

LEXSEE 41 TEX INT'L LJ 103

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Texas International Law Journal

Winter, 2006

41 Tex. Int'l L.J. 103

LENGTH: 20420 words

COMMENT: Closing U.S. Courts to Foreign Seamen: The Judicial Excision of the FAA Seamen's Arbitration Exemption from the New York Convention Act

NAME: Matthew Nickson +

BIO: + Matthew Nickson is a third-year law student at the University of Texas. I would especially like to thank Professor Michael Sturley, an excellent independent study adviser, and Professor David Robertson, for teaching me admiralty law. I would also like to thank editor Erin Reed and the entire staff of the Texas International Law Journal for their dedication in reviewing this article, as well as attorney Kenny Hooks III, for the legal briefs and comments that he sent me. Finally, for their personal encouragement, I would like to thank my friends Toni Attwell and Guy Benet.

SUMMARY:

... In the recent Francisco and Bautista decisions, the Fifth and Eleventh Circuit Courts of Appeals compelled arbitration of Jones Act tort claims brought by Filipino seamen whose employment contracts included mandatory arbitration clauses falling under the United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards and its implementing Act. ... In 2002 in *Francisco v. Stolt Achievement MT* and again last year in *Bautista v. Star Cruises*, panels of the Fifth and Eleventh Circuit Courts of Appeals compelled arbitration of tort claims brought by plaintiff seamen whose employment contracts contained covenants to arbitrate falling under the United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards (New York Convention or Convention) and its implementing Act (the Convention Act). ... First, he found that the section 202 commercial limitation does not establish that the Convention Act was intended, by directly incorporating "a transaction, contract, or agreement described in section 2 of this title," to concomitantly incorporate the exemption from arbitration of disputes arising out of seamen's employment contracts contained in section 1. ... The Nunez Court distinguished *Marinechance Shipping, Ltd. v. Sebastian*, a Fifth Circuit case relying upon *The Bremen* and *Carnival Cruise Lines* to uphold an arbitration clause in a Filipino seaman's employment contract, and suggested in dicta that Boyd might not apply to foreign seamen due to "problems of uniformity and comity that are unique to [the] international setting[]." ...

HIGHLIGHT: ABSTRACT

In the recent Francisco and Bautista decisions, the Fifth and Eleventh Circuit Courts of Appeals compelled arbitration of Jones Act tort claims brought by Filipino seamen whose employment contracts included mandatory arbitration clauses falling under the United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards and its implementing Act. Matthew Nickson's note argues that the decisions are flawed because they distort statutory plain meaning and legislative history. It also examines why the decisions run counter to fundamental principles of U.S. admiralty law and the broad remedial policies of the Jones Act, as well as Supreme Court labor law and Federal Employers' Liability Act jurisprudence. The note concludes that both cases work an injustice to foreign seamen and should be overturned.

TEXT:

[*104]

I. Introduction

In 2002 in *Francisco v. Stolt Achievement MT* n1 and again last year in *Bautista v. Star Cruises*, n2 panels of the Fifth and Eleventh Circuit Courts of Appeals compelled arbitration of tort claims brought by plaintiff seamen whose employment contracts contained covenants to arbitrate falling under the United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards (New York Convention or Convention) n3 and its implementing Act (the Convention Act). n4 *Francisco* involved a Filipino seaman, Ernesto Francisco, who sued his employer for negligence under the Jones Act n5 after sustaining injuries aboard a chemical tanker ship navigating the Mississippi River. *Bautista* involved consolidated Jones Act negligence and wrongful death claims surrounding a tragic boiler explosion that occurred in the Port of Miami aboard the famous S.S. *Norway*.

To justify their holdings, both the *Francisco* and *Bautista* panels relied upon the ever expanding Supreme Court policy favoring arbitration and forum-selection clauses. The courts discussed Federal Arbitration Act (FAA) n6 and Convention Act cases compelling arbitration in the international business context so as to deny the incorporation into the Convention Act of the seamen's arbitration exemption found in FAA section 1. n7

The decisions are problematic for two important reasons. The first reason is that they interpret the interaction of the FAA and the Convention Act as producing a result that seems unnatural. Arguably, a unified reading of the two acts provides that the seamen's [*105] arbitration exemption is applicable to the Convention Act. At the very least, for a variety of reasons to be explored below, this applicability is ambiguous. It is befuddling that both courts determined so peremptorily that the plain meaning of the Convention Act does not incorporate the exemption.

The second key problem with *Francisco* and *Bautista* is their dismissal of legislative history that is favorable to the plaintiffs. The courts discount testimony given before the Senate Foreign Relations Committee by Richard Kearney, a State Department official and the Convention Act's drafter. The decisions also ignore evidence - apparent from questions posed to Mr. Kearney by Senator J. William Fulbright, the Act's principal legislative sponsor - about the Act's intended scope. The impressions that both men had of the Convention Act help to clarify any uncertainty vis-a-vis its interaction with the FAA.

What's more, *Francisco* and *Bautista* are hostile to fundamental principles of U.S. admiralty law. Among other things, these holdings violate FAA policy by paving the way for arbitration of U.S. seamen's tort claims; circumvent the liberal policies of the Jones Act and of the Federal Employers' Liability Act (FELA); n8 and contravene Supreme Court labor law jurisprudence and especially *U.S. Bulk Carriers, Inc. v. Arguelles*. n9

There can be no doubt that *Francisco* and *Bautista* implicate an ongoing debate about the role of human beings in global economic development. To improve the Philippine economy by securing jobs overseas for Filipino citizens and thereby attracting remittances, Philippine law mandates that contracts of employment of seamen be arbitrable. n10 Hence, the Philippine Overseas Employment Administration (POEA), an organ of the Philippine Department of Labor and Employment (DOLE), requires that all seamen sign employment contracts with arbitration agreements similar to the clauses litigated in these cases. n11 Surely it is no coincidence that the Philippines holds a comparative advantage in crewing. n12

[*106] In the name of broad policies underlying the recognition of foreign arbitral agreements (international comity, predictability, and economic efficiency), the Fifth and Eleventh Circuits have effectively closed the courts within their jurisdictions to foreign seamen tort claimants. This Article will attempt to ascertain present and future effects of this development. Part II will provide an overview of germane issues relating to Title 9. Parts III and IV will analyze in depth the reasoning of the *Francisco* and *Bautista* Courts. Finally, Part V will evaluate the consistency of each decision with U.S. maritime law and policy generally, as well as the current and anticipated impact of these holdings upon the rights of U.S and foreign seamen. The conclusion will reiterate the recommendation that both decisions be overruled.

II. The Applicable Layout of Title 9 of the United States Code

Before delving any deeper into the issues surrounding *Francisco* and *Bautista*, it is useful to understand the most important statutory provisions at issue in the dispute: 9 U.S.C. 1-307. Title 9 of the United States Code deals with arbitration; it was originally enacted into positive law by Congress in 1947 n13 and is now organized into three chapters. Chapter 1, enacted in 1925, is the FAA. Chapter 2, enacted in 1970, is the Convention Act, implementing the New York Convention. Chapter 3, enacted in 1990, is the Panama Convention Act, n14 implementing the Inter-American Convention on International Commercial Arbitration (the Panama Convention). n15

The original purpose of the FAA was to dislodge judicial hostility to arbitration and place agreements to arbitrate on an equal footing with other contracts. n16 In keeping with [*107] this mandate, FAA section 2 provides that written

agreements to arbitrate controversies arising out of maritime transactions and commercial contracts shall be enforceable in U.S. courts, to wit:

A written provision in any maritime transaction or a contract evidencing a transaction involving commerce to settle by arbitration a controversy thereafter arising out of such contract or transaction, or the refusal to perform the whole or any part thereof, or an agreement in writing to submit to arbitration an existing controversy arising out of such a contract, transaction, or refusal, shall be valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract. n17

At the same time, section 1 unequivocally exempts seamen's employment contracts from being treated as either maritime transactions or commercial contracts. n18 The provision defines the terms "maritime transactions" and "commerce" - which are stipulated to encompass interstate and foreign commerce - and specifies: "But nothing herein contained shall apply to contracts of employment of seamen, railroad employees, or any other class of workers engaged in foreign or interstate commerce." n19 Thus, the FAA definitions of a "maritime transaction" and "a contract evidencing a transaction involving commerce" exclude seamen's employment contracts. Under the FAA, seamen cannot under any circumstances be compelled to arbitrate statutory or general maritime law claims. n20

[*108] The main controversy in *Francisco* and *Bautista* surrounds the interplay of the FAA and the Convention Act. The Convention Act was passed in 1970 to provide a generalized framework for the recognition and enforcement of foreign arbitral agreements in international contracts; n21 it replaced a pele-mele patchwork of distinct bilateral U.S. agreements. n22 Although the FAA applies to matters touching interstate and foreign commerce and is not of a narrower scope of Commerce Clause coverage than the Convention Act, n23 the Convention Act was enacted to incorporate the New York Convention's unification of the standards by which signatory countries uphold the validity of foreign arbitral agreements and awards. n24

[*109] Both the *Francisco* and *Bautista* Courts held that the Convention Act conflicts with the section 1 exemption. This conclusion is not apparent from a cursory glance at the structure of Title 9. Section 202 of the Convention Act, n25 in delineating the scope of arbitration agreements that are judicially enforceable under the New York Convention, incorporates the FAA:

An arbitration agreement or arbitral award arising out of a legal relationship, whether contractual or not, which is considered as commercial, including a transaction, contract, or agreement described in section 2 of this title, falls under the Convention. An agreement or award arising out of such a relationship which is entirely between citizens of the United States shall be deemed not to fall under the Convention unless that relationship involves property located abroad, envisages performance or enforcement abroad, or has some other reasonable relation with one or more foreign states. For the purpose of this section a corporation is a citizen of the United States if it is incorporated or has its principal place of business in the United States. n26

Operating in tandem with section 202, section 208 n27 provides for the residual application of the FAA to the Convention Act. n28 According to the Act's principal architect, Mr. Kearney, sections 203-05 n29 signal explicit departures from the FAA and from Title 28 of the United States Code that serve to reconcile applicable U.S. law with the terms of the Convention. n30 Section 203 confers federal question jurisdiction over Convention Act cases and waives the 28 U.S.C. 1332 diversity and amount in controversy requirements. n31 Section 204 is a venue provision that permits a Convention Act case to be brought in a district or division embracing the place of arbitration agreed upon by the parties, if the location is within the United States. n32 Section 205 permits the removal of Convention Act cases to federal courts. n33

In seeming harmony with FAA section 2, section 202 applies the Convention Act only to an "arbitration agreement or arbitral award arising out of a legal relationship, [*110] whether contractual or not, which is considered as commercial" n34 This limitation is embodied in the language of the United States accession to the New York Convention, which includes two limiting declarations that were executed in accordance with Convention Article I(3). n35 These declarations provide that the United States will apply the Convention only on the basis of reciprocity, and only to differences arising out of legal relationships that are considered as commercial under U.S. national law. n36 A natural inference is that FAA section 1, including the seamen's exemption, constitutes the U.S. national law definition of arbitral

agreements falling under the Convention Act. No alternative definition exists. Further, no U.S. statutory provision or New York Convention article either explicitly addresses the arbitrability of seamen's employment contracts or specifically mentions or repudiates any of the section 1 exemptions. Therefore, because: (1) section 202 references section 2 and applies the Convention only to commercial contracts; (2) section 208 residually incorporates the FAA into the terms of the Convention Act; and (3) sections 203-07 furnish exclusive Convention-specific provisions, the silence of the Convention Act and of the New York Convention itself as to the section 1 exemptions (as well as the silence of the Panama Convention and the Panama Convention Act) indicates that they must be applied uniformly throughout the title. The section 1 statutory heading - "'Maritime transactions' and 'commerce' defined; exceptions to operation of title" - hints at as much.

As such, by maintaining that the FAA seamen's exemption conflicts with the Convention Act, Francisco and Bautista reject the most obvious interpretation of Title 9.

III. The Reasoning of the Fifth Circuit in Francisco

In September 2000, plaintiff-appellant Ernesto Francisco was injured while working aboard the M/T Stolt Achievement, a chemical tanker navigating the Mississippi River near [*111] New Orleans, Louisiana. n37 While cleaning toluene residue from one of the ship's tank compartments, he became dizzy from inhaling the fumes n38 and the ladder upon which he was mounted slipped, causing him to gash his forehead and right eye socket and requiring reconstructive surgery. n39 Mr. Francisco brought suit in Louisiana state court under the "saving to suitors" clause of the admiralty jurisdiction statute, n40 alleging causes of action under the Jones Act and the general maritime law of unseaworthiness and maintenance and cure. His employment contract included two provisions - legally mandated by the Philippine Overseas Employment Administration of the Philippine Department of Labor and Employment - requiring arbitration in the Philippines of all claims and disputes arising out of his employment relationship. n41 Defendants, n42 relying upon the New York Convention, removed the case to the U.S. District Court for the Eastern District of Louisiana, which granted an order dismissing the litigation and compelling arbitration pursuant to 9 U.S.C. 205. n43 Mr. Francisco appealed, and the Fifth Circuit affirmed.

[*112] Francisco raised an issue of first impression for which there was no applicable precedent from any U.S. court of appeals. n44 The holding and guiding philosophy of the decision compelling arbitration is that the Convention Act does not embrace the 9 U.S.C. 1 seamen's arbitration exemption n45 principally because (1) the Convention Act is intended to be interpreted as broadly as possible, n46 and (2) the Convention Act does not explicitly mention seamen or specifically incorporate the section 1 exemptions within its ambit. n47

The Fifth Circuit addressed three principal arguments by Mr. Francisco relating to the proper construction and interpretation of Title 9. n48 Mr. Francisco's first contention was that the Convention Act clearly incorporates the provisions of the FAA, both explicitly, as evidenced by the language of 9 U.S.C. 202 and 208, and implicitly, by virtue of their joint enactment, along with the Panama Convention Act, into positive law within the framework of a unified statutory title. n49 Mr. Francisco's second contention was that the statutory heading of 9 U.S.C. 1, which includes the phrase "exception to operation of title" in reference to the specific exemptions at the end of the section, is demonstrative of congressional intent to make the exemption of seamen's contracts from arbitration applicable to all of Title 9. n50 The third argument advanced by Mr. Francisco was that Senate testimony by Mr. Kearney, whose statements to the Senate Foreign Relations Committee are reproduced in the Committee's Report, n51 establishes that the Convention Act was intended to be applied only to contracts designated as falling under the national law definition of "commercial" as specifically defined and limited in 9 U.S.C. 1. n52

Judge Reavley, writing for a unanimous panel, rejected all of Mr. Francisco's arguments. First, he found that the section 202 commercial limitation does not establish that the Convention Act was intended, by directly incorporating "a transaction, contract, or agreement described in section 2 of this title," to concomitantly incorporate the exemption from arbitration of disputes arising out of seamen's employment contracts contained in section 1. n53 Instead, the court reasoned that because: (1) the use of the word "including" in 9 U.S.C. 202 cannot be taken to mean that "agreements falling under the Convention are exclusively limited to those which also fall under 2 of the Arbitration Act"; and, because [*113] (2) the Convention Act "makes no mention" of the 9 U.S.C. 1 exemption for seamen employment contracts, the section 1 exemption must be discarded. n54

The court never furnished any specific evidence of congressional intent to limit the application of the section 1 exemptions to the FAA. Judge Reavley invoked no strong counter to the weight of: (1) the statutory layout of Title 9; (2) the incorporation into the Convention Act by 9 U.S.C. 202 of transactions, contracts, and agreements as described in 9

U.S.C. 2; and (3) testimony in the legislative history by Mr. Kearney as to the nature of this incorporation. n55 Rather, for reasons to be detailed below, the court, in justifying its holding, resorted to general policy considerations favoring arbitration. Yet of principal importance (the creak that opened the door) was the statutory language of 9 U.S.C. 208 and its merely conditional adoption of the provisions of the FAA. n56 This conditionality became the key to the hasty divorce of the Convention Act from the specific exemptions enumerated in 9 U.S.C. 1; the rupture was sustained by broad assertions of legislative and judicial policy. n57

The court's analysis of the role of section 208 in the interaction of the FAA and the Convention Act ignored traditional canons of statutory construction as well as the legislative history of the Convention Act. The court invoked numerous considerations of policy to support its conclusion that section 1 is only partially incorporated into the Convention Act. n58 It discussed its own holding in *Sedco, Inc. v. Petroleos Mexicanos* that the Convention "contemplates a very limited inquiry by courts when considering a motion to compel arbitration." n59 It cited the "broadly worded" language of Article II(1) of the Convention to conclude that, although the Convention Act was specifically ratified as applying only to contracts considered to be commercial under U.S. national law (the definition that Mr. Kearney identified as being supplied by 9 U.S.C. 1-2), n60 the national [*114] law definition cannot include the section 1 exemptions because neither the ratifying language of the Convention nor the Convention Act specifically affirms their applicability. n61 Further, the court placed special emphasis on the federal policy favoring arbitration n62 and discussed three Supreme Court decisions upholding agreements to arbitrate disputes arising out of domestic and international business transactions. n63 It quoted *Dean Witter Reynolds, Inc. v. Byrd* for the proposition that "doubts as to whether a contract falls under the Convention should be resolved in favor of arbitration"; n64 *Scherk v. Alberto-Culver Co.* for the proposition that the Convention Act seeks: (1) to encourage the recognition and enforcement of commercial arbitration agreements in international contracts, and (2) to unify the standards by which arbitral agreements and awards are enforced in signatory nations; n65 and *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.* for the holding that federal policy favoring arbitration carries special weight in the international commercial context. n66

The court also employed a variant of the plain meaning doctrine to reject two policy arguments that Mr. Francisco advanced in support of his view of the integration of section 1 into the Convention Act. First of all, in confronting Mr. Francisco's contention that the [*115] positively codified Title 9 is evidence of integrated law, n67 the opinion quoted *Aaron v. SEC* and stated:

[Mr.] Francisco argues that as a matter of policy the Convention Act and the Arbitration Act should be applied uniformly. We cannot accept this argument. If the language of a statutory provision "is sufficiently clear in its context and not at odds with the legislative history, it is unnecessary to examine the additional considerations of policy ... that may have influenced the lawmakers in their formulation of the statute." n68

The reference to *Aaron* is disturbing on two fronts. It juxtaposes oddly with the court's preceding, seemingly tacit admission of doubt as to the correctness of its conclusion and concomitant urging of the importance of federal policy: "Even if we were doubtful of the correctness of our conclusion, doubts as to whether a contract falls under the Convention Act should be resolved in favor of arbitration" n69 Moreover, the *Aaron* quotation made it easier for the court to dismiss Mr. Francisco's reliance upon the statutory heading of Title 9, which the court acknowledged was helpful to Mr. Francisco. n70 The court cited Fifth Circuit language in *National Resources Defense Council v. EPA* that "the heading of a section can shed light on the meaning of an ambiguous word or phrase ... [but] cannot create an ambiguity where none otherwise would exist." n71 And, because Title 9 was reenacted and codified in 1947 - twenty-three years before the enactment of the Convention Act - the court had added incentive to prevent the creation or, more aptly, the enhancement of statutory ambiguities by non-textual material. n72 Regrettably, it acted on its impulse. n73

[*116] To reject Mr. Francisco's second policy argument, the court employed the plain meaning doctrine to disregard legislative history unfavorable to defendants. n74 As discussed above, the legislative history relating to enactment of the Convention Act principally includes: (1) a three-page Senate Foreign Relations Committee report, to which is appended eleven pages of transcribed testimony by Mr. Kearney, also the Chairman of the State Department Committee on Private International Law; n75 and (2) a three-page House Judiciary Committee report, to which is appended a two-page Executive Communication from Mr. H.G. Torbert, Jr., Assistant Secretary of State for Congressional Relations. n76 Mr. Kearney's testimony is the only part of the available legislative history to substantively analyze the interaction of the FAA and the Convention Act. n77 The court reproduced the relevant portion of Mr. Kearney's testimony:

Paragraph 3 of article I of the Convention permits a state party to the Convention to file a declaration that the Convention will apply only to legal relationships that are considered as commercial under the national law of that state The United States will file such a declaration Consequently it is necessary to include the substance of this limiting declaration in the legislation that implements the Convention. This is what the first sentence of section 202 intends. It was not, of course, necessary to make any reference to the national law of the United States in the first sentence of section 202 because the definition of commerce contained in section 1 of the original Arbitration Act is [*117] the national law definition for the purposes of the declaration. A specific reference, however, is made in section 202 to section 2 of Title 9, which is the basic provision of the original Arbitration Act. n78

Confronted with this testimony, the court triangulated. It acknowledged that the testimony suggests that sections 1 and 2 furnish the Convention Act definition of "commerce," but confessed uncertainty as to the fate of the exemptions (as if the contours of the 9 U.S.C. 1-2 definition had been enlarged, without anybody saying anything). n79 The court neglected to mention that Senator Fulbright (D-AK), who chaired the Foreign Relations Committee and introduced S. 3274, the bill that became the Convention Act - and who along with Senator George Aiken (R-OH) interrogated Mr. Kearney - evinced a strong desire that the Convention Act reach only the same arbitration agreements as the FAA:

The Chairman. Does this legislation have any effect whatever on State laws?

Mr. Kearney. No, Mr. Chairman, it does not. It concerns in effect solely the jurisdiction of the Federal district courts.

The Chairman. And it does not alter or change a citizen's rights under State laws?

Mr. Kearney. Not at all.

The Chairman. Does it in any way broaden Federal authority?

Mr. Kearney. Not basically. It provides for the right of removal to the district court from the State court in a case that falls under the Convention, but what we are dealing with is foreign commerce which now is fully within the ambit of Federal authority.

... .

The Chairman. So there is no possible opposition based upon the idea we are now reaching out and subjecting citizens to further arbitrary intervention of the Federal authorities or any other authorities in their private affairs. That is not justified; is that correct?

Mr. Kearney. That is correct. The basic reason that we propose this legislation and to become party to the Convention is because the people engaged in foreign trade consider arbitration is a very economical and speedy way of settling commercial disputes and they are the ones who wanted this. n80

It appears Senator Fulbright did not intend for the Convention Act to expand the scope of arbitrable disputes. Throughout the hearing with Mr. Kearney, neither he nor Senator Aiken demonstrated great familiarity with the text of S. 3274. n81 Their report sketched a brief outline of the bill and noted that it was unopposed. n82 A substantial portion of the [*118] session with Mr. Kearney was taken up with irrelevant topics, including Fulbright's light-hearted quips about the State Department's slow pace in drafting the Act; his querying Mr. Kearney about his title as an unconfirmed ambassador/special representative of the president; and Senator's Aiken's questions regarding Mr. Kearney's impressions of World Court decisions. n83 All the same, Senator Fulbright did make his legislative intent for the Convention Act unambiguous. His perspective went unopposed and uncontradicted.

The Francisco Court ignored Senator Fulbright's questions and commentary (while employing the plain meaning doctrine to disregard Mr. Kearney's testimony). It substituted its own view of the interaction of the FAA and the Convention Act:

Furthermore, the testimony of a witness not a member of Congress cannot bind this court where the plain language of the Convention Act does not provide an exception for seaman employment contracts. "Legislative history is problematic even when the attempt is to draw inferences from the intent of duly appointed committees of the Congress." As discussed above, 202 of the Convention Act states that a contract considered commercial includes those contracts described in 2 of the Arbitration Act, makes no mention of 1, and does not state that only those contracts described in 2 of the Arbitration Act "fall under" the Convention. "Courts should not rely on inconclusive statutory history as a basis for refusing to give effect to the plain language of an Act of Congress" n84

Thus, the court brushed aside Mr. Francisco's last argument relating to the Convention Act. It went on to compel arbitration.

IV. The Reasoning of the Eleventh Circuit in Bautista

Just as the S.S. Norway was returning to the Port of Miami from a seven-day Caribbean cruise, her boiler room exploded, instantly killing four Filipino seamen and seriously injuring at least nineteen others. Christened in 1960 as the S.S. France and purchased by Norwegian Cruise Line (NCL) owner Knut Kloster in 1979, the S.S. Norway had a history of safety and boiler room problems. n85 Suits were filed in Florida state court under the "saving to suitors" clause n86 by four injured seamen and by the estates of six who were killed, alleging causes of action under the Jones Act and the general maritime law. Pursuant to 9 U.S.C. 205, the actions were removed to federal district court, where they were consolidated. In an opinion that looked heavily to Francisco, the district court compelled arbitration in the Philippines in accordance with the contractual agreements [*119] signed by the plaintiffs. n87 Plaintiffs appealed the decision to the Eleventh Circuit Court of Appeals, which effectively adopted Francisco and affirmed the district court in an opinion issued on January 2005. n88

Judge Restani, the Chief Judge of the United States Court of International Trade, sitting by designation and writing for the panel, concluded that - owing to the broad language of the Convention Act, the framework of Title 9, and the purposes of the New York Convention - the Convention Act applies to contracts of employment of seamen. n89 In reaching its decision, the Bautista Court relied upon the "plain and unambiguous meaning" of the language of the Convention Act, as well as the "coherent and consistent" nature of the Title 9 statutory scheme. n90 It reasoned that because Title 9 is not a "seamless whole," the FAA seamen's exemption does not apply either directly or residually to the Convention Act. n91

The court developed the following arguments: First, it posited that the FAA applies only residually, not directly, to the New York and Panama Convention Acts, through the mechanisms of sections 208 and 307. n92 To this end, section 208 affirms the primacy of the Convention Act over the FAA, a principle of statutory and treaty law construction for which the court cited the Fifth Circuit holding in *Sedco*. n93

Second, the use of the word "including" in section 202 is probative of congressional intent to embrace all commercial agreements to arbitrate within the scope of the Convention Act. n94 "Including" was the court's *Atlas*. The past participle operated in lieu of - and as effectively as - a specific disavowal of the seamen's exemption. Additionally, because section 202 "makes no mention" of section 1, "the terms of the Convention Act do not provide that we read section 1 into section 202." n95

Third, Mr. Kearney's testimony "could not alter the plain terms of the Convention Act." n96 The court relied upon Francisco, which quoted *dicta* in *Circuit City Stores* observing that "legislative history is problematic even when the attempt is to draw inferences from the intent of duly appointed committees of the Congress." n97 Hence, Judge [*120] Restani reaffirmed her contention that the seamen's exemption does not apply directly to the Convention Act. She reiterated that it does not apply indirectly to the Convention Act, either.

Fourth, the FAA exemptions do not apply residually to the Convention Act because they conflict with the Convention as ratified and the Convention Act. Conflict was predicated upon legal findings that: (1) the FAA exemptions are "narrow and specific," whereas the Convention and the Convention Act are "broad and generic"; n98 (2) the failure of the Convention Act to contradict the exemptions by name is inconsequential; n99 (3) the Convention Act "covers commercial legal relationships without exception," and it therefore conflicts with the exemptions. n100 In addition, the court emphasized policy arguments in favor of international arbitration, borrowing cases involving international business transactions and concluding that "to read industry-specific exceptions into the broad language of the Convention Act would be to hinder the Convention's purpose." n101

In short, the court used: (1) the broad language of the Convention Act, (2) the framework of Title 9, and (3) the purposes of the Convention to hold that there is no justification for removing a subset of employment contracts from the scope of the Convention Act.

V. Francisco and Bautista Are Hostile to the Most Fundamental Principles of Admiralty Law

Beside the problems with their interpretive methodology, Francisco and Bautista are hostile to numerous fundamental principles of maritime law. The decisions are poorly [*121] reasoned on many grounds, of which four critical examples will be addressed. The first problem is that by abridging the non-waivable right of a Jones Act plaintiff to elect his judicial forum, the Francisco and Bautista Courts completely ignored the Supreme Court jurisprudence of *Boyd v. Grand Trunk Western Railroad*. n102 The second problem is that they completely ignored U.S. Bulk Carriers, Inc. v. Arguelles, which upheld the right of a seaman party to an arbitrable collective bargaining agreement to sue for back wages. n103 The third problem is that they were overly superficial in their analyses of Supreme Court cases (particularly *Scherk v. Alberto-Culver Co.* and *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*) evidencing the judicial policy favoring arbitration. The fourth problem is that, contrary to the intent of Senator Fulbright, Francisco and Bautista ensure the arbitrability of American seamen's employment contracts that fall under the Convention Act.

A. The Rulings Run Counter to *Boyd v. Grand Trunk Western Railroad*.

The Supreme Court held in *Boyd v. Grand Trunk Western Railroad* that the right of a FELA negligence plaintiff to select the forum in which to initiate suit under FELA section 6 is a substantial right. n104 The *Boyd* Court invalidated two forum-selection agreements entered into by petitioner Alexander Boyd and respondent Grand Trunk Western Railroad Company after Mr. Boyd was injured in the course of his duties. n105 Pursuant to the terms of each agreement, Mr. Boyd accepted an advance of \$ 50 and agreed to sue Grand Trunk, if at all, in either the county or district in which he was injured or in which he resided at the time of his accident. n106 The per curiam opinion held that FELA section 5 - providing that "any contract, rule, regulation, or device whatsoever, the purpose or intent of which shall be to enable any common carrier to exempt itself from any liability created by this Act, shall to that extent be void" - proscribed the execution of any covenant limiting the right of any plaintiff to sue in a forum provided by section 6. n107

Boyd came down exactly ten months after *Ex parte Collett*, where the Court held that the right of a FELA plaintiff to sue in a forum afforded him by section 6 was subject to the venue chapter - particularly 28 U.S.C. 1404(a) - of the revised and codified federal judicial code. n108 Hence, section 1404(a) was interpreted as statutorily importing into the FELA the doctrine of forum non conveniens, mooting prior authority to the contrary. n109 Yet the *Collett* Court insisted that its decision threatened no substantive rights of FELA [*122] plaintiffs, including the right to bring suit in any district authorized by section 6. n110 For its part, the *Boyd* Court distinguished *Ex parte Collett* and stated, before explicitly reaffirming the passage immediately above: "and nothing in *Ex parte Collett* affects the initial choice of venue afforded Liability Act plaintiffs." n111

Neither the Francisco nor the Bautista opinions mentioned *Boyd*. n112 They did not reckon with a doctrine that unambiguously militates in support of the petitioners. The language of *Boyd* clearly invalidates all arbitration and forum-selection clauses entered into by railroad workers (and, by extension, seamen), even those consummated after the occurrence of litigable incidents. n113

This is not to peremptorily conclude that *Boyd*, standing alone, is dispositive. Because *Boyd* was a FELA case, one must inquire whether its holding is applicable to Jones Act claims. The language of the Jones Act n114 and its judicial gloss are strongly probative of such applicability. n115 Also, a thorough explanation of *Boyd* must evaluate the case's vitality in light of more recent case law favoring arbitration. Some may argue that *Vimar Seguros y Reaseguros, S.A. v. M/V Sky Reefer* n116 and especially *Carnival Cruise Lines, Inc. v. Shute* n117 - each of which held that language substantially similar to FELA 5 did not invalidate an arbitration and a forum-selection clause, respectively - moot *Boyd*. Let us examine these considerations in turn.

1. The Applicability of *Boyd* to Jones Act Claims

It would be strange indeed if *Boyd* were held to not be incorporated into the Jones Act, which provides that in personal injury actions "all statutes of the United States modifying or extending the common law right or remedy in cases of personal injury to [*123] railway employees shall apply." n118 In *Kernan v. American Dredging Co.*, the Supreme Court declared that the Jones Act places seamen plaintiffs in "a position perfectly analogous" to that of FELA claimants. n119

The Court reaffirmed this principle in 1990 in *Miles v. Apex Marine Corp.* when it stated that "the Jones Act makes applicable to seamen the substantive recovery provisions of the older FELA." n120

Kernan and *Miles* aside, the Jones Act does not always track FELA. n121 Yet exceptions have been judicially created to prevent incorporation into the Jones Act of FELA doctrines that might bar recoveries historically available to seamen under the general maritime law. In *Cortes v. Baltimore Insular Line, Inc.*, n122 *The Arizona v. Anelich*, n123 and *Cox v. Roth*, n124 the Supreme Court held that the Jones Act does not adopt FELA provisions that would neutralize the Act's beneficent purposes. *Cortes* featured a seaman who perished due to the alleged failure of his master to furnish maintenance and cure, which the Court determined constituted a personal injury providing a cause of action under the Jones Act. n125 Because an action for maintenance and cure does not survive the decedent, an alternative finding would have precluded recovery n126 - a possibility the Court vehemently [*124] rejected by accepting the consequence that the Jones Act furnishes a double remedy. n127 Invoking the "beneficent purpose" of the Jones Act, the Court held that defaults traditionally recognized as giving rise to valid claims under the maritime law - though not cognizable under FELA - are comprised within the Jones Act. n128

The Court employed similar reasoning in *The Arizona* and in *Cox*. The Arizona Court determined that FELA did not import an affirmative defense based upon the theory of assumption of risk into admiralty. n129 Assumption of risk had historically not been available as a defense to an unseaworthiness claim (the decedent, Mario Anelich, died as a result of injuries caused by defective commercial fishing equipment), n130 but FELA had, by reverse implication of its terms, been interpreted to permit its application (on land, of course) in cases involving defects in appliances not falling within the purview of the Federal Safety Appliance Act. n131 Justice Stone, writing for the majority, relied upon the notion that the Jones Act was intended to enlarge - not narrow - the protection afforded seamen, to destroy any inference that FELA carries affirmative defenses into admiralty. n132

The *Cox* Court ruled that, despite section 7 of FELA (which provides that in case of the death of a tortfeasor an action may proceed against "the receiver or receivers or other persons or corporations charged with the duty of the management and operation of the business of a common carrier"), n133 the Jones Act did not incorporate a rule prohibiting suit against the personal representative of a tortfeasor. n134 As explained by the Court, the reasons FELA did not specifically permit suit against a personal representative are that railroads are rarely owned by individuals, and they are prevented from discontinuing business by various federal regulations. n135 This particularity of the FELA had to yield to (1) the liberal and beneficent purposes of the Jones Act, and (2) judicial unwillingness to bar recovery (a result that would mimic the "extreme harshness of the old common law rule abating actions on the death of the tortfeasor"). n136

[*125] Thus, it appears fairly certain that Supreme Court case law, particularly the holdings in *Kernan* and *Miles*, supports the incorporation into the Jones Act of the *Boyd* rule against forum-selection clauses. This conclusion is bolstered by the fact that *Cortes*, *The Arizona*, and *Cox* disclaim FELA-Jones Act identity only when equivalence would harm a seaman plaintiff (for example, by frustrating a progressive doctrine of the general maritime law). n137 Attacks on the relevance of *Boyd* to *Francisco* and *Bautista* must come from a different quarter. They must impugn the validity of *Boyd* itself.

2. The Vitality of *Boyd* in Light of *Sky Reefer* and *Carnival Cruise Lines*

A student of maritime law may question the continuing vitality of *Boyd*, especially in light of the Supreme Court's directives, some relatively recent, honoring arbitration and forum-selection clauses - of which, as aforementioned, covenants to arbitrate form a subset n138 - in disputes arising out of international business transactions, n139 international contracts of carriage falling under the Carriage of Goods by Sea Act (COGSA), n140 and passenger cruise ship contracts. n141 *Carnival Cruise Lines* and *Sky Reefer* merit particular attention, although ultimately they should be factually distinguished from *Boyd*, in line with a relevant holding of *The Bremen v. Zapata Offshore Co.*

On one level, *Carnival Cruise Lines* and *Sky Reefer* hint that today's Supreme Court, if given the opportunity, would overrule *Boyd*. Both cases, especially *Carnival Cruise Lines*, which generated a fierce dissent, were described as earth-shattering n142 (*Sky Reefer*, [*126] like *The Bremen*, explicitly overruled long lines of established precedents and broke new judicial ground). n143 The decisions construed statutory language similar to FELA 5 to not prohibit forum-selection and arbitration clauses, respectively.

a. Background to *Carnival Cruise Lines* and *Sky Reefer*

Carnival Cruise Lines extended the holding in *The Bremen* that forum-selection clauses are presumptively valid to apply to a domestic forum-selection clause in a cruise ship passenger contract. Justice Blackmun, writing for the *Carnival*

Cruise Lines majority, declined to adopt the Ninth Circuit position that "a nonnegotiated forum-selection clause in a form ticket contract is never enforceable simply because it is not the subject of bargaining." n144 While acknowledging that such form contract clauses "are subject to judicial scrutiny for fundamental fairness," n145 he nonetheless extolled their benefits n146 and determined that they do not contravene 46 U.S.C. app. 183c, n147 which provides that no provision of a passenger carriage contract may (1) relieve the shipowner or his agents from liability for negligence resulting in death or personal injury, or (2) "lessen, weaken, or [*127] avoid" a suitor's right to a trial. n148 According to Justice Blackmun, the legislative history of section 183c revealed that the statute was enacted precisely to prohibit the use of arbitration clauses, not forum-selection agreements. n149 Thus, because the clause at issue did not deny a judicial remedy to the plaintiffs, it conformed to section 183c.

Sky Reefer involved claims brought under a COGSA n150 bill of lading by a wholesale fruit distributor and its subrogated insurer for damages caused by the allegedly negligent stowage of Moroccan oranges and lemons aboard the M/V Sky Reefer. n151 The bill of lading contained a Japanese arbitration and choice-of-law provision mandating arbitration of all disputes before the Tokyo Maritime Arbitration Commission. n152 Justice Kennedy, writing for the majority, held that the arbitration agreement did not violate COGSA section 3(8), n153 which voids any contractual clause that relieves or lessens a carrier's liability for loss or damage to transported goods. n154

The Sky Reefer Court engaged in a two-pronged analysis. First, it determined that arbitration clauses do not lessen substantive liability under section 3(8) because they affect [*128] only procedural rights. n155 In so doing, the Court pointed to the historical purpose of section 3(8), which was not to enshrine forum rights but rather to stop carriers from including bill of lading clauses capping damage recoveries and imposing stringent statutes of limitations. n156 The Court also cited numerous cases evidencing pro-arbitration judicial policy, including *The Bremen*, *Scherk*, *Mitsubishi Motors*, and *Carnival Cruise Lines*; n157 identified practical problems with overturning the clause on grounds of inconvenience to the parties; n158 and turned to a law review article finding that no other party to the Hague Rules from which COGSA is derived has interpreted section 3(8) to bar foreign forum-selection clauses. n159 Second, the Court invoked the *Mitsubishi Motors* "second look" doctrine to hold that, to ensure the Japanese arbitrators enforce COGSA, the district court may retain jurisdiction and review the arbitral award. n160

b. Why Boyd Survives

Clearly, *Carnival Cruise Lines* and *Sky Reefer* demonstrate that - after *The Bremen*, *Scherk*, and *Mitsubishi Motors* (the last two of which are treated extensively in Part V.C) - the Supreme Court approves of the economic and judicial benefits that forum-selection and arbitration clauses confer upon businesses, the judiciary, and the general public. Yet, like *Scherk* and *Mitsubishi Motors*, the cases must be read carefully. One should recall Justice Blackmun's possible hinting in *Carnival Cruise Lines*, reproduced in note 149, that section 183c still prohibits arbitration clauses. n161 Perhaps the *Carnival Cruise Lines* Court - despite its vigorous assertion that the forum clause was reasonable and did not deny plaintiffs their day in court n162 - was slightly reticent to sweepingly place its imprimatur upon more than a domestic forum-selection clause in a passenger contract that - unlike the towage contract in *The Bremen* or the bill of lading in *Sky Reefer* - contained an adhesive contractual provision enforced against an economically disadvantaged party.

Boyd still has an enduring pedigree. *Scherk* has been in the reporters for thirty-one years and *Sky Reefer* is now almost ten years old, but Boyd has not been explicitly overruled in the interim. The lower courts are therefore bound to follow its dictates. One cannot forget that, in establishing the presumptive validity of forum-selection clauses in admiralty in *The Bremen*, Chief Justice Berger, writing for the majority, stressed that:

[a] contractual choice-of-forum clause should be held unenforceable if enforcement would contravene a strong public policy of the forum in which [the] suit is brought, whether declared by statute or by judicial decision. See, e.g. *Boyd v. Grand Trunk West W. R. Co.* n163

[*129] Since *The Bremen*, at least one state court outside the Fifth Circuit has hinted that Boyd might not be relevant to Convention Act cases. In *Nunez v. American Seafoods*, the Alaska Supreme Court ruled that Boyd invalidated a domestic forum-selection clause in a U.S. seaman's employment contract. n164 The *Nunez* Court distinguished *Marinechance Shipping, Ltd. v. Sebastian*, a Fifth Circuit case relying upon *The Bremen* and *Carnival Cruise Lines* to uphold an arbitration clause in a Filipino seaman's employment contract, n165 and suggested in dicta that Boyd might not apply to foreign seamen due to "problems of uniformity and comity that are unique to [the] international setting[]." n166 Yet the *Sebastian* holding and its progeny have attracted the ire of commentators and at least one venerable admiralty jurist,

Judge Sam Kent of the Galveston Division of the U.S. District Court for the Southern District of Texas, writing in *Sabocuhan v. Geco-Prakla*. n167

With nary a sentence or paragraph dealing with *Boyd*, the Francisco and Bautista Courts overlook a doctrine that protects foreign seamen who are injured in U.S. waters from waiving their right to assert a Jones Act claim in a U.S. court. *Boyd* might not be perfect - for example, the doctrine may go too far by invalidating all post-injury forum-selection agreements. Nonetheless, the decision is still good law serving a noble purpose and the Francisco and Bautista holdings contravene it.

[*130]

B. Francisco and Bautista ignore *U.S. Bulk Carriers, Inc. v. Arguelles*

1. Introduction to U.S. Labor Law Cases Relating to FAA 1 and Discussion of *Textile Workers of America v. Lincoln Mills of Alabama* and its Progeny

Francisco and Bautista do not constitute the first instances in which courts have looked around for a tool that would help them to evade the specific exemptions in FAA 1. In *Textile Workers Union v. Lincoln Mills* n168 and its companion case, *General Electric Co. v. Local 205, United Electrical, Radio and Machine Workers*, n169 petitioner unions successfully sought arbitration of labor-related grievances pursuant to arbitration clauses in their collective bargaining agreements. Although these agreements could have been construed as employment contracts falling under an FAA section 1 exemption, the Supreme Court looked to section 301(a) of the Labor Management Relations Act (LMRA) n170 as a source of "federal substantive law for the enforcement of collective bargaining agreements in industries in commerce or affecting commerce." n171 Pursuant to this newly declared section 301 power, the Court enforced the contracts' arbitral provisions. Neither opinion mentioned the FAA section 1 exemptions, perhaps because they encompass a partially coextensive yet much broader swath of employment contracts than LMRA 301. n172

Justice Douglas, writing for the majority in *Textile Workers*, gave three reasons for the derivation of a law-making grant from section 301. He emphasized: (1) the congressional desire for "industrial peace" as reflected in passage of the LMRA; (2) evidence therein of legislative intent to enforce agreements to arbitrate labor grievances; n173 and (3) the nature and purpose of section 301 - in particular, the interaction between subsections (a) and (b), the second of which confers upon unions the right, not available at common law, to sue and be sued as entities. n174 This right to sue and be sued for breaches of bargaining agreements triggered the Court's assumption of the equity power to order [*131] specific performance. n175 To justify its position, the Court termed the parties' covenant to arbitrate contractual disputes "the quid pro quo for an agreement not to strike," and he invoked the "federal policy that federal courts should enforce these agreements on behalf of or against labor organizations and that industrial peace can best be obtained only in that way." n176 It also ruled that compelling arbitration would not run afoul of the Norris-LaGuardia Act, n177 a Depression-era law that protects the right to strike by attaching strict procedural conditions to the issuance of labor injunctions. n178

2. Arguelles Doctrine and the Limited Applicability of *Textile Workers*

Although many foreign seamen (including the plaintiff in Francisco) are parties to collective bargaining agreements, there are two Supreme Court cases that explain why their employment contract arbitration clauses are not embraced by the holding in *Textile Workers*. Of course, one is *Boyd*, in which the Court recognized the non-waivable nature of the railway employee's right to elect the judicial forum in which to pursue his FELA claim. For reasons given in Part V.A, the *Boyd* non-waivability principle, which the Court reaffirmed in *The Bremen* some fifteen years after *Textile Workers* came down, is applicable to suits brought under the Jones Act.

Yet *Boyd* is not alone in preserving the seaman's option. In *U.S. Bulk Carriers, Inc. v. Arguelles*, the Supreme Court refused to enforce the terms of a collective bargaining [*132] agreement that mandated arbitration of a seaman's wage-related disputes. n179 Justice Douglas, writing for the Arguelles majority, upheld the right of plaintiff Mr. Dominic Arguelles to sue his former employer for unpaid back wages and penalties under 46 U.S.C. app. 596-97. n180 While Justice Douglas approved the general enforceability of arbitration agreements in collective bargaining agreements under LMRA 301 and *Textile Workers*, he declined to interpret either as mandating arbitration of Mr. Arguelles's claims. n181 His primary rationale was that section 596 - which derived all the way back from the Act of July 20, 1790 n182 - furnished a statutory remedy that "does not wholly jibe" and is in "literal conflict" with forced arbitration. n183 This literal conflict, Justice Douglas reasoned, must be resolved in favor of the seaman's statutory right to bring suit in federal court. n184 Hence, unlike the court in Francisco (which, as explained in Part III, posited that the Convention Act denied

the FAA seamen's exemption because, among other reasons, the Act does not specifically reaffirm section 1), he placed a high burden upon any attempt to prove congressional revocation sub silentio of a congressionally furnished remedy:

The chronology of the two statutes - 596 and 301 - makes clear that the judicial remedy was made explicit in 596 and was not clearly taken away by 301. What Congress has plainly granted we hesitate to deny. Since the history of 301 is silent on the abrogation of existing statutory remedies of seamen in the maritime field, we construe it to provide only an optional remedy to them. We would require much more to hold that 301 reflects a philosophy of legal compulsion that overrides the explicit judicial remedy provided by 46 U.S.C. 596. n185

Moreover, the majority turned to the statutory text and judicial progeny of the LMRA. It reasoned that because LMRA 301 and Textile Workers dealt principally with lawsuits to enforce agreements that are initiated either by or against labor unions, Congress surely did not intend for section 301 to limit the rights of individual seamen (as opposed to union entities) to sue for wages. n186

[*133] All told, *Arguelles* is a fascinating case that is worthy of extensive study in its own right. Although the opinion relates to suits for back wages, there is no reason why it ought not apply to Jones Act and pendent general maritime claims. Indeed, insofar as the Jones Act represents a persistent second attempt by Congress to furnish seamen with a negligence remedy, n187 one might argue - given the Act's rich history - that it is even more susceptible to an *Arguelles*-type vindication than was section 596.

Arguelles also proclaims the historical and contemporary significance of the doctrine that the seaman is the ward of the admiralty. n188 Courts still do rely - at least somewhat - on the notion that the seaman is a vulnerable litigant deserving special judicial solicitude. As a case in point, the Fifth Circuit founded a holding upon this premise in a decision issued in 2004. n189

Three concluding observations follow from analysis of *Arguelles*, underscoring dispositive considerations for overruling *Francisco* and *Bautista*. The first observation is that the case remains good law and must, as valid precedent, be respected by lower [*134] courts. n190 The second is that the *Arguelles* holding appears naturally applicable to Jones Act claims. The third observation is that *Arguelles* cannot be dismissed (as some might wish) as the *cri de coeur* of a liberal Court that has since moved rightward. Though Justice Douglas's opinion expressed a hearty disregard for arbitration, n191 his sentiments were not at all shared by the Court's left wing. Justices Brennan and Marshall - who, along with Justice Stewart, joined a vigorous dissent written by Justice White - maintained that the Court should have compelled arbitration and sounded a note of strong endorsement of mediation of labor grievances. n192 The dissent criticized the majority's interpretation of [*135] section 301 by arguing that Congress, in enacting the LMRA, intended that the terms of both seamen and non-seamen's collective bargaining agreements be judicially recognized. n193

Arguelles is not a relic. n194 Even today, the Supreme Court holdings in *Scherk* and *Mitsubishi Motors* notwithstanding, it counsels that no seaman, suing in an individual capacity, be compelled to arbitrate for having signed an agreement to do so.

C. *Francisco* and *Bautista* Misconstrue Supreme Court Cases Favoring Arbitration

As discussed in Parts III and IV, the *Francisco* and *Bautista* Courts turned to numerous Title 9 cases for evidence of judicial policy favoring arbitration. n195 Each court [*136] cited various appellate court decisions that support the "very limited inquiry" *Sedco* doctrine. n196 These decisions, which involve arbitrable disputes between sophisticated business parties, compel arbitration once four jurisdictional prerequisites are met. n197 The most significant prerequisite is that the agreement under scrutiny arise out of a commercial legal relationship. n198 The *Francisco* and *Bautista* Courts satisfied this requirement by holding that seamen's employment contracts are commercial. n199

More importantly, both courts invoked seminal Supreme Court arbitration cases - particularly *Scherk* and *Mitsubishi Motors* - to cast their decisions in the light of a growing judicial consensus favoring international arbitration writ large. As already discussed in Part V.A, this consensus is amply reflected in case law and secondary literature. n200 From the landmark decision in *The Bremen* onward, the Supreme Court has upheld agreements to arbitrate: (1) Securities Exchange Act claims; n201 (2) Sherman Act claims; n202 (3) disputes arising out of employment relationships not exempted by FAA 1; n203 and (4) disputes arising out of bills of lading falling under COGSA. n204 The Court has also honored a forum-selection clause included in an adhesive cruise ship passenger ticket. n205

Nevertheless, judicial policy favoring arbitration - strong though it may be - is not blind. The Francisco and Bautista Courts are peremptory in citing Scherk and Mitsubishi Motors without adequately describing the factual circumstances of either holding. n206 When [*137] it comes to reckoning with two of the most critical FAA and Convention Act cases, Francisco and Bautista fall far short.

1. Scherk v. Alberto-Culver Co.

Scherk v. Alberto-Culver Co. involved Securities Exchange Act ('34 Act) 10(b) n207 rule 10b-5 n208 claims brought in federal district court by the American cosmetics manufacturer Alberto-Culver against German national Fritz Scherk, who had allegedly misled Alberto-Culver about encumbrances attaching upon the trademarks to three European cosmetics companies that he had sold the company. n209 The purchase agreement contained clauses providing for mandatory arbitration under Illinois law of any disputes arising thereunder before the International Court of Arbitration of the International Chamber of Commerce in Paris, France. n210 The district court and the Seventh Circuit Court of Appeals, relying upon the Supreme Court decision in Wilko v. Swan, vacated the arbitration clause. n211 The Supreme Court reversed. n212

Justice Stewart, writing for the Court, chose not to overrule Wilko, which he posited was applicable to the '34 Act, but nonetheless upheld the Scherk arbitration clause for two reasons. n213 First, the Court emphasized the international nature of the commercial transaction at issue and, "most significantly," the fact that "the subject matter of the contract concerned the sale of business enterprises organized under the laws of and primarily situated in European countries, whose activities were largely, if not entirely, [*138] directed to European markets." n214 Second, the Court, in oft-cited language, expounded at length upon the importance to the international business community of neutralizing uncertainties as to the fora and law governing disputes arising out of private international agreements. n215

Scherk is of questionable relevance in the employment context. Two observations - one relating to the facts in Scherk and the other relating to Justice Stewart's construction of Title 9 - weaken the blind embrace of Scherk by the Francisco and Bautista Courts. The first observation is that, as should already be clear from the foregoing discussion, Scherk has nothing to say about FAA 1. The case mandated arbitration by sophisticated business parties of a highly technical securities law dispute. The reasoning underlying the holding was that international trade cannot flourish in the face of thorny choice-of-law imbroglios and accompanying "unseemly and mutually destructive jockeying by the parties to secure tactical litigation advantages" (complications triggered by one moneyed party's attempts to outfox the other on the global judicial stage). n216 In effect, the Scherk Court was echoing its disposition of The Bremen and rebuking businessmen who try to renege on freely negotiated contractual agreements. It was not, on its face, addressing seamen without bargaining power.

Of course, preliminary forum non conveniens and choice-of-law inquiries - the objects of the Scherk Court's ire - also occupy a considerable amount of judicial resources in transnational personal injury cases. n217 One could argue that, to neutralize the expenses associated with litigating such preliminary motions in an era of tort reform, Scherk must be extended to apply to tort claims arising out of employment contracts. n218 There is room for debate on this score, and the debate is worth having. All the same, to use Scherk as a policy rationale for compelling arbitration of seamen's injury claims (as did the Francisco and Bautista Courts), without seriously engaging the relevant jurisprudence or noting Scherk's facts, is to either misconstrue or misunderstand its holding.

Second, although Francisco and Bautista both cited to discussion in footnote 15 of Scherk of the New York Convention and the Convention Act, the courts overlooked the fact that the Scherk Court treated the FAA and the Convention Act as one unified statute, the "United States Arbitration Act." n219 Justice Stewart seemed to consider chapter 2 as [*139] merely an amendment to chapter 1 that does not impair the title's uniformity. n220 Although he stipulated the applicability of the United States Arbitration Act to the parties' dispute (probably because Mr. Scherk did not invoke section 206 to compel arbitration, but asked instead for a section 3 stay of proceedings - which, incidentally, the First Circuit has since found to apply in Convention Act cases) n221, his opinion implicitly discouraged attempts to treat the Convention Act as a separate statutory animal than the FAA. Even though a court today will, depending upon procedural posture, n222 often only apply a single Title 9 chapter to a case before it, one of Scherk's directives may be to not conjure up hidden fault lines splitting the three chapters. Later cases (including the legendary admiralty jurist Judge John R. Brown's Fifth Circuit opinion in Sedco, Inc. v. Petroleos Mexicanos), while acknowledging distinctions between chapters 1 and 2, have heeded this lesson. n223

2. Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.

Along with Scherk, the Francisco and Bautista Courts invoked *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.* n224 to reiterate the strong federal policy supporting [*140] arbitration in the international commercial context, as well as the manifold concerns of international comity in furtherance of this policy. n225 But neither court considered the policies emanating from this FAA-Convention Act case - involving the arbitrability of claims arising under the Sherman Act n226 in a complex contractual dispute between an automobile manufacturer joint venture and a Puerto Rican car dealership - in light of its factual backdrop. Both courts ignored the fact that Justice Blackmun, writing for the *Mitsubishi Motors* majority, relied upon the Convention Act's legislative history. Indeed, Justice Blackmun explicitly referred to President Lyndon Johnson's 1968 Letter of Transmittal apprising the Senate of domestic exemptions to arbitration under the Convention Act. n227

Mitsubishi Motors, like Scherk, implicated a commercial dispute between two business parties. n228 While Justice Blackmun's opinion affirmed the "federal policy in favor of arbitral dispute resolution," it specified that this policy is geared toward the international commercial context. n229 Bowing to legislative history, the opinion also affirmed that arbitrability exemptions grounded in American law remain viable:

We do not quarrel with the Court of Appeals' conclusion that Art. II(1) of the Convention, which requires the recognition of agreements to arbitrate that involve "subject matter capable of arbitration," contemplates exceptions to arbitrability grounded in domestic law. And it appears that before acceding to the Convention the Senate was advised by a State Department memorandum that the Convention provided for such exceptions. See S.Exec.Doc. E, 90th Cong., 2d Sess., 19 (1968). n230

In letters accompanying the transmittal of the Convention to the Senate, both President Johnson and Secretary of State Nicholas Katzenbach emphasized the commercial limitation to U.S. accession to the Convention. Secretary Katzenbach stressed the role of this limitation in ensuring the consistency of the Convention, as applied in the United States, with the FAA: "A declaration limiting application of the convention by the United States to [*141] commercial transactions would be consistent with the policy expressed in Title 9 (arbitration) of the United States Code (Federal Arbitration Act)." n231

Thus, Secretary Katzenbach echoed the theme of titular uniformity that is explored above in the analysis of Scherk. It is a sure bet that the Francisco and Bautista Courts were unaware of the existence of his letter.

In compelling arbitration in *Mitsubishi Motors*, the Supreme Court merely applied the holding in Scherk to antitrust lawsuits by balancing the public interest in private enforcement of antitrust claims, which it outright downplayed, against the Scherk policies championing international arbitration. n232 The *Mitsubishi Motors* majority stressed the importance of (1) "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"; n233 (2) the determination in *The Bremen* that "agreeing in advance on a forum acceptable to both parties is an indispensable element in international trade, commerce, and contracting"; n234 and (3) the determination in Scherk that the "parochial" refusal of domestic courts to enforce international arbitration agreements will "invite unseemly and mutually destructive jockeying by the parties to secure tactical litigation advantages ... [and] damage the fabric of international commerce and trade, and imperil the willingness and ability of businessmen to enter into international commercial agreements." n235

No doubt, the *Mitsubishi Motors* majority appeared concerned with honoring the conditions under which U.S. businessmen sign contracts between themselves and foreigners, so as to facilitate U.S. integration into the world economy. This decision, like Scherk, did not on its face have anything to do with adhesive employment contracts signed by seamen from Third World countries. Justice Blackmun's acknowledgment of the [*142] Convention Act's legislative history notwithstanding, the Francisco and Bautista Courts name-dropped *Mitsubishi Motors* irresponsibly, without paying its intricacies any heed.

D. Francisco and Bautista Open the Door to Mandatory Arbitration of U.S. Seamen's Disputes Falling Under the Convention Act, a Result that the Act's Drafter and Sponsor Desired to Avoid

Freudensprung v. Offshore Technical Services, Inc. n236 is evidence that - in contravention of the intent of the Convention Act's drafter and Senate sponsor n237 - Francisco and Bautista furnish the precedents necessary for the partial voiding of the seamen's FAA arbitration exemption. In *Freudensprung*, a Fifth Circuit panel compelled arbitration of a

U.S. seaman's tort claims in accordance with the terms of a "Consultant's Agreement" that he had signed with his employer (Texas-based OTSI), stipulating that "'any dispute' arising from the Agreement be submitted to binding arbitration under Texas law in Houston, Texas." n238 While working on a single point mooring system (used to load and unload oil tankers) off the coast of Lagos, Nigeria, plaintiff-appellant Fred Freudensprung suffered severe physical and mental injuries when a cable on a stern winch failed, causing heavy chains to strike him in the back. n239 Mr. Freudensprung brought suit in the United States District Court for the Southern District of Texas under the Jones Act and for Kermarec negligence, n240 unseaworthiness, and maintenance and cure. n241 Upon OTSI's motion, the district court compelled arbitration and the Fifth Circuit affirmed.

Francisco practically commands the result in Freudensprung. By ruling that the Convention Act does not embrace the FAA 1 arbitration exemptions, Francisco renders arbitrable any claim brought by a U.S. seaman whose employment contract, as provided in 9 U.S.C. 202, "involves property located abroad, envisages performance or enforcement abroad, or has some other reasonable relation with one or more foreign states." n242 It does not matter if both parties to the contract are U.S. citizens so long as the requirement of a commercial reasonable relation with a foreign country is satisfied. n243 Of course, it is not illogical to assume that, at least in the Fifth and Eleventh Circuits, the reasonable relation requirement will be construed broadly in favor of arbitration. n244

[*143] Many seamen are engaged in the movement of goods in foreign or interstate commerce. n245 Plus, many U.S. seamen today are "brown-water seamen" like Mr. Freudensprung who work in the petroleum industry. n246 Because the petroleum industry certainly involves the movement of goods in international commerce, perhaps even the archetypal roustabout on a jack-up rig in the Gulf of Mexico could be held to satisfy the Convention Act's reasonable relation requirement. Regardless, by dint of Freudensprung, Francisco and Bautista circumvent the intent of Mr. Kearney and Senator Fulbright, discussed in Part III, that the Convention Act not widen the scope of arbitrable contracts of U.S. citizens. n247

VI. Conclusion

The ancient doctrine that the seaman is the ward of the admiralty developed precisely because seamen were considered to be vulnerable parties requiring judicial protection. The doctrine's modern incarnation should hold that seamen from developing countries like India, Ukraine, or the Philippines - men and women who are probably undereducated, desperate, and willing to work aboard ship (where, out of necessity, their freedoms are greatly constrained) on almost any terms - merit special solicitude. n248

By the same token, the governments of many developing countries recognize that wage levels must remain low if their manufacturing and service industries are to flourish, just as cruise ships and other large corporations know that if they cannot find ways to minimize liability exposure (for example, by making liberal use of arbitration clauses in company contracts) they risk being harmed or even bankrupted by lawsuits.

We are confronted with a policy conflict. And, in a world in which not all legitimate interests can be reconciled, some policies have to be preferred over others by presidents and legislatures. While federal courts in the United States may exercise general lawmaking power in accordance with the judicial gloss of both the admiralty jurisdiction statute and LMRA 301, they must first heed specific constitutionally enacted laws of the Congress. n249 On the subject of mandatory arbitration of seamen's employment contracts, federal law (FAA 1) is well nigh unambiguous. The right of a seaman to sue under 28 U.S.C. 1333 may not be waived in an arbitration clause.

[*144] The courts in Francisco and Bautista did not adjudicate responsibly. At worst, their opinions distorted statutory plain meaning and slammed the door on clear and viable legislative history. At best, by confidently sidestepping ambiguity, they made challenging cases appear all too easy. The courts' analyses notwithstanding, the language of Title 9 and its legislative history, as well some of the most fundamental principles of admiralty law, strongly militate for the overruling of Francisco and Bautista by the United States Supreme Court.

Legal Topics:

For related research and practice materials, see the following legal topics:
 Civil Procedure
 Alternative Dispute Resolution
 Mandatory ADR
 Admiralty Law
 Arbitration
 Federal Arbitration Act
 Civil Procedure
 Alternative Dispute Resolution
 Arbitrations
 Foreign Arbitral Awards

FOOTNOTES:

n1. 293 F.3d 270 (5th Cir.), cert. denied, 537 U.S. 1030 (2002).

n2. 396 F.3d 1289 (11th Cir.), cert. dismissed, 125 S. Ct. 2954 (2005).

n3. United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards, June 10, 1958, 21 U.S.T. 2517, 330 U.N.T.S. 38, reprinted in 9 U.S.C. 201 note (2000) [hereinafter New York Convention]. The New York Convention was drafted at the United Nations Conference on Commercial Arbitration, held in New York City from May 20 to June 10, 1958. The Convention was approved by President Nixon on September 1, 1970, and entered into force with respect to the United States on December 29, 1970. 9 U.S.C. 201 note.

n4. The New York Convention Act is codified as chapter 2 of Title 9 of the United States Code at 9 U.S.C. 201-08 (2000).

n5. 46 U.S.C. app. 688(a) (2000).

n6. The Federal Arbitration Act (FAA) is codified as chapter 1 of Title 9 of the United States Code at 9 U.S.C. 1-16 (2000).

n7. 9 U.S.C. 1.

n8. 45 U.S.C. 51-60 (2000).

n9. 400 U.S. 351 (1971).

n10. See Brief of the Department of Labor and Employment of the Republic of the Philippines as Amicus Curiae in Support of Appellees at 4-8, *Bautista v. Star Cruises*, 396 F.3d 1289 (11th Cir.), cert. dismissed, 125 S. Ct. 2954 (2005) (No. 03-15884). The Philippines is a party to the New York Convention. Philippine Executive Order No. 247, issued by President Corazon Aquino (the leader of the "People Power" movement that toppled the dictator Ferdinand Marcos) in 1987, states that the POEA shall "'exercise original and exclusive jurisdiction to hear and decide all claims arising out of an employer-employee relationship or by virtue of any law or contract involving Filipino workers for overseas employment.'" *Id.* at 5 (citing R.3.60, Ex. B, para. 4(d)).

n11. The plaintiffs in *Francisco* and *Bautista* had signed employment contracts incorporating the "Amended Standard Terms and Conditions Governing the Employment of Seafarers on Board Ocean-Going Vessels" formulated by the POEA in 2000 pursuant to POEA Memorandum Circular No. 9. *Id.*

n12. Few would dispute that the economic development of poor countries hinges upon their relative ability to produce goods and services that are inexpensive and of good commercial quality. The recent decline of the Mexican and Central American manufacturing and textile industries, in the face of Chinese competition, demonstrates how powerful a commodity cheap labor has become. See Ginger Thompson, *Fraying of a Latin Textile Industry: Quotas' End Shuts Down Factories and Hopes in El Salvador*, N.Y. Times, Mar. 25, 2005, at C1 (dis-

Discussing how the ending of the quota system established by the 1974 Multi-Fiber Agreement is devastating the El Salvadoran textile industry, which cannot compete with low Chinese wages); Florence Amalou & Phillippe Ricard, *L'Europe Se Dechire sur la Question des Importations Textile*, *Le Monde*, Mar. 26, 2005, at 17, available at <http://www.lemonde.fr/web/article/0,1-0@2-3234,36-631465@51-629742,0.html> (reporting the French and Italian refusal of the European Commission request to provide favorable tariff treatment to tsunami victim nations, and mentioning the effects of Chinese and Indian dominance in the textile industry on the European, Bangladeshi, El Salvadoran, Madagascan, and Sri Lankan economies). This essay neither lauds nor criticizes the decision of the government of the Philippines (a country with significant economic and political problems that is presently, with U.S. assistance, battling a terrorist insurgency instigated by the Islamic fundamentalist organization Abu Sayyaf) to barter its citizens' rights to sue, presumably to relieve chronic unemployment. See generally Steven Rogers, *Beyond the Abu Sayyaf: The Lessons of Failure in the Philippines*, 83 *Foreign Aff.* 15 (2004) (discussion of the war on terror in the Philippines). Rather, it seeks to examine how U.S. courts should adjudicate tort claims brought by foreign seamen whose employment contracts contain adhesive arbitration clauses falling under the Convention Act.

Nevertheless, the plight of Filipino seamen is often a sad one, as explained by Judge Marsh in *Jose v. M/V Fir Grove*, 801 F. Supp. 358 (D. Or. 1992). To give the appearance of complying with the global minimum monthly wage requirement for seamen set by the International Transport Federation (ITF) and to thereby avoid delays associated with sympathy strikes by tug and longshoremen's unions in developed countries, many shipping countries require their Filipino employees to sign two or more collective bargaining agreements - one, a dud, containing the wage recommended by the ITF and by AMOSUP (the Associated Marine Officers' and Seamen's Union of the Philippines), its Philippine affiliate, and the other containing the actual, lower wage. *Id.* at 363-65 (discussing testimony of Dr. Herbert Northrup, a retired professor of labor economics at the Wharton School of the University of Pennsylvania, as well as written studies by Drs. Northrup and Paul Chapman). In *Jose* - a case falling under the U.S. Shipping Act (46 U.S.C. app. 10313(e)-(f) for wages owing under a dud collective bargaining agreement - Judge Marsh described how AMOSUP had negotiated the seamen's dud collective bargaining agreement without any input from the seamen and after the *Fir Grove*, the object of the libel in rem, had left port. *Id.* at 366-67. The employer admitted in testimony that he had no intention of paying the AMOSUP CBA wage, and had procured the contract merely to deceive ITF inspectors. *Id.* at 367.

n13. Act of July 30, 1947, ch. 392, 61 Stat. 670.

n14. 9 U.S.C. 301-07 (2000).

n15. Inter-American Convention on International Commercial Arbitration, Jan. 30, 1975, 14 I.L.M. 336, reprinted in 9 U.S.C.A. 301 note (2004).

n16. See *Dean Witter Reynolds, Inc. v. Byrd*, 470 U.S. 213, 219-20 (1985). The Dean Witter Court noted:

The House Report accompanying the [FAA] makes clear that its purpose was to place an arbitration agreement "upon the same footing as other contracts, where it belongs," H.R.Rep. No. 96, 68th Cong., 1st Sess., 1 (1924), and to overrule the judiciary's longstanding refusal to enforce agreements to arbitrate.

Id. In the attached footnote, the Dean Witter Court continued:

According to the Report: "The need for the law arises from an anachronism of our American law. Some centuries ago, because of the jealousy of the English courts for their own jurisdiction, they refused to enforce specific agreements to arbitrate upon the ground that the courts were thereby ousted from their jurisdiction. This jealousy

survived for so long a period that the principle became firmly embedded in English common law and was adopted with it by the American courts. The courts have felt that the precedent was too strongly fixed to be overturned without legislative enactment, although they have frequently criticised the rule and recognized its illogical nature and the injustice which results from it. This bill declares simply that such agreements for arbitration shall be enforced, and provides a procedure in the Federal courts for their enforcement." H.R.Rep. No. 96, 68th Cong., 1st Sess., 1-2 (1924).

Id. at 220 n.6; see also *U.S. Asphalt Ref. Co. v. Trinidad Lake Petroleum Co.*, 222 F. 1006, 1007 (S.D.N.Y. 1915) ("It has never been denied that the hostility of English-speaking courts to arbitration contracts probably originated (as Lord Campbell said in *Scott v. Avery*, 4 H.L.Cas. 811) - "in the contests of the courts of ancient times for extension of jurisdiction - all of them being opposed to anything that would altogether deprive every one of them of jurisdiction."").

n17. 9 U.S.C. 2 (2000).

n18. Section 1 provides in full:

"Maritime transactions", as herein defined, means charter parties, bills of lading of water carriers, agreements relating to wharfage, supplies furnished vessels or repairs to vessels, collisions, or any other matters in foreign commerce which, if the subject of controversy, would be embraced within admiralty jurisdiction; "commerce", as herein defined, means commerce among the several States or with foreign nations, or in any Territory of the United States or in the District of Columbia, or between any such Territory and another, or between any such Territory and any State or foreign nation, or between the District of Columbia and any State or Territory or foreign nation, but nothing herein contained shall apply to contracts of employment of seamen, railroad employees, or any other class of workers engaged in foreign or interstate commerce.

Id. 1.

n19. Id. (emphasis added).

n20. See *Circuit City Stores, Inc. v. Adams*, 532 U.S. 105, 109 (2001) ("Section 1 of the Federal Arbitration Act (FAA or Act) excludes from the Act's coverage "contracts of employment of seamen, railroad employees, or any other class of workers engaged in foreign or interstate commerce.") (citation to authority omitted); *U.S. Bulk Carriers, Inc. v. Arguelles*, 400 U.S. 351, 351-53, 357-58 (1971) (holding that plaintiff merchant seaman, who was party to a collective bargaining agreement and had sued his employer on the admiralty side of Maryland federal district court asserting claims under 46 U.S.C. app. 596-97, could not be compelled to arbitrate his claims under section 301(a) of the Labor Management Relations Act, 29 U.S.C. 185(a)).

n21. See *Scherk v. Alberto-Culver Co.*, 417 U.S. 506, 520 n.15 (1974).

n22. See S. Comm. on Foreign Relations, 90th Cong., Message from the President of the United States Transmitting the Convention on the Recognition and Enforcement of Foreign Arbitral Awards, Adopted at New York on June 10, 1958, at 29-33 (Comm. Print 1968) [hereinafter S. Comm. on Foreign Relations] (reproducing a 1959 letter, appended to a 1960 American Bar Association (ABA) resolution supporting accession to the New York Convention, from Mr. Arthur Dean to Mr. Clifford J. Hynning, the then-Chairman of the Secretary of State's Committee on International Unification of Private Law, noting that "since World War II, the United States has signed commercial treaties containing arbitration provisions with Japan, Korea, the Republic of

China, Iran, Israel, Haiti, Colombia, Nicaragua, Ireland, Greece, Italy, the Federal Republic of Germany, Denmark, and The Netherlands. These have been bilateral treaties covering a broad range of commercial provisions, treating, among other problems, the recognition and enforcement of arbitral awards. Although such bilateral commercial treaties are a flexible medium for arbitral provisions, and can be adapted to the requirements of each nation with whom the United States contracts, the variations from treaty to treaty hardly encourage the formation of a uniform international law of arbitration").

n23. The FAA occupies the full extent of congressional power under the Commerce Clause. See 9 U.S.C. 1; see also *Allied-Bruce Terminix Cos. v. Dobson*, 513 U.S. 265, 270, 279 (1995) ("The Act's history, to the extent informative, indicates that the Act's supporters saw the Act as part of an effort to make arbitration agreements universally enforceable. They wanted to 'get a Federal law' that would 'cover' areas where the Constitution authorized Congress to legislate, namely, 'interstate and foreign commerce and admiralty.'" (citing testimony of Mr. Julius H. Cohen, the ABA drafter of much of the FAA)); *Prima Paint Corp. v. Flood & Conklin Mfg. Co.*, 388 U.S. 395, 405 n.13 (1967) ("Congressman Graham, the [FAA's] sponsor in the House, told his colleagues that it 'only affects contracts relating to interstate subjects and contracts in admiralty.' 65 Cong. Rec. 1931 (1924). The Senate Report on this legislation similarly indicated that the bill "[relates] to maritime transactions and to contracts in interstate and foreign commerce." S. Rep. No.536, 68th Cong., 1st Sess., 3 (1924)."); *Paladino v. Avnet Computer Techs., Inc.*, 134 F.3d 1054, 1060 (11th Cir. 1998) ("The FAA governs Avnet's motion. The FAA's provisions concerning the validity of arbitration clauses reach to the edge of Congress's power under the Commerce Clause." (citing *Dobson*, 513 U.S. at 270)). The FAA preempts conflicting state law. See, e.g., *Southland Corp. v. Keating*, 465 U.S. 1, 16 (1984).

n24. See *Bergesen v. Joseph Muller Corp.*, 710 F.2d 928, 930-32 (2d Cir. 1983). The New York Convention was drafted to iron out kinks in the 1923 Geneva Protocol on Arbitration Clauses, Sept. 24, 1923, 27 L.N.T.S. 157 and the 1927 Geneva Convention on the Execution of Foreign Arbitral Awards, Sept. 26, 1927, 92 L.N.T.S. 301. *Bergesen*, 710 F.2d. at 930. Essentially, the Convention represents an international compromise on what sorts of arbitral agreements merit international recognition. Its drafters made provision for ratifying states to invoke reciprocity and commercial limitations to accession (explained in detail *infra*) yet did not permit the filing of additional general reservations. See S. Comm. on Foreign Relations, *supra* note 22, at 23.

One compromise reflected in the Convention involved reconciling distinct civil and common law concepts of which arbitral agreements are to be considered "foreign" (and, hence, falling under the Convention). At the time of the Convention's drafting, the common law definition of a foreign award was territorial, but the civil law definition was less straightforward and involved consideration of the nationality of the parties, the nature of the dispute, and (particularly in France and then-West Germany) the law governing the procedure. *Bergesen*, 710 F.2d at 931 (discussing G. Haight, *Convention on the Recognition and Enforcement of Foreign Arbitral Awards* 1 (1958)). The ultimate solution, embodied in Article I(1), incorporates both definitions. New York Convention, *supra* note 3, at art. I(1) ("This Convention shall apply to the recognition and enforcement of arbitral awards made in the territory of a State other than the State where the recognition and enforcement of such awards are sought [i.e., the common law component], and arising out of differences between persons, whether physical or legal. It shall also apply to arbitral awards not considered as domestic awards in the State where their recognition and enforcement are sought [i.e., the civil law component].") (emphasis added); see also S. Comm. on Foreign Relations, *supra* note 22, at 17-18 (overview of the drafting history of paragraph 1 of Article I).

n25. 9 U.S.C. 202 (2000).

n26. *Id.* With the exceptions of the limiting declarations discussed *infra*, section 202 tracks the language of Article II(1) of the Convention, which provides that "each Contracting State shall recognize an agreement in writing under which the parties undertake to submit to arbitration all or any differences which have arisen or which may arise between them in respect of a defined legal relationship, whether contractual or not, concerning a subject matter capable of settlement by arbitration." New York Convention, *supra* note 3, at art. II(1).

n27. 9 U.S.C. 208.

n28. Section 208 states that "chapter 1 applies to actions and proceedings brought under this chapter to the extent that chapter is not in conflict with this chapter or the Convention as ratified by the United States."

n29. 9 U.S.C. 203-05.

n30. See S. Rep. No. 91-702, app. at 5-15 (1970) (testimony of Richard Kearney, appended to the Senate Foreign Relations Committee Report on S.3274 [the Convention Act] as to the import of each section of the Convention Act). At page 2 of the Report under the heading "Committee Action and Recommendation," the Committee notes: "The Committee on Foreign Relations held a public hearing on S. 3274 on February 9, 1970, at which time Mr. Richard D. Kearney, Office of the Legal Adviser, Department of State, testified in support of the bill. The transcript of that hearing is reprinted in the appendix to this report."

n31. See 9 U.S.C. 203.

n32. Id. 204.

n33. Id. 205. Sections 206 and 207 are also "Convention-specific." Section 206 provides district courts the power to direct arbitration. Section 207 provides either party to an arbitration agreement up to three years from the date of the granting of an arbitral award to seek an order confirming the award from a federal district court. See id. 206-07.

n34. Id. 202.

n35. Article I(3) of the Convention provides that:

When signing, ratifying, or acceding to this Convention, or notifying extension under article X hereof, any State may on the basis of reciprocity declare that it will apply the Convention to the recognition and enforcement of awards made only in the territory of another Contracting State. It may also declare that it will apply the Convention only to differences arising out of legal relationships, whether contractual or not, which are considered as commercial under the national law of the State making such declaration.

New York Convention, *supra* note 3, at art. I(3). As of September 1, 1970 - the date President Nixon approved accession - thirty-seven countries had ratified the Convention. Of these, twenty-five had filed limiting declarations. Austria, Bulgaria, the Byelorussian Soviet Socialist Republic, the Central African Republic, Czechoslovakia, Ecuador, France, the Federal Republic of Germany, Hungary, India, Japan, the Malagasy Republic, Morocco, Nigeria, the Netherlands, Norway, the Philippines, Poland, Romania, Switzerland, Tanzania, the Ukrainian Soviet Socialist Republic, and the Union of Soviet Socialist Republics had filed reciprocity limitations. The Central African Republic, Ecuador, France, Hungary, India, the Malagasy Republic, Nigeria, the Philippines, Poland, Romania, Trinidad and Tobago, and Tunisia had filed commercial limitations. See *id.* at app.

n36. Id. at n.29. The United States' declarations read:

"The United States of America will apply the Convention, on the basis of reciprocity, to the recognition and enforcement of only those awards made in the territory of another Contracting State."

"The United States of America will apply the Convention only to differences arising out of legal relationships, whether contractual or not, which are considered as commercial under the national law of the United States."

Id.

n37. Original Brief on Behalf of Ernesto Francisco at 6-7, *Francisco v. Stolt Achievement MT*, 293 F.3d 270 (5th Cir. 2002) (No. 01-30694).

n38. Toluene (chemical formula C₇H₈) is an aromatic hydrocarbon with numerous industrial applications, among them the production of phenol, polyurethane foams, and trinitrotoluene (TNT). Inhalation may cause vertigo and nausea. See *Earles v. Union Barge Line Corp.*, 486 F.2d 1097, 1099 n.1 (3d Cir. 1973) ("Toluene is a vital or 'critical' material in wartime, because TNT, trinitrotoluene ... is undoubtedly the principal explosive in modern warfare. Toluene is used extensively as a solvent in the rubber, lacquer, and munitions industries. It is poisonous when inhaled." (quoting A. Lowy & B. Harrow, *An Introduction to Organic Chemistry* 242-43 (7th ed. 1954))).

n39. Original Brief on Behalf of Ernesto Francisco, *supra* note 37, at 7.

n40. 28 U.S.C. 1333(1) (2000).

n41. *Francisco*, 293 F.3d at 271. The opinion reproduces the two provisions, which also figure in *Bautista*. See *Bautista v. Star Cruises*, 396 F.3d 1289, 1293 & nn. 4-5, 1294 (11th Cir.), cert. dismissed, 125 S. Ct. 2954 (2005). Section 29 of Mr. Francisco's contract stipulated that:

In cases of claims and disputes arising from this employment, the parties covered by a collective bargaining agreement shall submit the claim or dispute to the original and exclusive jurisdiction of the voluntary arbitrator or panel of arbitrators. If the parties are not covered by a collective bargaining agreement, the parties may at their option submit the claim or dispute to either the original and exclusive jurisdiction of the [Philippine] National Labor Relations Commission (NLRC), pursuant to Republic Act (RA) 8042 otherwise known as the Migrant Workers and Overseas Filipinos Act of 1995 or to the original and exclusive jurisdiction of the voluntary arbitrator or panel of arbitrators.

Section 31 stipulated that:

Any unresolved dispute, claim or grievance arising out of or in connection with this Contract ... shall be governed by the laws of the Republic of the Philippines, international conventions, treaties and covenants where the Philippines is a signatory.

As to the nature of proceedings before the Philippine NLRC, the Francisco Court added:

Section 10 of the Migrant Workers and Overseas Filipinos Act of 1995 provides that disputes submitted to the NLRC are resolved by arbitration. Hence, our reading of the contract is that all claims and disputes arising from the employment are subject to arbitration, regardless of whether there is a collective bargaining agreement and regardless of whether the parties opt to proceed before the NLRC.

Francisco, 293 F.3d at 271 & n.1.

n42. Defendants included Stolt Achievement, Inc.; Stolt-Nielsen Transportation Group, Ltd.; Stolt Parcel Tankers, Inc.; and the vessel Stolt Achievement MT, which was subject to a libel in rem. Francisco, 293 F.3d at 270.

n43. *Id.* at 271-72.

n44. U.S. district courts and state courts had already considered the question of mandatory arbitrability of foreign seamen's tort claims and reached different results. See *Lejano v. K.S. Bandak*, 705 So. 2d 158 (La. 1997) (foreign forum-selection clause is valid). But see *Jaranilla v. Megasea Maritime Ltd.*, 171 F. Supp. 2d 644 (E.D. La. 2001) (motion to remand to state court granted based upon finding that Filipino seaman's employment contract is not covered by the Convention Act), vacated, 2002 A.M.C. 2621, 2002 WL 2022516 (E.D. La. Aug. 29, 2002) (motion to remand to state court denied in light of issuance of Fifth Circuit opinion in *Francisco*).

n45. *Francisco*, 293 F.3d at 274.

n46. See *id.* at 274-75.

n47. *Id.* at 274 ("Neither the Convention nor the limiting language ratifying the Convention contemplate any exception for seamen employment contracts or employment contracts in general.").

n48. See Original Brief on Behalf of Ernesto Francisco, *supra* note 37, at 10-28; see also Reply Brief of Appellant, Ernesto Francisco, *Francisco*, 293 F.3d 270 (No. 01-30694). The court also considered arguments relating to enforcement of arbitration agreements under the New York Convention and the then-present status of Philippine law that are beyond the scope of this article.

n49. See *Francisco*, 293 F.3d at 275.

n50. *Id.* It is of critical importance to recognize the fact that Title 9, unlike, for example, title 46 ("a grab-bag of discrete maritime statutes, such as the Limitation of Liability Act and the Death on the High Seas Act, thrown together for mere convenience"), has been enacted into positive law. See Brief of Apostleship of the Sea of the United States of America as Amicus Curiae Supporting Appellants at 10-11, *Bautista v. Star Cruises*, 396 F.3d 1289 (11th Cir. 2005) (No. 03-15884) [hereinafter *Apostleship Brief*]; Act of July 30, 1947, ch. 392, 61 Stat. 670, 674.

n51. S. Rep. No. 91-702, app. at 5-15 (1970).

n52. *Francisco*, 293 F.3d at 275-76 (quoting from and discussing S. Rep. No. 91-702, app. at 6).

n53. *Id.* at 274-75.

n54. *Id.* at 274.

n55. *Apostleship Brief*, supra note 50, at 13.

n56. See *Francisco*, 293 F.3d at 274. But see *Apostleship Brief*, supra note 50, at 15 ("It is helpful to review Chairman Kearney's enumeration of the areas of potential conflict (between FAA and Convention Act proceedings) to which 208 refers: (a) amount-in-controversy requirements; (b) venue rules; (c) grounds for removal; (d) time periods for enforcement actions; and (e) grounds for refusing to recognize awards." (citing S. Rep. No. 91-702, app. at 7-8)).

n57. *Francisco*, 293 F.3d at 274-75.

N58. *Id.* The court's construction of the word "including" in section 208 appears able to do no work other than to repudiate the section 1 exemptions. And, particularly in light of the court's acknowledgment of the U.S. commercial limitation to ratification of the Convention, there is no indication that the court intends to (1) limit the general definitions in section 1 of "maritime transactions" and "contracts evidencing transactions involving commerce" (which are each stipulated to fall under the FAA in section 2 and defined generally in section 1) to the FAA, or (2) construe the Convention Act as applying to more than just maritime transactions or commercial contracts. Notwithstanding the court's expansive interpretation of the term "including," it is hard to imagine how, given the U.S. commercial limitation, the term "including" could be interpreted to encompass anything other than employment contracts. A troubling implication of this observation is that instead of clearly repudiating the section 1 exemptions, Congress obliquely inserted the term "including" into section 208 to implicitly repudiate them.

n59. *Id.* at 273 (citing *Sedco, Inc. v. Petroleos Mexicanos Mexican Nat'l Oil Co.*, 767 F.2d 1140, 1144-45 (5th Cir. 1985)).

n60. *Id.* at 274-76. The court cites Mr. Kearney's Senate testimony as reproduced in S. Rep. No. 91-702. Mr. Kearney testified:

Paragraph 3 of article I of the Convention permits a state party to the Convention to file a declaration that the Convention will apply only to legal relationships that are considered as commercial under the national law of that state The United States will file such a declaration

Consequently it is necessary to include the substance of this limiting declaration in the legislation that implements the Convention. This is what the first sentence of section 202 intends. It was not, of course, necessary to make any reference to the national law of the United States in the first sentence of section 202 because the definition of commerce contained in section 1 of the original Arbitration Act is the national law definition for the purposes of the declaration. A specific reference, however, is made in section 202 to section 2 of Title 9, which is the basic provision of the original Arbitration Act.

S. Rep. No. 91-702, app. at 6; see also Francisco, 293 F.3d at 275-76.

n61. Francisco, 293 F.3d at 274 (stating that "while the ratification language expresses an intent to limit the reach of the Convention to commercial relationships, there is no indication that employment contracts or seamen employment contracts are not considered "commercial").

n62. Undoubtedly, modern American congressional and judicial policy favors executory enforcement of arbitration agreements in the international commercial context. Ms. Susan Karamanian's discussion of judicial construction of the FAA, the Convention Act, and the relationship between them is instructive. See Susan L. Karamanian, *The Road to the Tribunal and Beyond: International Commercial Arbitration and United States Courts*, 34 *Geo. Wash. Int'l L. Rev.* 17, 25-26 (2002) ("In 1925, the U.S. Congress, resting on its authority to enact substantive rules to regulate interstate commerce and admiralty, enacted the Domestic FAA. Designed to "reverse centuries of judicial hostility to arbitration agreements," the Domestic FAA "places arbitration agreements "upon the same footing as other contracts." (discussing *Prima Paint Corp. v. Flood & Conklin Mfg. Co.*, 388 U.S. 395, 405 (1967))) (citations omitted); see also Karamanian, *supra*, at 22-25 (discussing Scherk and noting that "in 1974, the U.S. Supreme Court opened the doors of arbitral tribunals to international commercial disputes The decision in Scherk ... signaled a new day for international arbitration ..."). In the employment context, however, as will be discussed *infra* in the Part IV discussion of U.S. labor law, the policy favoring arbitration is less unambiguously discernable. See generally Kristin McCandless, Comment, *Circuit City Stores, Inc. v. Adams: The Debate over Arbitration Agreements in the Employment Context Rages On*, 80 *Denv. U. L. Rev.* 225 (2002).

n63. To the court, the fact that employment contracts are "commercial" for Convention and Convention Act purposes seems to render these cases apposite. Francisco, 293 F.3d at 274.

n64. *Id.* at 274-75 (citing *Dean Witter Reynolds, Inc. v. Byrd*, 470 U.S. 213, 217 (1985)). One should note that the *Dean Witter Reynolds* holding, affirming the arbitrability of "intertwined" federal-state causes of action, did not explicitly apply to contracts of adhesion; the Court reserved judgment on the matter. *Dean Witter Reynolds*, 470 U.S. at 216 n.2.

n65. Francisco, 293 F.3d at 275 (citing *Scherk v. Alberto-Culver Co.*, 417 U.S. 506, 520 n.15 (1974), a case affirming the arbitrability of a Securities Exchange Act section 10b-5 claim).

n66. *Id.* at 274-75 (citing *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614, 631 (1985), which affirmed the arbitrability of a Sherman Act claim). The Francisco Court neglected to specify that all three cases relate to international business transactions. In *Mitsubishi Motors*, for example, the Court relied upon Scherk to underline the importance to international commerce of enforcing commercial arbitration clauses. See *Mitsubishi Motors*, 473 U.S. at 631 (citing a passage in Scherk emphasizing that the enforcement of choice-of-law/forum clauses is "an almost indispensable precondition to achievement of the orderliness and predictability essential to any international business transaction").

n67. See Reply Brief of Appellant, Ernesto Francisco, *supra* note 48, at 1-3 (discussing how Title 9 of the United States Code - including section 1 and its statutory heading - was codified and enacted into positive law in 1947 by the United States Congress by Acts of 1947, ch. 392, 1, reprinted in U.S. Code Cong. Service 1947, at 664).

n68. Francisco, 293 F.3d at 275 (citing *Aaron v. SEC*, 446 U.S. 680, 695 (1980)).

n69. *Id.* at 274.

n70. *Id.* at 275 ("While the use of the term 'title' in the heading is helpful to Francisco, it does not change our conclusion that the plain language of the Convention Act, enacted long after 1 of the Arbitration Act, does not admit to an exception for seaman employment contracts.") (citation to authority omitted). Essentially, respondents need not worry about the heading of 9 U.S.C. 1 because the Court's understanding of the "plain language" of the Convention Act allows it to minimize its importance.

n71. *Id.* (citing *Natural Res. Def. Council v. EPA*, 915 F.2d 1314, 1321 (5th Cir. 1990)). Consistent with its holding, the court in Francisco must have been absolutely convinced that, upon the codification of the Convention Act, Congress neglected to amend the 9 U.S.C. 1 descriptive heading to read "exception to operation of Chapter 1" or "exception to operation of the Federal Arbitration Act."

n72. See *id.* A key weakness in the court's approach was its emphasis upon the "long" time period (twenty-three years) separating reenactment and codification of the FAA from enactment of the Convention Act. The court's assumption was that the statutory heading was actually intended to apply exclusively to the FAA. The problem with this reasoning is that it distorts the plain meaning of Title 9 and implies that Congress passed up at least two opportunities - the 1970 enactment of the Convention Act and the 1990 enactment of the Panama Convention Act, both of which relate back to the FAA - to correct the erroneous heading of a key definitional statute.

n73. The Francisco Court's approach to the statutory heading of 9 U.S.C. 1 and to statutory construction overall is at odds with the recent Supreme Court holding in *Koons Buick Pontiac GMC, Inc. v. Nigh*, 125 S. Ct. 460 (2004). In *Koons*, the Court ruled that a 1995 amendment to the civil-liability provision of the Truth in Lending Act (TILA), 15 U.S.C. 1640, which added a third clause to subparagraph (a)(2)(A) increasing the maximum and minimum amounts of damages recoverable in individual actions brought for violations of TILA in relation to closed-end loans secured by real property, did not eliminate the general applicability to the remainder of the subparagraph (covering consumer credit transactions in general) of the lower maximum and minimum brackets prescribed by the second clause for "liability under this subparagraph." *Koons*, 125 S. Ct. at 463-64. Unlike the Francisco Court, Justice Ginsburg, writing for the Supreme Court majority, was forthright in acknowledging the ambiguity of the provision under consideration. *Id.* at 463 ("Less-than-meticulous drafting of the 1995 amendment created an ambiguity."). Her analysis relied in part upon legislative history (the lack of demonstrable intent to render the second clause's damage limitation inapplicable to the first clause) and the "passing strange" effects of adopting the contrary position. *Id.* at 468 ("Had Congress simultaneously meant to repeal the longstanding \$ 100/\$ 1,000 limitation on 1640(a)(2)(A)(i), thereby confining the \$ 100/\$ 1,000 limitation solely to clause (ii), Congress likely would have flagged that substantial change. At the very least, a Congress so minded might have stated in clause (ii): 'liability under this clause.' "All in all, we think this is a case where common sense suggests, by analogy to Sir Arthur Conan Doyle's "dog that didn't bark," that an amendment having the effect petitioner ascribes to it would have been differently described by its sponsor, and not nearly as readily accepted by the floor manager of the bill." (quoting *Church of Scientology of Cal. v. IRS*, 484 U.S. 9, 17-18 (1987))). To ascertain with precision the intent of the Congress when using the word "subparagraph," Justice Ginsburg also consulted numerous treatises on statutory drafting, among them L. Filson's *Legislative Drafter's Desk Reference* (1992), the *House Legislative Counsel's Manual on Drafting Style* (1995), and the *Senate's Legislative Drafting Manual* (1997). *Id.* at 467. She evinced a willingness to comprehend congressional conventions of statutory drafting and organization.

Justice Scalia, the sole dissenter (Justices Kennedy, Stevens, and Thomas filed concurring opinions), interpreted the structure of 1640(a)(2)(A) in a different manner than Justice Ginsburg. *Koons*, 125 S. Ct. at 472

(Scalia, J., dissenting). He also criticized the Court's use of "ventriloquist" legislative history. *Id.* at 474 ("Needless to say, I also disagree with the Court's reliance on things that the sponsors and floor managers of the 1995 amendment failed to say. I have often criticized the Court's use of legislative history because it lends itself to a kind of ventriloquism.") (citation omitted). But Justice Scalia, like Justice Ginsburg, consulted the same legislative manuals indicating the definition of the word "subparagraph," and he employed inferences about statutory organization to bolster his conclusions. *Id.* at 473 (discussing the treatment of subdivisions of statutory units in the drafting manuals cited above). He, too, placed great importance upon understanding the manner in which statutes are organized. See *id.* at 472-74.

n74. See *Francisco*, 293 F.3d at 275-76. Note that both the *Francisco* and *Bautista* Courts also fail to mention the contents of President Lyndon Johnson's 1968 letter transmitting the New York Convention to the Senate for advice and consent to ratification (S. Comm. on Foreign Relations (1968)). Secretary of State Nicholas Katzenbach's Letter of Submittal includes a statement emphasizing that the U.S. commercial limitation "would be consistent with the policy expressed in Title 9 (arbitration) of the United States Code (Federal Arbitration Act)." S. Comm. on Foreign Relations, *supra* note 22, at 5. See also the discussion of *Mitsubishi Motors* *infra* in Part V.C.2 of this article.

n75. S. Rep. No. 91-702, app. at 5 (1970).

n76. H.R. Rep. No. 91-1181 (1970); see also *Apostleship Brief*, *supra* note 50, at 12-13.

n77. See S. Rep. No. 91-702, app. at 5-15.

n78. *Francisco*, 293 F.3d at 275-76.

n79. *Id.* at 276 ("This testimony suggests that the definition of a transaction involving 'commerce' in 1 and 2 of the Arbitration Act is the same as the definition of a 'legal relationship ... which is considered as commercial' falling under the Convention Act. However, the witness does not specifically address whether the exclusion in 1 of seamen employment contracts is also applicable to the then-proposed 202 of the Convention Act." (citing S. Rep. No. 91-702, app. at 6)).

n80. S. Rep. No. 91-702, app. at 10.

n81. See *id.* app. at 5-15.

n82. See *id.* at 2 (subpart entitled "Committee Action and Recommendation").

n83. *Id.* app. at 11-15. Senator Aiken and Mr. Kearney engaged in a lengthy discussion of World Court jurisprudence.

n84. *Francisco*, 293 F.3d at 276 (citing *Circuit City Stores, Inc. v. Adams*, 532 U.S. 105, 120 (2001); *Hubbard v. United States*, 514 U.S. 695, 708 (1995)).

n85. Following the explosion, newspaper articles chronicled the ship's safety problems. See, e.g., Jamie Malernee et al., *Cruise Ship Blast Kills Four; Boiler Accident on Norway Injures at Least 19; Officials Rule Out Act of Terrorism as Investigation Gets Under Way*, Sun-Sentinel (Fla.), May 26, 2003, at 1A (noting, in enumerating the ship's history of inspections, retrofits, and repairs, that "in August 1980, the Norway was adrift at sea for 36 hours due to a power failure caused by a blocked fuel line" and that "in May 1981 the ship drifted without power for 24 hours when a boiler failed"). The New York Times reported that, according to a U.S. Coast Guard official, the S.S. Norway failed a safety inspection in 2001 and was forced to cancel a cruise, but passed a safety inspection on May 15, 2003; an NCL spokeswoman was quoted as saying that the boiler room, which was completely rebuilt in 1999, passed a routine inspection on May 16. Dana Canedy, *Officials Examining Steam Engine in Explosion on Cruise Ship*, N.Y. Times, May 28, 2003, at A15; Dana Canedy & Charlie Nobles, *Boiler Room Blast Kills 4 Crew Members on Cruise Ship*, N.Y. Times, May 26, 2003, at A10.

n86. 28 U.S.C. 1333(1) (2000).

n87. *Bautista v. Star Cruises*, 286 F. Supp.2d 1352, 1356 (S.D. Fla. 2003), *aff'd*, 396 F.3d 1289 (11th Cir.), *cert. dismissed*, 125 S. Ct. 2954 (2005).

n88. *Bautista v. Star Cruises*, 396 F.3d 1289 (11th Cir.), *cert. dismissed*, 125 S. Ct. 2954 (2005).

n89. *Id.* at 1299 (citing *Francisco*, 293 F.3d at 274, for the finding that employment contracts are commercial).

n90. *Id.* at 1295 (citing *Robinson v. Shell Oil Co.*, 519 U.S. 337, 341 (1997)).

n91. *Id.* at 1296.

n92. *Id.* at 1297.

n93. *Id.* (citing *Indus. Risk Insurers v. M.A.N. Guttehofnungshutte GmbH*, 141 F.3d, 1434, 1440 (11th Cir. 1998) (quoting *Sedco, Inc. v. Petroleos Mexicanos Mexican Nat'l Oil Co.*, 767 F.2d 1140, 1145 (5th Cir. 1985) to hold that "the Convention must be enforced according to its terms over all prior inconsistent rules of law")).

n94. See *Bautista*, 396 F.3d at 1298.

n95. *Id.*

n96. *Id.* at 1299.

n97. *Id.* at 1297 (citing *Francisco v. Stolt Achievement MT*, 293 F.3d 270, 276 (5th Cir.), *cert. denied*, 537 U.S. 1030 (2002) (relying upon dicta in *Circuit City Stores, Inc. v. Adams*, 532 U.S. 105, 120 (2001))). In *Circuit City*, Justice Kennedy, writing for the majority, held that resort to legislative history was unnecessary because the "statutory text" of section 1 is "clear" as to the conclusion that the residual clause "any class of workers engaged in foreign or interstate commerce" is to be construed narrowly, in light of the immediately preceding

exemptions from mandatory arbitration and according to the judicial maxim *eiusdem generis*. *Circuit City*, 532 U.S. at 114-15, 118-19. The majority further discounted the legislative history of FAA section 1 by calling it "quite sparse," and characterized as problematic the notion that the exemptions were added at the behest of Andrew Furuseth (the president of the International Seaman's Union of America, who testified before a Subcommittee of the Senate Committee on the Judiciary) because of the difficulty inherent in deducing congressional intent from the opinions of an interest group spokesperson. *Id.* at 119-20. Besides the fact that Justice Kennedy did not address a great deal of available FAA legislative history (in particular, the fact that, to eliminate the opposition of organized labor, the exclusionary language in section 1 was inserted after Secretary of Commerce Herbert Hoover suggested in a letter that "if objection appears to the inclusion of workers' contracts in the law's scheme, it might be well amended by stating "but nothing herein contained shall apply to contracts of employment of seamen, railroad employees, or any other class of workers engaged in interstate or foreign commerce." *Id.* at 126 n.4, 127 (Stevens, J., dissenting) (discussing the ninth hearing of the joint hearings on S. 1005 and H.R. 646 before the Subcommittees of the Committees on the Judiciary, 68th Cong., 1st Sess., 2 (1924)). One should note the dispositive factual distinction between the testimony of a non-governmental labor organizer (although, arguably, the *Circuit City* Court did not adequately consider the impact of his testimony) and that of the high-ranking State Department official who drafted the Convention Act. The latter spoke on behalf of the Executive Branch and, thus, the President of the United States. Recall, as mentioned previously, that the Senate saw fit to make Mr. Kearney's testimony the centerpiece of its historical record.

n98. *Bautista*, 396 F.3d at 1299.

n99. See *id.* The court offered a strange reason why petitioners were mistaken to insist upon explicit Convention Act rejection of the FAA exemptions. It stated that "according to [petitioners'] logic, a statutory provision pertaining to persons above the age of eighteen would not conflict with a provision that exempts thirty year-olds." Apparently, the court would not assume that the statute pertaining to persons over 18, if enacted after the latter statute and codified in the same positive title, would be interpreted to inherently acknowledge and incorporate the thirty-year-old persons' exception.

n100. *Id.* At this particular juncture, the court failed to contend with the well supported idea, discussed *supra*, that the national law definition of a contract evidencing a transaction involving commerce, provided in section 1, also includes the arbitration exemptions. Instead, it quoted *Francisco*: "In short, the language of the Convention, the ratifying language, and the Convention Act implementing the Convention do not recognize an exception for seamen employment contracts. On the contrary, they recognize that the only limitation on the type of legal relationship falling under the Convention is that it must be considered 'commercial,' and we conclude that an employment contract is 'commercial.'" *Id.* (citing *Francisco*, 293 F.3d at 274).

n101. *Id.* The court turned to *Scherk v. Alberto-Culver Co.* and *Industrial Risk Insurers v. M.A.N. Guttehofnungshutte GmbH* for their endorsement of the national policy favoring arbitration. *Id.* at 1299-1300 (citing *Scherk v. Alberto-Culver Co.*, 417 U.S. 506, 520 n.15 (1974); *Indus. Risk Insurers v. M.A.N. Guttehofnungshutte GmbH*, 141 F.3d, 1434, 1440 (11th Cir. 1998)). The court reiterated the concern of the drafters of Article II(1) of the Convention, discussed in *Scherk*, that domestic courts might decline to enforce agreements to arbitrate "on the basis of parochial views of their desirability." *Bautista*, 396 F.3d at 1300 (citing *Scherk*, 417 U.S. at 520 n.15).

n102. 338 U.S. 263, 264-66 (1949).

n103. 400 U.S. 351 (1971).

n104. Boyd, 338 U.S. at 265. In pertinent part, section 6 provides that ""under this Act an action may be brought in a district court of the United States, in the district of the residence of the defendant, or in which the cause of action arose, or in which the defendant shall be doing business at the time of commencing such action. The jurisdiction of the courts of the United States under this Act shall be concurrent with that of the courts of the several States" Id.; see also 45 U.S.C. 56 (2000).

n105. Boyd, 338 U.S. at 264-65.

n106. Id. at 263-64.

n107. Id. at 265 (quoting *Duncan v. Thompson*, 315 U.S. 1, 6 (1942), for the conclusion that ""Congress wanted Section 5 to have the full effect that its comprehensive phraseology implies").

n108. *Ex parte Collett*, 337 U.S. 55, 71-72 (1949); see also *In re Air Crash Disaster near New Orleans*, 821 F.2d 1147, 1163 & n.25, 1164 (5th Cir. 1987) (en banc) (repudiating earlier Fifth Circuit case law and asserting that the doctrine of *forum non conveniens* as elaborated in *Piper Aircraft Co. v. Reyno*, 454 U.S. 235, 255 (1981) - not a modified two-pronged analysis consisting of both a choice-of-law and a *forum non conveniens* inquiry - is applicable to suits under the Jones Act and the general maritime law).

n109. *Collett*, 337 U.S. at 57-58; see also *Balt. & Ohio R.R. v. Kepner*, 314 U.S. 44 (1941).

n110. *Collett*, 337 U.S. at 60 ("Section 1404(a) does not limit or otherwise modify any right granted in 6 of the Liability Act or elsewhere to bring suit in a particular district. An action may still be brought in any court, state or federal, in which it might have been brought previously.").

n111. Boyd, 338 U.S. at 266 (citation omitted).

n112. It is only fair to note that Mr. Francisco did not discuss Boyd in the "Original Brief on Behalf of Ernesto Francisco," supra note 37, filed with the court on June 18, 2001, or in the "Reply Brief of Appellant, Ernesto Francisco," supra note 48, filed on August 30, 2001. Nor, for that matter, did appellees or Amicus Curiae Louisiana State University.

n113. Boyd applies to arbitration clauses on the theory that "an agreement to arbitrate before a specified tribunal is, in effect, a specialized kind of forum-selection clause that posits not only the situs of suit but also the procedure to be used in resolving the dispute." *Scherk v. Alberto-Culver Co.*, 417 U.S. 506, 519 (1974). "Under some circumstances, the designation of arbitration in a certain place might also be viewed as implicitly selecting the law of that place to apply to that transaction." Id. at 519 n.13.

n114. 46 U.S.C. app. 688(a) (2000).

n115. The Jones Act states that:

Any seaman who shall suffer personal injury in the course of his employment may, at his election, maintain an action for damages at law, with the right of trial by jury, and in such action all statutes of the United States modifying or extending the common-law right or remedy in cases of personal injury to railway employees [the Federal Employers' Liability Act (FELA), 45 U.S.C. 51-60 (2000)] shall apply; and in case of the death of any seaman as a result of any such personal injury the personal representative of such seaman may maintain an action for damages at law with the right of trial by jury, and in such action all statutes of the United States conferring or regulating the right of action for death in the case of railway employees shall be applicable. Jurisdiction in such actions shall be under the court of the district in which the defendant employer resides or in which his principal office is located.

Id.

n116. 515 U.S. 528 (1995).

n117. 499 U.S. 585 (1991).

n118. 46 U.S.C. app. 688(a) (2000).

n119. 355 U.S. 426, 439 (1958).

n120. 498 U.S. 19, 32 (1990). Like FELA lawsuits, which are non-removable by virtue of 28 U.S.C. 1445(a) (2000) (providing that "[a] civil action in any State court against a railroad or its receivers or trustees, arising under [45 U.S.C. 51-60], may not be removed to any district court of the United States"), Jones Act claims have been judicially declared to not be removable by virtue of the Jones Act's incorporation of FELA. *Pate v. Standard Dredging Corp.*, 193 F.2d 498, 500 (5th Cir. 1952) ("Therefore, new Title 28, United States Code, 1445(a), now bars removal to the federal courts of any action brought under the Federal Employer's Liability Act; and the pertinent provisions of the Jones Act, incorporating by reference all statutes of the United States modifying or extending a common-law right or remedy in cases of personal injuries to railway employees, is still in full force and effect. It follows that actions brought by seamen in the state courts under the Jones Act are not removable to the federal courts."); *Romero v. Int'l Terminal Operating Co.*, 358 U.S. 354, 371 n.29 (1959) ("The policy of unremovability of maritime claims brought in the state courts was incorporated by Congress into the Jones Act." (citing *Pate*, 193 F.2d 498)).

n121. See *Desper v. Starved Rock Ferry Co.*, 342 U.S. 187 (1952). *Desper* was a Jones Act seaman status case. Petitioner Anna Desper, administrator of the estate of her son Thomas J. Desper, a seasonal tour boat operator who was injured during the tourist offseason when a fire extinguisher exploded while he was painting life preservers on board a moored barge, brought suit in federal court under the Jones Act, claiming that a 1939 amendment to FELA 1 enlarged the coverage of the Jones Act to include "those whose work 'substantially affects' navigation." *Id.* at 189. The amendment, available at 53 Stat. 1404, "redefines for the purposes of the Federal Employers' Liability Act the scope of the word 'employee' to include certain persons not theretofore covered, because they were not directly engaged in interstate or foreign commerce." *Id.* at 190.

The district court entered a jury verdict in Ms. Thomas's favor but the Seventh Circuit reversed. *Id.* at 188. The Supreme Court affirmed the Seventh Circuit reversal by holding that the definition of a seaman under the Jones Act is independent from the definition of a railway employee under FELA. *Id.* at 190 ("Seamen were given the rights of railway employees by the Jones Act, but the definition of 'seaman' was never made dependent on the meaning of 'employee' as used in the legislation applicable to railroads."). So, because Mr. Desper was not a seaman for Jones Act purposes under the maritime law jurisprudence of the day, his mother would

have to look to the Longshoremen's and Harbor Workers' Compensation Act, 33 U.S.C. 901 et. seq. (2000), for a federal remedy. *Id.* at 191-92.

For commentary about Desper's relation to other Jones Act-FELA identity cases discussed in this article, see note 137 *infra*.

n122. 287 U.S. 367 (1932).

n123. 298 U.S. 110 (1936).

n124. 348 U.S. 207 (1955).

n125. *Cortes*, 287 U.S. at 370-73.

n126. *Id.* at 371 ("On the other hand, the remedy for [Mr. Cortes'] injury ends with his death in the absence of a statute continuing it or giving it to another for the use of wife or kin. *Western Fuel Co. v. Garcia*, 257 U.S. 233, 240, 42 S.Ct. 89, 66 L.Ed. 210; *Lindgren v. United States*, 281 U.S. 38, 47, 50 S.Ct. 207, 74 L.Ed. 686. Death is a composer of strife by the general law of the sea as it was for many centuries by the common law of the land.").

n127. *Id.* at 374-75 ("We are told, however, that the personal injury from negligence covered by the statute must be given a narrow content, excluding starvation and malpractice, because for starvation and malpractice the seaman without an enabling act had a sufficient remedy before... . A double remedy during life is not without rational office if the effect of the duplication is to carry the remedy forward for others after death. The argument for the respondent imputes to the lawmakers a subtlety of discrimination which they would probably disclaim.").

n128. *Id.* at 377 ("We do not read the act for the relief of seamen as expressing the will of Congress that only the same defaults imposing liability upon carriers by rail shall impose liability upon carriers by water... . The act for the protection of railroad employees does not define negligence. It leaves that definition to be filled in by the general rules of law applicable to the conditions in which a casualty occurs.").

n129. *The Arizona v. Anelich*, 298 U.S. 110, 123 (1936).

n130. *Id.* at 116-18.

n131. *Id.* at 119.

n132. *Id.* at 123 ("The denial in the Federal Employers' Liability Act of the defense of assumption of risk refers only to suits founded on the Federal Safety Appliance Act, applicable alone to railroads. It can raise no inference as to the availability of the defense in suits brought to recover for injuries to seamen. No provision of the Jones Act is inconsistent with the admiralty rule as to assumption of risk. The purpose and terms of the Act, and the nature of the juristic field in which it is to be applied, preclude the assumption that Congress intended, by its adoption, to modify that rule by implication.") (citations omitted).

n133. 45 U.S.C. 57 (2000).

n134. *Cox v. Roth*, 348 U.S. 207, 209 (1955).

n135. *Id.* at 208-09.

n136. See *id.* at 209-10 ("The Jones Act, in providing that a seaman should have the same right of action as would a railroad employee, does not mean that the very words of the F.E.L.A. must be lifted bodily from their context and applied mechanically to the specific facts of maritime events. Rather, it means that those contingencies against which Congress has provided to ensure recovery to railroad employees should also be met in the admiralty setting. Applying such a rule here, we conclude that Congress, having provided that railroad employees could recover regardless of the "survival" of the tortfeasor railroad, intended that the death of the tortfeasor should not defeat recovery under the Jones Act.").

n137. *Desper* is not at odds with *Cortes* and its progeny. Rather, all four cases harmoniously reflect the basic structure of the Jones Act grant of a negligence action to seamen. From a logical perspective, this legislative grant consists of the uniting of two legal conceptions - the conception of a seaman and the conception of a federal railway employees' liability law - that are necessarily distinct and autonomous (otherwise, there arguably would be no need for the Jones Act in the first place). Naturally, the definition of a Jones Act seaman has nothing to do with the FELA definition of a railway employee; the former derives its meaning from the general maritime law and from maritime law congressional enactments. As Justice Thomas, writing for the Court, explained in *Stewart v. Dutra Construction Co.*, 125 S. Ct. 1118, 1123 (2005):

Although the [Jones Act] is silent on who is a "seaman," both the maritime law backdrop against which Congress enacted the Jones Act and Congress' subsequent enactments provide some guidance. First, "seaman" is a term of art that had an established meaning under general maritime law. We have thus presumed that when the Jones Act made available negligence remedies to "any seaman who shall suffer personal injury in the course of his employment," Congress took the term "seaman" as the general maritime law found it. [*Chandris v. Latsis*, 515 U.S. 347, 355 (1995) (citing *Warner v. Goltra*, 293 U.S. 155, 159 (1934)]; G. Gilmore & C. Black, *Law of Admiralty* 6-21, pp. 328-329 (2d ed. 1975). Second, Congress provided further guidance in 1927 when it enacted the LHWCA, which provides scheduled compensation to land-based maritime workers but which also excepts from its coverage "a master or member of a crew of any vessel." 33 U.S.C. 902(3)(G). This exception is simply "a refinement of the term 'seaman' in the Jones Act." *McDermott Int'l, Inc. v. Wilander*, 498 U.S. 337, 347, 111 S.Ct. 807, 112 L.Ed. 866 (1991).

n138. *Vimar Seguros y Reaseguros, S.A. v. M/V Sky Reefer*, 515 U.S. 528, 534 (1995) (citing *Scherk v. Alberto-Culver Co.* 417 U.S. 506, 519 (1974) for the principle that "foreign arbitration clauses are but a subset of foreign forum selection clauses in general").

n139. *The Bremen v. Zapata Off-Shore Co.*, 407 U.S. 1 (1972).

n140. *Sky Reefer*, 515 U.S. 528.

n141. *Carnival Cruise Lines, Inc. v. Shute*, 499 U.S. 585 (1991).

n142. See *id.* at 597-605 (Stevens, J., dissenting); see also Linda S. Mullenix, *Another Easy Case, Some More Bad Law: Carnival Cruise Lines and Contractual Personal Jurisdiction*, 27 Tex. Int'l L.J. 323, 370 (1992) ("Carnival Cruise Lines, Inc. v. Shutes ignored unconscionability and wrongly enforced a forum-selection clause in an adhesive consumer contract... . The Carnival Cruise Lines decision will now further muddle already extraordinarily complex due process personal jurisdiction jurisprudence by serving as a basis for a new contractual analysis theory.").

n143. *Sky Reefer*, 515 U.S. at 533-34, 537 (overturning the holding in *Indussa Corp. v. S.S. Ranborg*, 377 F.2d 200 (2d Cir. 1967) (en banc) that foreign forum-selection clauses are void under COGSA 3(8) (codified at 46 U.S.C. app. 1303(8))); *The Bremen*, 407 U.S. at 9, 15-16 (limiting *Bisso v. Inland Waterways Corp.*, 349 U.S. 85 (1955) to its facts - "Bisso rested on considerations with respect to the towage business strictly in American waters, and those considerations are not controlling in an international commercial agreement" - and either distinguishing or effectively overruling *Carbon Black Export, Inc. v. The Monrosa*, 254 F.2d 297 (5th Cir. 1958) by insisting that "in an era of expanding world trade and commerce, the absolute aspects of the doctrine of the Carbon Black case have little place and would be a heavy hand indeed on the future development of international commercial dealings by Americans").

n144. *Carnival Cruise Lines*, 499 U.S. at 593.

n145. *Id.* at 595.

n146. Justice Blackmun acknowledged the factual differences between the sophistication of the petitioners and the negotiated nature of the forum-selection clauses in *The Bremen* and *Carnival Cruise Lines*. *Id.* at 590-95. Yet he identified policy reasons for enforcing the clause, such as (1) the cruise line's interest in limiting the fora in which it may be sued; (2) the parties' and the court system's interest in conserving resources that might otherwise be devoted to the presentment and adjudication of pretrial motions; and (3) the consumer interest in benefiting, in the form of reduced fares, from the cruise line's forum limitation. *Id.* at 593-94. He also ruled that the choice of a Florida forum was not unreasonably inconvenient to the Shutes, who were residents of Washington. *Id.* at 593-95 (finding that "in evaluating the reasonableness of the forum clause at issue in this case, we must refine the analysis of *The Bremen* to account for the realities of form passage contracts," and determining that any inconvenience inhering in the Florida forum-selection clause was not unreasonable because (1) there was no lack of notice to petitioners of the arbitration clause in the passenger contract; (2) Florida was not a "remote alien forum"; and (3) the dispute was not local or "inherently more suited to resolution in the State of Washington than in Florida"). But see *id.* at 601-02 (Stevens, J., dissenting) (citations omitted), where an indignant Justice Stevens appended a copy of the cruise line's contract to his opinion and stated:

A forum-selection clause in a standardized passenger ticket would clearly have been unenforceable under the common law before our decision in *The Bremen*, and, in my opinion, remains unenforceable under the prevailing rule today.

The Bremen, which the Court effectively treats as controlling this case, had nothing to say about stipulations printed on the back of passenger tickets. That case involved the enforceability of a forum-selection clause in a freely negotiated international agreement between two large corporations providing for the towage of a vessel from the Gulf of Mexico to the Adriatic Sea. The Court recognized that such towage agreements had generally been held unenforceable in American courts, but held that the doctrine of those cases did not extend to commercial agreements between parties with equal bargaining power.

n147. *Carnival Cruise Lines*, 499 U.S. at 595-97.

n148. According to 46 U.S.C. app. 183c(a) (2000):

It shall be unlawful for the manager, agent, master, or owner of any vessel transporting passengers between ports of the United States or between any such port and a foreign port to insert in any rule, regulation, contract, or agreement any provision or limitation (1) purporting, in the event of loss of life or bodily injury arising from the negligence or fault of such owner or his servants, to relieve such owner, master, or agent from liability, or from liability beyond any stipulated amount, for such loss or injury, or (2) purporting in such event to lessen, weaken, or avoid the right of any claimant to a trial by court of competent jurisdiction on the question of liability for such loss or injury, or the measure or damages therefor. All such provisions or limitations contained in any such rule, regulation, contract, or agreement are declared to be against public policy and shall be null and void and of no effect.

n149. *Carnival Cruise Lines*, 499 U.S. at 596-97. The Court noted:

The legislative history of 183c suggests instead that this provision was enacted in response to passenger-ticket conditions purporting to limit the shipowner's liability for negligence or to remove the issue of liability from the scrutiny of any court by means of a clause providing that "the question of liability and the measure of damages shall be determined by arbitration." See S.Rep. No. 2061, 74th Cong., 2d Sess., 6 (1936); H.R.Rep. No. 2517, 74th Cong., 2d Sess., 6 (1936). See also *Safety of Life and Property at Sea: Hearings before the House Committee on Merchant Marine and Fisheries*, 74th Cong., 2d Sess., pt. 4, pp. 20, 36-37, 57, 109-110, 119 (1936). There was no prohibition of a forum-selection clause. Because the clause before us allows for judicial resolution of claims against petitioner and does not purport to limit petitioner's liability for negligence, it does not violate 183c.

Id.

n150. COGSA, the Carriage of Goods by Sea Act, is codified at 46 U.S.C. app. 1300-15 (2000).

n151. *Vimar Seguros y Reaseguros, S.A. v. M/V Sky Reefer*, 515 U.S. 528, 530-31 (1995).

n152. *Id.* at 531.

n153. 46 U.S.C. app. 1303(8).

n154. Section 3(8) provides that:

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 liability otherwise than as provided in this chapter, shall be null and void and of no effect.

Id.

The lower court had assumed that the clause violated COGSA and held that, by virtue of their later enactment and greater specificity, FAA sections 1-2 (which specially make maritime bills of lading arbitrable) override the COGSA prohibition. *Vimar Seguros y Reaseguros, S.A. v. M/V Sky Reefer*, 29 F.3d 727, 730-33 (1st Cir. 1994), *aff'd* on other grounds, 515 U.S. 528 (1995). The Supreme Court reconciled the clause with COGSA and therefore did not reach the FAA question, although it hinted that it agreed that the FAA required arbitration. See *Sky Reefer*, 515 U.S. at 530, 538-39.

n155. *Sky Reefer*, 515 U.S. at 534.

n156. *Id.* at 534-35 ("The liability imposed on carriers under COGSA 3 is defined by explicit standards of conduct, and it is designed to correct specific abuses by carriers. In the 19th century it was a prevalent practice for common carriers to insert clauses in bills of lading exempting themselves from liability for damage or loss, limiting the period in which plaintiffs had to present their notice of claim or bring suit, and capping any damages awards per package.") (citations omitted).

n157. *Id.* at 535-39.

n158. *Id.* at 536.

n159. *Id.* at 536-37 (citing Michael F. Sturley, *International Uniform Laws in National Courts: The Influence of Domestic Law in Conflicts of Interpretation*, 27 *Va. J. Int'l L.* 729, 776-96 (1987)).

n160. *Id.* at 540 (citing *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614, 638 (1985)).

n161. See *Carnival Cruise Lines, Inc. v. Shute*, 499 U.S. 585, 596-97 (1991).

n162. *Id.* at 594-95.

n163. *The Bremen v. Zapata Off-Shore Co.*, 407 U.S. 1, 15 (1972) (citation omitted). The public policy exemption is absolutely coterminous with the legal policy of this nation towards seamen and the twin arbitral exemptions found in Article V, Section 2 of the New York Convention. The section advances two bases for the non-recognition/enforcement of foreign arbitral awards (and, perhaps by logical extension, of foreign agreements to arbitrate). It provides as follows:

Recognition and enforcement of an arbitral award may also be refused if the competent authority in the country where recognition and enforcement is sought finds that:

(a) The subject matter of the difference is not capable of settlement by arbitration under the law of that country; or

(b) The recognition or enforcement of the award would be contrary to the public policy of that country.

New York Convention, *supra* note 3, at art. V(2).

n164. 52 P.3d 720, 723-24 (Alaska 2002).

n165. *Id.* (distinguishing *Sebastian*, 143 F.3d 216, 217, 220-21 (5th Cir. 1998)). The court in *Sebastian* did not consider the applicability of *Boyd*, the New York Convention, or the FAA and its arbitration exemptions. In response to an argument advanced by appellee American Seafoods Group, the Nunez Court, which relied upon *Boyd* to invalidate a forum-selection clause in a domestic seaman's employment contract, distinguished *Sebastian* and its progeny, naming *Afram Carriers, Inc. v. Moeykens*, 145 F.3d 298 (5th Cir. 1998); *Sabocuhan v. Geco-Prakla*, 78 F. Supp. 2d 603 (S.D.Tex. 1999); *Valle v. Chios Venture Shipping*, 1999 WL 155942 (E.D. La., March 17, 1999); and *Lejano v. K.S. Bandak*, 705 So. 2d 158 (La. 1997). *Nunez*, 52 P.3d at 723 n.30.

n166. *Nunez*, 52 P.3d at 723.

n167. See *Sabocuhan*, 78 F. Supp. 2d at 606-07. Judge Kent wrote:

Were this Court at liberty to decide the issue, it would unhesitatingly hold unenforceable the kind of maritime forum-selection clauses at issue in this case. It is axiomatic that seamen are wards of the Admiralty court. This Court finds it truly shameful that the United States, the greatest and most prosperous nation on the face of the earth, would deny an injured seaman a remedy within its court system. This refusal is all the more appalling when the seaman is injured in the course of conveying goods right to the very shores of this nation. These seaman often labor aboard dilapidated vessels in deplorably dangerous working conditions, and yet at considerable risk to life and limb they assist in bringing products to this country which inure to the benefit of all United States citizens. Denying an injured seaman a United States forum is utterly contrary to the beneficent attitude towards seamen that has for centuries characterized the Admiralty courts of the English speaking world.

Id.; see also Lisa Sechelski, Comment, Forum Selection Clauses in Seamen's Contracts: Are We Protecting Commercial Progress by Denying Seamen Their Rightful Day in Court?, 26 *Hous. J. Int'l L.* 203 (2003).

n168. 353 U.S. 448 (1957).

n169. 353 U.S. 547 (1957).

n170. The Labor Management Relations Act (or "LRMA") is also known as the Taft-Hartley Act and is codified in pertinent part at 29 U.S.C. 185 (2000).

n171. *Gen. Elec.*, 353 U.S. at 548; see also *Textile Workers*, 353 U.S. at 456-58. 29 U.S.C. 185 ("Suits by and against labor organizations") is divided into five subparts. Section 185(a) ("Venue, amount, and citizenship") provides that breach of contract suits between employers and labor organizations, or between labor organizations, may be brought in any federal district court having jurisdiction over the parties. Amount in controversy and diversity requirement are waived. Other subparts of the section deal with questions of agency, enforceability of judgments, jurisdiction, and service of process. Nowhere in section 185 is there an explicit grant of lawmaking authority.

n172. The LMRA was enacted in 1947, the same year that Title 9 was codified into positive law. See Labor Management Relations Act, ch. 120, 301, 61 Stat. 136, 156-57 (1947) (codified at 29 U.S.C. 185).

n173. *Textile Workers*, 353 U.S. at 453 & n.4, 454-55. Justice Douglas conceded that "the legislative history of 301 is somewhat cloudy and confusing. But there are a few shafts of light that illuminate our problem." *Id.* at 452. He cited S. Rep. No. 80-105, at 20-21, 23 (1947); H.R. Rep. No. 80-245, at 21 (1947); H.R. Conf. Rep. No. 80-510, at 42 (1947); and an exchange between Congressmen Hartley and Barden on the House floor. *Textile Workers*, 353 U.S. at 452, 455-56.

n174. *Textile Workers*, 353 U.S. at 451-52, 454. Justice Douglas' reasoning is that because Congress has made a procedural rule (section 301(b)) that furnishes a right not available at common law by permitting a union to sue or be sued as an entity, and because Congress has made an accompanying rule that grants the federal courts jurisdiction over lawsuits between an employer and a union, or between unions (301(a)), it must follow from a general understanding of the schema of the Taft-Hartley Act and of federal labor law generally that Congress did not mean for section 301 to merely be a jurisdictional statute. Rather, section 301 was drafted to permit courts to award monetary and injunctive relief in lawsuits falling under it.

n175. The scope of the federal judicial authority deriving from section 301 is broad and vague. See *id.* at 457 ("The range of judicial inventiveness will be determined by the nature of the problem."). Substantive law is to arise out of the Labor Management Relations Act, other statutes, and legislative policy. *Id.* ("Some [problems] will lack express statutory sanction but will be solved by looking at the policy of the legislation and fashioning a remedy that will effectuate that policy."). Federal judicial lawmaking authority, the Court decreed, is constitutionally supported. *Id.* ("There is no constitutional difficulty. Article III, 2, extends the judicial power to cases 'arising under ... the Laws of the United States'").

n176. *Id.* at 455.

n177. The Norris-LaGuardia Act, also known as the Labor Disputes Act, is codified at 29 U.S.C. 101-15 (2000).

n178. The Court conceded that "a literal reading might bring the dispute within the terms of the Act," but also noted the Act's pro-arbitration stance and its legislative history. *Textile Workers*, 353 U.S. at 458 ("The failure to arbitrate was not a part and parcel of the abuses against which the Act was aimed. Section 8 of the Norris-LaGuardia Act does, indeed, indicate a congressional policy toward settlement of labor disputes by arbitration, for it denies injunctive relief to any person who has failed to make 'every reasonable effort' to settle the dispute by negotiation, mediation, or 'voluntary arbitration.'"). He also noted the Court's application of injunctive relief in two Railway Labor Act cases and one National Labor Relations Act case involving racial discrimination. *Id.* (citing *Virginian Ry. Co. v. Sys. Fed'n*, 300 U.S. 515 (1937); *Graham v. Brotherhood of Locomotive Firemen*, 338 U.S. 232, 237 (1949); *Syres v. Oil Workers Int'l Union, Local No. 23*, 350 U.S. 892 (1955)).

At issue in *General Electric* was a dispute between the General Electric Company and Local 205 of the United Electrical, Radio, and Machine Workers of America, which represented two workers in wrongful discharge and pay-related disputes with the company. *Gen. Elec.*, 353 U.S. at 547-48. The parties' collective bargaining agreement stipulated that either party could submit employment-related grievances to arbitration following the exhaustion of a four-step internal mediation procedure. *Id.* at 547. After participating in the procedures, Local 205 sought arbitration and was rebuffed by General Electric. *Id.* at 548. The union initiated suit in federal district court, which ruled that the Norris-LaGuardia Act barred the issuance of an injunction compelling arbitration. *Id.* The First Circuit Court of Appeals reversed and held that arbitration could be compelled pursuant to section 2 of the FAA because, it found, a collective bargaining agreement is not a "contract of employment" for

FAA purposes. *Id.* Justice Douglas, writing for the Supreme Court majority, affirmed the determination of the court of appeals yet seemingly abandoned the lower court's construal of FAA section 1 ("We follow in part a different path than the Court of Appeals, though we reach the same result."). *Id.* Instead of performing an FAA analysis, the Court held that an implied grant of substantive law-making authority emanating from LMRA section 301 essentially neutralized the prohibitions of the Norris-LaGuardia Act. *Gen. Elec.*, 353 U.S. at 548.

n179. 400 U.S. 351 (1971).

n180. *Id.* at 366-67. The provisions were repealed in 1983 and have been recodified. Section 596 is presently codified in Title 46 at sections 10301(b), 10313(f)-(h), 10501(b), and 10504(b)-(d). Section 597 is presently codified at sections 2101(12), 10313(e), (i), and 10504(a), (e).

n181. See *Arguelles*, 400 U.S. at 357.

n182. *An Act for the Government and Regulation of Seamen in the Merchants Service*, ch. 29, § 6, 1 Stat. 131, 133-34 (1790) (current version is amended and codified as indicated in note 180 *supra*).

n183. *Arguelles*, 400 U.S. at 353-54, 356.

n184. *Id.* at 356-57 (noting that "the literal conflict between this ancient seaman's statute and the relatively new grievance procedure is one which we think Congress rather than this Court should resolve. We do not sit as a legislative committee of revision. We know that this employee has a justiciable claim. We know it is the kind of claim that is grist for the judicial mill. We know that in 1790 Congress allowed it to be recoverable when made to a court. We know that this District Court has the case properly before it under the head of maritime jurisdiction. We hesitate to route this claimant through the relatively new administrative remedy of the collective agreement and shut the courthouse door on him when Congress, since 1790, has said that it is open to members of his class").

n185. *Id.* at 357-58.

n186. *Id.* at 355-56. The opinion stated:

We reviewed the legislative history of 301 in *Textile Workers Union of America v. Lincoln Mills of Alabama*. The matter of foremost concern in Congress was the enforceability of collective-bargaining agreements. The essence of 301 was a new federal policy governed by federal law - "that federal courts should enforce these agreements on behalf of or against labor organizations and that industrial peace can best be obtained in that way." Enforcement by or against labor unions was the main burden of 301, though standing by individual employees to secure declarations of their legal rights under the collective agreement was recognized. Since the emphasis was on suits by unions and against unions, little attention was given to the assertion of claims by individual employees and none whatsoever concerning the impact of 301 on the special protective procedures governing the collection of wages by maritime workers. We can find no suggestion in the legislative history of the Labor Management Relations Act of 1947 that grievance procedures and arbitration were to take the place of the old shipping commissioners or to assume part or all of the roles served by the federal courts protective of the rights of seamen since 1790.

Id. (citations omitted).

n187. For more on the history of the Jones Act, see *Chelentis v. Luckenbach S.S. Co.*, 247 U.S. 372 (1918); *Panama R.R. v. Johnson*, 264 U.S. 375 (1924); David W. Robertson & Michael F. Sturley, *Understanding Panama Railroad Co. v. Johnson: The Supreme Court's Interpretation of the Seaman's Elections Under the Jones Act*, 14 U.S.F. Mar. L.J. 229 (2001-2002).

n188. *Arguelles*, 400 U.S. at 355.

n189. See *Karim v. Finch Shipping Co.*, 374 F.3d 302, 312-13 (5th Cir. 2004). In *Karim*, the Court approved the setting aside by the United States District Court for the Eastern District of Louisiana of a contingent fee agreement under the terms of which the plaintiff seaman would take nothing. The seaman, Noor Begum Karim, was deported to Bangladesh before judgment issued in his suit against his employer for maintenance and cure. *Id.* at 304-06. Finch deposited the judgment amount in the registry of the district court, and Mr. Karim's attorney moved to withdraw it. *Id.* at 304. The district court ordered the attorney to submit an accounting before withdrawal; the accounting revealed that the attorney intended for the entire judgment to satisfy medical and personal advances made by him to Mr. Karim, with the difference reserved for attorney's fees. *Id.* at 305. Citing its general admiralty powers, the court sua sponte appointed the Tulane Law School law clinic to represent Mr. Karim in a hearing to determine applicable law and the reasonableness of the fee arrangement. *Id.* Following the hearing, the court altered the agreement to provide Mr. Karim with half of the net judgment. *Id.* at 306.

The Fifth Circuit affirmed, upholding the dispositive rationale that the seaman is a court ward meriting special protection. *Karim*, 374 F.3d at 312 (the court's precise ruling stated: "we hold: it may be proper for a district court, sitting in admiralty, to use its admiralty powers to alter a contingent fee contract for legal services entered into by an uncounseled seaman when he is absent at the time of the attempted disbursement of his judgment, as in this instance"). After surveying legislation enacted for the benefit of seamen (citing 46 U.S.C. app. 10313(g) (daily penalty for late payment of wages); *The Osceola*, 189 U.S. 158 (1903) (discussion of foreign laws of maintenance and cure); *Chandris, Inc. v. Latsis*, 515 U.S. 347, 354 (1995) (discussion of the origin of the Jones Act)), the court approvingly cited a broad swath of cases in which courts have invoked the doctrine that the seaman is the ward of the admiralty to: (1) fashion special judicial rules to protect seamen (citing *Arguelles*, 400 U.S. at 355; *Romero v. Int'l Terminal Operating Co.*, 358 U.S. 354, 360-61 (1959); *Harden v. Gordon*, 11 F. Cas. 480, 485 (D. Me. 1823); *Richards v. Relentless, Inc.*, 341 F.3d 35, 41 (1st Cir. 2003); *Orsini v. O/S Seabrooke O.N.*, 247 F.3d 953 (9th Cir. 2001); *Noble Drilling, Inc. v. Davis*, 64 F.3d 191, 195 (5th Cir. 1995); *Garrett v. Moore-McCormack Co.*, 317 U.S. 239, 248 (1942)); (2) construe statutes in their favor (citing *Governor of the Bank of Scotland v. Sabay*, 211 F.3d 261, 265-70 (5th Cir. 2000); *Isbrandtsen Co. v. Johnson*, 343 U.S. 779, 782-83, 787 (1952)); and (3) construe evaluations of abuse of district court discretion in their favor (citing *Isbrandtsen Marine Servs., Inc. v. M/V Inagua Tania*, 93 F.3d 728, 733-34 (11th Cir. 1996); *Schlesinger v. Teitelbaum*, 475 F.2d 137 (3d Cir. 1973)). *Karim*, 374 F.3d at 310-11.

n190. One manner in which *Arguelles* could be read to support *Francisco* and *Bautista* is through the argument that the *Arguelles* Court - in reaffirming *Textile Workers* and failing to invoke 9 U.S.C. 1 - implicitly acknowledged the arbitrability of seamen's disputes falling under collective bargaining agreements. Because the *Francisco* and *Bautista* plaintiffs were parties to collective bargaining agreements, their contracts could become arbitrable under a theoretical variant of the *Textile Workers* doctrine that is less wedded to the numerous legal and policy considerations upon which the *Textile Workers* and *Arguelles* Courts based their holdings (the fact that 29 U.S.C. 185(a) and its progeny are predominantly concerned with suits by and against labor unions; the contention that Congress, in enacting the Labor Management Relations Act, did not seek to close the courts to section 596 (and, by extension, Jones Act) plaintiffs; the maritime policy of special solicitude for seamen; etc.). Under such a doctrine, the FAA section 1 exemption is mooted by the purpose of the Convention Act or by a changing legislative and judicial consensus that retroactively modifies its meaning.

An objection to this type of approach is that it does not conform to legislative history. It turns the court into an amendatory legislature, "a legislative committee of revision." *Arguelles*, 400 U.S. at 356.

n191. See *id.* at 356 (commenting, perhaps in a display of pique, that "it is said that arbitration would be most appropriate because 'a familiarity with the customs and practices of shipping would be distinctly helpful in assessing the validity of the claims,' and the 'underlying wage claims [are] based on factual disputes.' Resolving factual disputes is hardly uncommon in federal district courts. And while an arbitrator in the area may have expertise, for 180 years federal courts have been protecting the rights of seamen and are not without knowledge in the area").

n192. *Id.* at 366-78 (White, J., dissenting). Justice White attacked the majority opinion on numerous grounds. After reviewing the facts of the case, he quoted from *United Steelworkers v. Warrior & Gulf Navigation Co.*, 363 U.S. 574, 582 (1960) to stress the superior knowledge and personal judgment of the labor arbitrator. *Id.* at 372 ("The ablest judge cannot be expected to bring the same experience and competence to bear upon the determination of a grievance, because he cannot be similarly informed.") (internal quotations omitted). He then quoted from *Republic Steel Corp. v. Maddox*, 379 U.S. 650 (1965) to describe the important union and employer interests supporting enforcement of the collective agreement. *Id.* at 373 n.8 ("Congress has expressly approved contract grievance procedures as a preferred method for settling disputes and stabilizing the 'common law' of the plant... . Union interest in prosecuting employee grievances is clear. Such activity complements the union's status as exclusive bargaining representative by permitting it to participate actively in the continuing administration of the contract. In addition, conscientious handling of grievance claims will enhance the union's prestige with employees. Employer interests, for their part, are served by limiting the choice of remedies available to aggrieved employees. And it cannot be said in the normal situation, that contract grievance procedures are inadequate to protect the interests of an aggrieved employee until the employee has attempted to implement the procedures and found them so.") (internal quotations omitted). Further, Justice White cited *Wilko v. Swan*, 346 U.S. 427 (1953) for the proposition that federally created rights are suitable for arbitration; noted the arbitrability, both before and after the passage of section 301 of the LMRA, of employee claims for liquidated damages under the Fair Labor Standards Act, codified at 29 U.S.C. 216(b), arising out of employer failure to pay overtime wages; and cited language in *United Steelworkers* that limits the role of courts in determining the scope of arbitration agreements. *Id.* at 374.

The dissent also criticized the majority's creation or ratification (depending upon how one interprets prior case law) of an employee's unilateral right to compel arbitration under a collective agreement, and insisted that 29 U.S.C. 185(a) endorses the enforcement of executory promises to arbitrate made by both seamen and non-seamen. The dissent noted:

Section 301, on the other hand, was enacted in 1947 as a farreaching measure designed to secure the enforcement of arbitration agreements in the federal courts in the belief that "industrial peace can be best obtained only in that way." *Textile Workers v. Lincoln Mills*, *supra*, 353 U.S., at 455, 77 S.Ct., at 917. Section 301 did away with common-law rules against enforcing executory promises to arbitrate, and there should be no reluctance to accommodate 596 and the policy of 301 by withholding judicial relief until contractual remedies are exhausted.

... .

Moreover, prior to the passage of 301, nonmaritime employees, like seamen, could go to court to resolve disputes over the meaning of the collective-bargaining agreement. Given the basis for federal jurisdiction, they could go to federal court. In this respect they were no different from seamen. When 301 provided for the enforcement of arbitration agreements and, as interpreted in *Maddox*, for exhaustion of internal remedies, there is not the slightest indication that Congress intended that seamen should be treated any differently from their non-maritime counterparts.

Arguelles, at 376-77 (White, J., dissenting).

n193. *Id.* at 375-77.

n194. But see *Lim v. Offshore Specialty Fabricators, Inc.*, 404 F.3d 898 (5th Cir.), cert. denied, 126 S. Ct. 365 (2005). On March 24, 2005, a Fifth Circuit panel narrowly confined *Arguelles* to its facts and held that certain wage claims falling under the FLSA are arbitrable under the Convention Act. *Id.* at 906-07. *Lim* was a 29 U.S.C. 216 opt-in collective action in which about one hundred Filipino seamen brought minimum wage and maximum hour claims under 29 U.S.C. 206-07. *Id.* at 900-01. As the seamen had signed POEA-mandated employment contracts containing arbitration clauses, the panel, relying upon *Francisco*, compelled arbitration. *Id.* at 902-03. In considering arguments by plaintiffs that U.S. policy contravenes mandatory arbitration of seamen's wage claims, the court swept *Arguelles* aside as follows:

For the following reasons, *Arguelles* is distinguishable. First, the claims in *Arguelles* addressed seamen's judicial remedies for denial of contractual wages. Plaintiffs do not claim they were not paid according to their contract; instead, they make claims under the FLSA for extra-contractual wages. Also at issue in *Arguelles* was the duty to follow the collective bargaining grievance procedure under the LMRA, a statute and procedure absent here. Finally, while the *Arguelles* court refused to hold 301 of the LMRA replaced access to courts, the Court did not declare seamen's wages conclusively exempt from arbitration in all situations.

Id. at 907 (citations omitted). This passage suggests the Fifth Circuit ignored almost everything about *Arguelles* and Justice Douglas's jealous assertion of the role of courts in defending seamen's rights. After all, no reading of the text of *Arguelles* itself could lead any objective observer to believe that the majority's opinion should be so summarily dismissed as applying only to contractual wage claims. The Court's language broadly construed the seaman's right to a judicial forum and, as the quotations from his opinion reproduced *supra* in the body of this article make clear, the Court never evinced an intent to limit its reasoning to claims for overtime wages and statutory penalties for nonpayment. Cf. *Arguelles*, 400 U.S. at 366 (Harlan, J., concurring) (stating that some types of statutory benefit claims may be arbitrable).

Besides, it is paradoxical for the *Lim* Court to insist that *Arguelles* is weaker outside of the context of the LMRA. On the contrary, as illustrated by Justice White's dissenting opinion described in note 192, *supra*, there may actually be a more persuasive theoretical case for arbitration of seamen's employment-related claims under the LMRA than under the Convention Act. Given the observations advanced in Parts III and IV *supra* of this Article as to the weakness of the *Francisco* and *Bautista* opinions generally, the *Arguelles* holding ironically appears firmer in the face of the *Francisco* and *Bautista* interpretation of Title 9 than within its own factual and legal context opposite *Textile Workers*.

n195. *Francisco v. Stolt Achievement MT*, 293 F.3d 270, 273, 275 (5th Cir.), cert. denied, 537 U.S. 1030 (2002) (citing *Sedco, Inc. v. Petroleos Mexicanos Mexican Nat'l Oil Co.*, 767 F.2d 1140, 1144-45 (5th Cir. 1985); *Dean Witter Reynolds, Inc. v. Byrd*, 470 U.S. 213, 217 (1985); *Scherk v. Alberto-Culver Co.*, 417 U.S. 506, 520 n.15 (1974); *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614, 631 (1985)); *Bautista v. Star Cruises*, 396 F.3d 1289, 1294-95 & 1294 n.7 (11th Cir.), cert. dismissed, 125 S. Ct. 2954 (2005) (citing *Francisco*, 293 F.3d at 273; *Standard Bent Glass Corp. v. Glassrobots Oy*, 333 F.3d 440, 449 (3d Cir. 2003) (3d Circuit variant of *Sedco* doctrine); *Scherk*, 417 U.S. at 520 n.15; *Mitsubishi Motors*, 473 U.S. at 638-40; *Czarina, L.L.C. v. W.F. Poe Syndicate*, 358 F.3d 1286, 1291, 1292 n.3 (11th Cir. 2004); *DiMercurio v. Sphere Drake Ins., PLC*, 202 F.3d 71, 74, 79 (1st Cir. 2000); *Indus. Risk Insurers v. M.A.N. Guttehofnungshutte GmbH*, 141 F.3d, 1434, 1440 (11th Cir. 1998); *Ledee v. Ceramiche Ragno*, 684 F.2d 184, 186 (1st Cir. 1982)).

n196. Refer generally to the discussion of *Sedco* in Parts III and IV *supra*. See *Bautista*, 396 F.3d at 1294 n.7 (citing *Standard Bent Glass*, 333 F.3d at 449).

n197. See *Francisco*, 293 F.3d at 273 (citing *Sedco*, 767 F.2d at 1144-45); *Bautista*, 396 F.3d at 1294 n.7 (citing *Standard Bent Glass*, 333 F.3d at 449). The prerequisites are that: "(1) there is an agreement in writing within the meaning of the Convention; (2) the agreement provides for arbitration in the territory of a signatory of the Convention; (3) the agreement arises out of a legal relationship, whether contractual or not, which is considered commercial; and (4) a party to the agreement is not an American citizen, or ... the commercial relationship has some reasonable relation with one or more foreign states." *Id.*

n198. See *Francisco*, 293 F.3d at 273 (citing *Sedco*, 767 F.2d at 1144-45).

n199. *Id.* at 274-75; *Bautista*, 396 F.3d at 1299 (approvingly citing *Francisco*, 293 F.3d at 274, and commenting that "we see no reason to diverge from the sensible reasoning of our sister Circuit").

n200. See, e.g., *Martin Davies, Forum Selection Clauses in Maritime Cases*, 27 *Tul. Mar. L.J.* 367 (2003); *McCandless*, *supra* note 62, at 225; *Stephen J. Ware, Arbitration Clauses, Jury-Waiver Clauses, and Other Contractual Waivers of Constitutional Rights*, 67 *Law & Contemp. Probs.* 167 (2004).

n201. *Scherk v. Alberto-Culver Co.*, 417 U.S. 506 (1974).

n202. *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614 (1985).

n203. *Circuit City Stores, Inc. v. Adams*, 532 U.S. 105 (2001).

n204. *Vimar Seguros y Reaseguros, S.A. v. M/V Sky Reefer*, 515 U.S. 528 (1995).

n205. *Carnival Cruise Lines, Inc. v. Shute*, 499 U.S. 585 (1991).

n206. See *Francisco v. Stolt Achievement MT*, 293 F.3d 270, 275 (5th Cir.), cert. denied, 537 U.S. 1030 (2002); *Bautista v. Star Cruises*, 396 F.3d 1289, 1295, 1299-1300, 1302 (11th Cir.), cert. dismissed, 125 S. Ct. 2954 (2005); cf. *Circuit City*, 532 U.S. at 114-15. Such omissions combine poorly with the failure of the *Francisco* and *Bautista* Courts to mention *Arguelles*, and the *Francisco* Court's failure to recognize that *Circuit City* renders employment contracts of workers not engaged in the movement of goods in foreign or interstate commerce arbitrable, yet reaffirms the FAA section 1 exemptions. The *Francisco* opinion does not cite *Circuit City* for its holding, but merely for the dictum that "legislative history is problematic even when the attempt is to draw inferences from the intent of duly appointed committees of the Congress." *Francisco*, 293 F.3d at 276 (quoting *Circuit City*, 532 U.S. at 120, 121). The *Bautista* Court, for its part, does cite *Circuit City* to show: (1) that 9 U.S.C. 1 "clearly exempts seamen's employment contracts from the FAA," *Bautista*, 396 F.3d at 1296 (citing *Circuit City*, 532 U.S. at 105, 109); (2) that an employment contract qualifies as a 9 U.S.C. 2 "contract evidencing a transaction involving interstate commerce," *id.* at 1298 (quoting *Circuit City*, 532 U.S. at 113) (internal quotations omitted); and (3) that Mr. *Kearney's* testimony constitutes legislative history, which, by virtue of its nature, is problematic as a source of interpretive guidance, *id.* (citing *Circuit City*, 532 U.S. at 120).

n207. 15 U.S.C. 78j(b) (2000).

n208. *17 C.F.R. 240.10b-5 (2004)*.

n209. *Scherk v. Alberto-Culver Co.*, 417 U.S. 506, 508-09 (1974).

n210. *Id.* at 508.

n211. *Id.* at 510; see *Wilko v. Swan*, 346 U.S. 427 (1953); see also *Am. Safety Equip. Corp. v. J.P. Maguire & Co.*, 391 F.2d 821, 825 (2d Cir. 1968). In *Wilko*, a Securities Act ("33 Act") case involving misrepresentation in the issuance of securities, the Court held that the plaintiff's right to select a judicial forum under section 12(2) of the '33 Act, 15 U.S.C. 77l, could not be waived. *Scherk*, 417 U.S. at 511-13. The Court based its holding upon policy grounds - the observation that the '33 Act was "'designed to protect investors' and to require 'issuers, underwriters, and dealers to make full and fair disclosure of the character of securities sold in interstate and foreign commerce and to prevent fraud in their sale,' by creating 'a special right to recover for misrepresentation ...'" - as well as upon the dictates of section 14. *Id.* at 512 (quoting *Wilko*, 346 U.S. at 431) (footnote omitted); see 15 U.S.C. 77n (2000) (providing that "any condition, stipulation, or provision binding any person acquiring any security to waive compliance with any provision of this subchapter or of the rules and regulations of the Commission shall be void").

n212. *Scherk*, 417 U.S. at 520-21.

n213. *Id.* at 513-15. Justice Stewart conceded that *Wilko* was arguably not controlling based upon substantive differences between the '33 and '34 Acts. He contrasted the statutory nature of the private remedy furnished by section 12(2) of the '33 Act with the judicial origin of the private right of action available by virtue of section 10(b) of the '34 Act. He also noted the role of the jurisdiction statute of the "33 Act, 15 U.S.C. 77v, which is uniquely broad in that it (1) makes jurisdiction in any federal or state court proper, and (2) makes '33 Act suits non-removable. Ultimately, however, Justice Stewart chose not to distinguish *Wilko*. See Karamanian, *supra* note 62, at 23-24 ("Wilko could have been distinguished because it dealt with a different statute. Acknowledging the differences between the 1933 Act and 1934 Act, the Court in *Scherk* recognized that *Wilko* is arguably not controlling. Or the Court in *Scherk* [sic] simply could have ruled that *Wilko*, predicated on "the old judicial hostility to arbitration,' was wrongly decided. Instead, the Court assumed *Wilko* applied to the 1934 Act and that *Wilko* was correctly decided. *Wilko* aside, the plaintiff in *Scherk* was not entitled to a judicial forum for its securities fraud claims. The unique nature of the agreements at issue in *Scherk* - "truly international agreements' - involved "considerations and policies significantly different from those found controlling in *Wilko*."") (citations omitted).

n214. *Scherk*, 417 U.S. at 515.

n215. *Id.* at 516 ("A contractual provision specifying in advance the forum in which disputes shall be litigated and the law to be applied is, therefore, an almost indispensable precondition to achievement of the orderliness and predictability essential to any international business transaction.").

n216. *Id.* at 517 ("In the present case, for example, it is not inconceivable that if *Scherk* had anticipated that Alberto-Culver would be able in this country to enjoin resort to arbitration he might have sought an order in France or some other country enjoining Alberto-Culver from proceeding with its litigation in the United States. Whatever recognition the courts of this country might ultimately have granted to the order of the foreign court, the dicey atmosphere of such a legal no-man's-land would surely damage the fabric of international commerce

and trade, and imperil the willingness and ability of businessmen to enter into international commercial agreements.").

n217. See, e.g., *Bhatnagar v. Surrendra Overseas Ltd.*, 52 F.3d 1220 (3d Cir. 1995); *Liaw Su Teng v. Skaarrup Shipping Corp.*, 743 F.2d 1140 (5th Cir. 1984); *In re Air Crash Disaster near Bombay*, 531 F. Supp. 1175 (W.D. Wash. 1982); David W. Robertson, *Forum Non Conveniens in America and England: "A Rather Fantastic Fiction,"* 103 L.Q. Rev. 398 (1987).

n218. Cf. *Carnival Cruise Lines, Inc. v. Shute*, 499 U.S. 585, 594 (1991) ("Finally, it stands to reason that passengers who purchase tickets containing a forum clause like that at issue in this case benefit in the form of reduced fares reflecting the savings that the cruise line enjoys by limiting the fora in which it may be sued.").

n219. Compare the Francisco Court's unwillingness to interpret chapters 1 and 2 in a harmonious fashion. "Francisco argues that as a matter of policy the Convention Act and the Arbitration Act should be applied uniformly. We cannot accept this argument. If the language of a statutory provision "is sufficiently clear in its context and not at odds with the legislative history, it is unnecessary to examine the additional considerations of policy ... that may have influenced the lawmakers in their formulation of the statute." Francisco, 293 F.3d at 275 (quoting *Aaron v. SEC*, 446 U.S. 680, 695 (1980)).

n220. But cf. *Scherk*, 417 U.S. at 510-13, 517, 520 n.15 ("Without reaching the issue of whether the Convention, apart from the considerations expressed in this opinion, would require of its own force that the agreement to arbitrate be enforced in the present case, we think that this country's adoption and ratification of the Convention and the passage of Chapter 2 of the United States Arbitration Act provide strongly persuasive evidence of congressional policy consistent with the decision we reach today."). Incidentally, one should note that any pro-arbitration policy supplied by the Convention that the Court did not consider might be offset by a closer analysis of the actual nature of the contract entered into by the parties. Footnote 6 at page 512 of Justice Stewart's opinion states:

The arbitration agreement involved in *Wilko* was contained in a standard form margin contract. But see the dissenting opinion of Mr. Justice Frankfurter, 346 U.S. 427, 439, 440, 74 S. Ct. 182, 189, concluding that the record did not show that "the plaintiff (*Wilko*) in opening an account had no choice but to accept the arbitration stipulation" The petitioner here would limit the decision in *Wilko* to situations where the parties exhibit a disparity of bargaining power, and contends that, since the negotiations leading to the present contract took place over a number of years and involved the participation on both sides of knowledgeable and sophisticated business and legal experts, the *Wilko* decision should not apply. See also the dissenting opinion of Judge Stevens of the court of appeals in this case, 484 F.2d 611, 615. Because of our disposition of this case on other grounds, we need not consider this contention.

The wording of the Court's holding is also instructive: "For all these reasons we hold that the agreement of the parties in this case to arbitrate any dispute arising out of their international commercial transaction is to be respected and enforced by the federal courts in accord with the explicit provisions of the Arbitration Act." *Id.* at 519-20.

n221. See *id.* at 509, 511; *DiMercurio v. Sphere Drake Ins., PLC*, 202 F.3d 71, 78 (1st Cir. 2000) (holding that 9 U.S.C. 208 impliedly incorporates the 9 U.S.C. 3 stay of proceedings into the Convention Act).

n222. For example, a case that falls under both the New York Convention and the Panama Convention is to be adjudicated under the Panama Convention if the majority of the parties to the arbitration agreement are na-

tionals of signatories to the Panama Convention and members of the Organization of American States. 9 U.S.C. 305 (2000).

n223. See *Sedco, Inc. v. Petroleos Mexicanos Mexican Nat'l Oil Co.*, 767 F.2d 1140, 1146 (5th Cir. 1985) ("In substance, the Convention replicates the Federal Arbitration Act. Indeed, 208 of the enabling legislation for the Convention incorporates all of the Convention into Chapter 1 of Title 9."). Judge Brown noted that the Convention is broader than the FAA in the respect that it permits federal courts to compel arbitration abroad. *Id.*; accord *S. Rep. No. 91-702*, app. at 10 (1970) (reproduced in Part III supra); see also *Indus. Risk Insurers v. M.A.N. Guttehofnungshutte GmbH*, 141 F.3d 1434, 1440 (11th Cir. 1998) ("The New York Convention is incorporated into federal law by the FAA, which governs the enforcement of arbitration agreements, and of arbitral awards made pursuant to such agreements, in federal and state courts."); *Jain v. de Mere*, 51 F.3d 686, 688 (7th Cir. 1995); *DiMercurio*, 202 F.3d at 78.

n224. 473 U.S. 614 (1985).

n225. *Francisco v. Stolt Achievement MT*, 293 F.3d 270, 275 (5th Cir.), cert. denied, 537 U.S. 1030 (2002); *Bautista v. Star Cruises*, 396 F.3d 1289, 1295, 1299-1300 (11th Cir.), cert. dismissed, 125 S. Ct. 2954 (2005).

n226. 15 U.S.C. 1 (2000).

n227. *Mitsubishi Motors*, 473 U.S. at 639 n.21; see *S. Comm. on Foreign Relations*, supra note 22, at 1, 3-5. Senate Committee on Foreign Relations, transmitting the New York Convention to the Senate for advice and consent to accession, includes a Letter of Transmittal from President Johnson; a Letter of Submittal from Secretary of State Nicholas Katzenbach; a discussion of the Convention's provisions; a list of signatory nations; a 1960 resolution of the American Bar Association supporting ratification; and various letters from American businessmen favoring ratification. President Johnson's letter emphasizes the U.S. commercial limitation, as does Secretary Katzenbach's. See *id.*

n228. Essentially, the disputes arose after Soler Chrysler-Plymouth, a Puerto Rican car dealer for areas in and around metropolitan San Juan, failed to meet the minimum sales volume specified in a Sales Agreement between the parties. Soler requested permission to transship ordered vehicles to Latin America and the continental United States, but Mitsubishi refused. Mitsubishi brought an action in the U.S. District Court for the District of Puerto Rico to compel arbitration in accordance with an arbitration clause in the Agreement and pursuant to the FAA and the Convention Act. Soler counterclaimed, raising numerous causes of action including a claim under the Sherman Act, held to not be arbitrable in *American Safety Equipment Corp. v. J.P. Maguire & Co.*, 391 F.2d 821 (2d Cir. 1968). *Mitsubishi Motors*, 473 U.S. at 616-24.

n229. *Id.* at 631 ("And at least since this Nation's accession in 1970 to the Convention, and the implementation of the Convention in the same year by amendment of the Federal Arbitration Act, that federal policy applies with special force in the field of international commerce.") (citations omitted) (emphasis added); see also *id.* at 639 (discussing the expansion of international trade and the need "for national courts to subordinate domestic notions of arbitrability to the international policy favoring commercial arbitration").

n230. *Id.* at 639 n.21 (citations omitted).

n231. *S. Comm. on Foreign Relations*, supra note 22, at 5.

n232. Over the strenuous objection of Justice Stevens's dissent, which Justices Brennan and Marshall joined, the majority criticized *American Safety*. In *American Safety*, the Second Circuit held that four factors - (1) the fact that private treble damages suits play an integral role in the enforcement of antitrust laws; (2) the "strong possibility" that contracts generating antitrust disputes might be contracts of adhesion; (3) the reality that antitrust disputes are complex and demand sophisticated economic and legal analysis; and (4) the determination that arbitrators from the business community (especially the foreign business community) should not be regulating other businesses - militated against sanctioning the arbitrability of antitrust disputes. *Mitsubishi Motors*, 473 U.S. at 632 (citing *Am. Safety*, 391 F.2d at 826-27). Justice Blackmun challenged each of these contentions on their own terms. Citing *The Bremen*, he alluded to the presumptive validity decreed therein of forum-selection clauses, and asserted that these ought not be set aside without a showing of "fraud, undue influence, or overweening bargaining power." *Id.* at 632-33 (citing *The Bremen v. Zapata Off-Shore Co.*, 407 U.S. 1, 12, 15, 18 (1972)). The Court also alluded to the rejection of the intertwining doctrine in *Prima Paint Corp. v. Flood & Conklin Mfg. Co.*, 388 U.S. 395 (1967)). Next, Justice Blackmun praised the expertise of arbitrators and the flexibility of the arbitration process, citing *Coenen v. R.W. Pressprich & Co.*, 453 F.2d 1209, 1215 (2d Cir. 1972) and other authority upholding the validity of agreements to arbitrate antitrust disputes that are entered into after the disputes arise to debunk the positions that antitrust cases are too complex for arbitration and that the business community should not be regulating itself. *Mitsubishi Motors*, 473 U.S. at 633-34. Finally, to dispel the notion that only domestic litigation may satisfy the public interest in enforcement of the antitrust laws, Justice Blackmun termed the policing function of 15 U.S.C. 15 ("Suits by Persons Injured") "important" yet "incidental" and cited *Brunswick Corp. v. Pueblo Bowl-O-Mat, Inc.*, 429 U.S. 477, 485-86 (1977) for the proposition that section 15 is primarily remedial, not punitive. *Mitsubishi Motors*, 473 U.S. at 634-37. Although Justice Blackmun mentioned the "element of uncertainty" of international transactions that arbitration clauses dispel, he essentially rejected *American Safety* without invoking either the FAA or the Convention Act. *Id.* at 636. In this respect, the terms of the Convention Act itself did not animate Justice Blackmun's conclusions.

n233. *Id.* at 629 (citing *Scherk v. Alberto-Culver Co.*, 417 U.S. 506 (1974)).

n234. *Id.* at 629-30 (citing *The Bremen*, 407 U.S. at 13-14).

n235. *Id.* at 629-31 (citing *Scherk*, 417 U.S. at 516-17).

n236. 379 F.3d 327 (5th Cir. 2004).

n237. See discussion in Part III *supra* of S. Rep. No. 91-702, app. at 10 (1970).

n238. *Freudensprung*, 379 F.3d at 332 (quoting from the terms of the "Consultant's Agreement"). OTSI provides experienced personnel for work on offshore platforms to companies in the offshore hydrocarbon industry. *Id.* OTSI signed an "Offshore Personnel Supply Agreement" with *Willbros West Africa, Inc.*, a Panamanian corporation with operations in Nigeria, and pursuant to another agreement, Work Order No. 4, Mr. *Freudensprung* agreed to work for *Willbros* as a barge leaderman off the Nigerian coast. *Id.* at 332-33. In addition to the arbitration covenant, Mr. *Freudensprung* agreed in the Consultant's Agreement with OTSI that he was an independent contractor without seaman status under the Jones Act. *Id.*

n239. *Id.* at 333.

n240. See *Kermarec v. Compagnie Generale Transatlantique*, 358 U.S. 625 (1959).

n241. *Freudensprung*, 379 F.3d at 333.

n242. *Id.* at 339 (quoting *Francisco v. Stolt Achievement MT*, 293 F.3d 270, 274 (5th Cir.), cert. denied, 537 U.S. 1030 (2002), which states that the "only limitation on the type of legal relationship falling under the Convention is that it must be considered 'commercial,' and ... an employment contract is 'commercial'").

n243. *Id.* at 340.

n244. The court's approval of *Lander Co. v. MMP Investments, Inc.*, 107 F.3d 476 (7th Cir. 1997) may well foreshadow what is to come for seamen. See *Freudensprung*, 379 F.3d at 340-41 (discussing *Lander* and *Jones v. Sea Tow Servs., Inc.*, 30 F.3d 360, 366 (2d Cir. 1994)). *Lander* involved a distribution agreement between two U.S. companies that was to be performed in Poland; the agreement included a clause providing for the arbitration of disputes in New York. *Id.* at 341. The Seventh Circuit found that the *Lander* contract fell under the terms of the Convention Act because it "'envisaged performance ... abroad,'" and compelled arbitration in accordance therewith. *Id.*

n245. See *Circuit City Stores, Inc. v. Adams*, 532 U.S. 105, 112-15 (2001) (employing the judicial canon of *eiusdem generis* to conclude that the section 1 arbitration exemption applies only to seamen, railroad employees, and transportation workers).

n246. See Brief of the Ass'n of Trial Lawyers of America and Trial Lawyers for Public Justice as Amici Curiae in Support of Appellants at 13-17, *Bautista v. Star Cruises*, 396 F.3d 1289 (11th Cir. 2005) (No. 03-15884) (concluding that "America will become a maritime nation without mariners" as a result of the fact that "the [U.S.] merchant marine fleet has declined sharply, despite government subsidies, as American owners have registered vessels under foreign flags of convenience to avoid U.S. taxes and have employed foreign seamen willing to work at lower wages" (citing Benjamin W. Labaree et al., *America and the Sea: A Maritime History* 591-99 (1998))).

n247. See, e.g., S. Rep. No. 91-702, app. at 10 (1970).

n248. Two hundred and forty-six years later, Voltaire's exclamation in chapter 19 of *Candide* at the sight of a debilitated slave in Suriname still rings hauntingly, "C'est a ce prix que vous mangez du sucre en Europe" (This is the price at which you are eating sugar in Europe.). Voltaire, *Candide ou L'Optimisme* 118 & n.1 (LectoGuide Series, Bordas 1982) (1759). Thus *Candide* enters Surinam in tears, evoking Christ's entry, weeping, into Jerusalem in Luke 19:28-44.

n249. See U.S. Const. art. VI, cl. 2. Clause 2 of Article VI provides that "This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding."