court held that there was no legal basis to strike down the arbitration clause in the CBA because Congress had chosen to allow arbitration of ADEA claims and the "[j]udiciary must respect that choice."<sup>65</sup> Before concluding its opinion, the Court addressed the argument that the CBA operated as a substantive waiver of the employees' ADEA rights because it allegedly precluded federal lawsuits and allowed the union to block the arbitration of claims.<sup>66</sup> The Court refused to decide this issue because the issue was not "fully briefed" and was "not fairly encompassed within the question presented," but it did cite *Mitsubishi* footnote nineteen to note that "a substantive waiver of federally protected civil rights will not be upheld."<sup>67</sup>

The Supreme Court's cases offer some insight into the prospective waiver doctrine but do not indicate exactly how this doctrine should be applied. Both cases reaffirm the critical passage in *Mitsubishi* footnote nineteen, and the Supreme Court clearly indicated that the prospective waiver doctrine in *Mitsubishi* footnote nineteen applies not only to anti-trust claims but also to other statutory claims. The *Vimar* Court reiterated the prospective waiver doctrine from *Mitsubishi* footnote nineteen in a dispute over a bill of lading under COGSA, and the *Pyett* Court recognized the doctrine's possible application to civil rights in general even though the case focused only on an employment-discrimination dispute.<sup>68</sup> Yet although the Supreme Court has stated that it would apply

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63. 29 U.S.C. §§ 621–34 (2006).

64. *Pyett*, 129 S. Ct. at 1465.

65. *Id.* at 1466.

66. *Id.* at 1474.

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

68. Commentators have suggested that the prospective waiver doctrine should apply only to statutes of fundamental importance. *See, e.g.*, Goldstein, *supra* note 3. The Court's extension of the prospective waiver doctrine to COGSA may be a tacit rejection of this suggestion. *See, e.g.*, Brubaker, *supra* note 3, at 314.

the prospective waiver doctrine if the right circumstances ever existed, none of the Court's cases have actually triggered its application.

The *Vimar* Court placed special emphasis on the interlocutory stage of the proceedings in relation to its ability (or willingness) to evaluate the likelihood that U.S. law would apply to the dispute. Even though the choice-of-law clause in question called for Japanese law, the Court deferred to the arbitrators in that instance because

[a]t 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. . . . Respondents seek only to enforce the arbitration agreement. . . . As the District Court has retained jurisdiction, mere speculation that the foreign arbitrators might apply Japanese law which, depending on the proper construction of COGSA, might reduce respondents' legal obligations, does not in and of itself lessen liability under COGSA § 3(8).<sup>69</sup>

Moreover, the *Vimar* Court either clarified that the prospective waiver doctrine is precluded by the second look doctrine or added some form of the second look doctrine as a new element to *Mitsubishi* footnote nineteen's test for striking down an arbitration agreement. The Court stated that it would condemn an agreement where choice-of-forum and choice-of-law clauses operated in tandem as a prospective waiver of a party's right to pursue statutory remedies if "there [were] no subsequent opportunity for review"—if there were no opportunity for a second look.<sup>70</sup> Although the *Mitsubishi* Court noted just after footnote nineteen that "the national courts of the United States will have the opportunity at the award-enforcement stage to ensure that the legitimate interest in the enforcement of the antitrust laws has been addressed,"<sup>71</sup> it did not include this as a factor in footnote nineteen. Thus, the *Vimar* Court may have limited the doctrine's scope by adding a post-award review requirement.

These Supreme Court decisions do not address, however, whether and how the prospective waiver doctrine complies with the New York Convention.<sup>72</sup>

### C. *The Appellate Courts' Interpretation of Mitsubishi Footnote Nineteen and Its Progeny*

Since the Supreme Court decided *Mitsubishi* in 1985, the U.S.

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69. *Vimar Seguros Y Reaseguros, S.A. v. M/V Sky Reefer*, 515 U.S. 528, 540–41 (1995).

70. *Id.* at 540 (quoting *Mitsubishi*, 473 U.S. at 637 n.19).

71. *Mitsubishi*, 473 U.S. at 638.

72. The *Pyett* Court did not address the New York Convention at all, and the *Vimar* Court merely noted that the FAA is "based in part" on the New York Convention. See *Vimar*, 515 U.S. at 538.

courts of appeals have routinely cited the language from footnote nineteen when determining whether to enforce contractual provisions containing choice-of-law and forum-selection clauses. These cases reveal a number of questions about the scope of the prospective waiver doctrine, including the viability of the doctrine, the expansion of the doctrine to jurisdiction agreements, and the role of foreign and international law.<sup>73</sup>

As a threshold issue, one trend illustrated by the circuit courts of appeals is an uncertainty about the weight of footnote nineteen's warning. On one hand, some courts have tried to dismiss the importance of the footnote in how they describe and characterize it. For example, courts have referred to *Mitsubishi's* "operate in tandem" passage as "not . . . binding,"<sup>74</sup> an "isolated sentence in a footnote,"<sup>75</sup> clear dicta,<sup>76</sup> a mere "fragment" of a footnote,<sup>77</sup> and "dicta grounded upon a firm principle of antitrust law."<sup>78</sup> On the other hand, the same courts have repeatedly referred to this same language contained in the footnote in reaching their decisions.

Two circuits in particular have questioned the Supreme Court's willingness to actually strike down an agreement for violations of U.S. public policy. The Seventh Circuit cited *Mitsubishi* footnote nineteen for the proposition that "prospective waivers of statutory antitrust remedies would *likely* be voidable as contrary to public policy."<sup>79</sup> Likewise, the Eleventh Circuit itself has opined that the Supreme Court has failed to delineate the prospective waiver doctrine: "Supreme Court precedent . . . does not resolve the precise issue presented in this case: namely, whether an international agreement may, through the interaction of choice-of-forum and choice-of-law clauses, prospectively waive the protections of United States securities laws."<sup>80</sup>

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73. Several of the cases discussed *infra* involve disputes stemming from the same core factual scenario. When the British insurance market, Corporation of Lloyd's ("Lloyd's"), suffered severe financial losses in the 1990s, many U.S. investors brought suits in U.S. courts alleging violations of U.S. securities laws. Because many of these investors had signed agreements with Lloyd's that included clauses mandating dispute resolution under British law in the U.K., a number of U.S. courts facing disputes about these agreements engaged in a *Mitsubishi* footnote nineteen analysis. For more information on Lloyd's, see Lloyd's of London Homepage, <http://www.lloyds.com/> (last visited May 5, 2010).

74. *Simula, Inc. v. Autoliv, Inc.*, 175 F.3d 716, 723 (9th Cir. 1999).

75. *Riley v. Kingsley Underwriting Agencies, Ltd.*, 969 F.2d 953, 957 (10th Cir. 1992).

76. *Roby v. Corp. of Lloyd's*, 996 F.3d 1353, 1364 (2d Cir. 1993).

77. *George Fischer Foundry Sys., Inc. v. Adolf H. Hottinger Maschinenbau GmbH*, 55 F.3d 1206, 1209 (6th Cir. 1995).

78. *In re Am. Express Merchs.' Litig.*, 554 F.3d 300, 319 (2d Cir. 2009), *petition for cert. filed*, 77 U.S.L.W. 3670 (U.S. May 29, 2009) (No. 08-1473).

79. *Bonny v. Soc'y of Lloyd's*, 3 F.3d 156, 161 (7th Cir. 1993) (emphasis added).

80. *Lipcon v. Underwriters at Lloyd's, London*, 148 F.3d 1285, 1293 (11th Cir. 1998) (emphasis omitted).

The federal courts of appeals have generally avoided the *Mitsubishi* footnote nineteen conundrum by choosing to enforce the agreements in question. Indeed, this pattern is true for the Second,<sup>81</sup> Fourth,<sup>82</sup> Fifth,<sup>83</sup> Sixth,<sup>84</sup> Seventh,<sup>85</sup> Ninth,<sup>86</sup> Tenth,<sup>87</sup> and Eleventh<sup>88</sup> Circuits. In certain instances, these courts have expressed hesitancy or doubts when arriving at their conclusions,<sup>89</sup> but they have generally compelled parties to comply with the contractual provisions nonetheless.<sup>90</sup>

In a notable expansion of the prospective waiver doctrine, these federal courts of appeals have also considered whether to apply this doctrine to invalidate choice-of-court agreements.<sup>91</sup> The appellate decisions do not explain this expansion, but Supreme Court precedent justifies it. Although the Supreme Court cases of *Mitsubishi*, *Vimar*, and *Pyett* involved only agreements to arbitrate, footnote nineteen's critical passage refers to "choice-of-forum" clauses<sup>92</sup> and the Supreme Court has recognized that "foreign arbitration clauses are but a subset of foreign forum selection clauses in general."<sup>93</sup>

This expansion, however, has led federal courts of appeal to not apply the prospective waiver doctrine if foreign law is comparable to

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81. See *Roby v. Corp. of Lloyd's*, 996 F.2d 1353, 1358 (2d Cir. 1993).

82. See *In re Cotton Yarn Antitrust Litig.*, 505 F.3d 274, 277 (4th Cir. 2007).

83. See *Haynsworth v. Corp.*, 121 F.3d 956, 958 (5th Cir. 1997).

84. See *George Fischer Foundy Sys. v. Adolph H. Hottinger Maschinenbau*, 55 F.3d 1206, 1210 (6th Cir. 1995).

85. See *Bonny v. Soc'y of Lloyd's*, 3 F.3d 156, 162 (7th Cir. 1993).

86. See *Simula, Inc. v. Autoliv, Inc.*, 175 F.3d 716, 718 (9th Cir. 1999); *Richards v. Lloyd's of London*, 135 F.3d 1289, 1297 (9th Cir. 1998).

87. See *Riley v. Kingsley Underwriting Agencies*, 969 F.2d 953, 956 (10th Cir. 1992).

88. See *Lipcon v. Underwriters at Lloyd's, London*, 148 F.3d 1285, 1295 (11th Cir. 1998).

89. See, e.g., *Bonny*, 3 F.3d at 160 ("[W]e have serious concerns that [the relevant] clauses operate as a prospective waiver of statutory remedies for securities violations."); *Roby v. Corp. of Lloyd's*, 996 F.2d 1353, 1364 (2d Cir. 1993) ("We are concerned in the present case that the [relevant] contract clauses may operate 'in tandem' as a prospective waiver of the statutory remedies for securities violations, thereby circumventing the strong and expansive public policy in deterring such violations.").

90. *Bonny*, 3 F.3d at 162; *Roby*, 996 F.2d at 1358. For an interesting discussion of several U.S. courts of appeals cases enforcing forum-selection and choice-of-law agreements in transactions triggering U.S. securities laws, see Darrell Hall, Note, *No Way Out: An Argument Against Permitting Parties to Opt Out of U.S. Securities Laws in International Transactions*, 97 COLUM. L. REV. 57 (1997).

91. See, e.g., *Lipcon*, 148 F.3d at 1288, 1293-94; *Shell v. R.W. Sturge, Ltd.*, 55 F.3d 1227, 1228, 1230-31 (6th Cir. 1995).

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

93. *Vimar Seguros Y Reaseguros, S.A. v. M/V Sky Reefer*, 515 U.S. 528, 534 (1995); see also *Allied-Bruce Terminix Cos. v. Dobson*, 513 U.S. 265, 289 (1995) (Thomas, J., dissenting) ("An arbitration agreement is a species of forum-selection clause: Without laying down any rules of decision, it identifies the adjudicator of disputes. A strong argument can be made that such forum-selection clauses concern procedure rather than substance."); *Roby*, 996 F.2d at 1362 n.2 ("[A]n arbitration clause is merely a specialized type of forum selection clause.").

U.S. statutory law. Although federal policy favors the enforcement of both arbitration and forum-selection clauses,<sup>94</sup> the Supreme Court precedent has led to differing analyses that appear to explain the appellate courts' analysis of the adequacy of foreign law. In cases involving arbitration clauses, a U.S. court deciding whether to enforce the relevant agreement must determine if the U.S. statute in question is suitable for arbitration, as directed by *Mitsubishi*.<sup>95</sup> When a U.S. court decides whether to enforce a forum-selection clause mandating proceedings in a foreign court, however, Supreme Court precedent does not clearly direct the court to focus on whether that forum may hear a dispute concerning U.S. law.<sup>96</sup> Rather, the Supreme Court's decision in *Bremen v. Zapata Offshore Co.* has led courts to focus on verifying that the selected forum is a "neutral forum experienced and capable in the resolution of [such] litigation."<sup>97</sup> Thus, a U.S. court determining whether to enforce a forum-selection clause will generally presume that the clause is valid unless it deems the clause "unfair" or "unreasonable."<sup>98</sup> Further, many U.S. courts often go about this analysis in a deferential manner if the forum-selection clause calls for litigation in the courts of a well-known or developed judicial system.<sup>99</sup> Thus, instead of addressing whether for-

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94. State contract law governs the interpretation and enforcement of choice-of-forum clauses contained in contracts that fall outside the purview of federal law. *See, e.g., Volkswagenwerk A.G. v. Klippan*, 611 P.2d 498, 505 (Alaska 1980). This Article focuses on whether federal law prohibits the enforcement of otherwise valid choice-of-court agreements, and does not address the nuances of the interaction between state and federal law on this issue. For background on these issues and the possible application of *Erie Railroad Co. v. Tompkins*, 304 U.S. 64 (1938), see generally Walter W. Weiser, *Forum Selection Clauses in Federal Courts: Limitations on Enforcement After Stewart and Carnival Cruise*, 45 FLA. L. REV. 553 (1993); Young Lee, *Forum Selection Clauses: Problems of Enforcement in Diversity Cases and State Courts*, 35 COLUM. J. TRANSNAT'L L. 663 (1997). Certain states have specific public policies regarding forum-selection clauses. *See, e.g., Lim v. Offshore Specialty Fabricators, Inc.*, 404 F.3d 898, 901–06 (5th Cir. 2005) (analyzing Louisiana's public policy against forum-selection clauses in light of the federal policy in favor of such clauses).

95. *See, e.g., Mitsubishi*, 473 U.S. at 628; *George Fischer Foundry Sys., Inc. v. Adolph H. Hottinger Maschinenbau GmbH*, 55 F.3d 1206, 1207–08 (6th Cir. 1995). The FAA and New York Convention specifically contemplate this inquiry. *See* 9 U.S.C. § 1 (2006); New York Convention, art. II(1).

96. A statute comparable to the FAA that compels the enforcement of choice-of-court clauses does not exist and may explain the development of this divergence. As discussed in Part V *infra*, the Hague Convention seeks to remedy this deficiency.

97. 407 U.S. 1, 17 (1972).

98. *Id.* at 10; *Carnival Cruise Lines, Inc. v. Shute*, 499 U.S. 585, 591, 596 (1991); *Haynsworth v. Corp.*, 121 F.3d 956, 961–62 (5th Cir. 1997); *Bonny v. Soc'y of Lloyd's*, 3 F.3d 156, 160 (7th Cir. 1993); RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 80 (1971) ("The parties' agreement as to the place of the action . . . will be given effect unless it is unfair or unreasonable."). *But see* BORN & RUTLEDGE, *supra* note 12, at 442–45 (delineating five different approaches to the enforcement of choice-of-court clauses).

99. *See, e.g., Richards v. Lloyd's of London*, 135 F.3d 1289, 1296 (9th Cir. 1998) (noting that the court was "hardly in a position to call the Queen's Bench a kangaroo court" (quoting British



eign courts will apply U.S. statutes, some federal courts have looked to whether the foreign law applied in those courts would be unfair or unreasonable.

For example, in *Roby v. Corp. of Lloyd's*,<sup>100</sup> the Second Circuit ruled on agreements with clauses mandating arbitration or litigation in the United Kingdom under British law.<sup>101</sup> When evaluating the forum-selection clauses, the court simply held that there was no reason to believe that "English courts would be biased or otherwise unfair" because U.S. courts "consistently have found them to be neutral and just forums."<sup>102</sup> Likewise, there was no reason to believe that "the chosen arbitral forum would be biased in any way."<sup>103</sup> Turning to the applicable law, the *Roby* court stated that the contracts raised a "serious question" about the subversion of U.S. public policy,<sup>104</sup> but decided that "the public policies of the securities laws would be contravened *if the applicable foreign law failed adequately to deter issuers from exploiting American investors*."<sup>105</sup> The court expressed these concerns after noting that "[a]ccording to the undisputed testimony of a British attorney, neither an English court nor an English arbitrator would apply the United States securities laws, because English conflict of law rules do not permit recognition of foreign tort or statutory law [in this case]."<sup>106</sup>

The Seventh Circuit echoed this analysis in *Bonny v. Society of Lloyd's*.<sup>107</sup> Faced with a similar dispute involving contractual provisions requiring litigation or arbitration in the United Kingdom under British law,<sup>108</sup> the *Bonny* court first confirmed that the relevant forum-selection clauses were prima facie valid and held that the clauses were not unreasonable because the plaintiffs would encounter no difficulty resolving their disputes in England.<sup>109</sup> The court then shifted to address its more "serious concerns" about possible public policy violations under *Mitsubishi* footnote nineteen.<sup>110</sup> Focusing on the remedies available under British law, the court opined that U.S. policies would be violated "unless

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Midland Airways Ltd. v. Int'l Travel, Inc., 497 F.2d 869, 871 (9th Cir. 1974))). A "kangaroo court" is a term of American origin that refers to an "illegal self-appointed tribunal characterized by irresponsible, perverted, or irregular procedures." MERRIAM-WEBSTER'S DICTIONARY AND THESAURUS 451 (2007).

100. 996 F.2d 1353.

101. *Id.* at 1358.

102. *Id.* at 1363.

103. *Id.*

104. *Id.*

105. *Id.* at 1364 (emphasis added).

106. *Id.* at 1362.

107. 3 F.3d 156 (7th Cir. 1993).

108. *Id.* at 158.

109. *Id.* at 159, 160.

110. *Id.* at 160.

remedies available in the selected forum do not subvert the public policy of [the 1933 Securities Act]. This is the fundamental question we face here."<sup>111</sup>

To address these "serious" public policy concerns, both the *Roby* and *Bonny* courts engaged in an evaluation of foreign law before determining if the contractual parties had prospectively waived their rights in violation of footnote nineteen. Both the *Roby* and *Bonny* courts concluded that application of British law would not violate U.S. public policy because British law offered adequate remedies to vindicate the substantive rights in question.<sup>112</sup> Indeed, the *Roby* court went through the various British causes of action to weigh them in light of U.S. public policy.<sup>113</sup>

Other federal courts of appeals have also followed this course of action. The Fourth Circuit and the Sixth Circuit have evaluated foreign causes of action arising from contracts providing for proceedings abroad under non-U.S. law.<sup>114</sup> The Ninth Circuit formulated a similar test to evaluate the adequacy of foreign law in a footnote nineteen dispute, asking "whether the law of the transferee court is so deficient that the plaintiffs would be deprived of *any reasonable recourse*."<sup>115</sup> In *Lipcon v. Underwriters at Lloyd's*,<sup>116</sup> the Eleventh Circuit also evaluated foreign law in light of U.S. public policy when considering a contract containing foreign choice-of-law and forum-selection clauses.<sup>117</sup> First, the court stated that it would not invalidate contractual clauses "simply because the remedies available in the contractually chosen forum [were] less favorable than those available in the courts of the United States."<sup>118</sup> Then, the court held that English law provided adequate remedies and evaluated the specific liability implications of English law while also citing *Roby*.<sup>119</sup>

Some federal appellate courts have emphasized that subsequent review—the "second look"—will allow the courts to address uncertainty about the applicable law and to ensure the application of federal statutory law. In *George Fischer Foundry Systems, Inc. v. Adolph H. Hot-*

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111. *Id.* at 161.

112. *Roby v. Corp. of Lloyd's*, 996 F.2d 1353, 1365 (2d Cir. 1993); *Bonny*, 3 F.3d at 161.

113. *See Roby*, 996 F.2d at 1365–66.

114. *See Allen v. Lloyd's of London*, 94 F.3d 923, 929 (4th Cir. 1996) (citing *Roby* and *Bonny* and evaluating British causes of action in light of U.S. securities laws); *Shell v. R.W. Sturge, Ltd.*, 55 F.3d 1227, 1230–31 (6th Cir. 1995) (citing *Roby* and *Bonny* and evaluating remedies under British law compared to policies contained in Ohio securities statutes).

115. *Simula, Inc. v. Autoliv, Inc.*, 175 F.3d 716, 723 (9th Cir. 1999) (emphasis added).

116. 148 F.3d 1285 (11th Cir. 1998).

117. *Id.* at 1288.

118. *Id.* at 1297.

119. *Id.*

*tinger Maschinenbau*,<sup>120</sup> Michigan and German corporations entered into a licensing agreement containing provisions requiring the resolution of all disputes before the Zurich Chamber of Commerce and under Swiss law.<sup>121</sup> After a dispute arose and the German corporation filed an application for arbitration, the Michigan corporation sought a preliminary ruling from the Zurich tribunal about whether it would apply U.S. antitrust law to the dispute.<sup>122</sup> Before the tribunal could rule on that issue, the Michigan corporation also filed action in a U.S. district court alleging antitrust violations and seeking a declaration that the arbitration agreement was void as to the antitrust claims.<sup>123</sup>

Recognizing the Michigan corporation's arguments (similar to the concerns of the *Roby* and *Bonny* courts) that application of Swiss law would probably result in a denial of certain remedies contained in U.S. statutes (specifically, treble damages),<sup>124</sup> the Sixth Circuit referred to the district court's refusal to speculate about the applicable law even in the face of a choice-of-law agreement: "[I]t would be sheer speculation for this [district] Court to attempt to predict in advance what law the [arbitral] Tribunal will decide to apply to plaintiff's antitrust claims."<sup>125</sup> Refusing to interrupt the ongoing arbitral proceedings, the Sixth Circuit indicated that *Mitsubishi* footnote nineteen's warning should only be triggered when it is "clear" what law the tribunal would apply.<sup>126</sup> The court justified this decision, noting that U.S. courts would have an opportunity to rectify any public policy violations resulting from the application of foreign law at the award-enforcement stage:

*Mitsubishi* stands for the proposition that arbitration should go forward even if there is a chance that United States antitrust statutory rights will not be fully recognized, because, should that occur, the aggrieved litigant may request a federal court, at the *award-enforcement stage*, to determine whether the arbitration award violates public policy.<sup>127</sup>

The Eighth Circuit echoed this same analysis in a domestic dispute in *Larry's United Super, Inc. v. Werries*.<sup>128</sup> Ruling on the validity of arbitration agreements between independent retail grocers and a grocery supplier along with certain corporate directors,<sup>129</sup> the court noted that

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120. 55 F.3d 1206 (6th Cir. 1995).

121. *Id.* at 1207.

122. *Id.*

123. *Id.*

124. *Id.* at 1208.

125. *Id.* (internal quotation marks omitted).

126. *Id.* at 1210.

127. *Id.* (emphasis in original).

128. 253 F.3d 1083 (8th Cir. 2001).

129. *Id.* at 1084.

the agreements contained a waiver of punitive damages, which the grocers claimed violated their statutory rights under the Racketeer Influenced Corrupt Organizations Act (RICO).<sup>130</sup> Deferring to the arbitral tribunal on the manner of statutory application, the court justified its decision on the potential for a court to assess any public policy violations after the award: "Whether federal public policy prohibits an individual from waiving certain statutory remedies is an issue that may be raised when challenging an arbitrator's award."<sup>131</sup>

Similarly, the Tenth Circuit referenced the New York Convention in deciding to defer the issue to the award-enforcement stage. In *Riley v. Kingsley Underwriting Agencies, Ltd.*,<sup>132</sup> the Tenth Circuit considered allegations of U.S. securities statute violations where the relevant agreements provided for dispute resolution in the U.K. under British law.<sup>133</sup> The plaintiff in *Riley* argued that the relevant provisions should be held void as against public policy under the "null and void" exception of the New York Convention's Article II because the application of English law would result in a waiver of certain provisions of U.S. securities statutes.<sup>134</sup> The court responded by affirming the dismissal of his claims because "the 'null and void' exception in the Convention is to be narrowly construed."<sup>135</sup> The court further recognized that Article V of the Convention "specifically provides for relief when enforcement of an award in violation of public policy is sought."<sup>136</sup>

### III. THE ELEVENTH CIRCUIT AND THE PROSPECTIVE WAIVER DOCTRINE

The Eleventh Circuit's opinion in *Thomas v. Carnival Corporation*<sup>137</sup> is intriguing because of its bold decision to protect U.S. federal statutes. Unlike the Supreme Court, the Eleventh Circuit did not have to decide whether a Seaman's Wage Act claim was arbitrable because the court had previously decided that parties could agree to submit Seaman's Wage Act claims for resolution in arbitration.<sup>138</sup> In *Lobo v. Celebrity Cruises, Inc.*, the Eleventh Circuit held that "the intent of the [New York] Convention is to promote the recognition and enforcement

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130. 18 U.S.C. §§ 1961–68 (2006); *Larry's United*, 253 F.3d at 1084–85.

131. *Larry's United*, 253 F.3d at 1086.

132. 969 F.2d 953 (10th Cir. 1992).

133. *Id.* at 954–56.

134. *Id.* at 959.

135. *Id.* at 960; *see also infra* Part V.A.

136. *Id.*; *see also* *Lim v. Offshore Specialty Fabricators, Inc.*, 404 F.3d 898, 907 (5th Cir. 2005) (discussing the requirements of New York Convention Article II and V in the context of a dispute over the enforcement of an arbitration clause in a seaman's employment contract).

137. 573 F.3d 1113 (11th Cir. 2009), *cert. denied*, 130 S. Ct. 1157 (2010).

138. *Id.* at 1124 n.17.

of arbitration provisions contained in international contracts, and that to read industry-specific exceptions into the broad language of the [FAA] would be to hinder the [New York] Convention's purpose."<sup>139</sup> Focusing on the prospective waiver doctrine in *Thomas*, the court declared that the "arbitration requirements" obliging the plaintiff to "arbitrate in the Philippines (choice-of-forum) under the law of Panama (choice of law)" operated in tandem "to completely bar Thomas from relying on any U.S. statutorily-created causes of action"—a restriction that "certainly qualifies as a 'prospective waiver' of rights."<sup>140</sup>

### A. *The Slip and Fall*

The Eleventh Circuit granted Plaintiff Puliyrumpil Mathew Thomas's appeal of the decision of the U.S. District Court for the Southern District of Florida to compel arbitration. As recounted in the Eleventh Circuit's decision, the dispute arose out of a slip-and-fall accident on a cruise ship.<sup>141</sup> On November 8, 2004, Thomas, who was employed as a waiter for Carnival Corporation, slipped and fell on a "wet substance" while working in the dining room of the *Imagination* cruise ship.<sup>142</sup> The fall injured his spine and right shoulder, and the coffee he was carrying burned his leg.<sup>143</sup>

Thomas sought damages for Carnival's actions after the accident. Thomas alleged that the on-board physician who initially saw him after the fall only treated his leg burn, not his other injuries.<sup>144</sup> Over the next year, Thomas allegedly received inadequate medical care from the on-board physician—Thomas was told that he did not have injuries but was later treated with analgesic balm and painkillers.<sup>145</sup> Because of his injuries, Carnival signed him off the ship twice and allegedly billed his absence as vacation days rather than as medical leave.<sup>146</sup> While on the ship, Thomas allegedly could not work many days due to his neck and shoulder injuries and did not receive pay for those days.<sup>147</sup> On October 10, 2005, Thomas executed a new Seafarer's Agreement that contained an arbitration clause, and he returned to employment on the *Imagina-*

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139. 488 F.3d 891, 895 (11th Cir. 2007) (internal quotation marks omitted). The Eleventh Circuit explicitly held that its decision in *Thomas* "has no bearing on the holding of *Lobo*" that Seaman's Wage Act claims can be resolved in arbitration. *Thomas*, 573 F.3d at 1124 n.17.

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

141. *Id.* at 1115–16.

142. *Id.*

143. *Id.* at 1116.

144. *Id.*

145. *Id.*

146. *Id.*

147. *Id.*

tion.<sup>148</sup> Thomas again received medical treatment for his November 8, 2004, injuries, but the on-board physician ultimately determined that Thomas was unfit for continuing duties.<sup>149</sup> Accordingly, Carnival officially discharged Thomas with a medical sign-off.<sup>150</sup>

Thomas commenced litigation in Florida state court, alleging four claims against Carnival in relation to his injuries.<sup>151</sup> First, he claimed that Carnival was negligent under the Jones Act.<sup>152</sup> Second, he alleged that the *Imagination* was unseaworthy.<sup>153</sup> Third, he asserted that Carnival failed to provide prompt and adequate maintenance and cure under maritime law.<sup>154</sup> Finally, he claimed that Carnival failed to pay wages as required under the Seaman's Wage Act.<sup>155</sup>

Carnival responded by removing the case to federal court and requesting the court to compel arbitration under the arbitration clause in the new Seafarer's Agreement,<sup>156</sup> which provided for arbitration in the Philippines.<sup>157</sup> The Eleventh Circuit quoted the clause as follows: "Any and all disputes arising out of or in connection with this Agreement, including . . . Seafarer's service on this vessel shall be referred to, and finally resolved by arbitration . . . ." <sup>158</sup>

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148. *Id.*

149. *Id.*

150. *Id.* Thomas's complaint alleged that after he was discharged in India, he was diagnosed with "chronic partial tear of right supraspinatus tendon and degenerative disc disease of the cervical spine at multiple levels." Notice of Removal, Exhibit B "Complaint and Demand for Jury Trial" at 5, *Thomas v. Carnival Corp.*, 2008 U.S. LEXIS 66169 (S.D. Fla. Jan. 4, 2008) (No. 07-21867) [hereinafter Notice of Removal].

151. *Thomas*, 573 F.3d at 1115, 1118.

152. *Id.* at 1115 n.1, 1118 (explaining that the Jones Act provides seamen "the statutory right to sue their employers in American court for the negligence of fellow crew members").

153. *Id.* at 1115, 1118.

154. *Id.* at 1115 n.2, 1118 (describing maintenance and cure as "an ancient common-law maritime remedy for seamen who are injured while in the service of a vessel" that requires the employer to pay maintenance, medical expenses, and unearned wages for the contract period until the seaman reaches "maximum cure").

155. *See infra* notes 209–16 and accompanying text (explaining the nature of the Seaman's Wage Act).

156. *Thomas*, 573 F.3d at 1115, 1118. Federal courts have subject matter jurisdiction over matters arising under the New York Convention. 9 U.S.C. § 205 (2006).

157. *Thomas*, 573 F.3d at 1116. The arbitration clause stated that "[t]he place of arbitration shall be London, England, Monaco, Panama City, Panama, or Manila, Philippines, whichever is closer to Seafarer's home country." Brief of Appellant Puliurumpil Mathew Thomas at 14, *Thomas*, 573 F.3d 1113 (No. 08-10613). Thus, because Thomas's home country was India, the clause called for arbitration in the Philippines. *Id.* at 13; *see also* Notice of Removal, *supra* note 150. The location of the agreed-upon arbitration does not appear to have influenced the Eleventh Circuit's decision.

158. *Thomas*, 573 F.3d at 1117 (alterations in original) (emphasis omitted). The first sentence of the arbitration clause provided: "Any and all disputes arising out of or in connection with this Agreement, including any questions regarding its existence, validity or termination, or Seafarer's service on the vessel, shall be referred to and finally resolved by arbitration under the Arbitration Rules of the International Chamber of Commerce." Brief of Appellant, *supra* note 157, at 14.

This Agreement also included the following choice-of-law clause:

This Agreement shall be governed by, and all disputes arising under or in connection with this Agreement or Seafarer's service on the vessel shall be resolved in accordance with, the laws of the flag of the vessel on which Seafarer is assigned at the time the cause of action accrues, without regard to principles of conflicts of laws thereunder. The parties agree to this governing law, notwithstanding any claims for negligence, unseaworthiness, maintenance, cure, failure to provide prompt, proper and adequate medical care, wages, personal injury, or property damage which might be available under the laws of any other jurisdiction.<sup>159</sup>

As the *Imagination* flew a Panamanian flag, the choice-of-law clause required Panamanian law to apply to any dispute under the new Seafarer's Agreement.<sup>160</sup> The district court granted Carnival's motion to compel arbitration, and Thomas appealed.<sup>161</sup>

The Eleventh Circuit reversed the district court's order compelling arbitration. The court determined that the arbitration clause in the new Seafarer's Agreement did not govern Thomas's first three claims because those claims accrued before he executed the new Seafarer's Agreement, which included the arbitration clause.<sup>162</sup> As the pleadings were unclear about whether Thomas's Seaman's Wage Act claim was based on his employment before or after he signed the new Seafarer's Agreement,<sup>163</sup> the court addressed whether the prospective waiver doctrine applied. To the extent that this claim was covered by the arbitration clause, the court found that the prospective waiver doctrine applied and

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159. *Thomas*, 573 F.3d at 1123 (emphasis omitted).

160. *Id.* at 1116, 1123 ("There is no dispute that the *Imagination's* flag of convenience is Panamanian.").

161. *Id.* at 1114–15.

162. *Id.* at 1117–20. Arguably, the court should have permitted the arbitral tribunal to determine the parties' dispute over the scope of the arbitration agreement because the arbitration clause states that "any and all disputes arising out of or connection with this agreement" are arbitrable. See Brubaker, *supra* note 3, at 312 & n.20 (citing *First Options of Chicago, Inc. v. Kaplan*, 514 U.S. 938, 943 (1995)); see also *Prima Paint Corp. v. Flood & Conklin Mfg. Co.*, 388 U.S. 395, 400, 404 (1967) ("Section 4 provides a federal remedy for a party 'aggrieved by the alleged failure, neglect, or refusal of another to arbitrate under a written agreement for arbitration,' and directs the federal court to order arbitration once it is satisfied that an agreement for arbitration has been made and has not been honored. . . . We hold, therefore, that in passing upon a § 3 application for a stay while the parties arbitrate, a federal court may consider only issues relating to the making and performance of the agreement to arbitrate." (footnote omitted)). The arbitration clause, however, does not explicitly state that any question concerning its scope shall be referred to arbitration. See *supra* note 158.

163. *Thomas*, 573 F.3d at 1119. Thomas argued that all his claims "directly stemmed from [his] period of employment and injury" in 2004, Brief of Appellant, *supra* note 157, at 67; see also *id.* at 15–16, 23, but Carnival claimed that Thomas's Seaman's Wage Act claim arose after October 2005 and therefore was subject to the arbitration clause. Appellee's Answer Brief at 6, *Thomas*, 573 F.3d 1113 (No. 08-10613).

partially invalidated the arbitration clause as a violation of public policy.<sup>164</sup>

B. *The Eleventh Circuit's Interpretation of the Prospective Waiver Doctrine*

Citing both *Mitsubishi* footnote nineteen and *Vimar*, the Eleventh Circuit applied the prospective waiver doctrine and refused to compel arbitration of Thomas's Seaman's Wage Act claim under the new Seafarer's Agreement. In reaching this decision, the court made two holdings. First, by deciding the scope and applicability of the parties' choice-of-law clause, the court held that certain choice-of-law clauses act as prospective waivers of public policy when a dispute is submitted to arbitration. Second, the court determined that the public policy provision in Article V of the New York Convention permitted it to refuse enforcement of an arbitration clause for a statutory claim. As discussed in Parts IV and V below, the analysis in this clear-cut case highlights the assumptions and limitations of the prospective waiver doctrine and its compatibility with international law.

1. INTERPRETATION OF THE PROSPECTIVE WAIVER DOCTRINE

In finding that Carnival and Thomas impermissibly waived Thomas's statutory claims, the Eleventh Circuit divided the application of the prospective waiver standard into three categories, depending upon the parties' choice of law. First, the court concluded that arbitration agreements are enforceable where assurance exists that the arbitral tribunal will apply U.S. law to resolve statutory claims.<sup>165</sup> The court reasoned that the Supreme Court did not find a prospective waiver in *Mitsubishi* because the parties there had agreed that American law would apply to the antitrust claims in the arbitration.<sup>166</sup> Thus, the Eleventh Circuit court emphasized that in *Mitsubishi* U.S. statutory rights "were . . . not being ignored or violated but specifically protected" by the arbitration because "there was no doubt that American law would apply."<sup>167</sup>

Second, the court determined that arbitration agreements are enforceable even if it is unclear whether U.S. statutory law will apply so long as a subsequent opportunity for review exists. The court reasoned that the Supreme Court did not find a prospective waiver in *Vimar* because U.S. courts could later review the arbitral award to ensure that

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164. *Thomas*, 573 F.3d at 1119–24.

165. *Id.* at 1120–21.

166. *Id.* at 1121.

167. *Id.* at 1121–22.



U.S. statutes were properly applied.<sup>168</sup> Accordingly, the Eleventh Circuit found that U.S. statutory rights could be protected at a subsequent stage of litigation where "it was unknown which country's laws would govern, it was possible that U.S. law might apply, and . . . there would be another opportunity to review the case."<sup>169</sup>

Third, upon reviewing *Mitsubishi* and *Vimar*, the Eleventh Circuit held that an arbitration clause cannot be enforced for statutory claims where it is not "evident" that "either U.S. law definitely will be applied" or that "there is a possibility that [U.S. law] might apply *and* there will be later review."<sup>170</sup> The court applied this standard and refused to compel arbitration of Thomas's Seaman's Wage Act claim. With regard to the applicable law, the court distinguished the choice-of-law clauses in *Mitsubishi* and *Vimar* by observing that the new Seafarer's Agreement "explicitly states that Panamanian law will apply" and that Carnival's counsel has provided "no such assurance . . . that U.S. law will apply."<sup>171</sup> As to reviewing an arbitral award, the court opined "there is no assurance" that the U.S. courts would have any subsequent opportunity to review the matter.<sup>172</sup> The court explained that because Thomas's other claims fell outside the scope of the arbitration clause in the new Seafarer's Agreement, Thomas might receive "no award in the arbitral forum" for his Seaman's Wage Act claim, and therefore later review may not exist because Thomas would "have nothing to enforce."<sup>173</sup> Thus, the court invalidated the arbitration agreement to permit Thomas to litigate his Seaman's Wage Act claim in the United States.

The court did not address its earlier decision in *Lipcon*, where the court enforced an agreement to litigate in England under English law despite the waiver of federal securities claims.<sup>174</sup>

## 2. THE NEW YORK CONVENTION AND THE PROSPECTIVE WAIVER DOCTRINE

The Eleventh Circuit characterized the standard in *Mitsubishi* footnote nineteen as an affirmative defense, based on public policy, to the enforcement of an arbitration agreement.<sup>175</sup> Although neither the *Mitsubishi* nor *Vimar* Courts directly addressed the compatibility of the pro-

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168. *Id.* 1121-23.

169. *Id.* at 1122.

170. *Id.* at 1123.

171. *Id.* at 1121. The court further stated that "it is undisputed that, regardless of the procedural posture of the case, U.S. law will never be applied." *Id.* at 1122-23.

172. *Id.* at 1123.

173. *Id.* at 1124.

174. See *supra* Part II.C. The parties' pleadings in *Thomas* did not reference *Lipcon*.

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

spective waiver doctrine with the New York Convention,<sup>176</sup> the Eleventh Circuit began its analysis of *Mitsubishi* footnote nineteen by turning to the language of the New York Convention.

The court looked to Article V(2)(b) of the New York Convention as the basis for this defense. The court quoted Article V's express language that the Convention applies to the "[r]ecognition and enforcement of an arbitral award . . . in the country where recognition and enforcement is sought." But then the court held that Article V(2)(b)'s defense to the recognition and enforcement of an arbitral award that "would be contrary to the public policy of that country" could be triggered in "a suit that seeks a court to compel arbitration."<sup>177</sup> The court did not explain why the public policy defense to enforcing an arbitral award also serves as a defense to enforcing an agreement to arbitrate.

Article II(3) of the Convention, however, appears to have influenced the court's decision. Article II(3) permits courts to refuse to "refer the parties to arbitration" where, *inter alia*, the arbitration agreement is "null and void."<sup>178</sup> Although the court did not cite Article II of the New York Convention, its analysis of the applicability of the prospective waiver standard ends by stating twice that the arbitration clause in the new Seafarer's Agreement was "null and void."<sup>179</sup> Thus, the court may have considered that the public policy protected by the "null and void" standard for the enforceability of an arbitration agreement encompasses public policy violations under Article V(2)(b).<sup>180</sup>

#### IV. AN ASSESSMENT OF PROSPECTIVE WAIVER DOCTRINE IN INTERNATIONAL DISPUTE RESOLUTION

As the Eleventh Circuit's decision in *Thomas* emphasizes, the prospective waiver doctrine serves to protect federal statutory claims from evisceration through adjudication in arbitration and foreign courts under foreign law. To this end, this doctrine appears to entail the following

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176. The *Mitsubishi* Court cited Article V of the New York Convention after footnote nineteen to discuss the "second look" doctrine, and the *Vimar* Court briefly noted that the FAA was based in part on the New York Convention. See *supra* Part II.

177. *Thomas*, 573 F.3d at 1120. Article V(2)(b) of the New York Convention states the following: "Recognition and enforcement of the award may also be refused if the competent authority in the country where recognition and enforcement is sought finds that: . . . [t]he recognition or enforcement of the award would be contrary to the public policy of that country." New York Convention, art. V(2)(b).

178. New York Convention, art II(3). Article II(3) of the New York Convention provides as follows: "The court of a Contracting State, when seized of an action in a matter in respect of which the parties have made an agreement within the meaning of this article, shall, at the request of one of the parties, refer the parties to arbitration, unless it finds that the said agreement is null and void, inoperative or incapable of being performed." *Id.*

179. See *Thomas*, 573 F.3d at 1124 & n.17.

180. Brubaker, *supra* note 3, at 313.

three elements. First, a party to a dispute must have a right to pursue a federal statutory claim. Second, the party must have agreed to resolve disputes concerning that right with the opposing party through arbitration or foreign-court adjudication under rules of law that do not protect that right. Third, that party must not have the opportunity to obtain judicial review in U.S. courts to ensure that their right was protected in the adjudication. Whether and how these factors may protect federal statutory claims is discussed below.

A. *The Right to Raise a Federal Statutory Claim: Accidental Extraterritoriality?*

To invoke the prospective waiver doctrine, the “right to pursue statutory remedies” must exist.<sup>181</sup> Thus, the nature of the “right” that the doctrine intends to protect plays a critical role in triggering the doctrine. As discussed below, the Eleventh Circuit’s decision in *Thomas* suggests that the right is the freedom to plead a claim under a U.S. statute, whereas other courts of appeals have construed the right as a claim against harmful conduct that a U.S. statute may regulate. A third approach, however, would define that right as a claim under a U.S. statute within the territorial application that Congress intended. This approach would better protect the substantive rights created by Congress without unduly undermining the arbitral process.

I. THE ELEVENTH CIRCUIT AND U.S. STATUTORY LAW

The Eleventh Circuit’s approach requires arbitrators to apply U.S. law, without limitation, to resolve federal statutory claims—period. In effect, the court held that parties may submit a dispute to arbitration or a foreign court only if “U.S. statutory rights, while not being heard by a federal judge, [are] nonetheless not being ignored or violated but specifically protected.”<sup>182</sup> Moreover, the court’s decision suggests that the right protected by the prospective waiver doctrine is the right *to assert a statutory claim under U.S. law* and that the forum-selection and choice-of-law clauses may not preclude such claims. The Eleventh Circuit did not consider whether Panamanian law regulated the same conduct controlled by the Seaman’s Wage Act<sup>183</sup> and did not undertake a conflict-of-laws analysis to determine whether Congress intended the Seaman’s Wage

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

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

183. The parties provided the Eleventh Circuit with only a brief discussion about the role of foreign law. *Carnival* argued, without citing any case, that *Thomas* was required to show that Panamanian law “would not provide him with a remedy.” Appellee’s Answer Brief, *supra* note 163, at 12–13. *Thomas* argued that the Seaman’s Wage Act “self-evidently [is] distinctly and solely [an] American statutory law” and that neither *Mitsubishi* nor *Vimar* “even intimate that a

Act to apply to the dispute. Thus, the decision suggests that to invoke the prospective waiver doctrine, a party need only raise a federal statutory claim in its pleadings.

The Eleventh Circuit's approach has three advantages. First, the court's approach provides the greatest protection of federal statutory claims in the most efficient manner. The decision ensures the application of U.S. law in U.S. courts when the parties do not consent to its application in arbitration or foreign courts. Moreover, permitting parties to pursue the litigation of U.S. statutory claims before the conclusion of arbitral proceedings significantly reduces the time and costs of enforcing these statutes where their application in arbitration or a foreign court is unlikely. Second, the court's decision may provide better predictability for the contracting parties. Rather than engage in a potentially intractable conflict-of-laws analysis or comity-centered comparison of state interests to determine whether U.S. law must be applied to resolve the dispute, U.S. courts can distinguish between choice-of-law clauses that may permit the adjudication of statutory claims and those that likely do not. This predictability will allow parties to confidently agree to a forum to resolve disputes, it will encourage parties to select arbitrators who can skillfully apply U.S. statutory law if necessary, and it will discourage parties from introducing arbitration and choice-of-law clauses that appear to waive a party's access to federal statutory remedies when in fact they do not. Finally, the court's focus on U.S. law appears to be directly compatible with the Supreme Court's statements in *Mitsubishi* footnote nineteen, which focused on the displacement of American law and the waiver "of a party's right to pursue statutory remedies."<sup>184</sup>

The Eleventh Circuit's approach, however, has three weaknesses as well. First, the Eleventh Circuit's position may unnecessarily overprotect the substantive law of statutory claims beyond what Congress intended. By assuming that federal statutes would apply but for the arbitration agreement and choice-of-law clause, the court's approach could force parties to assent to the adjudication of federal statutes in circumstances where U.S. courts would not apply them in litigation. Second, according to the views expressed by the Supreme Court, international commerce and trade may be undermined by the court's overprotective approach to invalidating arbitration clauses.<sup>185</sup> Third, the Eleventh Circuit's approach would allow parties to partially evade arbitration, despite

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foreign law substitute for the U.S. statutory claim is acceptable." Reply Brief of Appellant Puliurumpil Mathew Thomas at 20, *Thomas*, 573 F.3d 1113 (No. 08-10613).

184. *Mitsubishi*, 473 U.S. at 637 n.19.

185. See *id.* at 629 ("[C]oncerns 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 require that we enforce the parties' agreement . . .").

the federal policy in favor of arbitration, and substantially affect settlement negotiations by alleging federal statutory claims regardless of whether the statute could apply in the dispute. The Second Circuit has condemned such an approach:

A plaintiff simply would have to allege violations of . . . *his country's* statutory law . . . in order to render nugatory any forum selection clause that implicitly or explicitly required the application of the law of another jurisdiction. We refuse to allow a party's solemn promise to be defeated by artful pleading.<sup>186</sup>

## 2. COURTS OF APPEALS AND THE PROTECTION OF PUBLIC POLICY BY FOREIGN LAW

Federal courts of appeals have considered invalidating an arbitration or choice-of-court agreement only if the foreign law selected by the parties does not offer adequate remedies and does not deter the proscribed conduct. Where foreign law provides a comparable antidote to the conduct regulated by the U.S. statute, these courts have permitted the parties to pursue adjudication under that foreign law in arbitration or in foreign courts—even if foreign law is different or less favorable. For example, the Second Circuit in *Roby*, the Seventh Circuit in *Bonny*, and the Eleventh Circuit in *Lipcon*, all followed this approach.<sup>187</sup>

Carnival pursued this approach on appeal,<sup>188</sup> in its petition for a rehearing en banc,<sup>189</sup> and ultimately by filing a petition for writ of certiorari with the Supreme Court.<sup>190</sup> The petition to the Supreme Court characterized the issue as “[w]hether an agreement to arbitrate that is otherwise enforceable under the [New York Convention] is *per se* void and unenforceable as to a U.S. statutory claim because it requires application of foreign law.”<sup>191</sup> The petition emphasized that the Eleventh Circuit’s decision in *Thomas* conflicted with the decisions of other federal appellate courts, explaining that those courts have held that choice-of-law and choice-of-forum provisions are “not fundamentally unfair sim-

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186. *Roby v. Corp. of Lloyd's*, 996 F.2d 1353, 1360 (2d Cir. 1993).

187. See *supra* Part II.

188. See Appellee’s Answer Brief, *supra* note 163, at 12–13 (briefly commenting that *Thomas* had not shown that Panamanian law “would not provide him with a remedy”).

189. See Appellee’s Petition for Rehearing En Banc at 3–11, *Thomas v. Carnival Corp.*, 573 F.3d 1113 (11th Cir. 2009) (No. 08-10613) [hereinafter *Petition for Rehearing*] (explaining that “Panama has a detailed and established body of maritime law providing remedies for unpaid wages,” including penalties “which can amount to up to 600 times the monthly wage”). But see *Kovacs v. Carnival Corp.*, 2009 WL 4980277, at \*1 (S.D. Fla. Dec. 21, 2009) (stating that Carnival “conceded, for the first time, that Panamanian law does not provide seaman [sic] with a reasonable equivalent to the rights provided by the Seaman’s Wage Act”).

190. See *Petition for Writ of Certiorari, Carnival Corp. v. Thomas*, 130 S. Ct. 1157 (2010) (No. 09-646), 2009 WL 4402888.

191. *Id.* at i.

ply because [the foreign law] provides different remedies than those available in the United States" but are "fundamentally unfair only where it deprives the claimant of any remedy."<sup>192</sup> The petition argued that an arbitration or choice-of-court agreement could only be invalidated where the opposing party has made "a substantial showing that the foreign law is unreasonable and against public policy."<sup>193</sup>

Although Carnival's petition was denied, the arguments contained in that petition—which reflect other decisions from the U.S. courts of appeals—offer an approach to the prospective waiver doctrine with certain advantages. This approach is consistent with the general federal policy in favor of enforcing arbitration and choice-of-court agreements and enhancing party autonomy. It promotes international commerce and trade, requiring parties to simply "restructure" their cases to match the agreed legal and procedural requirements of the foreign law and forum.<sup>194</sup> The approach also deters contractual parties from later rescinding their promises by "artfully pleading" domestic claims in litigation.

This approach, however, has certain disadvantages. In particular, this approach entails substantial unpredictability about whether the judiciary will consider foreign law as a sufficient substitute to a U.S. statute.<sup>195</sup> Moreover, this approach may restrict the impact and scope of application of U.S. law contrary to what Congress may have intended. Indeed, this approach has not been approved by the Supreme Court, and its case law does not clearly support this approach.<sup>196</sup> In *Mitsubishi* and *Scherk*, the Court did not address the issue of the applicable law because the parties agreed to the application of American law to their antitrust

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192. *Id.* at 12. The petition presumably focused on this element of the prospective waiver doctrine because it provides the clearest circuit split. *See* SUP. CT. R. 10 (indicating that "a conflict with the decision of another United States court of appeals on the same important manner" may serve as a reason to grant a petition for a writ of certiorari).

193. Petition for Writ of Certiorari, *supra* note 190, at 16.

194. *See* *Shell v. R.W. Sturge, Ltd.*, 55 F.3d 1227, 1231 (6th Cir. 1995) ("The fact that parties will have to structure their case differently than if they were litigating in federal court is not a sufficient reason to defeat a forum selection clause."); *Bonny v. Soc'y of Lloyd's*, 3 F.3d 156, 162 (7th Cir. 1993) ("[E]nforcing the clauses here simply means that plaintiffs will have to structure their cases differently than if they were proceeding in federal district court.").

195. *Cf.* Philip J. McConaughay, *The Risks and Virtues of Lawlessness: A "Second Look" at International Commercial Arbitration*, 93 NW. U. L. REV. 453, 487 (1999) (commenting that this approach introduces "enormous uncertainty" into international arbitration).

196. *Cf. id.* at 482, 490 ("The Mitsubishi Court was careful to avoid any suggestion that the elimination of the mandatory law constraint on arbitrability foretold the elimination of the mandatory law constraint on contractual choice of law. . . . Neither the Supreme Court's decisions permitting the international arbitration of mandatory law claims . . . nor the Supreme Court's decisions enforcing forum selection clauses in international transactions . . . otherwise support the displacement of mandatory law.").

and securities claims, respectively.<sup>197</sup> In *Vimar*, the Court found that "it [was] not established what law" would apply and would not invalidate the agreement to arbitrate because the arbitral tribunal "may conclude that COGSA applies of its own force or that Japanese law does not apply so that, under another clause of the bill of lading, COGSA controls."<sup>198</sup> In *Bremen*, the Court did not address a federal statutory right, but held that selecting a foreign forum that would not apply the "judicial" rule invalidating exculpatory clauses in towing contracts would contravene a strong American policy only if between an American tower and American towee.<sup>199</sup> Nor have the federal appellate courts provided any valid reason why parties may opt out of federal law that would otherwise apply. The Tenth Circuit in *Riley* cited the Supreme Court's decision in *Carnival Cruise Lines, Inc. v. Shute* to argue that foreign laws and remedies "different or less favorable" than U.S. laws and remedies do not provide a sufficient reason to refuse enforcement of an arbitration or choice-of-court clause.<sup>200</sup> But *Carnival Cruise Lines* does not support this assertion.<sup>201</sup> In *Carnival Cruise Lines*, the Court held only that an agreement to use a foreign forum does not violate public policy.<sup>202</sup> It is not clear how the federal policy in favor of enforcing forum-selection agreements allows the enforcement of choice-of-law clauses that preclude federal statutory claims.

### 3. THE SUPREME COURT AND THE EXTRATERRITORIALITY OF U.S. STATUTES

Another approach alluded to in the Supreme Court's decision in *Mitsubishi* would require a conflict-of-laws analysis. Although it did not undertake a formal choice-of-law analysis, the Supreme Court acknowledged that defendant Soler could raise counterclaims under the American antitrust laws in arbitration because counsel for Mitsubishi agreed that American law would govern those claims.<sup>203</sup> Counsel's concession is not too surprising because, as discussed below, a U.S. federal court applying American conflict-of-laws rules most likely would have

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197. *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614, 637 n.19 (1985) (noting that counsel "conceded that American law applied to the antitrust claims"); *Scherk v. Alberto-Culver Co.*, 417 U.S. 506, 508 (1974) (explaining that the parties agreed that the "laws of the State of Illinois, U.S.A. shall apply").

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

199. *Bremen v. Zapata Off-Shore Co.*, 407 U.S. 1, 15-17 (1972) (explaining that this judicial rule was established in *Bisso v. Inland Waterways Corp.*, 349 U.S. 85 (1955)).

200. *Riley v. Kingsley Underwriting Agencies*, 969 F.2d 953, 958 (10th Cir. 1992).

201. *See Carnival Cruise Lines, Inc. v. Shute*, 499 U.S. 585, 595 (commenting only on the foreign forum, not the foreign laws and remedies).

202. *Id.* at 596-97.

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

applied American antitrust laws in that case.<sup>204</sup> Thus, if the Seaman's Wage Act could not apply to the dispute under a conflict-of-laws analysis, then Thomas could not invalidate the arbitration agreement under the prospective waiver doctrine, and the choice-of-law clause in Thomas's Seafarer's Agreement was harmless.

To determine whether U.S. statutes could apply in an international dispute, the Supreme Court inquires into whether Congress intended the extraterritorial application of the statute and whether Congress was constitutionally permitted to do so.<sup>205</sup> For example, in the antitrust context, the Supreme Court has determined both that Congress intended that antitrust law "appl[y] to foreign conduct that was meant to produce and did in fact produce some substantial effect in the United States"<sup>206</sup> and that "Congress would not have intended" antitrust law to apply to "foreign anticompetitive conduct" that caused "foreign injury . . . independent of domestic effects."<sup>207</sup> As the Supreme Court's jurisprudence reveals, this inquiry can be difficult because neither judicial presumptions nor unclear congressional records reveal the true intent of Congress regarding the extraterritorial application of a statute.<sup>208</sup>

Congress, however, explicitly provided the territorial scope of the Seaman's Wage Act. The Act requires the master or owner of the ship to "pay to the seaman 2 days' wages for each day payment is delayed."<sup>209</sup>

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204. See *infra* notes 206–07 and accompanying text.

205. See generally BORN & RUTLEDGE, *supra* note 12, at 613–83. The Supreme Court has not applied a multifactor balancing test that courts have used for contract and tort claims to determine whether the law of one jurisdiction has a closer connection to or greater interest in the dispute. *Id.* at 683–746; see also PETER HAY, RUSSELL J. WEINTRAUB & PATRICK J. BORCHERS, CONFLICT OF LAWS: CASES AND MATERIALS 348–400 (13th ed. 2009).

206. *Hartford Fire Ins. Co. v. California*, 509 U.S. 764, 796 (1993).

207. *F. Hoffmann-LaRoche, Ltd. v. Empagran, S.A.*, 542 U.S. 155, 169, 173 (2004).

208. The Supreme Court has applied a variety of rules of construction. See, e.g., *Hoffmann-LaRoche*, 542 U.S. at 164 (construing the statute according to the rule of reason and customary international law to avoid "interference with the sovereign authority" of other nations); *Hartford Fire*, 509 U.S. at 796 (applying the "effects" test to regulate foreign conduct that "was meant to produce and did in fact produce some substantial effect in the United States"); *EEOC v. Arabian Am. Oil Co.*, 499 U.S. 244, 248 (1991) ("It is a longstanding principle of American law that legislation of Congress, unless a contrary intent appears, is meant to apply only within the territorial jurisdiction of the United States." (internal quotation marks omitted)). Some commentators have complained about the Supreme Court's application of different rules to construe Congress's intent, arguing that the Supreme Court's approach results in confusion and unpredictable results because "the Court has neither acknowledged the existence of . . . different approaches, nor provided guidance as to when it will apply one, rather than another." BORN & RUTLEDGE, *supra* note 12, at 659; see also *id.* at 638, 658–59.

209. Seaman's Wage Act, 46 U.S.C. § 10313(g) (2006). The Eleventh Circuit quoted the relevant payment provisions of the Seaman's Wage Act in its earlier decision on the arbitrability of this Act. See *Lobo v. Celebrity Cruises, Inc.*, 488 F.3d 891, 893 n.2 (11th Cir. 2007) (noting that the master must pay the seaman the balance due within a certain timeframe and that for each day of delayed payment the master could be penalized with two days of payment). The *Thomas* court described this same penalty provision—which requires two days of payment for each day of



Payment of at least “one-third of the wages due” is required “at the time of discharge,” and the balance is due “within 24 hours after the cargo has been discharged or within 4 days after the seaman is discharged, whichever is earlier.”<sup>210</sup> According to the Act, however, its provisions apply only to a “seaman on a foreign vessel” when that vessel is “in a harbor of the United States.”<sup>211</sup> Deriving from 1790 legislation, the Seaman’s Wage Act is designed, among other things, “to [e]nsure that foreigners will not be turned ashore without funds” and “become a public charge on the harbor.”<sup>212</sup>

Thus, the Seaman’s Wage Act may not have actually provided the plaintiff in *Thomas* with a remedy. Because a foreign vessel is defined as “a vessel of foreign registry or operated under the authority of a foreign country,”<sup>213</sup> the Act applies to the *Imagination* as it was registered and operated under the laws of Panama.<sup>214</sup> Accordingly, Thomas may not have been entitled to wages because, according to his complaint, he “was signed off to his home country of India.”<sup>215</sup> Indeed, the complaint does not indicate that Thomas ever was discharged “in a harbor of the United States” after he executed the arbitration agreement and signed back onto the *Imagination*.<sup>216</sup> If, in fact, Thomas never was discharged in a U.S. harbor, the arbitration and choice-of-law clauses could not

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delay—as a “treble-damages wage-penalty provision.” *Thomas v. Carnival Corp.*, 573 F.3d 1113, 1115 n.3 (11th Cir. 2009), *cert denied*, 130 S. Ct. 1157 (2010). Perhaps the *Thomas* court did so to align itself with *Mitsubishi*, which addressed treble damages under antitrust law. *See id.* at 1123.

210. *Id.* § 10313(f).

211. 46 U.S.C. § 10313(i). A commentator has suggested that an anti-waiver provision in the Seaman’s Wage Act may explain the Eleventh Circuit’s decision to invalidate the arbitration agreement. *See Lakatos, supra* note 3. That provision provides that “[a] seaman by any agreement other than one provided for in this chapter may not . . . be deprived of a remedy to which the . . . seaman otherwise would be entitled for the recovery of wages.” 46 U.S.C. § 10317. Even if this provision influenced the Eleventh Circuit, it would not apply if the Seaman’s Wage Act does not apply.

212. *Velidor v. Benghazi*, 653 F.2d 812, 818 (3d Cir. 1981) (internal quotation marks omitted) (citing *Strathearn S.S. Co. v. Dillon*, 252 U.S. 348 (1920)); *see also Chung v. Overseas Navigation Co.*, 774 F.2d 1043, 1049 (11th Cir. 1985) (stating that a purpose of the Seaman’s Wage Act is “to ensure that a seaman is not turned ashore with little or no money in his pocket”); *Thomas v. Carnival Corp.*, No. 07-21867, 2008 U.S. Dist. LEXIS 66169, at \*11 (S.D. Fla. Jan. 4, 2008) (noting that “it is undisputed . . . that [Thomas] is not a citizen of the United States”), *rev’d*, 573 F.3d 1113 (11th Cir. 2009), *cert. denied*, 130 S. Ct. 1157 (2010).

213. 46 U.S.C. § 110.

214. *See Thomas v. Carnival Corp.*, 573 F.3d 1113, 1116 & n.4 (11th Cir. 2009), *cert. denied*, 130 S. Ct. 1157 (2010).

215. Notice of Removal, *supra* note 150.

216. The complaint states that Thomas was “ordered an orthopedic evaluation” in Miami ten days before he was officially discharged, but the complaint does not indicate whether Thomas was evaluated in Miami. *Id.* Thomas may have a Seaman’s Wage Act claim if he left the ship in the United States for medical treatment. *See, e.g., Vidovic v. Losinjska Plovidba Oour Broadarstvo*, 868 F. Supp. 691, 694 (E.D. Pa. 1994) (“A seaman who is forced to leave his ship because of injury requiring medical treatment is deemed ‘discharged’ under the Seaman’s [Wage] Act.”).

operate in tandem to waive any rights because the rights would not exist under the statute. In this scenario, the justification that "U.S. law will never be applied"<sup>217</sup> in the arbitration would not have been sufficient to invalidate the arbitration clause.

The chief advantage of this conflict-of-laws approach to analyzing prospective waiver claims is that it would provide the fullest scope of application for U.S. federal statutes while minimizing the harm to international trade and commerce and to the policy in favor of forum selection agreements only to the extent of Congress's intent. Indeed, this approach likely would be applied after the issuance of an arbitral award to determine whether the arbitral tribunal violated American public policy under Article V(2)(b) of the New York Convention. The main disadvantages are the potential short-term unpredictability of the territorial scope of federal statutes and the inconvenience of requiring a conflict-of-laws analysis where Congress did not address the territoriality of a statute.

#### B. *The Scope of the Choice-of-Law Clause: Who Decides?*

The prospective waiver doctrine also requires that the parties contractually agree to exclude U.S. or comparable foreign law from the adjudication, whether in arbitration or in a foreign court. Thus, the prospective waiver doctrine can be relied upon to pursue litigation in the U.S. only if the choice-of-law clause in the parties' agreement would actually preclude claims under U.S. or comparable foreign law. This element raises two issues—what the parties agreed upon and who determines that issue.<sup>218</sup>

In deciding whether a choice-of-law clause prevents a party from pursuing U.S. statutory claims, the Eleventh Circuit interpreted the *Mitsubishi* and *Vimar* decisions as dividing cases into three categories: cases where the parties or the clause guarantee that U.S. law will apply, cases where U.S. law may apply, and cases where the parties have not disputed that U.S. law will not apply.<sup>219</sup> The court considered *Mitsubishi* to be in the first category, noting that "the party seeking to compel arbitration conceded that U.S. law would apply in the arbitration."<sup>220</sup> The choice-of-law clause in *Mitsubishi* provided that "[t]his Agreement is

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

218. This Article focuses on whether federal law prohibits the enforcement of otherwise valid choice-of-law clauses, but a separate, related issue is what law applies when deciding the enforceability and scope of a choice-of-law clause. The nuances of the interaction between state and federal law as well as the law that the arbitrator should apply to construe a choice-of-law clause are outside the scope of this Article.

219. *See Thomas*, 573 F.3d at 1120–24.

220. *Id.* at 1121.

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," but counsel "conceded that American law applied to the antitrust claims."<sup>221</sup>

The court categorized *Vimar* in the second group because "it was unknown which country's laws would govern [and] it was possible that U.S. law might apply."<sup>222</sup> The choice-of-law clause in *Vimar* stated that "[t]he contract evidenced by or contained in this Bill of Lading shall be governed by the Japanese law."<sup>223</sup> Confronted with this clause, the Supreme Court cited *Mitsubishi* but did not find a waiver because "it [was] not established what law the arbitrators [would] apply" and "[t]he arbitrators may conclude that COGSA applies."<sup>224</sup>

The Eleventh Circuit decided that the choice-of-law clause in *Thomas* fell into the third category, finding that the clause was "in direct contradistinction" to the clauses in *Mitsubishi* and *Vimar* because it "specifie[d] ex ante that *only* foreign law would apply."<sup>225</sup> On three separate occasions, the court repeated its conclusion that the clause waived U.S. law. First the court said that "it is undisputed that, regardless of the procedural posture of the case, U.S. law will never be applied in resolving the resolution of Thomas's claims."<sup>226</sup> Second, the court proclaimed, "There is no uncertainty as to the governing law in these proposed arbitral proceedings—only Panamanian law will be applied."<sup>227</sup> Finally, the court declared that "[t]here is no dispute that . . . Thomas must arbitrate in the Philippines (choice-of-forum) under the law of Panama (choice-of-law)."<sup>228</sup> The choice-of-law clause in *Thomas* stated that "[t]he parties agree to [Panamanian] law, notwithstanding any claims for negligence, unseaworthiness, maintenance, cure, failure to provide prompt, proper and adequate medical care, wages, personal injury, or property damage which might be available under the laws of any other jurisdiction."<sup>229</sup> The Eleventh Circuit's analysis did not address the issue raised by the parties of whether the court could interpret the choice-of-law clause without waiting for an arbitral tribunal to decide this issue.<sup>230</sup>

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

222. *Thomas*, 573 F.3d at 1121–22.

223. *Vimar Seguros Y Reaseguros, S.A. v. M/V Sky Reefer*, 515 U.S. 528, 531 (1995).

224. *Id.* at 540.

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

226. *Id.* at 1122–23.

227. *Id.* at 1123.

228. *Id.*

229. *Id.*

230. Referencing *Vimar*, Carnival argued that "the choice-of-law question must be decided in the first instance by the arbitrator." Appellee's Answer Brief, *supra* note 163, at 14. Thomas responded by arguing that *Mitsubishi* and *Vimar* "make clear that it is the court's job (not an

Other circuits have expressly included such deliberations in their opinions. For example, in *George Fischer Foundry Systems, Inc. v. Adolph H. Hottinger Maschinenbau*, the Sixth Circuit affirmed a district court opinion dismissing an action under U.S. law where an arbitral tribunal in Zurich was already considering the same dispute and was specifically considering whether it would apply U.S. antitrust law.<sup>231</sup> The Sixth Circuit quoted the district court opinion, noting that "it would be sheer speculation for this Court to attempt to predict in advance what law the Tribunal will decide to apply to plaintiff's antitrust claims . . . [and] it is not clear that the Zurich tribunal will not award treble damages [available under U.S. law]."<sup>232</sup>

The Supreme Court has held that disputed issues should be submitted to arbitration once a court has concluded that an arbitration agreement between the parties exists.<sup>233</sup> Thus, the Court's holding in *Vimar* that "the choice-of-law question . . . must be decided in the first instance by the arbitrator" arguably should be read to require that this issue be referred to the arbitrators regardless of the nature of the choice-of-law clause.<sup>234</sup> The *Mitsubishi* Court's statement that courts could apply the prospective waiver doctrine does not compel the conclusion that courts must interpret the scope of the choice-of-law clause. Perhaps recognizing this issue, the *Thomas* court stated that the arbitral tribunal would not permit the application of U.S. law under the choice-of-law clause as "the arbitrator is bound to effectuate the intent of the parties irrespective of any public policy considerations."<sup>235</sup> Under this theory, the parties intended to violate American public policy and the arbitral tribunal would be required to respect this intent.

If the Eleventh Circuit had compelled the parties to arbitrate the scope of the choice-of-law clause, then the court could have invalidated

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arbitrator's) to determine if the arbitration clause works in tandem with a choice of law clause to waive the U.S. statutory claim." Reply Brief of Appellant, *supra* note 183, at 20.

231. 55 F.3d 1206, 1207, 1210 (6th Cir. 1995).

232. *Id.* at 1208.

233. See *First Options of Chicago, Inc. v. Kaplan*, 514 U.S. 938, 944–45 (1995) (stating that under the FAA any "silence or ambiguity about the question . . . 'whether a particular merits-related dispute is arbitrable because it is within the scope of a valid arbitration agreement' . . . should be resolved in favor of arbitration" (quoting *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614, 626 (1985))); *Prima Paint Corp. v. Flood & Conklin Mfg. Co.*, 388 U.S. 395, 400, 404 (1967) ("Section 4 provides a federal remedy for a party 'aggrieved by the alleged failure, neglect, or refusal of another to arbitrate under a written agreement for arbitration,' and directs the federal court to order arbitration once it is satisfied that an agreement for arbitration has been made and has not been honored. . . . We hold, therefore, that in passing upon a § 3 application for a stay while the parties arbitrate, a federal court may consider only issues relating to the making and performance of the agreement to arbitrate.").

234. *Vimar Seguros Y Reaseguros, S.A. v. M/V Sky Reefer*, 515 U.S. 528, 541 (1995) (citing *Mitsubishi*, 473 U.S. at 637 n.19).

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

the arbitration agreement only if the arbitral tribunal decided that the choice-of-law clause excluded U.S. statutory law.<sup>236</sup> Indeed, the parties could have agreed to obtain a partial award on this issue before proceeding to the merits of the dispute in arbitration. The arbitral tribunal could then have determined whether the parties intended to evade American public policy and whether such intent was permissible. It is quite possible that the arbitral tribunal could have found that the parties did not intend to or could not evade the mandatory statutory law of the United States even where, as in *Thomas*, the choice-of-law clause explicitly disclaimed the application of any other law.<sup>237</sup> Whether such a result should follow for a choice-of-court agreement is less certain, but nothing bars a court from deferring to the chosen court in the first instance.

Yet the Eleventh Circuit's approach provides an efficient resolution of the matter. Rather than wait for a needless arbitration or foreign litigation, the court's approach would allow courts to construe apparently unremitting choice-of-law clauses in the manner that they are most likely to be interpreted and apply the prospective waiver doctrine accordingly. Such an approach is more compelling when one considers an international arbitrator's or foreign judge's potential disinterest in adjudicating unique U.S. statutory claims.<sup>238</sup> In subsequent decisions, the court could create a *prima facie* standard whereby it could determine which choice-of-law clauses require adjudication by an arbitral tribunal or foreign court before a court can invalidate the forum selection agreement.

This analysis highlights, however, a fundamental weakness in the prospective waiver doctrine. As commentators have noted, invalidating the arbitration clause would not be enough to guarantee the application of U.S. statutory law.<sup>239</sup> Instead, the court would have to invalidate the choice-of-law clause as well. Thus, if a U.S. court can construe the choice-of-law clause as barring resort to U.S. statutory claims, instead of deferring to the arbitral tribunal or foreign court, perhaps the court should simply invalidate the choice-of-law clause to permit U.S. statutory claims in arbitration rather than invalidate the arbitration clause.<sup>240</sup>

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236. See Brubaker, *supra* note 3, at 315 & n.33.

237. See generally BORN, *supra* note 48, at 558–71.

238. Hans Smit, Mitsubishi: *It Is Not What It Seems to Be*, J. INT'L ARB., Sept. 1987, at 7, 13.

239. See, e.g., Friedland & Odynski, *supra* note 3.

240. In fact, district courts interpreting *Thomas* have invalidated choice-of-law clauses that were severable from the remainder of the contract while upholding the relevant arbitration provisions. See, e.g., *Krstic v. Princess Cruise Lines, Ltd.*, No. 09-23846-CIV, 2010 WL 1542083, at \*4–\*5 (S.D. Fla. Mar. 25, 2010); *Cardoso v. Carnival Corp.*, No. 09-23442-CIV, 2010 WL 996528, at \*4 (S.D. Fla. Mar. 16, 2010).

C. *A Second Look at the Opportunity for Review: Does This Element Obviate the Doctrine?*

The third and final aspect of the prospective waiver doctrine is that it does not apply if a U.S. court has a subsequent opportunity to review the arbitral adjudication of the federal statutory claim. The Supreme Court announced in *Vimar* that the prospective waiver doctrine would apply "[w]ere there no subsequent opportunity for review."<sup>241</sup> As discussed below, this requirement, which appears to be a restatement of the second look doctrine, may foreclose any application of the prospective waiver doctrine, but the Eleventh Circuit inferred from the language in *Vimar* that a set of cases exists for which subsequent judicial review is unavailable.

The Eleventh Circuit construed the "opportunity for review" element to require the party claiming a prospective waiver of statutory rights—here, the plaintiff Thomas—to show, paradoxically, that he will likely succeed in arbitration or foreign litigation. The court held that "the possibility of any later opportunity presupposes that arbitration will produce *some* award which the plaintiff can seek to enforce" in U.S. courts.<sup>242</sup> The court further construed this element as requiring an "assurance of an 'opportunity for review'" and permitting arbitration only if "it is *evident* . . . there will be later review."<sup>243</sup> Applying these standards, the *Thomas* court found that the U.S. courts "will be deprived of any later opportunity to review" because of the "distinct possibility" that the plaintiff might receive "no award in the arbitral forum."<sup>244</sup>

The court's interpretation of *Vimar*'s "opportunity for review" as requiring "*some* award" that the plaintiff can enforce is curious because it appears to have interpreted the possibility of "no award" as meaning no award in favor of Thomas. Arbitration inevitably would produce an award, unless the parties abandoned their claims or settled their dispute.<sup>245</sup> Because arbitrators who are failing in their responsibility to render an award can be replaced,<sup>246</sup> the possibility that an arbitral tribu-

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

242. *Thomas v. Carnival Corp.*, 573 F.3d 1113, 1123 (11th Cir. 2009), *cert. denied*, 130 S. Ct. 1157 (2010).

243. *Id.* (emphasis added).

244. *Id.* at 1124.

245. Of course, a U.S. court could review a settlement if the parties requested the arbitral tribunal to incorporate their settlement in an award.

246. For example, if the Eleventh Circuit had upheld the district court's decision to compel arbitration in *Thomas*, the parties could have replaced arbitrators under Philippine law or the FAA. As the place of arbitration, the parties could invoke Philippine law, which has adopted the UNCITRAL Model Law on International Commercial Arbitration. See An Act to Institutionalize the Use of an Alternative Dispute Resolution System in the Philippines and to Establish the Office for Alternative Dispute Resolution, and for Other Purposes, Rep. Act No. 9285 §§ 19–31 (2004).

nal will not issue an award does not exist.<sup>247</sup> Indeed, as the Eleventh Circuit implied, an award in *Thomas* may have been a declaration that Carnival is not liable and therefore that Thomas is not entitled to damages.<sup>248</sup> Thus, before determining that an opportunity for review exists, the decision in *Thomas* requires courts to look to the nature of the dispute to ensure that the party claiming statutory remedies probably will obtain a favorable arbitral award that it can enforce.

The Eleventh Circuit did not explain why an award *against* a party claiming the prospective waiver doctrine would not provide a sufficient opportunity for review. The language in *Vimar* requires only an arbitral award that U.S. courts can review.<sup>249</sup> Although a losing party would not have an award that it could seek to enforce, that party could oblige the prevailing party to decide between submitting the award for review by the U.S. courts or waiving the award. If a party lost on its U.S. statutory claims in arbitration, the party could commence litigation to pursue those claims in U.S. court. To bar the litigation, the opposing party in arbitration could submit its favorable arbitral award for recognition and enforcement.<sup>250</sup> If the prevailing party did so, the U.S. court would have the opportunity to review the arbitral award to determine whether the arbitral tribunal properly adjudicated the federal statutory claims or whether its adjudication violated American public policy. If the prevailing party decided not to submit the arbitral award for recognition and enforcement, then the losing party could litigate its claims and the courts would not have any concern that arbitration waived those claims. Thus, it is unclear why the Eleventh Circuit decided to narrow the scope of the "opportunity for review" element to apply only to potential awards in favor of a party claiming that the prospective waiver doctrine applies.

Nevertheless, the court's approach has two advantages. First, the decision is efficient because it avoids compelling parties to lose in arbitration or in a foreign court before pursuing statutory remedies in U.S.

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Under the UNCITRAL Model Law as adopted in the Philippines, the parties, unless they have agreed upon a different procedure, could request that the National President of the Integrated Bar of the Philippines replace an arbitrator if the arbitrator's impartiality or independence is successfully challenged or if the arbitrator becomes unable to or fails to act. See UNCITRAL Model Law on International Commercial Arbitration arts. 11-15, June 21, 1985, 24 I.L.M. 1302 (1985). Similarly, a U.S. court exercising jurisdiction over the parties (instead of deferring to the place of the arbitration) could replace "a vacancy" in the arbitral tribunal under the FAA. 9 U.S.C. §§ 5, 206 (2006).

247. Admittedly, a recalcitrant opponent can significantly delay arbitral proceedings through the arbitrator appointment process.

248. See *Thomas*, 573 F.3d at 1124. Carnival made this argument in its petition for a rehearing en banc. Petition for Rehearing, *supra* note 189, at 12-13 (citing cases).

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

250. See 9 U.S.C. §§ 9, 13, 207 (2006) (allowing parties to apply to U.S. courts to confirm arbitral awards as enforceable judgments).

courts. By permitting litigation without arbitration, the court's decision may avoid imposing an unnecessary hardship by allowing parties to litigate without requiring them to expend time and money in arbitration only to later re-litigate the same dispute. Second, the court's decision adds substance to the language in *Vimar* to preserve the prospective waiver doctrine. Although an opportunity for review will always exist, construing the language in *Vimar* as a nonexistent hypothetical would serve to obviate the prospective waiver doctrine altogether.

Yet, several arguments militate against this approach. First, because the parties have agreed to arbitration or litigation in a foreign court, any hardship concern does not invoke notions of fairness. Also, Thomas may have faced little hardship because arbitration of this "single issue" dispute would have likely proceeded quickly.<sup>251</sup> Moreover, this approach is only more efficient if the party loses in arbitration, which may be difficult to predict.

Second, this approach to the prospective waiver doctrine could lead to unfair consequences for opposing parties who bargained for the agreement to arbitrate and its standard may be difficult to apply. Because this approach focuses on the success in arbitration of the party claiming prospective waiver, the Eleventh Circuit was forced to evaluate the probability of such an award, reasoning that an opportunity for review required a favorable outcome for the party claiming prospective waiver that was "evident" or guaranteed with some "assurance" and that a "distinct possibility" was not sufficient.<sup>252</sup> But a "distinct possibility" always exists that a party may not prevail on their claims, even if the arbitral tribunal considered and properly adjudicated U.S. statutory claims. Of course, the Eleventh Circuit in future litigation could clarify this standard to determine the facts necessary for a "distinct possibility" aside from the "single issue" presented in *Thomas*.<sup>253</sup> However, a stricter view—one that requires the submission of every case to arbitration—may accord with the Supreme Court's apparent trend in relying upon "the cavalcade of mercantile arbitral panels"<sup>254</sup> to decide private disputes in addition to the "phalanx of non-Article III tribunals"<sup>255</sup> that decides public rights. Indeed, the Supreme Court's second-look doctrine, as explained in *Mitsubishi*, serves to protect U.S. statutory claims on this basis.<sup>256</sup>

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

252. *See id.*

253. *Id.*

254. Joseph R. Brubaker, Book Review, 17 AM. REV. INT'L ARB. 293, 297 (2007) (reviewing THOMAS E. CARBONNEAU, *THE LAW AND PRACTICE OF ARBITRATION* (2d ed. 2007)).

255. *Commodity Futures Trading Comm'n v. Schor*, 478 U.S. 833, 855 (1986).

256. *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614, 638 (1985)



## V. THE PROSPECTIVE WAIVER DOCTRINE AND INTERNATIONAL LAW

From the perspective of international law, the prospective waiver doctrine's reliance upon the law applicable to the merits of the parties' dispute to determine jurisdiction appears anomalous. Neither the New York Convention nor the Hague Convention addresses the law that the arbitral tribunal or contractually selected court must apply to the merits of the parties' dispute. Instead, these Conventions address the other principal topics that comprise the field of conflicts of law<sup>257</sup>—jurisdiction and judgments.<sup>258</sup> Rather than provide any rules to determine the law applicable to a dispute, these Conventions permit national courts to refuse to enforce, for certain subject matters, choice-of-court and arbitration agreements as well as judgments and awards. Thus, only a liberal interpretation of the text of these conventions would permit the judiciary to apply the prospective waiver doctrine, but such interpretation undermines the uniformity and predictability that these Conventions seek to establish.

### A. *The Prospective Waiver Doctrine and the New York Convention*

As the Supreme Court has explained, the New York Convention was designed to "encourage the recognition and enforcement of commercial arbitration agreements in international contracts and to unify the standards by which agreements to arbitrate are observed and arbitral awards are enforced in the signatory countries."<sup>259</sup> Article II of the New York Convention requires national courts to refer parties to arbitration if the parties have agreed to arbitrate, unless the dispute concerns "a subject matter [not] capable of settlement by arbitration" or the arbitration agreement is "null and void, inoperative or incapable of being performed."<sup>260</sup> Article V provides bases for courts to refuse to recognize and enforce resulting arbitration awards if, among other things, the award is "contrary to the public policy of that country."<sup>261</sup>

The prospective waiver doctrine was a by-product of the Supreme Court's decision in *Mitsubishi* to narrow the scope of the nonarbitrability exception under the New York Convention.<sup>262</sup> As the dissent in *Mitsubishi* observed, this exception "plainly suggests the possibility that

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257. HAY, WEINTRAUB & BORCHERS, *supra* note 205, at 1.

258. New York Convention, arts. II–III, V; Hague Convention, arts. V–XV.

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

260. New York Convention, art. II.

261. *Id.* at art. V(2)(b).

262. *See id.* at art. II(1). Article II(1) does not indicate which law courts should apply to determine whether the subject matter is arbitrable. Commentators have suggested that courts should determine arbitrability only under their own national law. *See, e.g.,* ALBERT JAN VAN DEN BERG, *THE NEW YORK ARBITRATION CONVENTION OF 1958*, at 152–53 (1981).

some subject matters are not capable of arbitration under the domestic laws of the signatory nations, and that agreements to arbitrate such disputes need not be enforced."<sup>263</sup> Although this exception would allow U.S. courts to retain control over the adjudication of federal statutory claims, including antitrust claims, the majority in *Mitsubishi* refused to recognize "subject-matter exceptions where Congress has not expressly directed the courts to do so."<sup>264</sup> The majority reasoned that judicially created exceptions would undermine "[t]he utility of the Convention in promoting the process of international commercial arbitration."<sup>265</sup>

Thus, the null and void clause provides the only possible basis under the New York Convention for courts to apply the prospective waiver doctrine and refuse to compel parties to arbitrate.<sup>266</sup> As commentators have noted, however, to promote international arbitration, these words "should be construed narrowly, and the invalidity of the arbitration agreement should be accepted in manifest cases only."<sup>267</sup> For this reason, federal courts of appeals have interpreted the null and void clause as permitting only basic contract defenses, such as fraud, mistake, duress, and waiver.<sup>268</sup> Indeed, the Eleventh Circuit has held that the null and void clause permits defenses to the enforcement of an international arbitration agreement only for these standard breach-of-contract

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263. *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614, 659 (1985) (Stevens, J., dissenting).

264. *Id.* at 639 n.21 (majority opinion).

265. *Id.*

266. New York Convention, art. II(3). The other defenses in Article II(3) to the enforcement of an arbitration agreement are not applicable because the prospective waiver doctrine does not render the arbitration clause inoperative or incapable of being performed. Arbitration clauses are "inoperative" if they have "ceased to have effect" as opposed to arbitration clauses deemed void ab initio. VAN DEN BERG, *supra* note 262, at 158. Moreover, arbitration clauses "incapable of being performed" refer to poorly drafted agreements, not agreements that violate public policy. *Id.* at 159.

267. VAN DEN BERG, *supra* note 262, at 155; *see also* Carbonneau, *supra* note 6, at 287.

268. *See Ledee v. Ceramiche Ragno*, 684 F.2d 184, 187 (1st Cir. 1982) ("The parochial interests of the Commonwealth, or of any state, cannot be the measure of how the 'null and void' clause is interpreted. . . . Rather the clause must be interpreted to encompass only those situations—such as fraud, mistake, duress, and waiver—that can be applied neutrally on an international scale."); *see also* DiMercurio v. Sphere Drake Ins. PLC, 202 F.3d 71, 79 (1st Cir. 2000) (quoting *Ledee* and commenting that the "null and void" clause "limits the bases upon which an international arbitration agreement may be challenged to standard breach-of-contract defenses"); *Riley v. Kingsley Underwriting Agencies, Ltd.*, 969 F.2d 953, 960 (10th Cir. 1992) (stating that the "'null and void' exception . . . is to be narrowly construed"); *I.T.A.D. Assocs., Inc. v. Podar Bros.*, 636 F.2d 75, 76 (4th Cir. 1981) ("Thus, our interpretation of the Article II(3) proviso must not only observe the strong policy favoring arbitration, but must also foster the adoption of standards which can be uniformly applied on an international scale."). *But see Rhone Mediterranee Compagnia v. Lauro*, 712 F.2d 50, 53 (3rd Cir. 1983) ("[W]e conclude that . . . the overall purpose[ ] of the Convention is that an agreement is 'null and void' only (1) when it is subject to an internationally recognized defense such as duress, mistake, fraud, or waiver, or (2) when it contravenes fundamental policies of the forum state." (citations omitted)).

defenses because these defenses “can be applied neutrally on an international scale.”<sup>269</sup>

The Eleventh Circuit’s decision in *Thomas* expanded the scope of the null and void clause.<sup>270</sup> As discussed above, the court ended its analysis by concluding that the arbitration agreement was “null and void” under the prospective waiver doctrine.<sup>271</sup> Although public policy arguably may play some role in the null and void standard—perhaps for fundamental public policies as the Third Circuit has suggested<sup>272</sup>—this approach undermines the uniformity that the New York Convention seeks to establish.<sup>273</sup> The alternative approach, advanced by the Tenth Circuit in *Riley*, would have maintained this uniformity. Because of the limited scope of the null and void clause, the Tenth Circuit rejected the application of the prospective waiver doctrine under Article II of the New York Convention and compelled arbitration in England under English law.<sup>274</sup> The court reasoned that Article V “specifically provides for relief when enforcement of an award in violation of public policy is sought.”<sup>275</sup>

#### B. *The Prospective Waiver Doctrine and the Hague Convention*

Designed “to promote international trade and investment through enhanced judicial co-operation,” the Hague Convention would establish a uniform approach to international forum-selection clauses.<sup>276</sup> The Convention seeks to ensure the enforcement of exclusive choice-of-court agreements and thus has been described as “the litigation analogue for the New York Convention.”<sup>277</sup> If the United States ratifies the Hague Convention, which it has already signed, the prospective waiver doc-

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269. *Bautista v. Star Cruises*, 396 F.3d 1289, 1302 (11th Cir. 2005) (quoting *DiMercurio*, 202 F.3d at 79).

270. Interestingly, neither the *Thomas* decision nor the parties’ pleadings focused on this aspect of the Eleventh Circuit’s decision in *Bautista*.

271. See *supra* Part III.B.2.

272. See *Rhone*, 712 F.2d at 53 (finding that an agreement may be “null and void” if it “contravenes fundamental policies of the forum state”).

273. Rather than expanding the New York Convention’s null and void clause, the court’s approach arguably should be construed as a judicially created contingent nonarbitrability exception to the enforcement of an arbitration agreement. Cf. Carbonneau, *supra* note 6, at 287 (explaining that classifying the prospective waiver doctrine as an “inarbitrable subject matter” may be “torturous” but would maintain “the integrity of the Convention’s regulatory framework”).

274. *Riley v. Kingsley Underwriting Agencies*, 969 F.2d 953, 959 (10th Cir. 1992).

275. *Id.* at 960.

276. Hague Convention, pmb1.

277. Louise Ellen Teitz, *The Hague Choice of Court Convention: Validating Party Autonomy and Providing an Alternative to Arbitration*, 53 AM. J. COMP. L. 543, 548 (2005); see also Ronald A. Brand, *Introductory Note to the 2005 Hague Convention on Choice of Court Agreements*, 44 I.L.M. 1291 (2005).

trine's role in invalidating exclusive jurisdiction agreements may be limited slightly.

The prospective waiver doctrine will retain its vitality for a number of federal statutes because the Convention excludes specific subject matters from its scope. Unlike the New York Convention's exclusion of subject matter not "capable of settlement by arbitration,"<sup>278</sup> which the *Mitsubishi* Court refused to interpret as permitting the recognition of "subject-matter exceptions where Congress has not expressly directed the courts to do so,"<sup>279</sup> Article 2 of the Hague Convention explicitly excludes certain subject matters from the Convention's scope.<sup>280</sup> For example, the Hague Convention excludes "anti-trust (competition) matters," disputes concerning the "carriage of passengers and goods," and cases "relating to contracts of employment"—matters that were at issue in *Mitsubishi*, *Vimar*, and *Thomas*.<sup>281</sup> Thus, the Hague Convention would not compel U.S. courts to enforce choice-of-court agreements regarding these or other excluded subject matters.<sup>282</sup> If U.S. courts chose to enforce exclusive jurisdiction agreements concerning these excluded matters under state or federal law,<sup>283</sup> however, those courts also could invoke the prospective waiver doctrine to protect federal statutory rights.

For matters not specifically excluded, however, the Hague Convention may limit the scope of the prospective waiver doctrine. Article 6

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278. New York Convention, art. II(1).

279. *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614, 639 n.21 (1985).

280. See Hague Convention, art. 2.

281. *Id.* The Explanatory Report to the Hague Convention explains that the carriage of passengers or goods was excluded to avoid conflict with the International Convention Regarding Bills of Lading (the "Hague Rules"). See TREVOR HARTLEY & MASATO DOGAUCHI, CONVENTION OF 30 JUNE 2005 ON CHOICE OF COURT AGREEMENTS: EXPLANATORY REPORT 32, available at <http://www.hcch.net/upload/exp137e.pdf> [hereinafter HAGUE CONVENTION EXPLANATORY REPORT]. The Hague Rules were enacted as COGSA in the United States. The Explanatory Report further explains that only antitrust issues that form the basis of a claim are excluded. HAGUE CONVENTION EXPLANATORY REPORT at 32–33.

The Hague Convention also excludes "emergency towage and salvage," which was at issue in *Bremen*. Hague Convention, art. 2(2); see also *Bremen v. Zapata Offshore Co.*, 407 U.S. 1, 3, 13 (1972) (explaining that the towing occurred "in an emergency"). Although this subject matter did not prevent the Supreme Court in *Bremen* from enforcing the choice-of-court agreement under its admiralty jurisdiction, the Explanatory Report indicated that this matter "would cause problems for some States." HAGUE CONVENTION EXPLANATORY REPORT at 32.

282. The Hague Convention further allows States to exclude certain categories of subject matter from the Convention's scope and refuse to enforce choice-of-court agreements concerning those subject matters. Hague Convention, art. 21.

283. See Note, *Hague Conference Approves Uniform Rules of Enforcement for International Forum Selection Clauses*, 119 HARV. L. REV. 931, 931, 935–36 (2006) (observing that "the ratification of this Convention would significantly clarify U.S. law by resolving difficult questions that federal courts now face in deciding whether to apply state or federal law to international forum selection agreements" because ratification would "render immaterial difficult *Erie* questions" by "requiring the recognition of international forum selection clauses in both state and federal cases").

permits a court "other than that of the chosen court" to refuse to compel parties to adjudicate their dispute in the contractually chosen court if doing so "would lead to a manifest injustice or would be manifestly contrary to the public policy" of the country where the court is located.<sup>284</sup> The history of the Hague Convention indicates that the drafters intended Article 6's "manifest injustice" and "public policy" provisions to provide a "high" standard that was limited to a country's "basic norms or principles."<sup>285</sup> Indeed, the Convention's structure also suggests a limited interpretation because Article 21 permits states to exclude additional subject matters from the Convention's scope<sup>286</sup> and, unlike the null and void provision in Article II of the New York Convention,<sup>287</sup> Article 6 of the Hague Convention permits a court to find a choice-of-court agreement null and void only "under the law of the State of the chosen court."<sup>288</sup>

Whether and how the U.S. courts will interpret Article 6 of the Hague Convention with respect to the application of the prospective waiver doctrine, however, is unknown.<sup>289</sup> If the Eleventh Circuit's decision in *Thomas* provides any indication, U.S. courts could liberally construe Article 6 to refuse to enforce choice-of-court agreements that operate in tandem with choice-of-law clauses to waive a party's right to statutory law. Thus, although the Convention does not exclude the securities laws at issue in *Scherk*, U.S. courts may well apply the prospective waiver doctrine to protect U.S. securities claims.<sup>290</sup>

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284. Hague Convention, art. 6(c).

285. HAGUE CONVENTION EXPLANATORY REPORT at 48 (explaining that these exceptions do not "permit a court to disregard a choice of court agreement" either "simply because it would not be binding under domestic law" or because "the chosen court might violate, in some technical way, a mandatory rule" of the country where the court is located).

286. See *supra* note 284 and accompanying text.

287. Although the New York Convention does not specify the law courts must apply to determine whether an arbitration agreement is null and void, the Eleventh Circuit in *Thomas* apparently applied U.S. law to this provision. See *supra* Parts III.B.2, V.A.

288. Hague Convention, art. 6(a); HAGUE CONVENTION EXPLANATORY REPORT at 47-48; see also Andrea Schulz, *The Hague Convention of 30 June 2005 on Choice of Court Agreements*, 2 J. PRIVATE INT'L L. 243, 255-56 (2006) (describing the selection of the law applicable to the "null and void" defense as "a major achievement" that serves to avoid "parallel proceedings" and any "denial of justice").

289. Cf. Jeffrey Talpis & Nick Krnjevic, *The Hague Convention on Choice of Court Agreements of June 30, 2005: The Elephant that Gave Birth to a Mouse*, 13 SW. J. L. & TRADE AM. 1, 24 (2006) (commenting that "it is likely that [Article 6(c)'s] meaning will instead be defined by national laws and policies which necessarily vary from state to state" and that some countries will refuse to enforce choice-of-court agreements that "are procedurally and/or substantively abusive").

290. *Id.* at 25 (explaining that the U.S. delegation refused to agree to a restrictive interpretation of "manifest injustice" in Article 6(c) because it "would create a conflict between the Convention and the current U.S. Supreme Court standard for substantive invalidity of unreasonable or unjust [choice-of-court] clauses").

## VI. CONCLUSION

The prospective waiver doctrine may undermine the U.S. policy in favor of forum-selection agreements. A more nuanced analysis may better serve to protect both federal statutory claims and the American policy in favor of arbitration, if the prospective waiver doctrine is necessary at all.

The prospective waiver doctrine in international dispute resolution stems from the humble origin of a footnote, but it has profound ramifications for U.S. courts and the international business community in general. Twenty-five years after that footnote, the Eleventh Circuit has provided a novel interpretation that aggressively protects the public policies contained in U.S. statutes. The *Thomas* decision sends a strong warning to commercial contractual parties that they may not be able to opt for the protections of foreign law in non-U.S. forums without first considering these policies. The decision also provides courts with a unique prophylactic measure to ensure the survival of U.S. statutory policies when the application of those policies in foreign proceedings and the domestic opportunity to review those foreign proceedings remain uncertain.

The *Thomas* decision's interpretation of the prospective waiver doctrine leaves several questions unanswered. Most significantly, the Eleventh Circuit opinion suggests but does not indicate whether Article II and Article V of the New York Convention should work in conjunction in cases of voiding contractual provisions for violations of public policy. Likewise, the decision's potential effect on the new Hague Convention remains unclear. Courts and commentators will probably continue to wrestle with this doctrine, and perhaps this decision, for years to come.