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Apologies and Corporate Governance in the Japanese Context -- Tatsum Tanaka's Sonna Shazai de wa Kaisha ga Abunai [Apologizing that Way Will Endanger Your Company]

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NEW YORK'S UNWELCOMING HARBOR: THE NEW YORK CONVENTION'S INAPPLICABILITY TO CLAIMS ARISING FROM SEAMEN'S EMPLOYMENT

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I. INTRODUCTION

In 1925, the United States embraced a limited pro-arbitration policy by enacting the Federal Arbitration Act (FAA). The FAA compels the enforcement of freely negotiated arbitration agreements, subordinate to certain subject-matter constraints imposed by other bodies of federal law.[1] Those constraints remained fairly unchanged until the United States ratified the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards (New York Convention).[2] The United States officially implemented and codified the New York Convention in 1970 by amending the FAA to include the Convention in sections 201 through 208 (the New York

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[1] 9 U.S.C. §§ 1–16 (2005); *see* Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc., 473 U.S. 614, 627–28 (1985) (holding that the bargain to arbitrate should be enforce "unless Congress itself has evinced an intention to preclude a waiver of judicial remedies for the statutory rights at issue").

[2] Convention on the Recognition and Enforcement of Foreign Arbitral Awards, June 10, 1958, 21 U.S.T. 2517, 330 U.N.T.S. 3 [hereinafter New York Convention]; *see* Kenneth R. Davis, *When Ignorance of the Law Is No Excuse: Judicial Review of Arbitration Awards*, 45 BUFF. L. REV. 49, 63–77 (1997) (proposing that the policy behind the FAA initially sought to "safeguard the right to arbitrate" but has since evolved to where arbitration is being promoted for its own sake. "This metamorphosis" results in the erosion "of the public policy defense."). Issues of public policy and subject-matter arbitrability closely parallel each other. *See infra* note 223.

Convention and section 201 through 208 of the FAA will be referred to collectively as the "N.Y. Convention Act").[3]

By including the N.Y. Convention Act within the FAA, Congress opened the door for courts to significantly expand the pro-arbitration policy beyond its previously understood role in federal law to the detriment of competing bodies of statutory law and policy in certain situations. The expansion of this policy is most evident in the realm of disputes touching upon international commercial transactions.[4] Section 1 of the original FAA contains an explicit exemption to arbitration for certain classes of workers, which states that "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."[5] The current pro-arbitration policy has insidiously expanded so far that it swallows that exemption, even though the exemption remains in chapter 1, section 1 of the amended FAA. The policy does so by enticing courts to take analytical shortcuts when determining whether the section 1 exemption for seamen extends to the N.Y. Convention Act found in chapter 2 (cases with an international element). The duty to perform a thorough and comprehensive analysis of the entire spectrum of federal law appears to have been neglected by two lines of cases in the Fifth and Eleventh Circuits. Those circuits have only made "a very limited inquiry"[6] in determining that the N.Y. Convention Act controls the arbitrability[7] of claims arising from seamen's employment with an international

[3] 9 U.S.C. § 201 ("The Convention on the Recognition and Enforcement of Foreign Arbitral Awards of June 10, 1958, shall be enforced in United States courts in accordance with this chapter [9 USCS §§ 201–208].").

[4] The clear judicial declaration of this federal policy in the context of international commercial transactions lies in *Mitsubishi Motors Corp.*, 473 U.S. 614, and *Scherk v. Alberto-Culver Co.*, 417 U.S. 506 (1974).

[5] 9 U.S.C. § 1. References to individual sections of title 9 of the United States Code will hereinafter simply be referred to as "section" followed by the specific section number.

[6] Bautista v. Star Cruises, 396 F.3d 1298, 1294 (11th Cir. 2005) (quoting Francisco v. Stolt Achievement MT, 293 F.3d 270, 273 (5th Cir. 2002)). *Bautista* and *Francisco* are the two authoritative opinions on the issue in the Fifth and Eleventh Circuits.

[7] In the United States, "the term 'arbitrability' is often used in the wider sense covering the whole issue of the tribunal's jurisdiction." JULIAN D.M. LEW ET AL., COMPARATIVE INTERNATIONAL COMMERCIAL ARBITRATION 188 (2003). However, when this Article speaks of arbitrability, it uses the term in the narrower sense of subject-matter arbitrability.

element,[8] including ancillary personal injury tort claims.[9] In doing so, those circuits have undermined the public policy choice to extend

[8] This Article speaks of claims arising from seamen's employment rather from seamen's contracts of employment, even though section 1 uses the term "contracts of employment," because most claims specific to seamen turn on status and not exact contractual relationship. *See* Chandris, Inc. v. Latsis, 515 U.S. 347, 379 (1995) (Stevens, J., concurring) (quoting Seas Shipping Co. v. Sieracki, 328 U.S. 85, 104 (1946) (Stone, C.J., dissenting) ("The liability of the vessel or owner for maintenance and cure, regardless of their negligence, was established long before our modern conception of contract. But it, like the liability to indemnify the seaman for injuries resulting from unseaworthiness, has been universally recognized as an obligation growing out of the status of the seaman and his peculiar relationship to the vessel, and as a feature of the maritime law compensating or offsetting the special hazards and disadvantages to which they who go down to sea in ships are subjected.")). If no contractual relationship existed, a worker could still be classified a seaman. In comparison, if no contractual relationship existed, then it follows that an arbitration agreement could not exist because arbitration is a creature of contract. Therefore, the term "seamen's employment contracts" does not address all potential claims by seamen but the broader concept of "arising from seamen's employment" does. For clarity, the bundle of claims traditionally litigated in seamen's employment cases will be grouped by status rather than contractual underpinnings; in other words, status provides a better nexus between all possible claims.

Currently, there is no debate over the exemption of purely domestic seamen/employer relationships from federal arbitral law. *See infra* Part II.B. However, due to the inherent nature of working on the high seas, many, if not most, seamen/employer relationships possess an international element and would therefore intuitively fall under the N.Y. Convention Act. Because this Article argues that all claims rising from seamen's employment are exempt from federal law, this Article will simply agglomerate both international and purely domestic claims into claims arising from seamen's employment.

[9] For the Fifth Circuit and district courts contained therein, see Tuca v. Ocean Freighters, Ltd., No. Civ.A. 05-5019, 2006 WL 901840 (E.D. La. Apr. 5, 2006) (distinguished, however, on the grounds that the contract in question failed to incorporate an arbitration clause in a second contract and therefore did not satisfy the in writing requirement of the N.Y. Convention Act); Magsino v. Spiaggia Maritime, Ltd., No. Civ.A. 04-2148, 2004 WL 2578922 (E.D. La. Nov. 10, 2004); Amizola v. Dolphin Shipowner, S.A., 354 F. Supp. 2d 689 (E.D. La. 2004); Lim v. Offshore Specialty Fabricators, Inc., No. Civ.A. 02-2126, 2003 WL 193518 (E.D. La. Jan. 28, 2003), *vacated*, 404 F.3d 898 (5th Cir. 2005), *cert. denied*, 126 S. Ct. 365 (2005); Gavino v. Eurochem Italia, No. Civ.A. 01-1314, 2001 WL 1491177 (E.D. La. Nov. 23, 2001), *aff'd*, 61 F. App'x 119 (5th Cir. 2003); Francisco v. M/T Stolt Achievement, No. Civ.A. 00-3532, 2001 WL 290172 (E.D. La. Mar. 23, 2001), *aff'd*, 293 F.3d 270 (5th Cir. 2002), *cert. denied*, 537 U.S. 1030 (2002); Lejano v. K.S. Bandak, No. Civ.A. 00-2990, 2000 WL 33416866 (E.D. La. Dec. 8, 2000).

For the Eleventh Circuit and district courts therein, see Latoja v. Carnival Corp., 144 F. App'x 101 (11th Cir. 2005), *cert. denied*, 126 S. Ct. 1419 (2006); Lobo v. Celebrity Cruises, Inc., 426 F. Supp. 2d 1296 (S.D. Fla 2006); Doe v. Royal Caribbean Cruises, Ltd., 365 F. Supp. 2d 1259 (S.D. Fla. 2005), *aff'd*, 180 F. App'x 893 (11th Cir. 2006); Acosta v. Norwegian Cruise Line, Ltd., 303 F. Supp. 2d 1327 (S.D. Fla.

greater judicial protection to seamen, rescinded statutory rights granted to seamen in the Jones Act, and further reduced the limited regulatory restraints on the nebulous world of international shipping.

This Article contends that a complete analysis of all relevant bodies of law, rather than a forced textual interpretation of the FAA, leads to the conclusion that Congress did not withdraw the long- and well-established protections granted to seamen by codifying the New York Convention.[10] Therefore, courts should interpret the ambiguous text of the FAA to extend section 1 to every chapter of the FAA, including the N.Y. Convention Act. This conclusion is grounded upon a plain-meaning interpretation of section 1 of the FAA—the only explicit exemption to arbitration within the Act—and a holistic application of federal law.

The FAA, contained in Title 9 of the U.S. Code, provides the framework of federal arbitral law and is divided into three chapters.[11] The first chapter, sections 1 to 16, constitutes the original FAA, which ostensibly deals only with domestic arbitration, and contains the explicit exemption to federal arbitral law for claims arising from

2003); Bautista v. Star Cruises, 286 F. Supp. 2d 1352 (S.D. Fla. 2003), *aff'd*, 396 F.3d 1289 (11th Cir. 2005), *cert. dismissed*, 545 U.S. 1136 (2005); Adolfo v. Carnival Cruise Lines, Inc., No. 02-23672, 2003 U.S. Dist. LEXIS 24143 (S.D. Fla. Mar. 17, 2003); Amon v. Norwegian Cruise Lines, Ltd., No. 02-21025, 2002 WL 32851545 (S.D. Fla. Sept. 26, 2002).

[10] This Article assumes American law controls the determination of the arbitrability of the claims in question, regardless of which law will or would be applied to the arbitration. See *infra* note 164 for the proposition that when determining whether to recognize an agreement to arbitrate under the New York Convention, courts will generally apply national law in determining arbitrability. The general conflict of law analysis applied to admiralty cases by U.S. courts, and therefore whether a seaman has a Jones Act tort cause of action derives from a trinity of Supreme Court cases: Lauritzen v. Larsen, 345 U.S. 571 (1953), Romero v. International Terminal Operating Co., 358 U.S. 354 (1959), and Hellenic Lines v. Rhoditis, 398 U.S. 306 (1970). *See generally* THOMAS J. SCHOENBAUM, ADMIRALTY AND MARITIME LAW 193 (4th ed. 2004). An admiralty conflict of law analysis balances a number of different factors: (1) the place of the wrongful act; (2) the law of the flag ship; (3) the allegiance or domicile of the injured; (4) the allegiance of the defendant; (5) the place where the contract of employment was made; (6) the inaccessibility of the foreign forum; (7) the law of the forum; and (8) the ship owner's base of operations.

[11] A clear outlining of a consistent federal arbitral nomenclature is essential to digesting the current issue because of the often confusing and conflicting use of the terminology in case law. DaPuzzo v. Globalvest Mgmt. Co., 263 F. Supp. 2d 714, 721 n.5 (S.D.N.Y. 2002) ("The Court notes that the relevant case law reflects some imprecision and overlapping nomenclature with respect to the exact title used to describe the various enactments and legal instruments embodying federal arbitration policy.").

seamen's employment. The second and third chapters, however, reference chapter 1 to form an "interrelated, but . . . not a seamless whole."[12] Chapter 1 fills the gaps of the other two chapters, sets out the procedural framework for federal courts to apply in implementing those chapters, and in certain circumstances—including the current instance—provides substantive elements. Chapter 2 codifies the New York Convention in sections 201 through 208. Chapter 3 codifies the Panama Convention,[13] also known as the Inter-American Convention, in sections 301 to 307. When discussing the three chapters collectively, they will be referred to as the FAA, and the specific chapters will be referenced individually.

Part II of this Article will set out the jurisprudence on the issue of whether section 1 extends to the N.Y. Convention Act and will provide the procedural backdrop for section 1 cases. Part III will establish that the text of the FAA alone cannot resolve the current issue, creating the need for a new analysis. Part IV will develop a new analysis that courts should apply when determining whether the N.Y. Convention Act controls claims arising from seamen's employment. Alternatively,

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[12] Bautista v. Star Cruises, 396 F.3d 1289, 1296 (11th Cir. 2005).

[13] Inter-American Convention on International Commercial Arbitration, Jan. 30, 1975, 14 I.L.M. 336, 1438 U.N.T.S. 248. Hereafter, I will only address the N.Y. Convention Act in chapter 2 but not chapter 3 because of the near identical structure of the two chapters. Section 302 states:

> § 302. Incorporation by reference
>
> Sections 202, 203, 204, 205, and 207 of this *title* [9 U.S.C. §§ 202–205, and 207] shall apply to this chapter [9 U.S.C. §§ 301–307] as if specifically set forth herein, except that for the purposes of this chapter [9 U.S.C. §§ 301–307] "the Convention" shall mean the Inter-American Convention.

9 U.S.C. § 302 (emphasis added). Moreover, section 307 mirrors section 208, which lies at the heart of the current issue:

> § 307. Chapter 1; residual application
>
> Chapter 1 [9 U.S.C. §§ 1–16] applies to actions and proceedings brought under this chapter [9 U.S.C. §§ 301–307] to the extent chapter 1 [9 U.S.C. §§ 1–16] is not in conflict with this chapter [9 U.S.C. §§ 301–307] or the Inter-American Convention as ratified by the United States.

Id. § 307. Therefore, even though this Article does not directly address section 1 extending to the Inter-American Convention, the analysis developed herein should apply equally to cases falling under that Convention.

the analysis developed herein could be viewed as the logical continuation of the current jurisprudence if courts were to hold that the text of the FAA is ambiguous in regard to the scope of section 1's applicability.

Finally, this Article draws an analytical distinction between conventional contract claims and tort causes of action, arguing that the analysis of arbitrability should differ based on this distinction. The distinction between personal injury tort causes of action and conventional contractual causes of action should be borne in mind on a more general level because it reveals the question of whether the United States and other New York Convention signatories intend for the convention to envelope personal injury tort claims simply because they arose from legal relationships with a commercial-contractual underpinning.[14]

II. THE CURRENT LEGAL LANDSCAPE

The N.Y. Convention Act's applicability and determination of forum are intimately intertwined. Part II.A outlines the procedural steps, jurisdictional elements, and real world practicalities involved with seamen employment and tort litigation under the N.Y. Convention Act that motivate litigating parties to fight for their preferred forum and provides the backdrop for the issue of whether section 1 extends throughout the FAA. Part II.B provides an example of an analytical framework currently employed by one court that has led to the conclusion that the exemption for seamen found within the FAA does not apply to every case falling under the Act. This analysis, tinted by the United States' pro-arbitration policy, is quite narrow and focuses solely on the statutory language of the N.Y. Convention Act.

The two circuits that have addressed the issue have held that the N.Y. Convention Act controls the arbitrability of claims arising from seamen's employment, despite the explicit exemption within section 1 of the same act (FAA). The determination that the N.Y. Convention Act controls the claims in question leads the courts to find federal jurisdiction,[15] without which the majority of cases would remain in

[14] For examples of commercial arbitral tribunals adjudicating tort claims, see *Doe*, 365 F. Supp. 2d 1259 (employee alleging eight counts relating to rape she experienced while working on employer's vessel), and *Bautista,* 396 F.3d 1289 (members of cruise ship crew seeking to recover for death or injury caused by a steam boiler explosion).

[15] *See infra* Part II.A (addressing the analysis of whether the N.Y. Convention controls the current issue under the rubric of subject-matter jurisdiction). This Article

state court,[16] and finding subject-matter jurisdiction usually leads courts to mechanically compel arbitration.[17]

A. Procedural Steps and Jurisdictional Prerequisite

The choice of forum plays a significant role in seamen employment litigation. The "prospect of generous recoveries"[18] attracts seamen to state courts, while other advantages exist for either party to get into or to stay in their preferred forum.[19] Moreover, being sent to arbitration—which is arguably pro-employer—presents the very real possibility that a seaman's right to recovery will be diminished or extinguished. These potential outcomes provide a strong incentive for seamen to remain in their chosen forum, which is often

addresses the issue of subject-matter jurisdiction under section 203. "An action or proceeding falling under the Convention shall be deemed to arise under the laws and treaties of the United States. The district courts of the United States . . . shall have original jurisdiction over such an action or proceeding, regardless of the amount in controversy." 9 U.S.C. § 203 (2005). It is assumed that issues of personal jurisdiction will be addressed before the issue of subject-matter jurisdiction arises.

[16] This Article contends that Congress made a clear and conscious decision not to regulate the arbitrability of conventional contractual claims arising from seamen's employment contracts, thereby leaving the field to be regulated by the states. This Article does not, however, take the stance that seamen's conventional contractual claims should never be a matter for arbitration. As subsequently discussed, advantages and benefits exist to the resolution of international disputes, which arguably have commercial aspects, through arbitration.

[17] If the N.Y. Convention Act does not control claims arising from seamen's employment it follows that section 1 applies and, if it applies, the court cannot compel arbitration. *See* Harden v. Roadway Package Sys., Inc., 249 F.3d 1137, 1139 (9th Cir. 2001) (finding a delivery driver to be a transportation worker engaged in interstate commerce and, therefore, within scope of section 1 exemption, and overruling the district court's compulsion of arbitration because the lower court "lacked the authority to compel arbitration in this case because the FAA is inapplicable to drivers . . . engaged in interstate commerce").

[18] Robert H. Murphy, *Prosecuting and Defending Foreign Seaman Claims: The Defensive Perspective*, 3 LOY. MAR. L.J. 45, 45 (2004).

[19] DEIDRE FITZPATRICK & MICHAEL R. ANDERSON, SEAFARERS RIGHTS 535 (2005) ("The forum can greatly affect the outcome of the claim. Major procedural differences exist between a state forum and a federal forum. For example, in state court, counsel are much more involved in selecting the jury than in federal court. Moreover, in state court, a plaintiff usually needs only five out of six, or nine out of 12, votes of the jury members to prevail. This is unlike federal court, which requires a unanimous verdict of the jury. Indeed, if a claimant is ultimately on the 'admiralty side' of federal court, a jury trial is not generally available and the case is determined entirely by the federal judge."). This rationale extends just as forcibly to an arbitral forum.

state court.[20] The battle for jurisdiction in maritime cases is often a "surrogate" battle for liability, with such cases often settling after the court determines jurisdiction.[21]

Legal actions between seamen and their employers often begin in state court, particularly in states perceived as providing certain litigation advantages to seamen.[22] If the employment contract contains an arbitration clause and an international element exists to the employee-employer relationship, the employer will remove the case to federal court under section 205.[23] A federal court determines whether jurisdiction exists when it rules on a motion to remand to state court for lack of subject-matter jurisdiction, when the defendant subsequently moves to compel arbitration, or when both motions are made simultaneously.[24] The N.Y. Convention Act grants removal jurisdiction "over just about any suit in which a defendant contends that an arbitration clause falling under the Convention provides a defense,"[25] with the standard being whether the controversy "relates

[20] *See* U.S. Bulk Carriers, Inc. v. Arguelles, 400 U.S. 351, 359–60 (1971) (Harlan, J., concurring) ("[T]he choice of forums inevitably affects the scope of the substantive right to be vindicated . . . ."); *see also* Alexander v. Gardener-Denver Co., 415 U.S. 36, 57–58 (1974) (stating that arbitral procedures are less protective of individual statutory rights than are judicial procedures).

[21] Martin Davies, *Forum Selection Clauses in Maritime Cases*, 27 TUL. MAR. L.J. 367, 367 (2003).

[22] Murphy, *supra* note 18, at 45 ("Foreign seamen have always been drawn to United States courts by the prospect of generous recoveries, but Louisiana attracts more than its share. The reason is clear—the Louisiana legislature and state courts have extended an invitation to foreign seamen worldwide to register their complaints in Louisiana. Expansive notions of jurisdiction as well as disregard of maritime defenses such as forum selection, choice of law, and arbitration clauses in seaman's employment contracts have opened the doors of Louisiana courts for foreign seamen claims.").

[23] "Where the subject matter of an action or proceeding pending in a State court relates to an arbitration agreement . . . the defendant . . . may, at any time before the trial thereof, remove such action or proceeding to the district court of the United States . . . ." 9 U.S.C. § 205 (2005). This Article does not address the propriety of federal jurisdiction over claims arising from seamen's employment contracts per se. If a seaman plaintiff or employer initially chooses a federal forum and establishes jurisdiction on an alternative basis, such as admiralty or diversity, a federal court should not be denied jurisdiction. This Article simply contends that the N.Y. Convention Act does not provide a basis for federal jurisdiction.

[24] *See* Magsino v. Spiaggia Maritime, Ltd., No. Civ.A. 04-2148, 2004 WL 2578922, at *1 (E.D. La. Nov. 10, 2004) (considering concurrent motions to compel arbitration and to remand to state court).

[25] Beiser v. Weyler, 284 F.3d 665, 669 (5th Cir. 2002).

to" to an arbitration agreement.[26] Courts give an expansive interpretation to the phrase "relates to," with jurisdiction existing "whenever an arbitration agreement falling under the Convention could *conceivably* affect the outcome."[27] In essence, the determination of whether subject-matter jurisdiction exists is both synonymous and simultaneous with the determination of whether the N.Y. Convention Act controls the arbitrability of claims arising from seamen's employment—if the Act does not control, it follows that a federal court lacks subject-matter jurisdiction.[28] If the federal court determines that the controversy does not "relate to" an arbitration agreement falling under the N.Y. Convention Act, it will remand the action to the initial state court.[29]

Although case law on the issue of the N.Y. Convention Act controlling the arbitrability of claims arising from seamen employment is sparse or non-existent in many jurisdictions, the federal jurisdictions that have addressed the issue have uniformly concluded that the N.Y. Convention Act controls, despite the section 1 exemption.[30]

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[26] 9 U.S.C. § 205 (2005).

[27] *Beiser*, 284 F.3d at 669.

[28] *See infra* note 258.

[29] Whether a third party, such as an insurance company or the family of a deceased seaman, can invoke an arbitration clause constitutes a distinct but subsidiary issue to whether claims arising from seamen's employment are arbitrable. This Article only addresses a direct action between a seaman and his employer. However, it suffices to say that if an arbitration agreement is void due to subject-matter non-arbitrability, it follows that a third party cannot invoke the same arbitration agreement.

[30] It appears at this time that only the Fifth and Eleventh Circuits have directly addressed the issue. This corresponds with where one would expect cases arising in admiralty to be brought geographically and the states that are perceived as seamen friendly. *See* Murphy, *supra* note 18, at 45; *see also In re* Eternity Shipping, Ltd., 444 F.Supp. 2d 347 (D. Md. 2006) (applying traditional forum selection clause analysis, rather than relying on the N.Y. Convention Act, to the same "arbitration" agreement at issue in the Fifth and Eleventh Circuit cases).

In a one-year span—from February 1, 2005 to February 1, 2006—only two cases within the Eleventh Circuit, including all district and state courts, contained the term "foreign arbitral awards." *See* Rintin Corp., S.A. v. Domar, Ltd. 374 F. Supp. 2d 1165 (S.D. Fla. 2005); Doe v. Royal Caribbean Cruises, Ltd., 365 F. Supp. 2d 1259 (S.D. Fla. 2005). In the Fifth Circuit, only eleven cases contained the search term. Of those, only eight gave treatment to the N.Y. Convention Act. No court saw more than two N.Y. Convention Act cases in the given year. *See* Lim v. Offshore Specialty Fabricators, Inc., 404 F.3d 898 (5th Cir. 2005); Keytrade USA, Inc. v. Ain Temouchent M/V, 404 F.3d 891 (5th Cir. 2005); RA Inv. I, LLC v. Smith & Frank Group Servs., No. 4:05CV363, 2005 U.S. Dist. LEXIS 36208 (E.D. Tex. Dec. 5, 2005); Ling v. Deutsche Bank AG, No. 4:05CV345, 2005 U.S. Dist. LEXIS 31734 (E.D. Tex. Nov. 28, 2005); Mitsui & Co. v. Delta Brands, Inc., No. 3:04-CV-1070-L,

The Fifth Circuit's Eastern District of Louisiana is a hotbed for this type litigation because of its close ties with the shipping industry. The Eastern District has served as an incubator for various modes of analyses for determining the applicability of the N.Y. Convention Act to claims arising from seamen's employment. For example, in *Dahiya v. Talmidge International, Ltd.*,[31] the injured seaman, a citizen of India working for a Singapore-based company, was injured on the high seas en route to Louisiana, where he received medical treatment.[32] The district court remanded the case to state court because it lacked subject-matter jurisdiction under the N.Y. Convention Act. The court held the forum selection clause "invalid because it contravenes Louisiana express public policy."[33] Therefore, it concluded that "the employment contract [did] not provide for arbitration in the territory of a Convention signatory, and . . . that no arbitration agreement exist[ed] to justify removal under [the N.Y. Convention Act]."[34] The court

2005 U.S. Dist. LEXIS 9678 (N.D. Tex. May 20, 2005); Galtney v. KPMG LLP, No. H-05-583, 2005 U.S. Dist. LEXIS 39500 (S.D. Tex. May 19, 2005); Mangin v. Murphy Oil USA, Inc., No. Civ.A. 04-2172, 2005 U.S. Dist. LEXIS 8338 (E.D. La. May 2, 2005); Ensco Offshore Co. v. Titan Marine L.L.C., 370 F. Supp. 2d 594 (S.D. Tex. 2005). The searches were run on LexisNexis on February 1, 2006 with search term "foreign arbitral awards" using natural language in the following sources: Legal > Cases- U.S. > All Courts – By Circuit > 11th & Former 5th Circuits – Federal & State Cases, Combined and Legal > Cases- U.S. > All Courts – By Circuit > 5th Circuit – Federal & State Cases, Combined.

For an interesting example of one district court's unfamiliarity with the N.Y. Convention Act, see Intergen N.V. v. Grina, No. Civ.A. 01-11774-REK, 2002 WL 32067127, at *2 (D. Mass. Nov. 6, 2002) (finding it unconstitutional to compel arbitration outside the United States, even if a federal statute and international convention directed it to do so. "This court has available to it no means of enforcement . . . . For example, it is beyond genuine dispute that this court is without authority to order the United States Marshal for the District of Massachusetts to send a team of deputies to London to find and effect service on all interested persons and entities.").

[31] No. Civ.A. 02-2135, 2002 WL 31962151 (E.D. La. Oct. 11, 2002).

[32] *Id.* at *1; *see also* Dahiya v. Talmidge Int'l Ltd., 931 So. 2d 1163, 1165 (La. Ct. App. 2006).

[33] *Dahiya*, 2002 WL 31962151, at *2.

[34] *Id.* The court's reasoning is questionable at best. The Fifth Circuit was unable to review the merits of the opinion as it was divested of appellate jurisdiction once the district court determined that it lacked subject-matter jurisdiction and remanded the case to state court. Dahiya v. Talmidge Int'l, Ltd., 371 F.3d 207 (5th Cir. 2004). Once remanded to state court, judgment was granted to the plaintiff seaman. *Dahiya*, 931 So. 2d at 1165. However, the Louisiana Court of Appeals, citing *Bautista* and *Francisco*, found the arbitration clause enforceable, thereby overturning the judgment. *Dahiya*, 931 So. 2d at 1170–73.

never addressed the issue of whether the exemption to arbitration for seamen found in section 1 extended to the N.Y. Convention Act.

The analysis and result of *Dahiya* contrasts with the similar case of *Gavino v. Eurochem Italia*.[35] Although a Louisiana federal court decided the case a little more than one year before *Dahiya*, the *Dahiya* court did not cite *Gavino*. In *Gavino*, a Filipino seaman working for an Italian company was injured—inferably on the high seas.[36] The *Gavino* court reached a result opposite to the *Dahiya* court by holding that the N.Y. Convention Act controls the arbitrability of claims arising from seamen's employment, in spite of the exemption found in section 1.[37] Because subject-matter jurisdiction existed under the N.Y. Convention Act, the federal court denied the motion to remand to the state court.[38] The district court sidestepped the question of whether Louisiana's public policy against forum selection clauses in employment contracts was relevant to determining whether section 1 extends to the N.Y. Convention Act by reasoning that "since the instant dispute has no connection to Louisiana, the Court does not find that Louisiana's policy against forum selection clauses in employment contracts is applicable."[39]

The result in *Gavino* comports with the greater part of historical and current jurisprudence on this subject.[40] The Fifth and Eleventh Circuits consistently compel arbitration of claims arising from seaman's employment under the N.Y. Convention Act,[41] while other circuits have yet to address the issue. Although courts have employed different analyses in the past, sometimes leading to contradictory results,[42] the standard analysis now applied looks first at whether the jurisdictional prerequisites exist to compel arbitration and then at

[35] No. Civ.A. 01-1314, 2001 WL 845456 (E.D. La. July 24, 2001).

[36] *Id.* at *1.

[37] *Id.*

[38] *Id.* at *4.

[39] *Id.* at *3.

[40] *See supra* note 9.

[41] *See* Bautista v. Star Cruises, 396 F.3d 1289, 1296 (11th Cir. 2005); Francisco v. Stolt Achievement MT, 293 F.3d 270, 273 (5th Cir. 2002).

[42] For examples of when arbitration was not compelled, see Dahiya v. Talmidge Int'l, Ltd., No. Civ.A. 02-2135, 2002 WL 31962151 (E.D. La. Oct. 11, 2002); Jaranilla v. Megasea Maritime Ltd., No. Civ.A. 02-2048, 2002 WL 2022516 (E.D. La. Aug. 29, 2002).

whether an affirmative defense or exemption, such as section 1, would preclude a federal court from compelling arbitration.[43]

The prerequisites for subject-matter jurisdiction under the N.Y. Convention Act are well-established and relatively uniform across all circuits.[44] Determining whether a case meets the jurisdictional prerequisites is a factual inquiry, whereas determining the existence of a categorical defense to arbitrability is an issue of law. The jurisdictional prerequisites arise from the interaction of the New York Convention and chapter 2, with section 202 being the directly controlling statutory text.[45]

Section 202 has a four-part test for finding jurisdiction under the N.Y. Convention Act. Jurisdiction exists if (1) there is an agreement in writing to arbitrate the dispute;[46] (2) the agreement provides for

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[43] Some courts decide first whether there is the affirmative defense of exemption under the FAA before addressing the jurisdictional prerequisites. Regardless of which issue is decided first the result will be the same.

[44] 2 VED P. NANDA & DAVID K. PANSIUS, LITIGATION OF INTERNATIONAL DISPUTES IN U.S. COURTS § 19:6 (2d ed. 2005), (stating that courts normally use a "four part test with minimal variation"); *see also* Sedco, Inc. v. Petroleos Mexicanos Mexican Nat'l Oil Co., 767 F.2d 1140, 1144–45 (5th Cir. 1985).

[45] Section 202 states as follows:

> Agreement or award falling under the Convention
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> 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 [9 U.S.C. § 2], 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.

9 U.S.C. § 202 (2005).

[46] The "in writing" requirement has not been uniformly interpreted across the circuits. Standard Bent Glass Corp. v. Glassrobots Oy, 333 F.3d 440, 449 (3d Cir. 2003) (recognizing a split between the Second and Fifth Circuits and agreeing with the Second Circuit that "an arbitration clause is enforceable only if it was contained in a signed writing or an exchange of letters."); *see also* Czarina, L.L.C. ex rel. Halvanon Ins. Co. v. W.F. Poe Syndicate, 254 F. Supp. 2d 1229, 1236 n.16 (M.D. Fla. 2002) (dismissing the Fifth Circuit's reasoning as "unpersuasive").

arbitration within a signatory country's territory; (3) a foreign element exists to the agreement such as one of the parties being a foreign citizen; and (4) the agreement arises out of a commercial legal relationship.[47] "The four-point checklist purports to lend automaticity to the enforcement procedure."[48] The first three requirements fail to raise issues of specific relevance to seamen's employment litigation as they apply equally to any agreement, regardless of the nature of the underlying legal relationship. The fourth requirement has been a point of contention in seamen's employment litigation,[49] but the issue of extending the section 1 exemption for seamen to the N.Y. Convention Act has subsumed the requirement.

Once the jurisdictional prerequisites are established, the final step[50] in the analysis for finding subject-matter jurisdiction, and the subsequent compulsion to arbitrate, focuses on whether an affirmative defense exists that would preclude the application of the N.Y. Convention Act.[51] The specific exemption for seamen's employment

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[47] NANDA & PANSIUS, *supra* note 44, at 19–16 n.5 (citing Ledee v. Ceramiche Ragno, 684 F.2d 184, 186–87 (1st Cir. 1982); Tenn. Imps., Inc. v. Filippi, 745 F. Supp. 1314, 1321–22 (M.D. Tenn. 1990); Wilson v. Lignotock: U.S.A., Inc., 709 F. Supp. 797, 798 (E.D. Mich. 1989)).

[48] JOSEPH D. BECKER, THE AMERICAN LAW OF NATIONS: PUBLIC INTERNATIONAL LAW IN AMERICAN COURTS 102 (2001).

[49] *See infra* Part II.B (discussing Bautista v. Star Cruises, 396 F.3d 1289 (11th Cir. 2005). I agree with the conclusion that, but for the exemption, these contracts are commercial in light of established jurisprudence. If not exempted, it follows that such contracts are commercial and satisfy the fourth requirement. However, as previously and subsequently discussed, I do not agree with lumping tort causes of action with commercial contractual claims.

[50] This Article endeavors to keep analytically distinct the issue of whether there was a valid contract in the first place, apart from the issue of whether the subject matter of such claims is arbitrable—an undertaking that has often been conflated in some courts' analyses. *See* Dahiya v. Talmidge Int'l Ltd., No. Civ.A 02-2135, 2002 WL 31962151 (E.D. La. Oct. 11, 2002). As this Article seeks to address only whether the N.Y. Convention Act controls the arbitrability of the subject matter of seamen's employment claims and not the factual prerequisites for finding a valid contract, it will hereafter be assumed that seamen's contracts of employment are valid under traditional rules of contract, i.e., the contracts are not tainted by adhesion. This is a large assumption to make in light of the nature of the industries that employ seamen. *See infra* Part IV.C (discussing the public policy of protecting sailors as "wards of the court").

[51] "[J]urisdictional prerequisites to an action confirming an award are different from the several affirmative defenses to confirmation." *Bautista*, 396 F.3d at 1295 (quoting Czarina, L.L.C. v. W.F. Poe Syndicate, 358 F.3d 1286, 1292 n.3 (11th Cir. 2004)). This rationale applies equally to motions to compel as evidenced by the *Bautista* decision.

claims, although differently characterized in some opinions, functions as an affirmative defense to the enforcement of the arbitration clauses in question.

Federal law does not control the arbitrability of seamen employment litigation falling outside the N.Y. Convention Act—litigation that is purely domestic. Such contracts are clearly outside of the scope of chapter 1 of the FAA and therefore are an affirmative defense to compelling arbitration under Federal law. Section 1 exempts seamen's employment claims from the scope of chapter 1 by excluding them from the definition of commerce as used throughout the chapter and, as this Article contends, the entirety of the FAA. The pertinent part of section 1 says that

> '[C]ommerce', 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.[52]

The Supreme Court in *Circuit City Stores, Inc. v. Adams*[53] recently clarified the scope of the section 1 exemption in addressing a split between the circuits.[54] The *Circuit City* Court determined that the section 1 exemption should not extend to all employment contracts, because "to exclude all employment contracts [from the FAA] fails to give independent effect to the statute's enumeration of the specific categories of workers."[55] The Court limited the scope of the section 1 exemption to workers "actually engaged in the movement of goods in

[52] 9 U.S.C. § 1 (2005).

[53] 532 U.S. 105 (2001), *cited in* EEOC v. Waffle House, Inc., 534 U.S. 279, 289 (2002). In *Circuit City*, an employee salesman argued he was engaged in interstate commerce and therefore exempt from arbitration under section 1. *Id.* at 114; *see also* Maryland Cas. Co. v. Realty Advisory Bd. on Labor Relations, 107 F.3d 979, 982 (2d Cir. 1997) (explaining that the exemption in section 1 "is limited to workers involved in the transportation industries").

[54] *Circuit City*, 532 U.S. at 109 (stating that the Ninth Circuit had split with other circuits).

[55] *Id.* at 114.

interstate commerce."[56] In doing so, the Court reaffirmed that seamen's employment claims arising under chapter 1 of the FAA are excluded, but was silent about whether the exemption applies to chapter 2.

B. The Eleventh Circuit's Treatment of Section 1

The Eleventh Circuit's definitive opinion on section 1, *Bautista v. Star Cruises*,[57] fails to extend the exemption to the N.Y. Convention Act and exemplifies how courts focus solely on the text of the N.Y. Convention Act and the greater FAA when determining the arbitrability of claims arising from seamen's employment in cases with a clear foreign element. The court's analysis of arbitrability focuses on whether chapter 1, section 1 precludes arbitration under chapter 2 without considering competing bodies of law or the greater statutory scheme. The *Bautista* Court relied heavily on *Francisco v. Stolt Achievement MT*, the Fifth Circuit's parallel case on the issue.[58]

In *Bautista*, a cruise ship's boiler exploded suddenly when the ship was in the port of Miami, killing six people and gravely wounding four others.[59] Representatives of the deceased and four survivors filed separate, but nearly identical, claims in a Florida court claiming damages for failure to cure and provide maintenance, unearned wages, and violations of the Jones Act.[60] Defendant, Norwegian Cruise Line, Ltd., removed the case to federal court under section 205 of chapter 2, claiming an arbitration agreement in the seamen's contracts governed the dispute.[61] Each aggrieved party had signed a standard contract of employment, approved by a division of the Department of Labor and Employment of the Republic of Philippines, the seamen's country of citizenship.[62] Each individual contract contained an identical

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[56] *Id.* at 112 (quoting Cole v. Burns Int'l Sec. Servs., 105 F.3d 1465, 1471 (D.C. Cir. 1997)); *see also* Paladino v. Avnet Computer Techs., 134 F.3d 1054, 1060–61 (11th Cir. 1998); Great W. Mortgage Corp. v. Peacock, 110 F.3d 222, 226 (3d Cir. 1997).

[57] 396 F.3d 1289 (11th Cir. 2005).

[58] *Bautista* cited *Francisco* five times. *Id.* at pages 1294, 1295, 1298, 1299, and 1301.

[59] Bautista v. Star Cruises, 286 F. Supp. 2d 1352, 1356 (S.D. Fla. 2003).

[60] *Id.*

[61] *Id.*

[62] *Id.*

arbitration clause which had been signed by the seamen and approved by the Philippine Department of Labor.[63]

The Eleventh Circuit held that the N.Y. Convention Act controls the arbitrability of claims arising from seamen's employment when the employment has a foreign element and concluded that the exemption for seamen, found in chapter 1 of the FAA, did not extend to chapter 2—the N.Y. Convention Act.[64] The court indicated its pro-arbitration predisposition by stating, "We are mindful that the [N.Y.] Convention Act 'generally establishes a strong presumption in favor of arbitration of international commercial disputes.'"[65] The court began with the proposition that the New York Convention requires the United States to recognize commercial agreements to submit to arbitration.[66] The United States, however, maintains the right to limit the application of the New York Convention to legal relationships defined as commercial under U.S. law.[67] The plaintiffs contended that the seamen's employment contracts were defined as non-commercial and were therefore exempt.[68] The plaintiffs reasoned that the definition of commerce in chapter 1, sections 1 and 2 does not include seamen's employment contracts and argued that the definition applies throughout the FAA.[69] The court rejected the plaintiff's proposed application of the definition by limiting the scope of section 1's application to chapter 1 due to the operation of chapters 2 and 3.[70] As a result, the exemption for seamen's employment contracts did not extend to cases falling under chapter 2.

The court determined that the exemption for seamen's employment contracts did not extend to cases falling under chapter 2 "either directly as an integral part of the [N.Y.] Convention Act or residually as a non-conflicting provision of the FAA."[71] In finding that

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[63] *Id.* at 1357. For the complete arbitration clause, see *infra* note 133.

[64] Bautista v. Star Cruises, 396 F.3d 1289, 1303 (11th Cir. 2005).

[65] *Id*. at 1295 (quoting Indus. Risk Insurers v. M.A.N. Gutehoffnungshütte GmbH, 141 F.3d 1434, 1440 (11th Cir. 1998)).

[66] *Id.* at 1296.

[67] *Id.*

[68] *Id*.

[69] Bautista v. Star Cruises, 286 F. Supp. 2d 1352, 1359 (S.D. Fla. 2003).

[70] *Bautista*, 396 F.3d at 1296. The court only devoted one paragraph to dealing with the issue of defining the scope of "commercial" in light of section 1. *Id.*; *see also Bautista*, 286 F. Supp. 2d at 1364–65.

[71] *Bautista*, 396 F.3d at 1296. This technical or arguably superficial distinction plays no role in this Article's analysis because congressional intent is paramount to interpreting the FAA. As this Article establishes, ambiguity exists in the FAA. The

the exemption did not apply to the N.Y. Convention Act, the court reasoned that the three chapters of the FAA are "closely interrelated" but "not a seamless whole," which may—and in this case did—lead to conflicts among the chapters.[72]

Congress, aware of such potential conflicts, provided two means of resolving them, which the court also found to indicate that the FAA should not be construed as a single statute.[73] The first means is the hierarchical structure of the FAA, which gives primacy to chapter 2 in its field of application and which subordinates the application of chapter 1 to cases falling under chapter 2, so far as chapter 1's application does not conflict with the provisions of chapter 2.[74] Section 208 resolves conflicts between the chapters: "Chapter 1 [9 U.S.C. §§ 1–16] applies to actions and proceedings brought under this chapter [9 U.S.C. §§ 201–208] to the extent that chapter is not in conflict with this chapter [9 U.S.C. §§ 201–208] or the Convention as ratified by the United States."[75]

The second means employed by Congress to create cohesiveness between the chapters was to embed explicit references to sections of chapter 1 within chapter 2.[76] Section 202 contains an explicit reference to section 2, which lies at the heart of the current issue. It states that "[a]n 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 [S]ection 2 of this *title* [9 U.S.C. § 2], falls under the Convention."[77] The court reasoned that the explicit reference to section 2 "does not indicate an intent to limit the definition of 'commercial' to those

issue of whether section 1 extends to the N.Y. Convention Act or whether the N.Y. Convention Act incorporated section 1 is irrelevant because structuring the analysis around this distinction attributes a level of technical specificity to Congress not supported by the ambiguous text. The better question is whether Congress intended federal law to control claims arising from seamen's employment. Therefore, this Article uses the terminology "section 1 extends to" and the "N.Y. Convention Act incorporated" interchangeably.

[72] *Id.* at 1296–97.

[73] *Id.* at 1297. For an example of a clear conflict between chapters 1 and 2 controlled by section 208, see Phoenix Aktiengesellschaft v. Ecoplas, Inc., 391 F.3d 433, 437 n.3 (2d Cir. 2004) (discussing the conflict between section 9, which has a one-year consent-to-confirmation requirement, and section 207, which only requires the commencement of an action to enforce an award within three years).

[74] *Bautista*, 396 F.3d at 1297.

[75] 9 U.S.C. § 208 (2005).

[76] *Bautista*, 396 F.3d at 1297.

[77] 9 U.S.C. § 202 (emphasis added).

described in section 2 of the FAA as modified by section 1; the expansive term 'including' would be superfluous if the FAA provided the full and complete definition."[78] The reference to section 2 is only meant to be "generally illustrative" of the scope of cases covered by chapter 2.[79] The court went on to dismiss evidence of legislative history as bearing on its interpretation of the statute.[80]

The court also decided that section 1 did not apply residually.[81] The court found a conflict between the "broad and generic" language of the N.Y. Convention and the "narrow and specific" exemptions of the FAA by reasoning that the N.Y. Convention Act applies to all "commercial legal relationships without exception," and that any exemption for a sub-class of commercial relationships would conflict.[82] As the court had already dismissed the argument that the United States' national law definition of commerce was to be found in the FAA, seamen's employment contracts were commercial legal relationships and any exemption for them would conflict with the broad scope of the N.Y. Convention Act.[83] The court then invoked the goals of the United States' pro-arbitration policy to further justify its interpretation by citing *Scherk v. Alberto-Culver Co*.[84]

The final section of the opinion addressed the plaintiff's other affirmative defenses against compelling arbitration under Article II(3) of the New York Convention. That article states that signatory nations must enforce an agreement to arbitrate unless the "agreement is null and void, inoperative or incapable of being performed."[85] Even though the plaintiffs did not "style" their arguments as falling under Article II(3), the court construed them as such.[86] The court analyzed the issue of unconscionability under the "null and void" clause and analyzed the argument that the case could not be heard in the Philippines under the "not-capable-of-being-performed" clause.[87] The court quickly rejected

[78] *Bautista*, 396 F.3d at 1298.

[79] *Id.*

[80] *See id.* at 1298–99.

[81] *See id.* at 1298.

[82] *Id.* at 1299.

[83] *Id.*

[84] *See id.* at 1299–1300 (citing Scherk v. Alberto-Culver Co., 417 U.S. 506 (1974)).

[85] New York Convention, Dec. 29, 1970, 21 U.S.T. 2517, 330 U.N.T.S. 3.

[86] *See Bautista*, 396 F.3d at 1301–02.

[87] *See id*. at 1302–03.

both arguments.[88] As the preceding review of the *Bautista* reasoning evinces, the current jurisprudence narrowly focuses on the text of the N.Y. Convention Act without considering other bodies of law.

III. AMBIGUITY EXISTS IN THE STATUTORY TEXT OF THE FAA

The current trend of expanding the United States' pro-arbitration policy leads to shortcomings in courts' analytical framework when addressing the arbitrability of seamen's contractual and tort claims. Part II.A analyzes the text of the FAA to determine whether the text standing alone can resolve the current issue. Part II.B proffers legislative history to undermine the current jurisprudence's holding that the FAA's text is unambiguous. Courts characterize their analysis as merely the interpretation of the N.Y. Convention Act's text without any regard for Congress's specific intent as to the particular issue.[89] Such means of analysis not only begins with an incomplete premise,[90]

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[88] *See id.*

[89] *See id.* at 1295–96; *Francisco*, 293 F.3d at 275.

[90] *See, e.g.*, United States v. American Trucking Ass'ns, Inc., 310 U.S. 534, 542–43 (1940).

> In the interpretation of statutes, the function of the courts is easily stated. It is to construe the language so as to give effect to the intent of Congress. There is no invariable rule for the discovery of that intention. Attempting to determine the meaning of a few words after they have been isolated from their context certainly would not contribute greatly to the purpose of the draftsmen of a statute, particularly in a law drawn to meet the needs of major occupation.

Id. The Court went on to note that intent can be found in the plain meaning but,

> when that meaning has led to absurd or futile results, however, this Court has looked beyond the words to the purpose of the act. Frequently, however, even when the plain meaning did not produce absurd results but merely an unreasonable one 'plainly at variance with the policy of the legislation as a whole' this court has followed that purpose rather than the literal words. When aid to construction of the meaning of words as used in the statute, is available, there certainly can be no 'rule of law' which forbids its use, however clear the words may appear on a 'superficial examination' . . . . A few words of general connotation appearing in the text of statutes should not be given a wide meaning contrary to a settled policy, excepting as a different purpose is plainly showing.

but also leads to a forced textual interpretation of the FAA. Part II.C provides a ground for distinguishing the current jurisprudence and applying the analysis proffered in Part IV.

A. The Ambiguous Text of the FAA

The conclusion in current jurisprudence that the language of N.Y. Convention Act is clear and unambiguous, thereby preventing courts from looking beyond the language of the Act,[91] will be addressed first.[92] As *Bautista* stated,

> As we take up this issue of statutory interpretation, the first step is to determine whether the statutory language has a plain and unambiguous meaning by referring to the language itself, the specific context in which that language is used, and the broader context of the statute as a whole. The inquiry ceases if the language is clear and the statutory scheme is coherent and consistent. Such is the case here.[93]

To the contrary, ambiguity does exist.[94] The court was quick to dismiss the exemption found in section 1 for seamen because section

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Id. at 543–44.

[91] *See Bautista*, 396 F.3d at 1295; *Francisco*, 293 F.3d at 275 ("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'").

[92] *See* Estate of Cowart v. Nicklos Drilling Co., 505 U.S. 469, 475 (1992); *see also* Burlington Northern R.R. Co. v. Oklahoma Tax Comm'n, 481 U.S. 454, 461 (1987); Rubin v. United States, 449 U.S. 424, 430 (1981).

[93] *Bautista*, 396 F.3d at 1295–96.

[94] *See* Alan Scott Rau, *The New York Convention in American Courts*, 7 AM. REV. INT'L ARB. 213, 230 (1996):

> Section 202 is hardly a model of elegant drafting. It is curiously phrased only in the negative, excluding from Convention status certain agreements or awards between American citizens. Of course, one explanation for this peculiar way of putting things can be found in the architecture of the section: The first sentence of § 202 announces the overarching principle—apparently absolute—that all agreements or awards "arising out of" a "commercial" "relationship" come within the Convention. The second sentence,

202[95] only references section 2 but fails to explicitly mention section 1.[96] Section 202 states that "[a]n 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 [9 U.S.C. § 2], falls under the Convention."[97] Section 2 states,

> A written provision in any maritime transaction or a contract evidencing a transaction involving commerce to settle by arbitration a controversy thereafter arising out of such contract or transaction, or the refusal to perform the whole or any part thereof, or an agreement in writing to submit to arbitration an existing controversy arising out of such a contract, transaction, or refusal, shall be valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract.[98]

The Eleventh Circuit in *Bautista* interpreted the reference to section 2 as being only "generally illustrative of the commercial legal relationships covered by section 202"[99] and consequently it could not limit the legal relationships falling under the N.Y. Convention Act. The court in *Bautista* came to this interpretation of the term "including," found in section 202, by relying on a sixty-four-year-old precedent from the Supreme Court and a thirty-seven-year-old decision from a sister circuit.[100] However, the Eleventh Circuit disregarded the context and the diverse statutory schemes in which those decisions interpreted the word "including" and failed to consider the entire statutory scheme in question. Putting so much reliance on one word, out of the entire FAA, contradicts a canon of statutory

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> quoted above, is then presumably necessary to introduce the inevitable limitations.

[95] *See Bautista*, 396 F.3d at 1296–97.

[96] *See id.*

[97] 9 U.S.C. § 202 (2005).

[98] 9 U.S.C. § 2 (2005).

[99] *Bautista*, 396 F.3d at 1298.

[100] *See id.* (citing Fed. Land Bank v. Bismarck Lumber Co., 314 U.S. 95, 100 (1941); Argosy Ltd. v. Hennigan, 404 F.2d 14, 30 (5th Cir. 1986)).

interpretation, as prescribed by the Supreme Court.[101] When interpreting a statute a court should look first to "the language of the governing statute, guided not by a 'single sentence or member of a sentence, but looking to the provisions of the whole law, and to its object and policy.'"[102]

The *Bautista* court's distinction between section 1 and section 2 and its holding that section 1 cannot affect the scope of the N.Y. Convention Act contradicts *Bernhardt v. Polygraphic Co. of America*, where the Supreme Court stated, "Sections 1, 2, and 3 are integral parts of a whole."[103] Moreover, "[t]here is no reason to assume that Congress did not intend to provide overlapping coverage between the New York Convention and Chapter 1 of the Federal Arbitration Act."[104] Retaining such a simplistic distinction allows courts to cherry pick which terms within the FAA it will emphasize, without giving due regard to the entire statute.[105] Section 1 defines the terms contained within section 2, if not the entire FAA.[106] That section 202 references section 2 establishes a textual relationship between section 1 and the N.Y. Convention Act; therefore, whether the section 1 exemption extends to the N.Y. Convention Act remains an open question.

Under the reasoning that a title cannot create ambiguity when the body of the act is clear, both the *Bautista* and *Francisco* opinions dismissed the fact that section 1 is titled "'Maritime transactions' and 'commerce' defined; exceptions to operation of title" (Title meaning Title 9 or the FAA).[107] To reach that conclusion, the courts appear to have assumed that for such a title to exist, but not extend to N.Y.

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[101] *See* John Hancock Mut. Life Ins. Co. v. Harris Trust & Sav. Bank, 510 U.S. 86, 94–95 (1993).

[102] *Id.* (quoting Pilot Life Ins. Co. v. Dedeaux, 481 U.S. 41, 51 (1987)).

[103] 350 U.S. 198, 201 (1956).

[104] Bergesen v. Joseph Muller Corp., 710 F.2d 928, 934 (2d Cir. 1983); Energy Transp., Ltd. v. M.V. San Sebastian, 348 F. Supp. 2d 186, 200 (S.D.N.Y. 2004).

[105] *See Bergesen*, 710 F.2d at 934; *see also* United Savs Ass'n. v. Timbers of Inwood Forest Assocs, Ltd., 484 U.S 365, 371 (noting that statutory interpretation "is a holistic endeavor," and that "[a] provision that may seem ambiguous in isolation is often clarified by the remainder of the statutory scheme").

[106] 9 U.S.C. § 1 (2005) (defining terms such as "maritime transactions" and "commerce").

[107] *See Francisco*, 293 F.3d at 275 (citing to Natural Res. Def. Council v. EPA, 915 F.2d 1314, 1321 (5th Cir. 1990)); *Bautista*, 396 F.3d at 1298 n.12 (citing 2A NORMAN J. SINGER, SUTHERLAND ON STATUTES AND STATUTORY CONSTRUCTION § 47:07 (6th ed. 2000)). It is of note that neither opinion could cite to greater authority on an issue that contradicts their holding.

Convention Act, an oversight of Congress led to the title remaining in place. However, such an assumption becomes untenable in light of the fact that when Congress amended the FAA to include the N.Y. Convention Act, it also revised the title of chapter 1 to "General Provisions,"[108] which is a revision only interpretable as applying to all subsequent chapters—otherwise there would have been no need to insert such a title. Thus the Eleventh Circuit's reasoning to reach its holding, combined with the title of section 1, creates a statutory scheme that is far from "coherent or consistent."[109]

In addition, *Bautista's* interpretation of the word "including" leads to a result that is at odds with another rule of statutory interpretation: A court should seek to interpret a statute to avoid surplusage.[110] "It is a cardinal principle of statutory construction that a statute ought, upon the whole, to be so construed that, if it can be prevented, no clause, sentence, or word shall be superfluous, void, or insignificant."[111] If the N.Y. Convention applies to all commercial relationships "without exception,"[112] then explicit reference to "illustrative"[113] examples of relationships would be redundant, which in turn renders the *Bautista* opinion's interpretation of the reference to section 2 in section 202 as surplusage. *Bautista* twists this rule of statutory interpretation by arguing that "the expansive term 'including' would be superfluous if the FAA provided the full and complete definition," therefore creating the need to interpret the statute as unambiguous.[114] While it is correct to conclude that the word "including" would be superfluous, it is incorrect to reason from this conclusion that the statute must be interpreted as unambiguous. In effect, the rule against surplusage, in

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[108] 84 Stat. 692, 693 ("Sections 1 through 14 of Title 9, United States Code, are designated 'Chapter 1' and the following heading is added immediately preceding the analysis of Section 1 through 14.").

[109] *Bautista*, 396 F.3d at 1295.

[110] *See* TRW Inc. v. Andrews, 534 U.S. 19, 31 (2001) (interpreting 15 U.S.C.S. § 1681 or the Fair Credit Reporting Act); Pennsylvania Dept. of Public Welfare v. Davenport, 495 U.S. 552, 562 (1990) ("Our cases express a deep reluctance to interpret a statutory provision so as to render superfluous other provisions in the same enactment"). *See also, e.g.*, S.C. v. Catawba Indian Tribe, 476 U.S. 498, 501 (1986); Jones v. United States, 529 U.S. 848, 857 (2000) (interpreting a criminal statute).

[111] *TRW Inc.*, 534 U.S. at 31.

[112] *Bautista*, 396 F.3d at 1299. This interpretation is not even supported by the text. Section 202 does not read "all commercial relationships," rather it uses the less forceful and more encompassing term "considered as commercial." 9 U.S.C. § 202 (2005).

[113] *Id.* at 1298.

[114] *See id.*

this instance, cuts both ways and supports neither extending section 1 to the N.Y. Convention nor limiting it to chapter 1. However, the rule makes clear that ambiguity certainly exists, regardless of which interpretation courts give to the statute, and therefore any interpretation cannot rest solely on the statutory text.

Not only does the current interpretation render a clause central to the issue as surplusage, but the logical continuation of the current jurisprudence's failure to extend the exemptions of chapter 1 to chapter 2 repeals another clause by implication, namely, "a class of workers engaged in foreign [] commerce."[115] This violates "the cardinal rule that repeals by implication are not favored" when interpreting a statute.[116] As previously stated, the N.Y. Convention will control arbitration agreements between two parties from the United States if their relationship "involves property located abroad, envisages performance or enforcement abroad, or has some other reasonable relation with one or more foreign states."[117] This additional basis for applying the N.Y. Convention Act closely correlates with activities falling under foreign commerce. For example, it is likely impossible to be involved in foreign commerce without satisfying the foreign element requirements of section 202. Therefore, the N.Y. Convention Act controls every contract involving "a class of workers engaged in foreign [] commerce," regardless of whether or not both parties were American. A result which renders the clear and precise wording of section 1 without effect because the term "engaged in foreign [] commerce" would be meaningless as it could not cover a single class of workers. Thus, the current interpretation results in repeal by implication.

When viewed as a whole, without over reliance on free-standing individual words, the FAA is far from unambiguous. Consequently, the text alone cannot answer every issue, particularly the current issue of whether section 1 extends to the N.Y. Convention Act. Therefore, the forthcoming analysis should apply to determining whether the N.Y. Convention Act incorporates section 1.

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[115] See Circuit City Stores, Inc. v. Adams, 532 U.S. 105 (2001) and Brown v. Nabor Offshore, Corp., 339 F.3d 391 (5th Cir. 2003) for cases dealing with the particular clause of section 1.

[116] Morton v. Mancari, 417 U.S. 535, 549 (1974) (quoting Posadas v. Nat'l City Bank, 296 U.S. 497, 503 (1936)); Traynor v. Turnage, 485 U.S. 535, 547 (1988).

[117] 9 U.S.C. § 202 (2005).

B. Legislative History and the Text of the FAA

The courts in both *Bautista* and *Francisco* evaded evidence of legislative intent arising from legislative history that contradicted their conclusion with less than persuasive reasoning.[118] The debate over the conflicting, often questionable value of legislative history and the intent derived from that history, in the view of a great many judges and commentators, is well documented.[119] However, the value of legislative history most starkly comes into question when the record leads to conflicting or questionable interpretations of legislative intent—that is, if its value is not completely dismissed from the beginning.[120] Rather than negating legislative history by finding it conflicting or questionable or by dismissing the value of all legislative history, the *Bautista* and *Francisco* courts relied on different but equally questionable grounds for ignoring the legislative record. The *Bautista* court held that because the text was unambiguous, the legislative record could not change its interpretation;[121] while the *Francisco* court found the record not clear enough.[122] Neither court provided evidence of contradictory legislative intent embedded in the legislative record.[123]

Both opinions mention the same testimony by Richard Kearney, the chairman of the State Department advisory committee, that supports a contrary textual interpretation of the FAA.[124]

> [P]aragraph 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

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[118] *See Francisco*, 293 F.3d at 275–76; *Bautista*, 396 F.3d at 1298–99.

[119] *See* Bank One Chicago, N.A. v. Midwest Bank & Trust Co., 516 U.S. 264, 279 (1996) (Scalia, J. concurring in part) ("In my view a law means what its text most appropriately conveys, whatever the Congress that enacted it might have 'intended.' The law *is* what the law *says*, and we should content ourselves with reading it rather than psychoanalyzing those who enacted it."). *Compare with* Stephen Breyer, *On the uses of Legislative History in Interpreting Statutes*, 65 S. CAL. L. REV. 845 (1992).

[120] See United Steelworkers v. Weber, 443 U.S. 193 (1979) and compare the majority and dissenting opinions for an example of how the value of legislative history decreases once that history is interpreted to lead to contrary conclusions.

[121] *Bautista*, 396 F.3d at 1299.

[122] *Francisco*, 293 F.3d at 276. The court in *Francisco* also relied on the fact that the text was unambiguous but only after finding the lack of specificity determinative. *Id.*

[123] *See id.*; *Bautista*, 396 F.3d at 1298–99.

[124] *Id.*

> that are considered as commercial under the national law of that state . . . . [T]he 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.[125]

That testimony directly supports the conclusion that section 1 was intended to extend to the N.Y. Convention Act.[126]

The *Bautista* court dismissed this evidence of legislative intent based on its previous determination that the text of the N.Y. Convention Act was unambiguous and the fact that Mr. Kearney was a "single State Department official."[127] Concededly, such testimony should not alter an interpretation that fits well into the greater statutory scheme. However, as previously discussed, the text of the N.Y. Convention Act is ambiguous in regard to whether section 1 extends to the N.Y. Convention Act, and therefore the court should not have dismissed the testimony.

The *Bautista* opinion went further in discounting the testimony by stating that the State Department is not the agency tasked with administering the statute.[128] This argument fails to acknowledge that the State Department traditionally plays a role in negotiating international treaties. As the governmental body that often first comes into contact with a treaty, some deference should be shown toward the State Department.[129]

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[125] *Francisco*, 293 F.3d at 275–76 (citing *Bautista*, 396 F.3d at 1298–99).

[126] S. REP. NO. 91-702, at 6 (1970).

[127] Bautista v. Star Cruise, 396 F.3d 1289, 1298 (11th Cir. 2005).

[128] *Id.*

[129] NANDA & PANSIUS, *supra* note 44, vol. 2, at 10–23 ("Expressions of the State Department or agencies tasked with administrating the treaty provisions carry considerable weight."). This consideration was dismissed by *Bautista,* 396 F.3d at 1299. ("Even if the above testimony were owed some deference, it could not alter the plain terms of the [N.Y.] Convention Act.").

The *Francisco* opinion sought to negate legislative history because Mr. Kearney did "not specifically address whether the exclusion in [section] 1 of seaman employment contracts is also applicable to the then-proposed [section] 202 of the [N.Y.] Convention Act."[130] However, Mr. Kearney's statements that section 1 contained the U.S. definition of commerce in regard to the N.Y. Convention Act and that it excludes seamen's employment contracts should not be disregarded because he did not use the exact words "seaman" or "exclusion" in relation to the N.Y. Convention Act.

Although this legislative history may only play a limited role in resolving the issue, it undermines the textual interpretation given by the Fifth and Eleventh Circuits and lends support to the conclusion that the text alone cannot answer the issue of whether section 1 extends to the FAA.

C. A Potential Ground for Distinguishing Future Cases from the Current Jurisprudence

Bautista, *Francisco*, and many lower court opinions addressing the issue of the arbitrability of claims arising from seamen's employment dealt with an identical forum selection clause, which was not a traditional arbitration agreement. As one court noted, "The 'arbitration clause' [in question] is more precisely a forum selection clause which compels aggrieved seamen to submit their complaints to the named Philippine agencies."[131] This may provide a court with grounds for distinguishing future section 1 cases from the current holding. In reality, the clause is more a traditional forum selection clause than an arbitration agreement, even though the lines of cases in question have construed the clause as arbitral. Forum selection clauses and arbitration clauses are related but distinct. Nevertheless, a number of courts have reasoned that "foreign arbitration clauses are but a subset of foreign forum selection clauses in general."[132]

That an existing international convention on foreign arbitral awards does not have an equivalent convention on the recognition of foreign judgments makes the two inherently different in terms of legal authority, even though they share functional characteristics. This

[130] *Francisco*, 293 F.3d at 276.

[131] Gavino v. Eurochem Italia, 2001 WL 845456, at *2 n.5 (E.D. La. 2001).

[132] Vimar Seguros y Reaseguros, S.A. v. M/V Sky Reefer, 515 U.S. 528, 534 (1995), *quoted in Francisco*, 293 F.3d at 278; *Lim*, 404 F. 3d at 906 (quoting *Francisco*, 293 F.3d at 278).

distinction is not noted by current jurisprudence in determining whether to enforce the forum selection clauses in question, but the distinction is highly relevant to determining the enforceability of such clauses because any analysis assessing the United States' international obligations under an international convention should seek to apply an analysis which will lead to a result conforming to those obligations, even possibly at the expense of other bodies of domestic law. However, the same concerns do not exist when applying comity considerations and the general policy of enforcing privately negotiated agreements, which are currently applied when recognizing foreign forum selection clauses. Thus, the analysis should be more discretionary.

Nearly all of the forum selection clauses (or "arbitration agreements") in question originate from a standardized contract signed by all Filipino seamen and contain the same forum selection clause.[133] "The Philippine government has implemented a system whereby disputes involving its seamen's employment contracts are governed by an arbitration tribunal" and where it "has acted through the [Department of Labor and Employment of the Republic of the Philippines], to protect its citizens and advance their employment opportunities with employers, it is not the role of this court to second-guess such actions."[134] Although the contract used the word arbitration, the "so called" arbitration agreement was promulgated by

[133] Amizola v. Dolphin Shipowner, S.A., 354 F. Supp. 2d 689, 691 (E.D. La. 2004). The court further stated:

> In cases of claims and disputes 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 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. If there is no provision as to the voluntary arbitrators to be appointed by the parties, the same shall be appointed from the accredited voluntary arbitrators of the National Conciliation and Mediation Board of the Department of Labor and Employment.

Id. at 691 n.2.

[134] Bautista v. Star Cruises, 286 F. Supp. 2d 1289, 1361–63 (11th Cir. 2005).

the Philippine government[135] and compelled upon Filipino seamen by their government.[136] The government compels potential employers to "comply with employment contract requirements of the Philippine Overseas Employment Administration."[137] In many cases, the government oversees the arbitration because the forum selection clauses provide two alternatives for adjudicating claims. The parties can either submit to the jurisdiction of the Filipino "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."[138]

All of these actions are attributes of sovereign power not implicated in arbitral law, which is based upon the ideal of enforcing privately negotiated agreements to resolve disputes.[139] Therefore, the jurisprudence holding that section 1 does not extend to the N.Y. Convention Act is predicated upon the conclusion that the clauses were arbitral rather than simply forum-related. By doing so, courts have injected notions of comity into their analysis, not just of foreign tribunals but of foreign governments, making the case for compelling arbitration greater than if the cases dealt strictly with arbitral considerations. The line of cases holding that section 1 does not extend to the N.Y. Convention Act creates dangerous precedent for future cases falling under the N.Y. Convention Act when the active involvement of a sovereign is not present. It is possible that future cases will only see the holding that section 1 does not extend to the N.Y. Convention Act and will not recognize the sovereign involvement, thereby leaving a vulnerable class of workers with minimal, if any, judicial protection by a sovereign power.[140]

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[135] *See id.* at 1356.

[136] *See Francisco*, 293 F.3d at 271.

[137] *Id.*

[138] *See Amizola*, 354 F. Supp. 2d at 691.

[139] *See* Dean Witter Reynolds Inc. v. Byrd, 470 U.S. 213, 219–20 (1985).

[140] *See* Lobo v. Celebrity Cruises, Inc., 426 F. Supp. 2d 1296 (S.D. Fla. 2006) (post *Bautista* case with no evidence of sovereign involvement in negotiating the so-called arbitration agreement).

IV. A NEW ANALYSIS: MOVING PAST A FORCED TEXTUAL INTERPRETATION OF THE FAA

The subsequent analysis can be viewed in one of two ways. First, it can be viewed as a wholly new analysis, not analytically beholden to the current jurisprudence, that can apply if a court addresses the issue as one of first impression or if a case is distinguished from the current jurisprudence as set forth in III.C. Alternatively, it can be viewed as the logical continuation of the current jurisprudence if a court finds the text ambiguous.

The analysis begins with non-textual considerations, external to the FAA, to assist in interpreting the Act. The initial issue addressed under Part IV.A is whether the United States retained the right under the New York Convention to exclude sub-classes of legal relationships. The analysis then looks to national law, to ascertain if Congress exercised that right to uphold the special protections extended to seamen, in place before acceding to the New York Convention, by applying established Supreme Court jurisprudence on subject-matter arbitrability. That jurisprudence directs courts to not only look to the N.Y. Convention Act itself but to incorporate legal considerations outside of the FAA into their analysis of subject-matter arbitrability. The proffered analysis seeks in Part IV.B to give the pro-arbitration policy the proper role in order to limit its ability to corrupt the analytical process.

Part IV.C develops the external legal consideration of public policy. A well-established patriarchal public policy exists in extending greater judicial protection to seamen as wards of the court because of the truly unique nature of their profession. The current state of the law robs the courts, or allows them to abdicate, their time-honored role as protectors of seamen. Public policy constitutes one of the enumerated grounds for refusal to recognize or enforce an arbitral agreement or award under the New York Convention and should influence the interpretation given to section 1. Once the policy is given the correct significance, the FAA, the Jones Act,[141] and the established Supreme Court jurisprudence should be individually[142] and collectively

[141] 46 U.S.C. app. § 688 (2005).

[142] The U.S. Supreme Court holds that

> Statutory construction . . . is a holistic endeavor. A provision that may seem ambiguous in isolation is often clarified by the remainder of the statutory scheme—because the same terminology is used elsewhere in a context that makes its meaning clear . . . or

construed to develop a complete analysis that supports interpreting section 1 as extending to the N.Y. Convention Act. Part IV.D develops further the distinction between personal injury tort causes of action under the Jones Act and conventional contractual claims.

A. A New Analysis: From the United States' International Obligations Under the New York Convention to Supreme Court Jurisprudence

The United States possesses the right to limit the subject matter within the scope of the New York Convention and to provide exceptions to arbitration "grounded in domestic law."[143] This right arises from the interaction of Article I(3) and Article II(1) of the New York Convention.[144] Although not deciding the issue, the Supreme Court in *Mitsubishi* went so far as to say that "[d]oubtless, Congress may specify categories of claims it wishes to reserve for decision by our own courts without contravening this Nation's obligations under the Convention."[145] Article I(3) allows a signatory nation to declare that it will define, under its national laws, what constitutes a commercial relationship.[146]

> 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

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> because only one of the permissible meanings produces a substantive effect that is compatible with the rest of the law.

United Sav. Ass'n v. Timbers of Inwood Forest Assocs, Ltd., 484 U.S. 365, 371 (1988). The latter consideration comes into play in analyzing the interaction between chapter 2 and section 1.

[143] Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc., 473 U.S. 614, 639 n.21 (1985) (citing Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc., 723 F.2d 155, 164 (1st Cir. 1983)).

[144] An important reason why Article I(3) included the option to make the declaration in question was to give the New York Convention signatory nations more flexibility in applying the Convention in order to ensure that a sufficient number of countries acceded to the Convention. Bergesen v. Joseph Muller Corp., 710 F.2d 928, 931–32 (2d Cir. 1983).

[145] *Id.*

[146] *See* New York Convention, *supra* note 2, art. I(3).

> 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.[147]

Article II(1) further explains that a signatory nation making the declaration possesses the supplemental right not to recognize an agreement to arbitrate that falls outside that national definition.[148]

> [E]ach 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*.'[149]

Subject-matter non-arbitrability predicated upon Article II(1) reflects a "special national interest in judicial, rather than arbitrable, resolution of dispute[s]" and includes "classic examples" such as "anti-trust, the validity of intellectual rights (patents, trademarks, etc.), family law, and the protection of weaker parties."[150] In effect, Article I(3) gives a signatory nation the right to exempt from arbitration "social matters deemed inappropriate for arbitration."[151] If an

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[147] *Id.* The treaty contained a footnote by the state department making such a declaration "[t]he 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." The declaration was made by the Senate on October 4, 1968, with two-thirds of the Senators present concurring.

[148] *See* Sideriuse Inc. v. Compania de Arcero del Pacifio, 453 F. Supp. 22, 24 (S.D.N.Y. 1978) ("The United States has limited the scope of Article II, Section 1 by adopting the reservation that the Convention applies only to arbitration agreements 'arising out of legal relationships . . . which are considered as commercial . . . .' Art. I, Sec. 3.").

[149] *Id.* (emphasis added).

[150] ALBERT JAN VAN DEN BERG, THE NEW YORK ARBITRATION CONVENTION OF 1958, 369 (1981); *see also* Parsons & Whittemore Overseas Co. v. Societe Generale de L'Industrie Du Papier (RAKTA), 508 F.2d 969, 975 (2d Cir. 1974) ("certain *categories* of claims may be non-arbitrable because of the special national interest vested in their resolution").

[151] BECKER, *supra* note 48, at 100.

agreement to arbitrate is not recognized under Article II(1), it follows that arbitration must not be compelled under Article II(3).[152]

As the New York Convention does not impose an absolute duty upon the United States to enforce every agreement to arbitrate, the applicability of the N.Y. Convention Act turns on whether Congress exercised its right to reserve claims arising from seamen's employment for our domestic courts by limiting the scope of the Act.[153] This determination turns on the application of "national law," as stated in Article I(3).[154] When determining whether an international

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[152] If an agreement to arbitrate is not recognized under Article II(1), by action of the declaration made under Article I(3), an analysis of that agreement's arbitrability need not include an analysis under the "null and void, inoperative or incapable of being performed" clause. A number of opinions either skip over the first requirement of recognizing the agreement to arbitrate or merge the requirement into an analysis of whether to enforce the agreement and compel arbitration. See the following cases that never mention Article II(1) or the need to recognize an agreement to arbitrate before enforcing the agreement: *Acosta*, 303 F. Supp. 2d 1327; *Amizola*, 354 F. Supp. 2d 689; *Bautista*, 286 F. Supp. 2d 1352; *Lejano*, 2000 WL33416866. An analysis under Article II(3) can encompass such defenses as misrepresentation, duress, fraud, undue influence. Other examples include the "arbitration agreement has ceased to have effect"—for example, res judicata or a settlement reached before the commencement of arbitration—and the arbitration "cannot be effectively set into motion"—for example, the contractually named arbitrator refuses the appointment. VAN DEN BERG, *supra* note 150, at 156–59. All of these potential analytical elements are factual, not categorical defenses to arbitration. Because this Article contends that the declaration made under Article I(3) provides the initial basis for excluding claims arising from seamen's employment from the scope of the New York Convention and subsequent codification, the before mentioned Article II(3) considerations need not play a role in determining the arbitrability of such claims.

[153] Moreover, the argument exists that Article V(2)(a) makes the issue of arbitrability "subject to a subjective assessment by national courts." That is why, in practice, a uniform definition of arbitrability under the New Convention does not exist. However, few national courts accept this view. KATHERINE LYNCH, THE FORCES OF ECONOMIC GLOBALIZATION, CHALLENGES TO THE REGIME OF INTERNATIONAL COMMERCIAL ARBITRATION 132 (2003). *See infra* Part IV.C for a discussion of Article V(2), which incorporates this issue into public policy.

[154] The New York Convention did not automatically supersede the existing legal regime established to address the unique situation of seamen. A treaty does supersede conflicting prior legislation. Section 115(2) of the Restatement (Third) of Foreign Relations Law of the United States states that "[a] provision of a treaty of the United States that becomes effective as law of the United States supersedes as domestic law any inconsistent preexisting provision of a law or treaty of the United States." However, no inherent conflict exists between a treaty providing an alternative arbitral forum for most, but not all, legal relationships and domestic legislation providing a judicial forum for a small subset of vulnerable workers and the claims specific to those workers. Nor does a treaty command greater respect than a domestic statute. NANDA & PANSIUS, *supra* note 44, at vol. 2, 10–17 ("A treaty does not have a status greater than

convention displaced preexisting federal law, a court should be mindful that when evaluating the interaction of a convention and federal law, a presumption arises that federal law was not displaced.[155]

The N.Y. Convention Act itself makes no explicit exemptions to its scope other than the requirement that the legal relationship[156] must be commercial.[157] Based on that fact, and by limiting their analyses to the N.Y. Convention Act text, the Fifth and Eleventh Circuits have concluded that no exemptions exist for any subset of commercial legal relationships to the scope of the N.Y. Convention Act. The *Bautista* court stated that "the [N.Y.] Convention Act covers commercial legal relationships without exception."[158] This conclusion proved central to the court's determination that the exemption for seamen in section 1 did not extend to the N.Y. Convention Act. The court reasoned that since the N.Y. Convention Act does not contain any explicit exemptions within it, any exemption, including section 1, must conflict with the N.Y. Convention Act and cannot co-exist with the broad scope of the Act.[159] The effect of such a conclusion results in no commercial subsets of subject matter or legal relationships falling outside the scope of the N.Y. Convention Act.

The current jurisprudence boils that inquiry of whether section 1 extends to the N.Y. Convention Act into a simple either/or proposition. Essentially, the inquiry is whether a legal relationship is commercial or not—with only commercial relationships being arbitrable—and the

an act of Congress," (citing *Head Money Cases*, 112 U.S. 580, 599 (1884))). Although the N.Y. Convention Act is both a treaty and—by its codification in the FAA—a statute, that still does not propel it to greater importance than other federal legislation. The courts therefore should not be predisposed to implement the N.Y. Convention Act at the expense of co-existing legislation.

[155] William N. Eskridge, Jr. & Philip P. Frickey, *The Supreme Court 1993 Term: Foreword: Law as Equilibrium*, 108 HARV. L. REV. 26, 100 (1994) (citing Societe Nationale Industrielle Aerospatiale v. United States Dist. Court, 482 U.S. 522, 538–39 (1987)).

[156] Legal relationship and subject matter can be referred to collectively and interchangeably. The New York Convention and chapter 2 speak in terms of legal relationships. However, the two terms are synonymous. By carefully defining a legal relationship, one can also define a congruous subject matter.

[157] *See* 9 U.S.C. § 202 (2005). *See also Mitsubishi*, 473 U.S. at 639 n.21 ("Yet in implementing the [N.Y.] Convention Act by amendment to the Federal Arbitration Act, Congress did not specify any matters it intended to exclude from its scope.").

[158] *Bautista*, 396 F.3d at 1299.

[159] *See* 9 U.S.C. § 208 (2005). Any part of chapter 1 that conflicts with chapter 2 is superseded by chapter 2.

analysis ends there.[160] However, this proposition misconstrues or fails to take into consideration the United States' retention of the right to define "commercial."[161] The Supreme Court in *Mitsubishi* characterized that right, which arises from the interaction of Articles I(3) and II(1), as the power to create exceptions to arbitration;[162] the analysis is not as simple as merely determining whether a relationship is commercial. A third option exists:[163] a legal relationship may be technically commercial under domestic law, yet not arbitrable, because Congress exempted such a relationship from arbitration.

The issue then becomes whether the exemption for seamen found in section 1 constitutes an extension of Congress's right to exempt classes of legal relationships or subject matter from arbitration. This issue can only be resolved by resorting to domestic law to determine whether Congress intended for disputes arising from such relationships to be arbitrable.[164] The discovery of the intent to exclude certain legal relationships does not turn on the invocation of the word "non-commercial," but rather on the intent to exclude the subject matter in

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[160] No universal definition of commercial exists as each signatory nation "has its own concept of a commercial relationship." MAURO RUBINO-SAMMARTANO, INTERNATIONAL ARBITRATION, LAW AND PRACTICE 947 (2001).

[161] Jacada, Ltd. v. Int'l Mktg. Strategies, Inc., 401 F.3d 701, 707 (6th Cir. 2005) ("Because Article I [of the New York Convention] defines what arbitration awards fall under the Convention and § 202 engages in exactly the same inquiry, we can only read [202] in light of that article").

[162] *Mitsubishi*, 473 U.S. at 639 n.21. At first glance this would seem to give the United States the unfettered discretion to arbitrarily exclude subject matter from the scope of the New York Convention. However, as the Court noted further in the same footnote, the pro-arbitration policy, or the "spirit" of the convention, serves as a restraint on this power. Moreover, the notion of reciprocity, also contained in Article I(3), serves to further limit the arbitrary use of the right.

[163] By definition, the act of defining encompasses two competing methods. First, line determination by discovering logically consistent principles: "to determine or identify the essential qualities or meaning of" something. Second, line drawing by an authoritative source, regardless of arbitrariness: "to fix or mark the limits." Definitions come from Merriam-Webster Dictionary Online, http://www.m-w.com. By making the declaration under Article I(3), Congress retained the right to define "commercial" based upon the second method. For example, if Congress were to pass a law saying that the act of larceny created a commercial relationship between the perpetrator and the victim, then that relationship would be commercial. However, such an approach would not be consistent with the first method of defining, at least based on any traditional notions of commercial. *See also supra* note 160.

[164] Although the New York Convention does not specify which law should apply to the determination of arbitrability in recognizing an agreement to arbitrate, it is generally accepted that the court seized of the action will apply its national law, without applying a conflict-of-laws analysis. LEW, *supra* note 7, at 189–94.

question from arbitration. "If Congress intended to limit or prohibit waiver of a judicial forum for a particular claim, such intent will be deducible from 'the statute's text or legislative history,' or from an inherent conflict between arbitration and the statute's underlying purposes."[165] Section 1 provides the best evidence of congressional intent on the arbitrability of claims arising from seamen's employment litigation. If the section 1 exemptions, which are the only legal relationships or subject matters explicitly referred to within the same act (FAA)[166] as chapter 2, do not constitute the exercise of Congress's right to limit the scope of the N.Y. Convention Act, then nothing likely will. Such a result is at odds with the affirmative act of making the declaration under Article I(3).[167] That does not mean, however, that the exemption automatically extends to the N.Y. Convention Act.

The only categorical exemption to arbitration, found within the same enactment as the N.Y. Convention Act, gives a presumption of non-arbitrability for claims arising from seamen's employment. This presumption should stand, barring explicit evidence that Congress intended to revoke the special protections granted seamen, because "close questions of [statutory] construction should be resolved in favor of continuity and against change."[168] Such protections are much more specific and well-grounded in policy and historical jurisprudence than a generic pro-arbitration policy. The analysis of the current jurisprudence turns that presumption on its head. The current jurisprudence reasons that any exemption to arbitration outside chapter 2, even within the same enactment, must be invalid barring evidence within chapter 2 of their validity, which is a conclusion at odds with established subject-matter arbitrability jurisprudence.

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[165] Shearson/American Express v. McMahon, 482 U.S. 220, 226–27 (1987) (citing *Mitsubishi*, 437 U.S. at 632–37).

[166] It should be remembered the N.Y. Convention Act and chapter 1 of the FAA are part of the same Act. They are not two distinct and disconnected bodies of law. The N.Y. Convention Act was an amendment to the original FAA. 91 P.L. No. 368, 84 Stat. 692 (1970).

[167] The argument exists that in making the declaration that Congress was equally, if not more, concerned with pre-established, non-arbitrable classes of claims than in retaining the right to exempt classes of claims in the future.

[168] David L. Shapiro, *Continuity and Change in Statutory Interpretation*, 67 N.Y.U. L. REV. 921, 925 (1992); *cited in* Exxon Mobil Corp. v. Allapattah Servs., 545 U.S. 546, 587 (2005) (Ginsburg, R., dissenting) (when interpreting a statute the "court should assume, as it ordinarily does, that Congress legislated against a background of law already in place and the historical development of that law."). *Exxon Mobil*, 545 U.S. at 587.

The issue of whether the narrow class of claims falling under the only explicit exemption in the FAA is non-arbitrable, regardless of the controlling chapter, is sui generis in relation to other claims of non-arbitrability. The Supreme Court jurisprudence that has evolved since the United States ratified and implemented the N.Y. Convention Act has only addressed the issue of subject-matter arbitrability in regard to claims without explicit support in the FAA itself. However, Supreme Court jurisprudence on subject-matter arbitrability not only implicitly supports the presumption of section 1 extending to all chapters of the FAA, but it also provides analytical guidance. Even though such an analytical framework was intended to be strict in order to mold the jurisprudence of the United States to the "spirit"[169] of the New York Convention, it still leads to the conclusion that the N.Y. Convention Act does not control claims arising from seamen's employment.

The limited analysis currently employed, structured solely around the text of the N.Y. Convention Act, significantly departs from Supreme Court jurisprudence. The Supreme Court in *Mitsubishi* approved a two-part test for determining arbitrability under the N.Y. Convention Act:[170] first, whether the scope of the arbitration agreement in contention encompasses the issue,[171] and second, "whether legal constraints external to the parties agreement foreclose[] the arbitration of those claims" (hereinafter "external legal constraints" or "considerations").[172] At issue in *Mitsubishi* was the arbitrability of private causes of action granted by the Sherman Antitrust Act.[173] The Court determined, in the absence of "explicit support" for exempting antitrust claims from arbitration in either the Sherman Act or the FAA, that "international comity, respect for the capacities of foreign and transnational tribunals, and sensitivity to the need of the international commercial system" required the enforcement of the parties' agreement to arbitrate.[174]

Regardless of whether *Mitsubishi* applies as direct authority on the current issue, the case provides a useful analysis.[175] The case

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[169] *See Mitsubishi*, 473 U.S. at 639.

[170] *Id.* at 628.

[171] *Id.*

[172] *Id.*

[173] 15 U.S.C. §§ 1–37(a) (2006). Other causes of action were claimed, but the opinion focused on the arbitrability of the antitrust claims.

[174] *Mitsubishi*, 473 U.S. at 628–29.

[175] The current issue of whether the only exemption found in the FAA extends to the N.Y. Convention does not fall squarely within the parameters of the analysis employed by the *Mitsubishi* Court. The Court noted that "explicit support" in the FAA

establishes a blueprint for ascertaining subject-matter arbitrability, which can aid in determining whether Congress intended the scope of the N.Y. Convention Act to encompass seamen's employment disputes, thereby revoking the special protections granted seamen, or, more precisely, whether the N.Y. Convention Act should be interpreted as incorporating section 1. As this Article contends that such claims categorically fall outside the scope of the N.Y. Convention Act, it will not address the first element of the test:[176] whether specific causes of action are within the scope of a contested arbitration agreement.[177] As subsequently discussed in Part IV.C, the pro-arbitration policy subsumes the individual scope requirement and directs courts to find every cause of action within the scope the particular arbitration agreement at issue. To the detriment of seamen, this leads to the inclusion of personal injury tort claims within the scope of individual seamen employment arbitration agreements.[178]

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for finding the claims non-arbitrable was an issue not before it. *Id.* at 628. This implicitly supports the presumption of non-arbitrability of claims with expressed support for being non-arbitrable within the FAA. As this presumption was not before the Court, it can be argued that an even more liberal analysis than the *Mitsubishi* analysis should apply, which is an argument subsequently developed in Part IV.C. *infra*.

[176] The first part of the *Mitsubishi* test focuses on the facts of an individual case, an approach that is not only inefficient but fails to guarantee the full implementation of the special protections afforded seamen. The best means for actualizing the special protections granted seamen by Congress calls for extending section 1 to the N.Y. Convention Act, rather than a case-by-case analysis focused on individual agreements to arbitrate. By making a blanket determination that the section 1 exemption applies, courts would remove an element of uncertainty generated by the first *Mitsubishi* test element—judicial determination of the scope of each agreement to arbitrate—to international shipping, although concededly not to the degree that the enforcement of arbitration agreements would. Nevertheless, just because a judicial determination would further commerce, at the expense of marginalized workers, does not give a court the prerogative to do so against Congress's will. For these reasons, the first part of the *Mitsubishi* test does not provide an appropriate tool for determining the arbitrability of claims arising from seamen's employment.

[177] *See Mitsubishi*, 473 U.S. at 626 ("[T]he first task of a court asked to compel arbitration of a dispute is to determine whether the parties agreed to arbitrate that dispute."). This Article's silence on the application of the scope requirement does not imply agreement with the application of the first element by the current jurisprudence. See Part IV.C *infra* for how the scope requirement has became too liberal.

[178] *See Mitsubishi*, 473 U.S. at 627 ("[T]he congressional policy manifested in the Federal Arbitration Act … requires courts [to] liberally . . . construe the scope of arbitration agreements covered by that Act . . . ."). The use of the pro-arbitration policy to broadly construe the scope of agreements to arbitrate has been abused in the context of maritime employment. Seamen, when entering into their employment contracts, in all likelihood, did not contemplate and agree to any and all tort claims

To determine Congress's will regarding the exclusion of seamen from federal arbitral law under the second element of the *Mitsubishi* test, a court should first look to the text of the FAA but should not end its analysis there. *Mitsubishi* directs courts to continue their analysis past the narrow confines of the N.Y. Convention Act because

> [j]ust as it is the congressional policy manifested in the Federal Arbitration Act that requires courts liberally to construe the scope of arbitration agreements covered by that Act, it is the congressional intention expressed in some other statute on which the courts must rely to identify any category of claims as to which agreements to arbitrate will be held unenforceable.[179]

Private parties agreeing to arbitrate "should be held to it unless Congress itself has evinced an intention to preclude a waiver of judicial remedies for the statutory rights at issue."[180] "If Congress did intend to limit or prohibit waiver of a judicial forum for a particular claim, such an intent 'will be deducible from [the statute's] text or legislative history.'"[181] There can be no stronger evidence of congressional intent to "preclude a waiver of judicial remedies" for claims arising from seamen's employment than an explicit exemption within the FAA itself. When section 1 is interpreted with this intent in mind and in light

against their employer being subject to arbitration. Many, if not most, seamen's contracts of employment do not make explicit reference to tort claims. *See* Gavino v. Eurochem Italia, No. Civ.A. 01-1314, 2001 WL 845456, at *3 (E.D. La. July 24, 2001) (holding that the contract's term "any and all disputes or controversies arising out of or by virtue of the Contract" included tort causes of action). Some authority exists for the proposition that to find tort claims within a contractual choice of law provision requires greater specificity than a general catch-all choice of law clause. *See* Krock v. Lipsay, 97 F.3d 640, 645 (2d Cir. 1996); *see also* Caton v. Leach Corp., 896 F.2d 939, 943 (5th Cir. 1990); Thompson & Wallace of Memphis, Inc. v. Falconwood Corp., 100 F.3d 429, 433 (5th Cir. 1996); Kuehn v. Childrens Hosp., 119 F.3d 1296, 1302 (7th Cir. 1997) (dicta). Rationale should apply equally to choice of forum clauses. The use of the pro-arbitration policy to determine the scope of an agreement to arbitrate lies outside the ambit of this Article. However, the application of the pro-arbitration policy to distort the scope of individual arbitration agreements gives greater importance to extending the exemption for seamen under section 1 to the N.Y. Convention Act.

[179] *Mitsubishi*, 473 U.S. at 627; *see also* Shearson/Am. Express, Inc. v. McMahon, 482 U.S. 220, 226–27 (1987).

[180] *Mitsubishi*, 473 U.S. at 628.

[181] *Shearson/Am Express*, 482 U.S. at 227 (quoting *Mitsubishi*, 473 U.S. at 628).

of external legal considerations, as indicated by *Mitsubishi,* it becomes clear the N.Y. Convention Act should be interpreted as incorporating section 1.

Before addressing the external legal constraints, which should be incorporated in the proposed analysis, the role of the pro-arbitration policy should be addressed. The pro-arbitration policy must be given the correct significance because of the policy's ability to distort the analytical process.

B. The Correct Role of the Pro-arbitration Policy

By providing a bright line rule or goal, the pro-arbitration policy seduces courts into beginning and ending their analysis of whether the N.Y. Convention Act controls the arbitrability of claims arising from seamen's employment with the Act's allegedly clear text. The pro-arbitration policy is a double-edged sword cutting against seamen. It colors a court's interpretation of the statutory text and leaves courts contented to go no further with their analysis. *Francisco* personifies the danger of the misapplication of the pro-arbitration policy.[182] Plaintiff seaman, a citizen of the Philippines, was injured on the Mississippi River.[183] The court stated that "[e]ven 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, in light of the Supreme Court's general recognition of 'the strong federal policy in favor of enforcing arbitration agreements.'"[184] This understanding of the pro-arbitration policy creates a nearly insurmountable, if not complete, hurdle to establishing subject-matter exemptions to arbitration.

Not only does the pro-arbitration policy function as tiebreaker, but it also seems to corrupt the analytical process from the very beginning by compelling courts to conform to their understanding of the pro-arbitration policy. The *Bautista* court began its discussion of exempting seamen from arbitration under the N.Y. Convention Act with the proposition that "[i]n analyzing [arguments against compelling arbitration], we are mindful that the [N.Y.] Convention Act 'generally establishes a strong presumption in favor of arbitration

[182] Francisco v. Stolt Achievement MT, 293 F.3d 270 (5th Cir. 2002).

[183] *Id.* at 271.

[184] *Id.* at 274–75 (quoting Dean Witter Reynolds, Inc. v. Byrd, 470 U.S. 213, 217 (1985)).

…."'[185] An understandable inclination arises from such a proposition is to conform the subsequent analysis to that rule of law. The narrowness of the currently applied analysis demonstrates this danger. An essential step in formulating a complete analysis for determining whether the N.Y. Convention Act controls claims arising from seamen's employment, including tort claims, is to give the pro-arbitration policy the proper significance.

The pro-arbitration policy of the United States differs when viewed from a legislative or judicial perspective and should embody two distinct concepts. The legislative pro-arbitration policy encompasses a number of value judgments and real world realities. The use of arbitration in international commercial disputes reflects the exigencies of doing business in an ever smaller world that routinely does not recognize national borders.[186] By providing predictability, neutrality, and efficiency in the resolution of the inevitable disputes that arise in cross-border commercial transactions, international commerce will be furthered—a primary goal of the New York Convention.[187] The legislative pro-arbitration policy embodies not only the goal of promoting international commerce, but also the reality that in many contexts, arbitration provides the only, if not the best, legal framework for furthering that goal. In the United States, arbitration currently provides the only legal framework to reliably resolve commercial disputes that transcend national borders, as Congress has yet to ratify a treaty on the recognition of foreign judgments or choice of court agreements. However, it is telling that the Hague Convention on Choice of Court Agreements specifically excludes "claims for personal injury brought by or on the behalf of

[185] Bautista v. Star Cruises, 396 F.3d 1289, 1295 (11th Cir. 2005) (quoting Indus. Risk Insurers v. M.A.N. Gutehoffnungshutte GmbH, 141 F.3d 1434, 1440 (11th Cir. 1998)). The danger of this presumption is exacerbated by the fact that the previous paragraph in the opinion stated that only "a very limited inquiry" would be made in the case. *Id.* at 1294 (quoting *Francisco*, 293 F.3d at 273).

[186] *See* Kenneth R. Davis, *Unconventional Wisdom: A New Look at Articles V and VII of the Convention on the Recognition and Enforcement of Foreign Arbitral Awards*, 37 TEX. INT'L L.J. 43, 44 (2002) ("In this global economy, giant multinationals leap with ease across oceans and continents. Treaties fostering trade and technology revolutionizing communication have obliterated barriers, expanding transnational commerce.").

[187] *See* Bergesen v. Joseph Muller Corp., 710 F.2d 928, 929 (2d Cir. 1983) ("Responding to the rapid expansion of international trade following World War II, the Convention reflects the efforts of businessmen involved in such trade to provide a workable mechanism for the swift resolution of their day-to-day disputes.").

natural persons" from the scope of the potential convention[188] (Part IV.D.1 develops further the issue of whether seamen's personal injury claims are arbitrable). A practical reality is that arbitration is the only internationally accepted legal framework. This reality strengthens its perception as the best means of resolving most disputes with an international flavor. Nevertheless, "most" does not mean "all." The legislative pro-arbitration policy should not attribute to Congress a preconceived pro-arbitration intent in every context.

The judicial pro-arbitration policy originally developed to effectuate the intent of Congress animated through the legislative pro-arbitration policy.[189] The judicial pro-arbitration policy seeks, or at least originally sought, to accomplish this by protecting the broad scope of the New York Convention from encroachment by preventing parochial protection of domestic courts of their jurisdiction and American parties.[190] It does this in two ways:[191] first, it directs courts to broadly construe the scope of particular agreements to arbitrate,[192] and second, it creates a presumption of subject-matter arbitrability when Congress has been silent.[193] The pro-arbitration policy should play a limited role in determining subject-matter arbitrability when Congress has directly addressed the issue.[194] However, that has not been the case. In determining that the N.Y. Convention Act controls claims arising from seamen's employment, the current jurisprudence

[188] Hague Convention on Private Int'l Law, *Convention on Choice of Court Agreements* art. 2(2)(j), (June 30, 2005), 44 I.L.M. 1294, available at http://www.hcch.net/index_en.php?%20act=conventions.text&cid=98. This germinating convention was signed by the U.S. delegation and submitted to the government and therefore, sheds some light on the arbitrability of seamen's personal injury claims from the United States' perspective specifically and the greater world generally.

[189] The primary purposes of the FAA were to remove historical judicial hostility to arbitration, as an encroachment upon their jurisdiction, and "to place arbitration agreements 'upon the same footing as other contracts." Scherk v. Alberto-Culver Co., 417 U.S. 506, 510–11 & n.4 (1974) (quoting H.R. Rep. No. 96, 65th Cong., 1st Sess., 1, 2 (1924)).

[190] *Id.* at 516–17.

[191] Arguably, a third means exists. On borderline factual questions, for example, if the "in writing" requirement has been satisfied, the policy may serve as a tie breaker. However, this use of the policy will likely never be expressly manifested in an opinion due to its contestable use.

[192] *See* Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc., 473 U.S. 614, 627 (1985).

[193] *See id.* at 639 n.21 ("[W]e decline to subvert the spirit of the United States' accession to the Convention by recognizing subject-matter exceptions where Congress has not expressly directed the courts to do so.").

[194] *Id.* at 614.

apparently assumes that Congress determined that the pro-arbitration policy functions as a one-size-fits-all concept; in other words, the policy can resolve any issue touching upon arbitrability, even congressional intent.

The judicial pro-arbitration policy has expanded beyond its established functions. The judicially applied pro-arbitration policy appears to be an amalgamation of the legislative and judicial policies, and as a result, the policy has become a combination of value judgments, functions, and political realities.[195] From a judicial perspective, this amalgamation appears to have morphed the pro-arbitration policy of the United States into a prophylactic determination by Congress that arbitration is the best means for resolving every dispute colored by an international element. The consolidation of the legislative and judicial policies gives the pro-arbitration policy an exaggerated significance, even if not expressed in many courts' analyses. The policy has become self-effectuating; arbitration is being promoted for its own sake without due regard for the underlying reasons for promoting arbitration.[196] By promoting arbitration as the end goal, rather than a means, courts have given the pro-arbitration policy the attributes of a public policy.

Not only have courts often implicitly failed to draw a clear distinction between public policy and mere policy, they have done so *explicitly*. An example of this blurring in the context of seamen's employment litigation is contained in *Lim v. Offshore Specialty Fabricators, Inc*, in which the Fifth Circuit stated that there is a "federal public policy" favoring arbitration.[197] If the pro-arbitration policy does rise to the level of public policy, that begs the question of how can there be a public policy exception to a public policy? As subsequently discussed in Part IV.C, public policy constitutes a

[195] This was previously elaborated upon in the legislative pro-arbitration policy paragraph. Also, Merriam-Webster defines "policy" in this context as "a high-level overall plan embracing the general goals and acceptable procedures especially of a governmental body." available at http://m-w.com/dictionary/policy (last visited Feb. 6, 2007).

[196] *See* Davis, *supra* note 2, at 63–77.

[197] Lim v. Offshore Specialty Fabricators Inc., 404 F.3d 898, 906 (5th Cir. 2005) ("[T]he federal public policy favoring domestic and international arbitration agreements has been declared by both statute and judicial decision."); *see also* HG Estate, LLC v. Corporación Durango, S.A. de C.V., 271 F. Supp. 2d 587, 595 (S.D.N.Y. 2003) ("[A] line of Supreme Court cases hold that arbitration clauses are favored by a public policy which finds legislative expression in the Federal Arbitration Act and the Convention on the Recognition and Enforcement of Foreign Arbitral Awards." (citations omitted)).

grounds under the Article V(2)(b) of the New York Convention for not enforcing an arbitral award. The distinction is more than academic as the policy has had a significant impact on the lives of seamen.

Promotion of arbitration in the international context does not rise to the level of public policy;[198] rather, it is simply a policy.[199] A public policy addresses a fundamental concern of the state and of society and encompasses notions of "morality and justice."[200] It is very questionable whether the promotion of commerce implicates any notions of "morality" or "justice." Additionally, a public policy should be advanced for its own sake. A policy on the other hand constitutes a value judgment by the government of its goals and the acceptable means of achieving those goals—goals which may change with the political wind or times.[201] A policy should be promoted to advance those goals, but not presumptively at the expense of other goals imbedded in other policies and laws.

With the line between public policy and policy not clearly drawn, the pro-arbitration policy appears to divert courts from determining whether Congress decided that arbitration is the best means for addressing the particular issue before the court. With regard to the arbitrability of seaman's employment claims, Congress has made this determination by including the exemption in section 1. By promoting arbitration for its own sake, courts are promoting arbitration at the expense of other congressional policies that the courts do not perceive as rising to the level of public policy.

The distinction between the various roles of the pro-arbitration policy must be maintained. In declining to extend the section 1 exemption for seamen to the N.Y. Convention Act, courts recognize

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[198] "Public policy" means "principles and standards regarded by the legislature or by the courts as being of *fundamental concern* to the state and the whole of society." BLACK'S LAW DICTIONARY 1267 (8th ed. 2004) (emphasis added).

[199] *See supra* note 195 and accompanying text. http://m-w.com/dictionary/policy (last visited Feb. 6, 2007). Such a definition does not directly incorporate societal values; instead, it incorporates short-term political values, which are more susceptible to arbitrary changes.

[200] Europcar Italia, S.p.A. v. Maiellano Tours, Inc., 156 F.3d 310, 315 (2d Cir. 1998) (defining public policy in the context of enforcing an award under the N.Y. Convention Act); *see also* Karaha Bodas Co. v. Perusahaan Pertambangan Minyak Dan Gas Bumi Negara, 364 F.3d 274, 305–06 (5th Cir. 2004).

[201] "To read the public policy defense [Article V(2)(b)] as a parochial device protective of national political interests would seriously undermine the Convention's utility. This provision was not meant to enshrine the vagaries of international politics under the rubric of 'public policy.'" Parsons & Whittemore Overseas Co. v. Societe Generale de L'Industrie du Papier (RAKTA), 508 F.2d 969, 974 (2d Cir. 1974).

generally the pro-arbitration policy's role of protecting the scope of the N.Y. Convention from encroachment.[202] Nevertheless, courts have failed to make the important distinction of the policy's applicability to the different branches of the government when interpreting the FAA.[203] The *Bautista* court declared that the underlying rationale of the pro-arbitration policy of the United States was to protect the benefits of the convention from the "'parochial' values" of "domestic courts."[204] The court derived the rationale from *Scherk v. Alberto-Culver Co.*:

> In their discussion of [Article II(1)], the delegates to the Convention voiced frequent concern that *courts* of signatory countries in which an agreement to arbitrate is sought to be enforced should not be permitted to decline enforcement of such agreements on the basis of parochial views of their desirability or in a manner that would diminish the mutually binding nature of the agreements. [205]

In applying the judicial pro-arbitration policy arising from *Scherk,* the *Bautista* court, and any other court addressing the arbitrability of claims arising from seamen's employment, fails to make the highly relevant distinction between the policy's role in protecting the benefits from the Convention in regard to the judiciary and the legislature. Some courts, when addressing the arbitrability of other legal relationships or subject matters, have recognized the fact that a "judicially implied exception" to arbitration differs in kind from a congressional exception.[206] However, the jurisprudence in question fails to make the distinction.

The rationale behind protecting the benefits of the Convention, embodied in the judicial pro-arbitration policy, is sound. If no such policy existed, the N.Y. Convention Act would prove unreliable in

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[202] Bautista v. Star Cruises, 396 F.3d 1289, 1299–1300 (11th Cir. 2005).

[203] Neither *Bautista* or *Francisco*, nor the lower courts, have addressed the issue.

[204] *Bautista*, 396 F.3d at 1300.

[205] Scherk v. Alberto-Culver Co., 417 U.S. 506, 520 n.15 (1974) (emphasis added).

[206] *Cf.* Alexander v. U.S. Credit Mgmt., Inc., 384 F. Supp. 2d 1003, 1012 (N.D. Tex. 2005) (analyzing the arbitrability of consumer protection laws under the FAA, the court recognized a difference in kind between a "judicially implied exception" and an explicit exemption by Congress) (quoting Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc., 473 U.S. 614, 639 n.21 (1985)).

practice as each court deciding a N.Y. Convention Act case would possess the freedom to carve out exemptions to arbitration for whichever subclasses of actions it saw fit to exempt. The policy serves to protect the scope of the N.Y. Convention Act, as well as the parties that reasonably rely on the stability of the Convention's scope of applicability. The rationale behind the policy, however, loses force when the policy extends to Congress. Congress is entrusted with the responsibility of making value judgments when competing policies collide. Apart from the formalistic issue of statutory interpretation, the true heart of the matter is the conflict between the policy of protecting seamen,[207] who are at an inherent disadvantage in the contractual arena, and the promotion of international commerce through the enforcement of freely negotiated agreements. Such a conflict can only be resolved by a value judgment; it cannot be resolved by a hierarchical judicial structuring of policies. In accord with the *Mitsubishi* court's external-legal-constraints test for subject-matter arbitrability, the two competing policies should be put on equal footing at the outset of any analysis.[208] The perfunctory application of the pro-arbitration policy, without the evaluation of competing policies, leads to the wrong determination that the N.Y. Convention Act controls claims arising from seamen's employment.

When Congress has spoken, as it has in section 1, a court should begin its analysis of whether the subject matter is exempted from federal arbitration law by looking to the congressional intention animating the statute in question. The analysis should not rely solely on the statutory text of the N.Y. Convention Act because, as evidenced by the line of cases in the Fifth and Eleventh Circuits, the analysis will likely end there. Such an analysis will quickly run into the pro-arbitration policy and the Act's ostensibly broad scope and will not overcome the presumption that any and all classes of claims are arbitrable. The Supreme Court seems to have recognized this danger in *Mitsubishi* when it directed courts to look to the "congressional intention manifested" in the statute in question.[209] Therefore, in determining the applicability of the N.Y. Convention Act to seamen's employment claims, the pro-arbitration policy should only apply

[207] This policy likely rises to the higher level of a public policy. *See infra* Part IV.C.

[208] *See* Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc., 473 U.S. 614, 628 (1985).

[209] *Id.* at 627 (citing Dean Witter Reynolds Inc. v. Byrd, 470 U.S. 213, 224–25 (1985) (White, J. concurring); Southland Corp. v. Keating, 465 U.S. 1, 16 n.11 (1984); Wilko v. Swan, 346 U.S. 427, 434–35 (1953)).

within its well-defined functions and should not be used to determine congressional intent when Congress has already spoken to the issue, as it has through section 1. The only inferable intent arising from section 1 is that Congress intended to remove claims arising from seamen's employment from federal arbitral law, and that specific intent should not be disregarded due to the misapplication of a generic pro-arbitration policy.

C. The Public Policy of Extending Greater Judicial Protection to Sailors

The exceptional nature of seamen's employment should be taken into consideration as an external legal constraint when determining the arbitrability of claims arising from such employment and therefore, the interpretation of section 1's applicability to the entire FAA. American jurisprudence and the greater world have long recognized the unique nature of working on the high seas.[210] As former Chief Justice Stone stated, "[t]he policy of the maritime law, for great, and wise, and benevolent purposes, has built up peculiar rights, privileges, duties, and liabilities in the sea-service, which do not belong to home pursuits."[211]

The current jurisprudence fails to consider the unique nature of the profession. Apart from determining the applicability of section 1, it simply assumes that all employment contracts, regardless of the peculiarities of the profession, are the same in regard to their arbitrability.[212] This assumption contradicts the rationale for distinguishing maritime law from all other bodies of law. Public policy provides the most convenient analytical tool for incorporating these concerns into the analysis of the arbitrability of claims arising from seamen's employment.

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[210] For an insightful review of the legal regimes that have attempted to address the unique nature of seamen's employment throughout history, see FITZPATRICK & ANDERSON, *supra* note 19, at 3–35. "No other class of workers in modern society can trace their legal regulation to such an interesting and important historical framework." *Id.* at 7.

[211] Seas Shipping Co., Inc. v. Sieracki, 328 U.S. 85, 105 (1946) (Stone, C.J., dissenting) (quoting Reed v. Canfield, 20 F. Cas. 426, 428 (C.C. Mass. 1832) (No. 11,641)).

[212] It has also been argued that the FAA does not effectively differentiate between classes of claims once within its scope. *See* William W. Park, *Amending the Federal Arbitration Act*, 13 AM. REV. INT'L ARB. 75 (2003) (calling for an amending of the FAA to better address the "different varieties of arbitration").

Seamen suffer from an inherent bargaining disadvantage when negotiating the terms of their contracts due to the unique nature of the maritime industry. Employers who operate on the high seas can dictate the terms of most contracts because they are liberated from the restraints of dealing with a single domestic employee market.[213] This contrasts starkly with traditional industries in which employers are compelled to work with the domestic pool of employees and the society of those employees. Normally, the society in which employee and employers interact regulates that interaction. However, a society's ability to regulate such interaction is substantially limited by its borders. Although a society's regulation of employment may affect where an employer ultimately chooses to do business, it will not fundamentally affect the hiring practices of the employer once the employer selects a location because the local society will dictate the structure of the employee/employer relationship. But this is clearly not the case with the shipping industry in which employee/employer relationships lack a traditional situs. Employers in other blue-collar dominated industries do not have the near-complete freedom that the shipping industry possesses to select employees from whichever country offers the best combination of cheap, qualified labor and the most accommodating legal regime (meaning non-existing or non-enforced) and then to remove the employee from that country. Therefore, as the shipping industry is truly unique, the legal regimes and concepts applied to "home pursuits"[214] should not automatically apply to seamen.

American jurisprudence historically recognizes the unique realities of working on the high seas. Courts deem seamen "wards' of the admiralty court,"[215] whose protection has been entrusted to them; "[s]ince ancient times seamen have been accorded special protection by their Governments and Courts . . . ."[216]

> Every court should watch with jealousy an encroachment upon the rights of seamen, because they are unprotected and need counsel; because they are thoughtless and require indulgence; because they are

[213] *See generally* FITZPATRICK & ANDERSON, *supra* note 19, at 3–35.

[214] *Seas Shipping Co.*, 328 U.S. at 103.

[215] *See also* Lampsis Navigation, Ltd. v. Ortiz De Cortes, 694 F.2d 934 (2d Cir. 1982).

[216] Arguelles v. U.S. Bulk Carriers, Inc., 408 F.2d 1065, 1069 (4th Cir. 1969), *aff'd*, 400 U.S. 351 (1971).

> credulous and complying; and are easily overreached. But courts of maritime law have been in the constant habit of extending towards them a peculiar, protecting favor and guardianship. They are emphatically the wards of the admiralty; and though not technically incapable of entering into a valid contract, they are treated in the same manner, as courts of equity are accustomed to treat young heirs, dealing with their expectancies, wards with their guardians, and cestuis que trust with their trustees. They are considered as placed under the dominion and influence of men, who have naturally acquired a mastery over them; and as they have little of the foresight and caution belonging to persons trained in other pursuits of life, the most rigid scrutiny is instituted into the terms of every contract, in which they engage. If there is any undue inequality in the terms, any disproportion in the bargain, any sacrifice of rights on one side which are not compensated by extraordinary benefits on the other, the judicial interpretation of the transaction, is that the bargain is unjust and unreasonable, that advantage has been taken of the situation of the weaker party, and that pro tanto the bargain ought to be set aside as inequitable.[217]

The preceding quotation comes from an 1823 opinion that has not been lost to history nor forgotten. The Supreme Court has cited the case numerous times, as recently as 2005,[218] and so have many lower courts. Although the rationale that seamen are so intellectually challenged so as to limit their ability to enter into freely negotiated agreements is not persuasive today, the reasoning can extend to the concept of economic power, which *Mitsubishi* cited as another consideration in determining arbitrability.[219] Today's shipping practice

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[217] Harden v. Gordon, 11 F. Cas. 480 (1823), *quoted in* Garrett v. Moore-McCormark Co. Inc., 317 U.S. 239, 246–47 (1942).

[218] Stewart v. Dutra Constr. Co., 543 U.S. 481, 487 (2005) (cited for the proposition that before the Jones Act an injured seaman was entitled to maintenance and cure).

[219] *Mitsubish*, 473 U.S. at 627 ("Of course, courts should remain attuned to well-supported claims that the agreement to arbitrate resulted from the sort of fraud or overwhelming economic power that would provide grounds 'for the revocation of any contract'").

of hiring predominately from developing countries and the inherent blue-collar nature of the work ensures that the financially disenfranchised will continue to constitute the bulk of seamen working on the open seas. At the same time, courts should consider that seamen, as a profession, are traditionally not well educated, thereby limiting their options beyond the profession. Due to their financial plight, seamen will always be vulnerable to the "overwhelming economic power" of their employers.[220]

To consider the unique public policy concerns of seamen is consistent with the United States' obligations under the New York Convention. The Convention, apparently aware that situations would arise that do not fit comfortably within sovereign prerogative and the allegiance-blind nature of arbitration,[221] made public policy an acceptable grounds for refusing to enforce arbitral awards. Article V(2) of the New York Convention states,

> Recognition and enforcement of an arbitral award may also be refused if the competent authority in the

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[220] *Mitsubishi*, 473 U.S. at 627. *See also* HERBERT R. BAER, ADMIRALTY LAW OF THE SUPREME COURT 88–89 (The Michie Company 1969) (quoting Brown v. Lull, 4 F. Cas. 407 (C.C. Mass. 1836)).

> [B]argains between [seamen] and shipowners, the latter being persons of great intelligence and shrewdness in business, are deemed open to much observation and scrutiny; for they involve great inequality of knowledge, of forecast, of power, and of condition. Courts of admiralty on this account are accustomed to consider seamen as peculiarly entitled to their protection; so that they have been, by a somewhat bold figure, often said to be favorites of courts of admiralty. In a just sense they are so, so far as the maintenance of their rights, and the protection of their interests against the effects of the superior skill and shrewdness of masters and owners of ships are concerned. Courts of admiralty are not, by their constitution and jurisdiction, confined to the mere dry and positive rules of the common law. But they act upon the enlarged and liberal jurisprudence of courts of equity; and, in short, so far as their powers extend, they act as courts of equity.

I do not agree in totality with the above quote, however, it evinces the inherent inequities in the seaman/employer relationship and the judiciaries' historical recognition of those inequities.

[221] *See generally Parsons & Whittemore Overseas Co.*, 508 F.2d at 975 (dismissing an argument that questioned the allegiance of arbitrators for failure to substantiate because "[t]he mere fact that an issue of national interest may incidentally figure into the resolution of a breach of contract claim does not make the dispute not arbitrable."); LYNCH, *supra* note 153, at 132–33.

> 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[222]
>
> (*b*) The recognition or enforcement of the award would be contrary to the public policy of that country.

The rationale that some subject matters are simply not appropriate for arbitration applies equally to enforcing agreements to arbitrate claims that run afoul of public policy. "The notion of arbitrability is closely linked to public policy considerations and normally a state determines that a particular category of disputes is not arbitrable based on public policy factors."[223] Public policy considerations can either be applied as a distinct grounds for refusing to compel arbitration, even though the subject matter is technically arbitrable, or be incorporated into determining arbitrability through the interaction of Article I(3) and Article II and indirectly section 1.[224] The influence of public policy will remain the same regardless of how incorporated.

As previously discussed, the current jurisprudence has analyzed the subject-matter arbitrability of claims arising from seamen's employment by only applying the considerations of the N.Y. Convention Act.[225] But neither of the two circuits addressing the issue have treated the public policy concerns animating the jurisprudence developed to address the special concerns of seamen.[226] However, at

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[222] It is generally accepted that Article V(2)(a), arbitrability separately, constitutes part of the public policy concept. It was included in the New York Convention for historical reasons. VAN DEN BERG, *supra* note 150, at 359–75. Therefore, for purposes of this Article, the concept of public policy will subsume the issue of arbitrability in Article V(2)(a) and will only be referred to collectively as "public policy."

[223] LYNCH, *supra* note 153, at 133.

[224] *See generally* VAN DEN BERG, *supra* note 150, at 359–60. Considerations of the role of public policy in determining arbitrability are the same whether enforcing an award or an agreement.

[225] *See supra* Part II.B.

[226] *See In re* Eternity Shipping, 444 F. Supp. 2d 347 (Md. 2006). In *Eternity Shipping*, the court dismissed the public policy argument because the contract contained the exact same arbitration clause promulgated by the Filipino government that was at issue in the Fifth and Eleventh Circuit cases. The court held that the heavy involvement of the Filipino government was a sufficient guarantee that the spirit of the public policy would not be violated. *See supra* note 140.

least the Eleventh Circuit was on notice of public policy concerns in the context of applying the N.Y. Convention Act. The district court in *Bautista* listed public policy as a basis for refusing to enforce an agreement to arbitrate. The court stated that "[u]nder the Convention, an agreement to arbitrate is null and void only when it is subject to internationally recognized defenses such as duress, mistake, fraud or waiver, or *when it contravenes fundamental policies of the forum nation*."[227] Nevertheless, the Eleventh Circuit failed to mention, much less address, the latter grounds for refusing to enforce an arbitration agreement. The appellate court only listed "fraud, mistake, duress, and waiver" as grounds under Article II(3) for not enforcing an arbitration agreement.[228] Regardless of where public policy concerns are best incorporated, under either Article I(3), Article II(1), Article II(3), or indirectly through section 1, they must be considered.

The New York Convention only speaks to a role for public policy in the arbitral scheme without specificity and, therefore, public policy arguments appear in a variety of contexts.[229] The New York Convention does not define public policy, nor does it describe sources of public policy; such measures are left to individual signatory nations to determine.[230] The sources for ascertaining the existence of a public policy are wide and varied. The Supreme Court established generally the sources of United States public policy in *Hurd v. Hodge*:

> The power of the federal courts to enforce the terms of private agreements is at all times exercised subject to the restrictions and limitations of the public policy of the United States as manifested in the Constitution, treaties, federal statutes, and applicable legal precedents. Where the enforcement of private agreements would be violative of that policy, it is the

[227] Bautista v. Star Cruises, 286 F. Supp. 2d 1352, 1365 (S.D. Fla. 2003) (emphasis added).

[228] Bautista v. Star Cruises, 396 F.3d 1289, 1302 (11th Cir. 2005).

[229] *See* Andrew M. Campbell, Annotation, *Refusal to Enforce Foreign Arbitration Awards on Public Policy Grounds*, 144 A.L.R. FED. 481 (1998) (listing the various contexts in which public policy arguments have arisen); *see also* Article V(2), *supra* text accompanying note 222.

[230] *See* Matthias Lehmann, *A Plea for a Transnational Approach to Arbitrability in Arbitral Practice*, 42 COLUM. J. TRANSNAT'L L. 753, 756–57 (2004).

> obligation of courts to refrain from such exertions of judicial power.[231]

Although the preceding quotation came from a civil rights case decided well before the enactment of the N.Y. Convention Act, it still provides a valuable guidepost of sources for ascertaining the existence of a public policy. However, "[w]hether arising from precedent, statute or otherwise, a public policy justifying [subject-matter non-arbitrability] must be well-settled."[232]

Judicial precedent indicates a longstanding public policy of extending greater judicial protection to seamen due to their marginalized status.[233] When judicial precedent is combined with the Jones Act (see Part IV.D.1), other statutes pertaining to seamen,[234] and section 1 itself, it becomes clear that a public policy exists of extending greater judicial protection to seamen. By allowing the N.Y. Convention Act to control claims arising from seamen's employment, without giving any consideration to the judiciary's historical role as protectors of seamen, the Fifth and Eleventh Circuits have been remiss.[235] The concept/doctrine of public policy provides an

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[231] Hurd v. Hodge, 334 U.S. 24, 34–35 (1948) (striking down covenant precluding the transfer of real property to African Americans). "It is clear that because of the public policies involved, states wish to apply their own law to the issue of arbitrability. The New York Convention of 1958, by far the most important convention on arbitration, recognizes this desire in Article V(2)(a)." Lehmann, *supra* note 230, at 756. This Article addressed the issue of which law an arbitral tribunal should apply in determining subject-matter arbitrability.

[232] Davis, *supra* note 2, at 110. The given quotation said "vacatur" instead of subject-matter non-arbitrability, but the rationale remains the same. The article was addressing dangers of the public policy defense to arbitrability when applied to judges. "A judge may not dignify his view of the public interest, no matter how appealing, by dubbing it 'public policy' and vacating an award that offends his sensibilities." *Id.*

[233] *See supra* text accompanying notes 213 & 214 (discussing the unique nature of seamen employed on the high seas).

[234] *See, e.g.*, Death on the High Seas Act, 46 U.S.C. §§ 30302–30308 (2006).

[235] Courts should be especially careful to maintain the current evisceration of long-standing protections to seamen. Due to the traditional financial shortcomings of those employed in the profession and their global disbursement, seamen (particularly foreign seamen) will not be able to take their fight to the political arena. Seamen, as a class, cannot compete with the lucrative shipping industry in gaining the ear of Congress. Today the political reality is that two main paths lead to congressional attention—well-financed lobbies or issues appealing to the media—both of which work against seamen. The issues of a traditionally poor and ethnic profession will not likely resonate with modern-day Congress—that is, if their issues even reach the attention of Congress. Most of the laws in place to protect seamen, both foreign and domestic, were enacted at a time when a greater portion of those seamen was

opportunity to incorporate the courts' role as protector of seamen's rights into arbitral law and, as an external legal constraint to subject-matter arbitrability, supports the conclusion that section 1 should be interpreted as extending throughout the entire FAA.[236]

A further consideration touching upon public policy is that international human rights law seeks to grant every seaman the right to a legal remedy and access to justice. That right rises from a number of international conventions, but it arises most clearly from the 1948 Universal Declaration of Human Rights, which states that "[e]veryone has the right to an effective remedy by the competent national tribunals for acts violating the fundamental rights granted him by the constitution or by law."[237] As result of this right, "it is well-established as matter of customary international law that States must allow [seamen] within their jurisdiction reasonable access to their courts for redress."[238] The current jurisprudence will effectively limit a seamen's ability to seek redress in U.S. courts.

American. *See infra* note 266. With shipping becoming less and less important in today's American job market, the likelihood that Congress will make the effort to re-amend the FAA in order to explicitly refute the current jurisprudence's misunderstanding of the N.Y. Convention Act, as Congress conceived it in 1970, diminishes each day.

[236] If the current holding that section 1 does not extend to the N.Y. Convention Act is not quickly refuted, claims arising from seamen's employment will never find their way into U.S. courts. As many seamen are financially challenged, contingent fees likely propel much of their litigation. Very few firms will likely invest the resources necessary to properly contest the current holding if such litigation entails years of fighting its way to the Supreme Court. At the same time, with the prospect of years of potentially fruitless litigation hanging over their head, seamen (or their surviving relatives) will likely accept lower settlements than are warranted. Also, the use of judiciously timed settlements can effectively limit the opportunities for courts to overturn the current holding. In *Bautista*, for example, the injured seamen sought certiorari but withdrew their petition under Rule 46 of the Supreme Court (dismissal by agreement of the parties). Bauitista v. Star Cruises, 545 U.S. 1136 (2005). Although it might not have been the case in *Bautista*, the use of such settlements by the shipping industry can be viewed as an opportunistic sword to keep seamen from gaining the advantages of having the current holding overturned.

[237] Universal Declaration of Human Rights, art. 8, G.A. Res. 217A, at 71, U.N. GAOR, 3d Sess., 1st plen. mtg., U.N. Doc A/810 (Dec. 12, 1948); *see also* FITZPATRICK & ANDERSON, *supra* note 19, at 59.

[238] *Id.*

D. Drawing a Clear Distinction Between Personal Injury Tort Causes of Action and Conventional Contractual Claims

This Article draws a clear distinction between personal injury tort claims that arise from an underlying contractual relationship and conventional contract claims that arise directly from the contract.[239] The distinction is highly relevant to determining the scope of the N.Y. Convention Act as construed and/or understood by Congress when it enacted section 1, the N.Y. Convention Act, and other statutes addressing seamen's employment.

1. The Jones Act and section 1 collectively constitute legal constraints to the arbitrability of personal injury tort claims arising from seamen's employment

As a creature of contract, arbitration intuitively embraces conventional contractual claims, but the relationship between arbitration and personal injury tort causes of action is not as readily apparent. The current jurisprudence fails to recognize this distinction and give it proper relevance.[240] Courts have sporadically touched upon this issue when addressing whether tort claims, arising from an underlying contractual relationship, fall within the scope of a particular arbitration agreement.[241] The distinction has relevance beyond determining the scope of individual arbitration agreements.

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[239] Some authority exists for the proposition that choice-of-law provisions govern only contractual disputes but not torts. *See* Lazard Freres & Co. v. Protective Life Ins. Co., 108 F.3d 1531, 1540–41 (2d Cir. 1997); Rosenberg v. Pillsbury Co., 718 F. Supp. 1146, 1150 (S.D.N.Y. 1989); Klock v. Lehman Bros. Kuhn Loeb Inc., 584 F. Supp. 210, 215 (S.D.N.Y. 1984). All the preceding cases interpreted New York's conflict of laws. The rationale should also carry force in regard to forum selection cases.

[240] *See* Bautista v. Star Cruises, 396 F.3d 1289 (11th Cir. 2005); Francisco v. Stolt Achievement MT, 293 F.3d 270 (5th Cir. 2002). Both involved Jones Act claims. For examples of where the courts did not even bother to name the causes of action, see Gavino v. Eurochem Italia, No. Civ.A. 01-1314, 2001 WL 845456 (E.D. La. July 24, 2001) and Lejano v. K.S. Bandak, No. Civ.A. 00-2990, 2000 WL 33416866. (E.D. La. Dec. 8, 2000). *Gavino* only said that the plaintiff was injured and filed suit; it never mentioned particular causes of action in determining the applicability of the N.Y. Convention Act. *Gavino*, 2001 WL 845456, at *1. *Lejano* merely stated that the plaintiff had brought a "seaman's personal injury lawsuit." *Lejano*, 2000 WL 33416866, at *1.

[241] *Compare Francisco*, 293 F.3d at 278 (addressing whether tort claims fell within the scope of the agreement to arbitrate) *with Bautista*, 396 F.3d at 1303. *Bautista* did not address whether tort claims were within scope of agreement to

Most actions brought in U.S. courts between a foreign seaman and his employer contain a Jones Act personal injury tort claim.[242] "The Jones Act extends the Federal Employees' Compensation Act . . . to seamen by providing a negligence cause of action and tort damages to seamen injured or killed in the course of their employment."[243] A Jones Act claim of negligence normally functions as the "anchor claim" that holds together a seamen's typical causes of action relating to personal injury—a bundle which typically includes claims of unseaworthiness, maintenance, cure, and wages.[244] The Act, "remedial in nature," should be "liberally construed in favor of injured seamen."[245]

The Jones Act provides a seaman injured in the course of his employment not only a tort cause of action against his employer, but more importantly to the issue in question, the explicit right to a jury trial.[246] This right, regardless of the intent of the parties, cannot be realized through arbitration.[247] A court should be wary of interpreting

arbitrate. The court did, however, address whether the arbitral panel was capable of adjudicating the tort claims. The court determined that it could not ascertain whether the panel could hear the tort claims but found that the uncertainty would not preclude the court from compelling arbitration as the plaintiff had "options beyond tort claims." *Id.*

[242] For examples of seamen employment cases containing Jones Act cause of action, controlled by the N.Y. Convention Act, see *Bautista*, 396 F.3d 1289; *Francisco*, 293 F.3d 270; Lejano v. Soriamont S.S. Agencies, Inc., 33 F. App'x 704 (5th Cir. 2002); Magsino v. Spiaggia Maritime, Ltd., No. Civ.A. 04-2148, 2004 WL 2578922 (E.D. La. Nov. 10, 2004) (Jones Act not expressly mentioned, but it is inferable that the action likely included a Jones Act claim.); Amizola v. Dolphin Shipowner, S.A., 354 F. Supp. 2d 689 (E.D. La. 2004); Acosta v. Norwegian Cruise Line, Ltd., 303 F. Supp. 2d 1327 (S.D. Fla. 2003); Amon v. Norwegian Cruise Lines, Ltd., No. 02-21025-CIV, 2002 WL 32851545 (S.D. Fla. Sept. 26, 2002); *Gavino*, 2001 WL 845456 (Jones Act not expressly mentioned, but inferable that the action likely included a Jones Act claim).

[243] Smallwood v. Am. Trading & Transp. Co., 839 F. Supp. 1377, 1379–80 (N.D. Cal. 1993).

[244] SCHOENBAUM, *supra* note 10 at 263.

[245] ROBERT FORCE, ADMIRALTY AND MARITIME LAW 91 (2004); *see also* The Arizona v. Anelich, 298 U.S. 110 (1936).

[246] "[T]he jury still occupies the exalted place originally envisioned for it in the Seventh Amendment." Stephan Landsman, *The Civil Jury in America* WORLD JURY SYSTEMS 381–403 (Neil Vidmar ed., 2000) (canvassing the history and role of a jury in civil trials in the United States).

[247] *See* Bernhardt v. Polygraphic Co. of America, 350 U.S. 198, 203 (1956) ("[T]he remedy by arbitration, whatever its merits or shortcomings, substantially affects the cause of action created by the State. The nature of the tribunal where suits are tried is an important part of the parcel of rights behind a cause of action. The

a statute so as to extinguish this explicit right because a "[t]rial by jury is justly dear to the American people."[248] The right to a jury "has always been an object of deep interest and solicitude, and every encroachment upon it has been watched with great jealousy."[249] As the Supreme Court stated in *Circuit City*, when directly addressing the section 1 exemption for seamen, "[i]t is reasonable to assume that Congress excluded 'seamen' . . . from the FAA for the simple reason that it did not wish to unsettle established or developing statutory dispute resolution schemes covering specific workers,"[250] such as jury trials. The Jones Act states that

> [a] seaman injured in the course of employment or, if the seaman dies from the injury, the personal representative of the seaman may elect to bring a civil action at law, *with the right of trial by jury*, against the employer. Laws of the United States regulating recovery for personal injury to, or death of, a railway employee apply to an action under this section.[251]

The Jones Act's explicit right to a jury trial seems to constitute precisely the type of explicit external legal constraints that the Supreme Court envisioned when it decided *Mitsubishi*, but did not find within the Sherman Act.[252] More precisely, the Jones Act contains a statutory procedural right inherently incompatible[253] with

change from a court of law to an arbitration panel may make a radical difference in ultimate result. Arbitration carries no right to trial by jury that is guaranteed both by the Seventh Amendment and by Ch. 1, Art. 12th, of the Vermont Constitution.").

[248] Chauffeurs Local No. 391 v. Terry, 494 U.S. 558, 581 (1990) (quoting Parsons v. Bedford, 28 U.S. 433, 446 (1830)).

[249] *Id*. (quoting *Parsons*, 28 U.S. at 446); *see also* Eskridge & Frickey, *supra* note 155, at 104; Eduard A. Lopez, *Mandatory Arbitration of Employment Discrimination Claims: Some Alternative Grounds for* Lai*,* Duffield*, and* Rosenberg, 4 EMP. RTS. & EMP. POL'Y J. 1 (2000) (arguing that a contract of adhesion rationale, combined with the Seventh Amendment right to a jury trial, could serve as a basis for finding arbitration agreements invalid in employment discrimination litigation).

[250] Circuit City Stores, Inc. v. Adams, 532 U.S. 105, 121 (2001).

[251] 46 U.S.C. § 30104(a) (2006) (emphasis added).

[252] *See* Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc., 473 U.S. 614, 628–37.

[253] This right is inherently incompatible with arbitration because without the authority of a sovereign to compel disinterested people to adjudicate a matter, it simply cannot be done (for example, arbitrators do have the power to create a jury). Moreover, even if it were feasible for an arbitral to create a jury ad hoc, it would

arbitration.[254] Conversely, resolutions of substantive factual and legal disputes, arising in claims governed by the Sherman Act, are adjudicated through any neutral forum, including an arbitral tribunal. The majority of statutory claims are analogous to Sherman Act claims in this respect, and the case law addressing arbitrability reflects that. The fact that the Jones Act contains an external legal constraint alone should lower the stringent standard set forth in *Mitsubishi* for finding a cause of action non-arbitrable.[255] Most importantly, *both* constraints noted as relevant are present here.

The second and primary constraint to subject-matter arbitrability is found within the FAA itself.[256] The section 1 exemption of seamen from federal arbitral law constitutes precisely this type of constraint. As a matter of fact, as the only explicit exemption to arbitration within

undermine the purposes of submitting to arbitration: speed, cost, and confidentiality. Additionally doing so would also require financial incentives that would only attract certain classes of potential jurors, thereby undermining the principle that a jury should encompass the collective views of the society it is meant to represent.

[254] Moreover, the waiver of a jury trial before the event giving rise to the claim takes place is frowned upon, especially in tort cases, due to the unknown quality of the nature and extent of the harm, before the event giving rise to the claim takes place. The issue of contractual waiver to a jury, before the fact, obviously arises more in the resolution of contractual disputes. However, the hostility toward waiving the right to a jury trial found in the resolution of contractual disputes provides insight into how the issue of a pre-contractual waiver in tort claims should be looked upon with disdain. In California, a right to a jury trial cannot be contractually waived before the fact. Grafton Partners L.P. v. Superior Court, 116 P.3d 479 (2005) (dealing with a California statute proscribing waiver in only enumerated situations and the California Constitution section that accords the right to a jury trial. The contract in question waived the right to a jury trial in any dispute arising between the parties. The court held the waiver invalid.); *cf.* K.M.C. Co. v. Irving Trust Co., 757 F.2d 752, 755, 756 n.4 (6th Cir. 1985) ("There is a significant distinction to be drawn between a contractual waiver entered into before any cause of action has arisen, and a party's procedural default once litigation has commenced in a particular case." The court stated that it would allow contractual waiver but only if it had been made "knowingly, voluntarily and intentionally."); Broemmer v. Abortion Servs. of Phoenix, Ltd., 840 P.2d 1013 (Ariz. 1992) (adding another requirement: "intelligently"); Caldwell v. KFC Corp., 958 F. Supp. 962 (D.N.J. 1997) (applying a contract of adhesion rationale to find the claim outside the scope of the arbitration agreement because "[n]othing in the [Federal Arbitration Act, 9 U.S.C. §§ 1–16] prescribes a wooden application of the federal presumption in favor of arbitrability to the complete exclusion of well-established principles of contract construction"). It is doubtful that financially challenged blue collar workers, especially those from third-world countries, are familiar with the concept of a jury trial to the extent necessary to waive the right knowingly, voluntarily, and intelligently.

[255] *Mitsubishi*, 473 U.S. at 628–29.

[256] *Id.*

the FAA, the section 1 exemption to seamen is the only possible class of claims that could constitute this type of legal constraint. Therefore, both types of legal constraints to arbitrability set forth in *Mitsubishi* exist in Jones Act tort claims arising from seamen's employment. The analytical framework set out in *Mitsubishi* for determining the arbitrability of statutory claims leads to the conclusion that arbitration agreements cannot apply to Jones Act tort claims. Consequently, the FAA should be interpreted as extending section 1 to the N.Y. Convention Act—a result wholly consistent with the United States' duties under the New York Convention due to the declaration made under Article I(3) of the Convention.[257]

At the same time, by removing Jones Act tort claims from the scope of the N.Y. Convention Act through the operation of section 1, irreconcilable inconsistencies are avoided because the legal regime developed over the centuries to protect seamen is no longer subject to an the arbitral legal scheme that was created to facilitate international commercial transactions. The current legal scheme is structured so that once a Jones Act claim is filed in state court, the action will remain there. Thus, a Jones Act claim is non-removable to federal court under 28 U.S.C § 1445(a), regardless if other grounds for federal jurisdiction exist, such as diversity.[258] One federal court recently declared that since the facts of the case failed to establish the in-writing requirement of the N.Y. Convention Act, it could not "fall under the [N.Y.] Convention [Act], and [as] there is no basis of federal jurisdiction other than the Jones Act . . . the matter must be remanded to state court."[259] Also, several jurisdictions, including the Eleventh Circuit,

[257] Although the Hague Convention on Choice of Court Agreements has yet to be ratified and therefore does not control, it provides guidance because it specifically excludes "claims for personal injury" from its scope. Hague Convention on Choice of Court Agreements, *supra* note 188, art. 2(2)(j).

[258] 28 U.S.C. § 1445(a) (2005). ("A civil action in any State court against a railroad or its receivers or trustees, arising under sections 1–4 and 5–10 of the Act of April 22, 1908 (45 U.S.C. §§ 51–54, 55–60), may not be removed to any district court of the United States."). This has been interpreted to extend to the Jones Act because the Act states that "[l]aws of the United States regulating recovery for personal injury to, or death of a railway employee shall apply" to Jones Act claims. 46 U.S.C. § 30104(a) (2006); *see* Lackey v. Atl. Richfield Co., 983 F.2d 620 (5th Cir. 1993); Pate v. Standard Dredging Corp., 193 F.2d 498 (5th Cir. 1952); Demarac v. Am. Dredging Co., 486 F. Supp. 853 (S.D.N.Y. 1980); McKee v. Merritt-Chapman & Scott Corp., 144 F. Supp. 423. (N.D. Ill. 1956); Moltke v. Intercontinental Shipping Corp., 86 F. Supp. 662 (S.D.N.Y. 1949); *see also* SCHOENBAUM, *supra* note 10, at 264.

[259] Tuca v. Ocean Freighters, Ltd., No. Civ.A. 05-5019, 2006 WL 901840, at *6 (E.D. La. Apr. 5, 2006).

hold that once a valid Jones Act claim is established, it may not be dismissed based on forum non conveniens.[260] A few jurisdictions even go so far as to hold forum selection clauses invalid once a Jones Act claim is established.[261] It seems strikingly inconsistent to structure a legal scheme so as to push Jones Act claims to a particular preferred forum, but then give an easy out to that scheme by the simple insertion of an arbitration clause.

Another inconsistency is that Congress intended for the Jones Act to offer a certain level of judicial protection to foreign seamen, although concededly not to the same level of protection afforded American seamen.[262] An analysis under the Jones Act does not turn on the nationality of the seaman because "[w]hether the injured seaman be an American or a foreign national is not important."[263] The original language of the Act, as promulgated in 1920, evinces a congressional intent to reach a broad class of seamen, including foreigners.

> If read literally, Congress has conferred an American right of action which requires nothing more than that plaintiff be 'any seaman who shall suffer personal injury in the course of his employment'. It makes no explicit requirement that either the seaman, the

[260] The authority for individual jurisdictions to hold forum non conveniens inapplicable to Jones Act claims was upheld in American Dredging Co. v. Miller, 510 U.S. 443 (1994). Federal circuit courts have exercised that right. *See* Zipfel v. Halliburton Co., 832 F.2d 1477, 1487 (9th Cir. 1987) ("[T]he *forum non conveniens* doctrine should be unavailable as a ground for dismissal under the Jones Act . . . ."); Szumlicz v. Norwegian Am. Line, Inc., 698 F.2d 1192, 1195 (11th Cir. 1983) ("If United States law applies, the case should not be dismissed for forum non conveniens."); *see also* SCHOENBAUM, *supra* note 10, at 238. *But see* Needham v. Phillips Petroleum Co. of Norway, 719 F.2d 1481 (10th Cir. 1983). States that exerted that authority include Florida and Louisiana. *See* Wai v. Rainbow Holdings, 315 F. Supp. 2d 1261 (S.D. Fla. 2004); Prado v. Sloman Neptun Schiffahrts, A.G., 611 So.2d 691 (La. Ct. App. 1992).

[261] Boutte v. Cenac Towing, Inc., 346 F. Supp. 2d 922 (S.D. Tex. 2004); Nunez v. Am. Seafoods, 52 P.3d 720 (Alaska 2002); Sawicki v. K/S Stavanger Prince, 802 So.2d 598 (La. 2001); LA REV. STAT. ANN. § 23:921(A)(2) (2006).

[262] *See* Mattes v. Nat'l Hellenic Am. Line, S. A., 427 F. Supp. 619, 628 (S.D.N.Y. 1977) ("By establishing a negligence standard of liability for claims by seamen injured in the course of their employment, the [Jones] Act not only affords protection to the seaman but, indirectly, to passengers whose well-being is entrusted to the vessel's crew. Where the vast majority of a vessel's passengers are consistently American citizens, this country has an interest in extending its law to protect the vessel's foreign crew from injuries which might in turn affect the safety of passengers . . . .").

[263] 2 MARTIN J. NORRIS, THE LAW OF SEAMEN § 684, at 358 (3d ed. 1970).

> employment or the injury have the slightest connection with the United States. Unless some relationship of one or more of these to our national interest is implied, Congress has extended our law and opened our courts to all alien seafaring men injured anywhere in the world in service of watercraft of every foreign nation—a hand on a Chinese junk, never outside Chinese waters, would not be beyond its literal wording.[264]

As the Supreme Court recognized in *Lauritzen v. Larsen*, the case that gave the preceding quotation, other bodies of law limit the application of U.S. maritime law to avoid the absurd result of a literal interpretation of the Jones Act. However, that does not mean that the N.Y. Convention Act should be interpreted to completely undermine congressional intent to extend some judicial protection to foreign seamen. Under the current jurisprudence, the mere insertion of a one-sentence arbitration clause in seamen's employment contracts stating, "any and all disputes"[265] between the parties are subject to arbitration, will block access to U.S. courts to any seamen who hail from a New York Convention signatory country.

Due to the current jurisprudence, it will only be matter of time before the shipping industry retools its practices to always include an arbitration clause in seamen's employment contracts for the purpose of avoiding the off chance that a personal injury tort claim will find its way into a U.S. court. This will not only further precipitate the decline of the competitiveness of the U.S. shipping industry,[266] but it will also

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[264] Lauritzen v. Larsen, 345 U.S. 571, 576–77 (1953).

[265] See Acosta v. Norwegian Cruise Line, Ltd., 303 F. Supp. 2d 1327, 1330 (S.D. Fla. 2003) and Gavino v. Eurochem Italia, No. Civ.A. 01-1314, 2001 WL 845456, (E.D. La. July 24, 2001), where such clauses were sufficient to make all causes of action subject to arbitration.

[266] *See* FITZPATRICK & ANDERSON, *supra* note 19, at 513–15. The United States' share of the world shipping market has been declining rapidly over the last fifty years in part because of the higher standards imposed by U.S. law upon the industry in comparison to other nations. By not holding foreign ships to the same standards as U.S. ships, the courts weaken the ability of American seamen and their employers to compete in industries that operate on the high seas. *See* Kyriakos v. Goulandris, 151 F.2d 132, 137 (2d Cir. 1945) ("The intention of Congress to benefit American seamen would not be served by a contrary construction of the [Jones Act], since it would tend to encourage the hiring of foreign seamen in American ports in preference to American seamen because the aliens would not have the right of suit against their employers if injury should occur in those ports, while American seamen would.").

lead to the disappearance of any level of judicial protection for foreign seamen. Legislative action should promulgate this result, not judicial construction of a treaty that on its face does not address the unique character of industries operating on the high seas.[267] If Congress intended to revoke the limited protections in place for foreign seamen who are either injured in the coastal waters of the United States or while in the employment of a U.S. company, it surely would have taken more expedient measures to do so rather than by using a generally applicable international convention on arbitration, that took courts and employers over thirty years to realize Congress so acted.[268] Over reliance on the application of a general rule of law to the exclusion of more specific statutory rules is an interpretive approach frowned upon by the Supreme Court.[269]

Congress did seek to limit the Jones Act's applicability to foreign seamen by amending the Act.[270] Yet Congress did not completely remove foreign seamen from the Act's scope, which implies that Congress intended to continue extending some level of judicial protection to foreign seamen.[271] The Jones Act was modified in 1982 to explicitly differentiate between foreign and American seamen and to remove foreign seamen, in certain circumstances, from the Act's

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[267] Shipping, from ancient times, through the middle ages, and up to present, has been specially regulated.." FITZPATRICK & ANDERSON, *supra* note 210, at 7. Courts should think twice before trying to squeeze a truly unique body of law under the auspices of an arbitration convention of general applicability that does not attempt in any way to address the unique concerns of these workers.

[268] The N.Y. Convention Act came into force in 1970. The first clear case from an appellant court holding the Act applicable to seamen was Francisco v. Stolt Achievement MT, 293 F.3d 270 (5th Cir. 2002). Thirty-two years certainly constitutes a round-about method of revoking narrow and explicit protections for seamen—foreign or American.

[269] "Specific provisions targeting a particular issue apply instead of provisions more generally covering the issue." Eskridge, Jr. & Frickey, *supra* note 155, at 99, *citing* Green v. Bock Laundry Mach. Co., 490 U.S. 504, 524–26 (1989); Crawford Fitting Co. v. J. T. Gibbons, Inc., 482 U.S. 437, 444–45 (1987).

[270] *See* 46 U.S.C.A. app. § 688 (West 2005), *amended by* Pub. L. No. 97-389, § 503(a), 96 Stat. 1955 (1982).

[271] David W. Robertson and Chari Lynn Kelly, *Protecting U.S. Oil Companies from Lawsuits Brought by Foreign Offshore Oil and Gas Workers: A Report on the Effects of the 1982 Amendment to the Jones Act*, 21 REV. LITIG. 309, 330–31 (2002) (arguing that the 1982 amendment to the *Jones Act* does not preclude federal courts from entertaining non-Jones Act claims from foreign seamen falling under 688(b)); *see also* MARTIN J. NORRIS, THE LAW OF SEAMEN § 30:4 (The Lawyers Co-Operative Publishing Co., 4th Ed. 1985) ("It was the intent of Congress not to make the Jones Act applicable to foreign offshore workers injured on drilling rigs and vessels in waters under the jurisdiction of foreign nations").

scope.[272] Nevertheless, Congress modified only the scope of the Act to remove cases without a material American connection by providing,

> No action may be maintained under subsection (a) or under any other maritime law of the United States for maintenance and cure or for damages for the injury or death of a person who was not a citizen or permanent resident alien of the United States at the time of the incident giving rise to the action, if the incident occurred—

Subsections A and B elaborate that this limitation on the scope of the Jones Act applies when a foreign seaman is injured in specified offshore activities or when the event that gave rise to the tort claim

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[272] 46 U.S.C.A. app. § 688(b) (West 2005) states:

> (b) Limitation for certain aliens; applicability in lieu of other remedy.
>
> (1) No action may be maintained under subsection (a) or under any other maritime law of the United States for maintenance and cure or for damages for the injury or death of a person who was not a citizen or permanent resident alien of the United States at the time of the incident giving rise to the action, if the incident occurred--
>
> (A) while that person was in the employ of an enterprise engaged in the exploration, development, or production of offshore mineral or energy resources—including but not limited to drilling, mapping, surveying, diving, pipelaying, maintaining, repairing, constructing, or transporting supplies, equipment or personnel, but not including transporting those resources by a vessel constructed or adapted primarily to carry oil in bulk in the cargo spaces; and
>
> (B) in the territorial waters or waters overlaying the continental shelf of a nation other than the United States, its territories, or possessions. As used in this paragraph, the term "continental shelf" has the meaning stated in Article I of the 1958 Convention on the Continental Shelf.
>
> (2) The provisions of paragraph (1) of this subsection shall not be applicable if the person bringing the action establishes that no remedy was available to that person--
>
> (A) under the laws of the nation asserting jurisdiction over the area in which the incident occurred; or
>
> (B) under the laws of the nation in which, at the time of the incident, the person for whose injury or death a remedy is sought maintained citizenship or residency.

took place in the territorial waters of another nation.[273] Foreign seamen, as classically understood (working on the high seas and coastal waters of the United States), remain within the gambit of the Jones Act—that is, once American law is found to apply. Moreover, when foreign seamen have no other remedy, they can still bring a Jones Act claim even if the two above limitations apply.[274] When the Act was amended, Congress had the opportunity to review the results of including foreign seamen within the Jones Act and to excise any level of protection for foreign seamen, yet it chose to continue extending some protection to them. In addition, the Jones Act was amended twelve years after the N.Y. Convention Act came into force, but Congress did not seek to conform the Jones Act to which the practical effect that the current jurisprudence will lead to. Also, the same year the N.Y. Convention Act was ratified, the Supreme Court held that the Jones Act applied to foreign seamen injured in the territorial waters of the United States.[275] Instead of mitigating the Court's holding by explicitly stating that the N.Y. Convention Act did not incorporate the section 1 exemption for seamen, a classification that was nationality-blind, Congress plausibly opted to maintain the status quo of protecting foreign seamen in certain circumstances by incorporating section 1 into the N.Y. Convention Act.

The most glaring inconsistency created by the current jurisprudence arises from the fact that the courts have not articulated (nor can an articulation be made within the confines of current jurisprudence) a means of differentiating between American and foreign seamen so as to guarantee American seamen the protection of the Jones Act. If anything, the Jones Act appears to evince a clear intention of protecting American seamen wherever their job may take them.[276] The current jurisprudence's holding that section 1 does not apply to every case falling under the FAA severely undermines the intent of the Jones Act; the logical continuation of this jurisprudence will lead to situations where an American seaman, injured in the

[273] *See* 46 U.S.C.A. app. § 688 (b)(1)(A)–(B) (West 2005).

[274] *See* 46 U.S.C.A. app. § 688 (b)(1), (b)(2) (West 2005).

[275] Hellenic Lines, Ltd. v. Rhoditis, 398 U.S. 306, 310 (1970) (holding Greek seamen, injured in New Orleans while working for Greek company owned by a resident alien resident in the United States, could invoke the Jones Act).

[276] Moragne v. States Marine Lines, 398 U.S. 375, 401 (1970) ("[T]he *Jones Act* was intended to achieve 'uniformity in the exercise of admiralty jurisdiction' by giving seamen a federal right to recover from their employers for negligence regardless of the location of the injury or death."). *See also* FORCE, *supra* note 245, at 95.

coastal waters of the United States or working for an American employer outside coastal waters, could be sent to arbitration in another country—possibly even a developing country.

The N.Y. Convention Act, instead of chapter 1 of the FAA, applies whenever a foreign element exists to the legal relationship.[277] As a result, if an American seaman's employer is foreign, or if a seaman's job takes them outside the United States, the N.Y. Convention Act will automatically control any issues relating to their employment and arbitration instead of the FAA under which the section 1 exemption still applies. The failure to protect seamen of all stripes by extending the section 1 exemption to the N.Y. Convention Act leads to the absurd result of American seamen being divested of their rights under the Jones Act and maritime law.

Case law is beginning to bear this out. *Freudensprung v. Offshore Technical Services, Inc*.[278] exemplifies the slippery slope that the current jurisprudence is following. In *Freudensprung*, an American, arguably a seaman, was injured while working off the coast of Nigeria.[279] The plaintiff instigated litigation in the District Court for the Southern District of Texas, even though his employment contract called for arbitration in Texas.[280] The court found it unnecessary to determine whether the plaintiff was in fact a seaman thereby accruing rights under the Jones Act.[281] This court so concluded because a foreign element existed to the relationship thereby giving the N.Y. Convention Act control of the dispute. Further, as prior precedent held the section 1 exemption inapplicable to cases falling under the N.Y. Convention Act, it was irrelevant whether the plaintiff was a seaman or not.[282] Quite likely, the court felt comfortable compelling arbitration between an American employee and a U.S. employer within the

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[277] 9 U.S.C. § 202 (2005):

> 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.

[278] Freudensprung v. Offshore Technical Servs., Inc., 379 F.3d 327 (5th Cir. 2004).

[279] *Id*. at 332.

[280] *Id.*

[281] *Id*. at 338.

[282] *Id.* at 338–43.

United States, which made it easier to blindly follow precedent. However, by failing to articulate a means of differentiating between American and foreign seamen under the N.Y. Convention Act, the court took one more step down the slippery slope to the point where the N.Y. Convention Act controls the arbitrability of every claim between a seaman and his employer, regardless of the nationality of either party or the locus of the tortious event. How will a court rule the next time an American seaman, with an American employer, is injured while working outside the coastal waters of the United States but an agreement calls for arbitration in Botswana or Mongolia?[283] Take this hypothetical one step further: the American seaman, while working for a foreign employer, is injured while in U.S. coastal waters. How the court will and how the court should resolve these questions are two very different issues. Future courts will be bound by precedent to compel arbitration of such disputes so long as the current jurisprudence fails to make a thorough analysis, leading to the conclusion that the policy of extending judicial protection to a vulnerable class of workers, manifested in section 1, applies regardless of whether a foreign element exists to the employee/employer relationship.

2. State law and the arbitrability of conventional contractual claims arising from seamen's employment contracts

If section 1 extends to the entire FAA, state law controls the arbitrability of conventional, non-tort contract claims.[284] Congress clearly intended for federal law not to control the arbitrability of such claims by including section 1 in the FAA. "The FAA contains no express pre-emptive provision, nor does it reflect a congressional intent to occupy the entire field of arbitration."[285] By abdicating the control of such claims, the federal government entrusted the decisions to the states,[286] as the only alternative body of domestic law, which can

[283] Botswana acceded to the Convention on December 20, 1971, and Mongolia acceded on October 24, 1994. H. SMIT & V. PECHOTA, INTERNATIONAL ARBITRATION TREATIES 49–54 (1998).

[284] See *Lim*, 404 F.3d 898 for a seamen employment litigation case where no tort causes of action were claimed.

[285] Volt Info. Scis. v. Bd. of Trs., 489 U.S. 468, 477 (1988).

[286] For example, arbitration agreements that are oral or purely intrastate already fall outside the scope of the FAA and are enforceable under state, but not federal, law. Pedro Menocal, *We'll do it for You Anytime: Recognition and Enforcement of Foreign*

determine the arbitrability of such claims.[287] Section 1 does not make an arbitral clause unenforceable; it simply removes such claims from the scope of the FAA.[288] The state of the law when the FAA was adopted in 1925, which was meant to be continued by the inclusion of section 1, supports this conclusion. Moreover, the Supreme Court held in *Dean Witter Reynolds Inc. v. Byrd* that bifurcated proceedings can co-exist, with courts adjudicating non-arbitrable statutory causes of action but compelling "arbitration of pendent arbitrable claims."[289] Therefore, states may still compel arbitration for certain claims while ruling on tort causes of action under the Jones Act.

The Supreme Court's jurisprudence prior to the enactment of the FAA held that states regulated arbitration of contractual maritime claims. In 1924, Justice Brandeis penned *Red Cross Line v. Atlantic Fruit Company*.[290] In that case, the Supreme Court reversed the New York Court of Appeals's holding that the court did not have the power to compel the charter owner to proceed to arbitration.[291] The Supreme Court determined that under general maritime law, an agreement to arbitrate was valid and that the enforcement of the agreement did not change substantive admiralty law.[292] Moreover, the state had concurrent jurisdiction because of the savings clause of the Judiciary Act.[293] Therefore, the state was free to grant specific performance of

Arbitral Awards and Contracts in the United States, 11 ST. THOMAS L. REV. 317, 324 (1999).

[287] *See generally* Stephen L. Hayford and Alan R. Palmiter, *Arbitration Federalism: A State Role in Commercial Arbitration*, 54 FLA. L. REV. 175, 179 (2002) (advocating a greater role for state arbitral law and "assert[ing] that states retain a vital, even essential, role in furthering the goals of a national pro-arbitration policy"); Menocal, *supra* note 286, at 323 ("While almost all states have arbitration laws of general application, several states—including Florida, California, Connecticut, Ohio, North Carolina, Oregon, and Texas—have enacted statutes applicable specifically to international arbitration, modeled in most instances on the United Nations Commission on International Trade Law (UNCITRAL) Model Law on International Arbitration").

[288] *See* Lopez, *supra* note 249, at 9–10.

[289] Dean Witter Reynolds Inc. v. Byrd, 470 U.S. 213, 218 (1985).

[290] Red Cross Line v. Atl. Fruit Co., 264 U.S. 109 (1923).

[291] *See id.* at 119–20 (The New York Court of Appeals held that the controversy "is one of admiralty; that under Article III, § 2, of the Federal Constitution, and § 256, Clause Third, of the Judicial Code, such controversies are within the exclusive jurisdiction of the admiralty courts; and that the State had no power to compel the charter owner to proceed to arbitration."). *See* Red Cross Line v. Atl. Fruit Co., 233 N.Y. 373 (1922).

[292] *See Red Cross Line,* 264 U.S. at 123–24.

[293] *See id.* at 123.

contractual arbitration clauses, even if federal maritime law did not mandate such a result. However, in 1925 the FAA reversed this result by using federal law to compel specific performance of arbitration agreements. Nevertheless, by leaving claims falling under the section 1 exemption outside of federal law, states retained their authority to determine the arbitrability of such claims.

Leaving the determination of arbitrability of section 1 claims to the states should remain the approach for determining the arbitrability of conventional contractual claims. A recent Third Circuit case, *Palcko v. Airborne, Inc.*,[294] provides an example of this reasoning at work.[295] The district court had found that the plaintiff was within the narrow class of workers excluded from the scope of the FAA by operation of section 1 and declined to compel arbitration under the applicable state law, even if that law directed the court to do so.[296] The lower court reasoned the FAA preempted alternative enforcement under state law, because to compel arbitration "'would directly conflict with Congress's express purpose' of exempting a certain class of workers 'from a federal law otherwise favoring arbitration.'"[297] The *Palcko* court flatly rejected this reasoning.[298] The court applied established Supreme Court jurisprudence to determine that Congress never intended to monopolize the entire field of arbitral law and remanded the case to apply the applicable state arbitral law.[299] Therefore, if section 1 extends to every chapter of the FAA, conventional contract claims do not become automatically non-arbitrable, but rather, state law determines the resolution of their arbitrability.

In addition, the fact that many seamen's contracts arise from collective bargaining agreements does not provide a basis for sidestepping the analysis and conclusion proffered by this Article. This is because "collective bargaining agreements are 'contracts of employment' within the meaning of the exclusion" found in section

[294] Palcko v. Airborne, Inc., 372 F.3d 588 (3d Cir. 2004).

[295] *See id.* The case did not deal with seamen but rather a transportation worker engaged in interstate commerce. As section 1 addresses not only seamen but also "railroad employees, or any other class of workers engaged in foreign or interstate commerce" this interpretation of the preclusive effect of section 1 should also apply to seamen exempted by section 1.

[296] *Id.* at 591.

[297] *Id.*

[298] *Id.* at 596.

[299] *Id.*

1.[300] Therefore, the N.Y. Convention Act will not control claims arising from seamen's employment even if the arbitration agreement was reached through collective bargaining. However, conventional contractual claims may still be enforceable under federal labor law, rather than state law, if they are covered by a collective bargaining agreement that dictates arbitration.[301]

V. CONCLUSION

The current jurisprudence determining whether the N.Y. Convention Act controls the arbitrability of claims arising from seamen's employment improvidently relies on the ambiguous statutory text. To compound that shortcoming, the jurisprudence has allowed pro-arbitration policy to taint its interpretation of the text and has contented many courts to go no further with their analysis. As this Article establishes, such a cursory analysis leads to the incorrect conclusion at the real-world expense of a vulnerable class of workers, namely seamen. Once the analysis moves beyond the ambiguous text it becomes evident that the United States exercised its right under the New York Convention to maintain the limited protections already granted to seamen in section 1 and other bodies of law. When the FAA is interpreted with the entire spectrum of federal law and pre-existing jurisprudence in mind, only one conclusion arises: section 1 extends to each and every chapter of the FAA.

[300] American Postal Workers Union v. U.S. Postal Serv., 823 F.2d 466, 473 (11th Cir. 1987); Bacashihua v. U.S. Postal Serv., 859 F.2d 402, 404–6 (6th Cir. 1988); United Food & Commercial Workers, Local Union No. 7R v. Safeway Stores, Inc., 889 F.2d 940, 943–44 (10th Cir. 1989).

[301] For example, one possible basis for federal jurisdiction to enforce an arbitral award in a collective bargaining context, even though jurisdiction does not exist under the FAA due to section 1, is section 301 of the Labor-Management Relations Act (29 U.S.C.S. § 185 (LexisNexis 2006)). *United Food & Commercial Workers*, 889 F.2d 940 ("In order to seek confirmation and enforcement of the arbitrator's award under section 301 of the Labor-Management Relations Act, codified at 29 U.S.C.S. § 185, the petitioner must show (1) that she has exhausted the grievance procedures under the collective bargaining agreement, or (2) that she falls within an exception to the exhaustion requirement").