MANDATORY ARBITRATION OF SEXUAL ASSAULTS IN MARITIME LAW

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I. INTRODUCTION

Following the Eleventh Circuit's holding in *Bautista*, cruise line employers have tried to compel arbitration of sexual assault claims brought by their employees ("seafarers").[1] In *Doe v. Royal Caribbean Cruises, Ltd.*, a Filipino woman ("Doe") was hired by Royal Caribbean Cruise Lines ("RCCL") through an employment agency in her native Philippines.[2] A pre-requisite to getting the job was signing a contract of employment, and the contract contained a provision stating that all claims would be settled in the Philippines.[3] The contract also incorporated standard terms

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1. *See* Bautista v. Star Cruises, 396 F.3d 1289, 1303 (11th Cir. 2005) (starting the trend of arbitration clauses in maritime employment contracts); *see also* Brett Rivkind, *Arbitration Clauses in Seaman's Employment Agreements Depriving Seaman of Right to Jury Trial*, THE LEGAL EXAMINER (Apr. 28, 2011), https://fortlauderdale.legalexaminer.com/miscellaneous/arbitration-clauses-in-seamens-employment-agreements-depriving-seamen/ ("[T]he decision in Bautista v. Star Cruises, [(citation omitted)] ha[s] permitted . . . cruise ship companies[] to take advantage of the unequal bargaining power by insertion of arbitration clauses into the employment agreements with seamen[.]"). The terms "seaman" and "seafarer" are interchangeable and refer to crewmembers who work on a ship.

2. *See* Doe v. Royal Caribbean Cruises, Ltd., 365 F. Supp. 2d 1259, 1261–62 (S.D. Fla. 2005) (noting that Doe was hired via an employment agency); *see also Filipino Crewing Agency*, MARLOW NAVIGATION, https://marlow-navigation.com/en/philippines-information/filipino-crewing-agency.asp (last visited Mar. 20, 2019) (showing an example of a common Filipino seafarer employment agency and the services they provide).

3. *See Royal Caribbean Cruises, Ltd.*, 365 F. Supp. 2d at 1261 (providing the terms of Doe's employment agreement); *see also* Anthony Advincula, *As Cruise Lines Seek Arbitration, Filipino Seafarers Become More Vulnerable*, INQUIRER.NET (July 25, 2018), https://usa.inquirer.net/14065/cruise-lines-seek-arbitration-filipino-seafarers-become-vulnerable ("[The arbitration clause] is written in small letters, at the bottom page of the contract. No one pays attention to it, which unfortunately turns out to be one of the most important parts of the contract . . . .").

promulgated by the Philippines Overseas Employment Administration—which governs the employment of Filipino seafarers—and one of the terms included an arbitration clause.[4]

Doe filed suit alleging she was sexually assaulted while under the employment of RCCL, and RCCL responded by filing a motion to compel arbitration.[5] The court agreed with RCCL, holding that "[Doe] was employed by [RCCL] pursuant to an agreement that requires that [Doe's] dispute be brought either before the National Labor Relations Commission of the Philippines, or to an arbitrator."[6]

In *Doe v. Princess Cruise Lines, Ltd.*, the court describes the harrowing ordeal of the alleged victim:

> [These] allegations tell a story of a woman, working for Princess Cruise Lines on one of its ships, who was drugged by other employees, raped and physically injured while she was unconscious, and when she reported to officials of the cruise line what had happened to her they treated her with indifference and even hostility, failed to provide her with proper medical treatment on board, and interfered with her attempts to obtain medical treatment and counseling ashore.[7]

Despite the court's moving account, the issue was not whether the claim was true, but, rather, whether the scope of the arbitration clause should include the sexual assault.[8] Princess Cruise Lines ("PCL") argued in the

4. *See Royal Caribbean Cruises, Ltd.*, 365 F. Supp. 2d at 1261 (noting that the agreement was governed by terms established by the Philippine Overseas Employment Administration); *see generally* PHILIPPINE OVERSEAS EMP. ADMIN., http://www.poea.gov.ph/default.html (last visited Mar. 20, 2019) (facilitating jobs for and protecting Filipino migrant workers around the world).

5. *See Royal Caribbean Cruises, Ltd.*, 365 F. Supp. 2d at 1261 (revealing the procedural history of the case); *see also* Liz Kramer, *A Motion to Compel Arbitration "Answers" a Complaint*, ARB. NATION (Apr. 25, 2014), https://www.arbitrationnation.com/a-motion-to-compel-arbitration-answers-a-complaint/ (describing the procedure of a motion to compel arbitration).

6. *Royal Caribbean Cruises, Ltd.*, 365 F. Supp. 2d at 1263 (finding that Doe's claim of sexual assault fell within the scope of the arbitration agreement); *see also* Gerardo C. Nograles, *Message From The Chairman*, NAT'L LAB. REL. COMMISSION, http://www.nlrc.dole.gov.ph/?q=node/1(Feb. 26, 2011, 6:38 PM) (resolving labor disputes of overseas workers via arbitration and other alternative dispute resolution methods).

7. Doe v. Princess Cruise Lines, Ltd., 657 F.3d 1204, 1208 (11th Cir. 2011) (recounting the alleged facts of the case); *see also* Brett Rivkind, *Appeals Court Addresses Arbitration Clause Involving Claim by Crewmember for Sexual Assault*, THE LEGAL EXAMINER (Sept. 26, 2011), https://fortlauderdale.legalexaminer.com/travel/mass-transit-airline-cruise-ship-train-bus/appeals-court-addresses-arbitration-clause-involving-claim-by-crewmember-for-sexual-assault/ (reporting on the enforceability of arbitration clauses in cases of sexual assaults).

8. *See Princess Cruise Lines, Ltd.*, 657 F.3d at 1208 (noting the issue before the court in this case); *see also* Brian Tooley, *Arbitration Pitfalls – Broad or Narrow Scope*, WELBORN SULLIVAN MECK & TOOLEY, P.C. (Mar. 2, 2015), https://www.wsmtlaw.com/blog/arbitration-pitfalls-broad-or-narrow-scope.html ("Unless the parties [to arbitration] intend to arbitrate all disputes that may touch on or collaterally relate to the contract, the arbitration clause should

affirmative, claiming the sexual assault "related to, arose out of, or [was] connected with [the victim's] employment duties . . . ."[9] In holding that arbitration was not proper in this case, the court reasoned that the plain language of the arbitration clause was too broad and, if PCL wanted to include sexual assaults under the clause's scope, they should have used narrower language.[10]

Michelle Haasbroek ("Haasbroek"), a South African spa facialist, was employed by PCL and agreed to an arbitration clause in her employment contract.[11] Haasbroek claimed to have been sexually assaulted by another employee of PCL, and because of this, she became pregnant.[12] Haasbroek argued that the sexual assault should not be arbitrated because the assault was independent of her employment.[13] The court disagreed, holding that a sexual assault "does not necessarily fall outside the scope of an arbitration clause in an employment agreement."[14]

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contain express language specifically identifying and narrowly describing the scope of disputes to be arbitrated.").

9. *See Princess Cruise Lines, Ltd.*, 657 F.3d at 1213 (summarizing PCL's argument claiming the sexual assault was linked to Doe's employment); *see also* Eric Koplowitz, *"I Didn't Agree to Arbitrate That!" — How Courts Determine if Employees' Sexual Assault and Sexual Harassment Claims Fall within the Scope of Broad Mandatory Arbitration Clauses*, 13 CARDOZO J. OF CONFLICT RESOL. 565, 572–74 (2012) (describing a two-part test that courts use to determine if a party has agreed to arbitration, including whether the dispute occurred in the employment context).

10. *See Princess Cruise Lines, Ltd.*, 657 F.3d at 1217–18 (finding that arbitration was not proper because the language of the arbitration clause was too broad); *see also* Tooley, *supra* note 8 (explaining the difference between broad and narrow language in an arbitration clause).

11. *See* Haasbroek v. Princess Cruise Lines, Ltd., 286 F. Supp. 3d 1352, 1354–55 (S.D. Fla. 2017) (describing Haasbroek's employment with PCL); *see also* Keith S. Brais, *Cruise Worker Opposes Princess Cruise Lines' Motion to Compel Arbitration of Her Sexual Assault and Rape Claims*, BRAIS LAW FIRM (Jul. 31, 2017), https://www.maritimelawblog.net/cruise-worker-opposes-princess-cruise-lines-motion-compel-arbitration-sexual-assault-rape-claims/ (reporting on Haasbroek's lawsuit against PCL).

12. *See Haasbroek*, 286 F. Supp. 3d at 1355 (noting that Haasbroek alleged she became pregnant after being sexually assaulted); *see also* Brais, *supra* note 11 ("Ms. Haasbroek alleges in court filings that she was raped by Eddie Yamile Santa Cruiz Reyes . . . [and as] a result of the rape, Ms. Haasbroek became pregnant and gave birth to a child.").

13. *See Haasbroek*, 286 F. Supp. 3d at 1358 (explaining Haasbroek's argument that the sexual assault was not within the scope of her employment agreement and therefore not arbitrable); *see also* Brais, *supra* note 11 ("Ms. Haasbroek's attorneys, argue that her assault and rape do not have a significant relationship to her employment and do not touch upon matters covered by the Employment Agreement.").

14. *See Haasbroek*, 286 F. Supp. 3d at 1358–59 (noting the court's disagreement with Haasbroek that the sexual assault did not fall within the scope of her employment agreement); *see also* Victoria VanBuren, *Jones v. Halliburton: Fifth Circuit Rules On Arbitration of Tort Claims By An Employee*, MEDIATE.COM (Sept. 2009), https://www.mediate.com/articles/BayerKbl20090921b.cfm (reporting on a Fifth Circuit case where a court similarly held that a sexual assault was within the scope of a sexual assault victim's

This Comment discusses the emergence of mandatory arbitration clauses in seafarer employment contracts, and how these clauses impact cases of sexual assault.[15] Part II will trace the origin of arbitration, the history of seafarer rights and remedies, a Supreme Court decision that opened the door to arbitration of sexual assaults, and its progeny in the Eleventh Circuit.[16] Finally, Parts III and IV will suggest solutions to address the issue presented in this Comment.[17]

With that in mind, this Comment does not aim to disparage or discredit arbitration at large. Arbitration, when mutually agreed to, can be an effective means of alternative dispute resolution. The narrow focus of this Comment is the inequity of compelling arbitration of sexual assaults, and how this phenomenon relates to maritime law.

II. BACKGROUND

A. THE ARBITRATION PROCESS

Arbitration in the American legal system stems from the Federal Arbitration Act of 1925 ("FAA").[18] In 1970, the United States became signatories to the Convention on the Recognition and Enforcement of Foreign Arbitral Awards (later codified and popularly referred to as the "Convention Act").[19] There are two kinds of arbitration: (1) voluntary; and (2) mandatory.[20] The finality of the arbitrator's decision rests on whether the agreement calls for binding or non-binding arbitration.[21]

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employment agreement and therefore an arbitrable claim).

15. *See supra* Part I.

16. *See infra* Part II.

17. *See infra* Part III–IV.

18. *See* Federal Arbitration Act, 9 U.S.C. §§ 1–16 (2018) (establishing arbitration in the American legal system); *see also* Imre S. Szalai, *Exploring the Federal Arbitration Act Through the Lens of History Symposium*, 2016 J. DISP. RESOL. 115 (2016) (tracing the history of the Federal Arbitration Act).

19. *See* Convention on the Recognition and Enforcement of Foreign Arbitral Awards, 9 U.S.C. § 201 (2018) (providing common standards for the recognition and enforcement of foreign arbitration awards); *see also United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards (New York, 10 June 1958)*, N.Y. ARB. CONVENTION, http://www.newyorkconvention.org/english (last visited Mar. 20, 2019) (reproducing the original text from the Convention Act).

20. *See* Barbara K. Repa, *Learn the Basics About Arbitration: What It Is, When It Arises, and How the Process Works*, NOLO, https://www.nolo.com/legal-encyclopedia/arbitration-basics-29947.html (last visited Mar. 20, 2019) (defining voluntary arbitration as "evenhanded"); *see also Arbitration*, NAT'L ASS'N OF CONSUMER ADVOCATES, https://www.consumeradvocates.org/for-consumers/arbitration (last visited Mar. 20, 2019) (defining forced arbitration as a requirement to arbitrate any dispute that arises during employment).

21. *See Binding and Non-Binding Arbitration – What is the Difference?*, EXPERT EVIDENCE

The primary goal of arbitration is to settle disputes outside the courtroom by using a neutral third party.[22] Some argue that, when compared with litigation, arbitration may be more favorable because it is informal, more cost-efficient, and a quicker way to settle disputes.[23] On the other hand, because arbitration is a non-judicial process, some benefits enjoyed through litigation are restricted or limited in arbitration.[24]

B. TRADITIONAL MARITIME LAW REMEDIES AVAILABLE TO SEAFARERS

Though the discussion of compelling arbitration of sexual assaults is undoubtedly far-reaching, maritime law deserves its own examination because it has distinct causes of action and possibilities of recovery for seafarers.[25] Justice Story—then a circuit judge—famously dubbed

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(Apr. 3, 2017), http://expert-evidence.com/binding-and-non-binding-arbitration-what-is-the-difference/ (defining binding arbitration as being "bound by the arbitrator's final decision" and non-binding arbitration as giving "each disputing party [the] liberty to reject the decision of the arbitrator and instead request a formal trial"); *see also* Steven C. Bennett, *Non-Binding Arbitration: An Introduction*, DISP. RESOL. J., https://www.jonesday.com/files/Publication/266ff349-03e1-4610-a7c1-6cd0f951e8bb/Presentation/PublicationAttachment/1d047cae-3d31-4b6b-b280-71ed96efa8e5/Bennett,%20Steven[2].pdf (May/July 2006) (explaining that non-binding arbitration serves as more of an "advisory" process, giving parties a peek into what options may arise in litigation).

22. *See Using Arbitration to Resolve Legal Disputes*, FINDLAW, https://adr.findlaw.com/arbitration/using-arbitration-to-resolve-legal-disputes.html (last visited Mar. 20, 2019) (providing that arbitration is an alternative to resolving disputes in court); *see also Arbitration & Mediation*, JUSTIA, https://www.justia.com/trials-litigation/arbitration-mediation/ (last visited Mar. 20, 2019) ("Arbitration . . . allow[s] parties to bring their cases to neutral third parties for resolution.").

23. *See* Barbara K. Repa, *Arbitration Pros and Cons,* NOLO, https://www.nolo.com/legal-encyclopedia/arbitration-pros-cons-29807.html (last visited Mar. 20, 2019) (indicating that arbitration costs less than litigation, resolves disputes faster, and provides more flexibility than the courtroom); *see also* Jean Murray, *What Are the Benefits and Drawbacks of Arbitration*, THE BALANCE SMALL BUS. (Jan. 21, 2019), https://www.thebalancesmb.com/what-are-the-benefits-and-drawbacks-of-arbitration-398535 (noting that arbitration is not as formal as litigation, which makes things move quicker).

24. *See* Katherine V.W. Stone & Alexander J.S. Colvin, *The Arbitration Epidemic*, ECON. POL'Y INST. (Dec. 7, 2015), https://www.epi.org/publication/the-arbitration-epidemic/ (cautioning that arbitration takes away certain rights because arbitration (1) does not need to follow formal rules of evidence and procedure; (2) does not include a jury or court reporter; (3) does not require that the arbitrator be an attorney or judge; (4) relies heavily on the impartiality of the arbitrator; and (5) is extremely difficult to appeal); *see also* Ronald L. Richman, *Arbitration: Good Decision or Bad, You Get What You Bargained For*, BULLIVANT HOUSE BAILEY (Jun. 2010), http://www.bullivant.com/Arbitration-eAlert (warning that arbitration is final unless there is "language in the contract that clearly expresses [the parties'] intention to allow for appeal of an arbitration award . . . .").

25. *See* Arthur A. Severance, Esq., *Navigating Maritime Personal Injury and Death Cases*, FED. B. ASS'N, http://www.fedbar.org/Sections/Admiralty-Law-Section/Admiralitas/Winter-

seafarers the "wards of the admiralty," and this reverential treatment stems from the unique relationship seafarers have with a ship, specifically the hazards seafarers face at sea compared with those faced by land-based employees.[26] To that end, three (3) distinct causes of action and corresponding remedies have developed in American maritime law.[27]

i. Maintenance and Cure

A discussion of seafarer remedies must start with *The Osceola*,[28] a seminal case known for establishing the cause of action of Maintenance and Cure ("M&C").[29] The concept of M&C stems from the belief that a ship is a seafarer's dwelling and should be available to the seafarer in times

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2016/Navigating-Maritime-Personal-Injury-and-Death-Cases.aspx (last visited Mar. 20, 2019) (discussing the various causes of action and recovery options under federal and general maritime law); *see also What is Admiralty Law*, FINDLAW, https://hirealawyer.findlaw.com/choosing-the-right-lawyer/admiralty-law.html (last visited Mar. 20, 2019) (summarizing why maritime law is distinct from land law). The terms "maritime law" and "admiralty law" are now interchangeable. For the sake of uniformity, I will use the term "maritime law" in this Comment.

26. *See* Chandris, Inc. v. Latsis, 515 U.S. 347, 354 (1995) (reflecting on the special status seafarers have enjoyed in American jurisprudence); *see also* Seas Shipping Co. v. Sieracki, 328 U.S. 85, 104 (1946) (underlining the seafarer's "peculiar relationship to the vessel" and the perils they are exposed to while aboard). "Vessel" is the common term used in maritime to refer to a ship.; Harden v. Gordon, 11 F. Cas. 480, 485 (C.C.D. Me. 1823) (No. 6,047) ("[C]ourts of maritime law have been in the constant habit of extending towards [seafarers] a peculiar, protecting favor and guardianship. They are emphatically the wards of the admiralty . . . ."); Asignacion v. Rickmers Genoa Schiffahrtsgesellschaft mbH & Cie KG, 783 F.3d 1010, 1017 (5th Cir. 2015) (recognizing that (1) American jurisprudence has an "explicit public policy that is well defined and dominant" to seafarers, (2) maritime law gives "special solicitude to sea[farers,]" (3) seafarers are the "wards of the admiralty," and (4) the remedies extended to seafarers are reflective of this unique status).

27. *See* Robert M. Mallano, *Seamen's Injuries: The Jones Act, Unseaworthiness, and Maintenance and Cure—The Siamese Triplets*, 51 CAL. L. REV. 412, 413–20 (1963) (presenting a broad overview of the three major causes of action available to seafarers); *see also* Harney B. Stover Jr., *Practical Personal Injury Phases of Maritime Law*, 45 MARQ. L. REV. 59, 59–71 (1961) (discussing the personal injury remedies available to seafarers in maritime law).

28. *See* The Osceola, 189 U.S. 158, 175 (1903) ("[T]he vessel and her owners are liable, in case a sea[farer] falls sick, or is wounded, in the service of the ship, to the extent of his maintenance and cure, and to his wages, at least so long as the voyage is continued."); *see also* Craig H. Allen, *Introduction: The Osceola After 100 Years: Its Meaning and Effect on Maritime Personal Injury Law in the United States*, 34 RUTGERS L.J. 605, 624 (2003) ("The Osceola can be characterized as a period of episodic evolution in the remedies available under the maintenance and cure . . . .").

29. *See* Vaughan v. Atkinson, 369 U.S. 527, 532 (1962) (holding that "[a] shipowner's liability for maintenance and cure is among the most pervasive [duties] of all[.]"); *see also What is 'Maintenance and Cure' in a Maritime Injury Case?*, NOLO, https://www.nolo.com/legal-encyclopedia/what-maintenance-cure-maritime-injury-case.html (last visited Mar. 20, 2019) (defining maintenance as "the room and board of the injured sea[farer] while recovering from the injury . . . [and cure as] the injured sea[farer]'s reasonable and necessary medical expenses . . . .")

of special need.[30] M&C affords a greater opportunity of recovery to the seafarer because this obligation does not depend on the fault of the employer,[31] the injury or illness covered is comprehensive,[32] and the employer's failure to pay may result in punitive damages.[33]

ii. Unseaworthiness

The second cause of action available to seafarers, the doctrine of unseaworthiness, can also be traced back to *The Osceola*,[34] and later as Supreme Court dicta in *Carlisle Packing*.[35] The doctrine of unseaworthiness focuses on a particular condition of the ship and imposes a strong duty on the ship's owner to provide a ship that is reasonably fit for its intended purposes or for the intended voyage.[36] Unseaworthiness is a

30. *See* Virginia A. McDaniel, *Recognizing Modern Maintenance and Cure as an Admiralty Right*, 14 FORDHAM INT'L L.J. 669, 669–77 (1990) (detailing the origins of M&C in maritime law); *see also* John B. Shields, *Seaman's Rights to Recover Maintenance and Cure Benefits*, 55 TUL. L. REV. 1046, 1046 (1981) (tracing M&C back to "medieval sea codes" such as the "Laws of Oleron," "Tables of Amalphi," "Maritime Ordinance of France," and "Good Customs of the Sea").

31. *See* NOLO, *supra* note 29 ("An injured sea[farer] is entitled to receive maintenance and cure benefits regardless of whose fault the injury was."); *see also* Michael J. Rauworth, *Probing the Mysteries of the Jones Act*, 159 SEA HIST. 24, 25, https://seahistory.org/assets/2017/09/Jones-Act-Part-1-SH159-1.pdf (last visited Mar. 20, 2019) ("The shipowner . . . is liable for on-the-job injuries without regard to the employer's fault . . . .").

32. *See* Ramirez v. Carolina Dream, Inc, 760 F.3d 119, 123 (1st Cir. 2014) (concluding that a seafarer was entitled to M&C for a pre-existing condition); *see also* Messier v. Bouchard Transp., 688 F.3d 78, 88 (2d Cir. 2012) (holding that a seafarer was entitled to M&C for lymphoma); Stevens v. McGinnis, Inc., 82 F.3d 1353, 1357–58 (6th Cir. 1996) (holding that a shipowner must pay M&C for a seafarer's illness).

33. *See* Atlantic Sounding Co. v. Townsend, 557 U.S. 404, 424 (2009) (establishing that a seafarer may recover punitive damages for their employer's "willful and wanton disregard of its [M&C] obligation . . . ."); *see also* Jeffrey S. Moller, *Punitive Damages in Maintenance and Cure Cases*, MARTINDALE (Jul. 6, 2009), https://www.martindale.com/admiralty-maritime-law/article_Blank-Rome-LLP_738558.htm (reviewing the holding in *Atlantic Sounding*).

34. *See* The Osceola, 189 U.S. 158, 175 (1903) ("[T]he vessel and her owner are, both by English and American law, liable to an indemnity for injuries received by sea[farers] in consequence of the unseaworthiness of the ship, or a failure to supply and keep in order the proper appliances appurtenant to the ship."); *see also* Joel K. Goldstein, *The Osceola and the Transformation of Maritime Personal Injury Law: Some Propositions about the Case and its Propositions*, 34 RUTGERS L.J. 663, 690–701 (2003) (highlighting the availability of unseaworthiness as a cause of action).

35. *See* Carlisle Packing Co. v. Sandanger, 259 U.S. 255, 258 (1922) (expanding on the doctrine of unseaworthiness as first mentioned in *The Osceola*); *see also Admiralty. Unseaworthiness. A Vessel Staunch and Fit for Its Intended Service of Receiving Uncontaminated Grain Is Not Rendered Unseaworthy by Temporary Presence of Noxious Fumigated Grain in Hold*, 47 VA. L. REV. 1428, 1428–29 (1961) (tracing the doctrine of unseaworthiness to *Carlisle Packing*).

36. McAllister v. Magnolia Petroleum Co., 357 U.S. 221, 227–34 (1958) (providing the first

valuable form of recovery because proof of causation is lenient compared with land-based laws, employers have virtually no defense against it, and there are several ways an employer may breach this duty to seafarers.[37]

iii. Negligence Under the Jones Act

The most significant cause of action traditionally available to seafarers is under the Merchant Marine Act (the "Jones Act").[38] This cause of action was imported from the Federal Employers Liability Act, a statute protecting railroad workers.[39] Although *The Osceola* was important in providing seafarers M&C and unseaworthiness, the Jones Act filled in a glaring gap left by *The Osceola*: redressing seafarers harmed by their employer's negligence (which would include a claim of sexual assault by a fellow seafarer).[40] The key difference between the three (3) remedies is that M&C and unseaworthiness are common law remedies, and the Jones Act is statutory.[41]

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comprehensive analysis of unseaworthiness in American jurisprudence); *see also* Mallano, *supra* note 27, at 415–16 (citing to *McAllister* as allowing for recovery under unseaworthiness).

37. *See* Boudoin v. Lykes Brothers Steamship Co., 348 U.S. 336, 336–40 (1955) (holding that (1) unseaworthiness extends to every part of the ship, and (2) assaults by seafarers constitute unseaworthiness); *see also* Ballwanz v. Isthmian Lines, Inc., 319 F.2d 457, 462 (4th Cir. 1963) (holding that assumption of risk is not a defense to unseaworthiness); Hercules Carriers, Inc. v. Claimant State of Fla. Dep't of Transp., 768 F.2d 1558, 1565–66 (11th Cir. 1985) (holding that (1) the owner or operator of the ship must provide a competent crew and captain, and (2) that failure to do so renders the vessel unseaworthy); Mitchell v. Trawler Racer, Inc., 362 U.S. 539, 549–50 (1960) (holding that (1) a vessel may become unseaworthy after leaving port, (2) actual or constructive knowledge of the condition is not necessary, and (3) the condition can be temporary to be considered unseaworthy); Patton-Tully Transp. Co. v. Turner, 269 F. 334, 339–40 (6th Cir. 1920) (holding that "[t]he duty to use reasonable care in keeping a ship and her appliances in same condition is a continuing duty resting upon the owners during a voyage and is nondelegable").

38. *See* Merchant Marine Act, 46 U.S.C. § 30104 (2018) (redressing seafarers injured due to their employer's negligence); *see also Overview of The Jones Act and Seaman's Injuries*, NOLO, https://www.nolo.com/legal-encyclopedia/overview-the-jones-act-seamens-injuries.html (last visited Mar. 20, 2019) (describing the Jones Act as a federal law redressing seafarers for the negligence of their employer).

39. *See* Federal Employers Liability Act, 45 U.S.C. § 51 (2018) (providing recovery for railroad workers that are injured on the job due to employer negligence); *see also What is the Federal Employers Liability Acts?*, KUJAWSKI MARCUS, LLC, https://www.kujawskimarcus.com/Railroad-Worker-Injury-Cases-FELA/What-Is-The-Federal-Employers-Liability-Act.shtml (last visited Mar. 20, 2019) (describing FELA as a remedy for injured railroad workers).

40. *See* Craig Allen, *Introduction, The Osceola After 100 Years: Its Meaning and Effect on Maritime Personal Injury Law in the United States*, 34 RUTGERS L.J. 605, 619 (2003) (noting that *The Osceola* barred negligence claims by seafarers); *see also* Goldstein, *supra* note 34, at 667 (highlighting the bar on recovery for crew negligence).

41. *See* George W. Stumberg, *The Jones Act. Remedies of Seaman.*, 17 OHIO ST. L.J. 484,

iv. Saving to Suitors

The "saving to suitors" clause is unique to Maritime law and grants a party the choice of pursuing a general maritime claim under federal law in state court.[42] This is significant because there is usually no right to a jury trial under general maritime law in federal court.[43] But because the "saving to suitors" clause allows a party to sue in state court, a right to a jury trial becomes available.[44]

C. MITSUBISHI AND ITS PROGENY IN THE ELEVENTH CIRCUIT

i. The Supreme Court Drives It Home with Mitsubishi

The modern trend of strongly favoring arbitration can be traced back to the Supreme Court's decision in *Mitsubishi*.[45] In *Mitsubishi*, Mitsubishi Motors Corporation ("MMC"), a Japanese automobile manufacturer, entered into an agreement with Soler Chrysler-Plymouth, Inc. ("Soler"), a

484–93 (1956) (comparing common law recoveries, M&C and unseaworthiness, with federal statutory recovery under the Jones Act); *see also Beware of the Curve Ball, Representation of Injured Seamen and Longshoremen and Harbor Workers*, BLUESTEIN LAW FIRM, P.A., https://www.bluesteinlawoffice.com/Maritime-Law-Articles/Beware-of-the-Curve-Ball-Jones-Act.shtml (last visited Mar. 20, 2019) (distinguishing the Jones Act from unseaworthiness and M&C).

42. *See* 28 U.S.C. § 1333 (2018) (allowing federal maritime claims to be brought in state court); *see also Overview of 'Saving to Suitors' Clause*, THE YOUNG FIRM (Dec. 9, 2015), http://www.jonesactlaw.com/library/overview-of-saving-to-suitors-clause/ (providing an overview of the "saving to suitors" clause).

43. *See* Richard M. Martin, *The Jones Act, Unseaworthiness, and Jury Trials*, LAMOTHE LAW FIRM (Jan. 4, 2016), https://lamothefirm.com/2016/01/04/the-jones-act-unseaworthiness-and-jury-trials-article-by-richard-martin/ (describing the right to a jury trial in maritime law); *see also* THE YOUNG FIRM, *supra* note 42 (noting that jury trials are typically not permitted in federal court).

44. *See* Brett Rivkind, *Admiralty Jurisdiction and the Right to Trial by Jury*, BOATING AND CRUISING SHIP LAW NEWS (May 23, 2013), https://www.maritimeinjuryattorneyblog.com/admiralty-jurisdiction-and-the/ (describing that the "saving to suitors" clause allows for a jury trial); *see also* Adam Deniger, *Save the Suitors: Can Defendants Force Plaintiffs Into Federal Court to Circumvent Common Law Remedies?*, THE LOYOLA CURRENT (Aug. 5, 2014), http://www.loyolacurrent.com/2014/08/05/save-suitors-can-defendants-force-plaintiffs-federal-court-circumvent-common-law-remedies/ (noting that the "saving to suitors" clause allows parties seek traditional common law remedies that are not allowed in federal court, such as jury trials).

45. *See* Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc., 473 U.S. 614, 629 (1985) (enforcing an agreement to arbitrate a purported violation of a federal statute in a contract arising from an international transaction); *see also* Daniel M. Schwarz, *A Regression From The New York Convention: Questions Raised By Thomas v. Carnival Corporation*, 64 U. MIAMI L. REV. 1441, 1444 (2010) (noting that *Mitsubishi* opened the door to arbitrate federal statutory claims).

Puerto Rican distributor, to sell Mitsubishi automobiles in Puerto Rico.[46] The agreement included an arbitration clause requiring all disputes to be arbitrated in Japan.[47] Eventually, Soler's performance was not to MMC's liking, and they moved to compel arbitration.[48] Soler counter-claimed alleging, among other things, violations under the Sherman Antitrust Act (the "Sherman Act").[49]

The district court compelled arbitration of most of the claims.[50] Intriguingly, the court also held that while the antitrust claims under the Sherman Act were normally not arbitrable, the international nature of this contract represented an exception under the Supreme Court's holding in *Scherk*.[51] The appellate court reversed the lower court, and the Supreme Court granted certiorari.[52]

The main question for the Court was whether a statutory claim was arbitrable.[53] Citing a "liberal federal policy favoring arbitration

46. *See Soler Chrysler-Plymouth, Inc.*, 473 U.S. at 616–17 (noting the contractual relationship between the two parties); *see also* David L. Noll, *Response: Public Litigation, Private Arbitration?*, 18 NEV. L.J. 477, 480–81 (2018) (describing the nature of the relationship between Mitsubishi Motors Corp. and Soler Chrysler-Plymouth, Inc.).

47. *See Soler Chrysler-Plymouth, Inc.*, 473 U.S. at 617 (revealing the requirement in the agreement that all disputes are to be arbitrated in Japan); *see also* Noll, *supra* note 46, at 481 (observing that *Mitsubishi* invoked an arbitration clause found in their agreement with Soler).

48. *See Soler Chrysler-Plymouth, Inc.*, 473 U.S. at 617–18 (observing that *Mitsubishi* brought an action against Soler in the United States District Court for the District of Puerto Rico); *see also* Noll, *supra* note 46, at 481 (observing that *Mitsubishi* started an arbitration proceeding against Soler before the Japan Commercial Arbitration Association).

49. *See Soler Chrysler-Plymouth, Inc.*, 473 U.S. at 617–19 (noting that Soler denied *Mitsubishi*'s allegations and counter-sued under several causes of action, one of which was the Sherman Act); *see also* Sherman Antitrust Act, 15 U.S.C. § 1 (2018) (protecting trade and commerce from unlawful monopolies).

50. *See Soler Chrysler-Plymouth, Inc.*, 473 U.S. at 620–21 (stating that the district court ordered the parties to arbitrate all of the issues raised in the complaint); *see also* Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc., 723 F.2d 155, 158 (1st Cir. 1983) (providing the procedural history of the case).

51. *See* Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc., 473 U.S. 614, 621 ("The District Court held . . . that the international character of the Mitsubishi-Soler undertaking required enforcement of the agreement to arbitrate even as to the antitrust claims."); *see also* Scherk v. Alberto-Culver Co., 417 U.S. 506, 534 (1974) (ordering arbitration of a claim arising under the Securities Exchange Act in an international agreement).

52. *See Soler Chrysler-Plymouth, Inc.*, 473 U.S. at 623–24 (finding that the district court erred in allowing Soler's statutory claims to proceed to arbitration); *see also Soler Chrysler-Plymouth, Inc.*, 723 F.2d at 169 (reversing the district court's judgment that Soler must submit their antitrust claims to arbitration).

53. *See Soler Chrysler-Plymouth, Inc.*, 473 U.S. at 616 ("The principal question presented by these cases is the arbitrability . . . of claims arising under the Sherman Act (citation omitted), and encompassed within a valid arbitration clause in an agreement embodying an international commercial transaction."); *see also* Thomas A. Manakides, *Arbitration of "Public Injunctions": Clash Between State Statutory Remedies and the Federal Arbitration Act*, 76 S. CAL. L. REV. 433,

agreements," the Court placed greater emphasis on whether the parties intended to arbitrate their dispute in the first place.[54] Significantly, the Court indicated that arbitration does not necessarily preclude statutory rights.[55] In essence, the Court said the parties agreed to arbitrate and Soler was not barred from pursuing their statutory remedies afforded under the Sherman Act in arbitration.[56]

Much of the discussion following the Court's holding in *Mitsubishi* has focused on the opinion's often-debated footnote 19, which states: "[w]e merely note that in the event the choice-of-forum and choice-of-law clauses operated in tandem as a prospective waiver of a party's right to pursue statutory remedies for antitrust violations, we would have little hesitation in condemning the agreement as against public policy."[57]

This footnote has become known as the prospective waiver doctrine.[58] Some interpret it as leaving the door open for judicial discretion in refusing the enforcement of arbitration when it contravenes public policy.[59] Still,

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443 (2003) (describing the question before the Court in *Mitsubishi*).

54. *See Soler Chrysler-Plymouth, Inc.*, 473 U.S. at 625–27 (showing the Court's preference toward arbitration as a matter of public policy); *see also* Manakides, *supra* note 53, at 443 (noting the Court's "strong pro-arbitration policy" in guiding its decision in *Mitsubishi*).

55. *See Soler Chrysler-Plymouth, Inc.*, 473 U.S. at 628 ("By agreeing to arbitrate a statutory claim, a party does not forgo the substantive rights afforded by the statute; it only submits to their resolution in an arbitral, rather than a judicial, forum. It trades the procedures and opportunity for review of the courtroom for the simplicity, informality, and expedition of arbitration."); *see also* Manakides, *supra* note 53, at 444 (stressing the Court's finding that a plaintiff "may vindicate its cause of action in the arbitral forum.").

56. *See Soler Chrysler-Plymouth, Inc.*, 473 U.S. at 628 ("In sum, the Court of Appeals correctly conducted a two-step inquiry, first determining whether the parties' agreement to arbitrate reached the statutory issues, and then, upon finding it did, considering whether legal constraints external to the parties' agreement foreclosed the arbitration of those claims."); *see also* Manakides, *supra* note 53, at 443 (showing that the Court ruled that Soler's claims are arbitrable).

57. *See* Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc., 473 U.S. 614, 637 (providing the basis of what was to become known as the prospective waiver doctrine); *see also* Courtland H. Peterson, *Choice of Law and Forum Clauses and the Recognition of Foreign Country Judgments Revisited Through the Lloyd's of London Cases*, 60 LA. L. REV. 1259, 1272 (2000) (quoting to footnote 19 in *Mitsubishi*).

58. *See* Joseph R. Brubaker & Michael P. Daly, *Twenty-five Years of the "Prospective Waiver" Doctrine in International Dispute Resolution: Mitsubishi's Footnote Nineteen Comes to Life in the Eleventh Circuit*, 64 U. MIAMI L. REV. 1233, 1234 (2010) (explaining that the prospective waiver doctrine has its roots in *Mitsubishi* and gives a court discretion in refusing to enforce arbitration that waives statutory rights, contrary to public policy); *see also* James U. Menz, *Shedding Light on the Effective Vindication Doctrine?*, KLUWER ARB. BLOG (Jan. 15, 2013), http://arbitrationblog.kluwerarbitration.com/2013/01/15/shedding-light-on-the-effective-vindication-doctrine/ (adding that the prospective waiver doctrine—also known as the "effective vindication" doctrine—was introduced in *Mitsubishi*).

59. *See* Brubaker & Daly, *supra* note 58 (explaining that the prospective waiver doctrine has its roots in *Mitsubishi* and gives a court discretion in refusing to enforce arbitration that waives

despite this exception, the Court has not taken the opportunity to give teeth to this doctrine, thus opening the door to arbitration of statutory rights and narrowing the doctrine's already questionable applicability.[60]

ii. Bautista Piggybacks on Mitsubishi

As mentioned in Part I, *Bautista* started the trend of arbitration in maritime employment contracts.[61] In 2003, a steam boiler exploded aboard the S/S Norway, a ship owned by Norwegian Cruise Line ("NCL").[62] Eight seafarers were killed, and four others were seriously injured.[63] The surviving seafarers and the widows of six of the deceased (collectively, the "Plaintiffs") brought an action against NCL seeking, among other things, damages for unseaworthiness, failure to provide M&C, and negligence under the Jones Act.[64]NCL moved to compel arbitration, arguing that the Plaintiffs signed employment agreements, which included arbitration clauses.[65] The Plaintiffs first argued that the Convention Act excludes

statutory rights, contrary to public policy); *see also* Menz, *supra* note 58 (quoting footnote 19).

60. *See* Green Tree Fin. Corp.-Ala. v. Randolph, 531 U.S. 79, 89 (2000) ("[W]e have recognized that federal statutory claims can be appropriately resolved through arbitration, and we have enforced agreements to arbitrate that involve such claims."); *see also* Am. Exp. Co. v. Italian Colors Rest., 570 U.S. 228, 232–35 (2013) (holding that the prospective waiver doctrine introduced in *Mitsubishi* does not invalidate the arbitration agreement because the party was not prohibited from pursuing their statutory rights in arbitration). *But see* Vimar Seguros y Reaseguros, S.A. v. M/V Sky Reefer, 515 U.S. 528, 540 (1995) (revealing a rare example of the Court's application of footnote 19).

61. *See* Bautista v. Star Cruises, 396 F.3d 1289, 1303 (11th Cir. 2005) (deciding that injured seafarers and widows of the seafarers killed aboard a vessel must arbitrate their claims because the seafarers signed employment contracts which included an arbitration clause); *see also* Thomas P. White, *Lost at Sea: Rescuing Cruise Line Crewmembers From the Perils of Foreign Arbitration*, 45 U. MIAMI INTER-AM. L. REV. 171, 177 (2013) (explaining that, while the original holding of *Bautista* applied only to Filipino seafarers, this was "the first step in the Eleventh Circuit's jurisprudence that would result in the deprivation of U.S. statutory rights of not just Filipino, but all crewmembers.").

62. *See* Bautista v. Star Cruises, 286 F. Supp. 2d 1352, 1356 (S.D. Fla. 2003) (describing the accident which gave way to the lawsuit); *see also* Noaki Schwartz, *Cruise Line Fights U.S. Suits Over Explosion*, SUN SENTINEL (Sep. 25, 2003), https://www.sun-sentinel.com/news/fl-xpm-2003-09-25-0309250153-story.html (reporting on an explosion aboard the S/S Norway on May 25, 2003).

63. *See Star Cruises*, 286 F. Supp. 2d at 1356 (noting the injuries and loss of life from the explosion); *see also* Schwartz, *supra* note 62 (reporting on an explosion aboard the S/S Norway on May 25, 2003).

64. *See Star Cruises*, 286 F. Supp. 2d at 1356 (stating that the survivors of the explosion and the widows of the seafarers killed in the explosion brought suit against NCL); *see also* John Pain, *Norwegian Cruise Line Blamed for Engine-Room Deaths*, SEATTLE TIMES (Jan. 11, 2008, 4:16 PM), https://www.seattletimes.com/life/travel/norwegian-cruise-line-blamed-for-engine-room-deaths/ (reporting on the lawsuits filed by the survivors and the widows of the deceased).

65. *See Star Cruises*, 286 F. Supp. 2d at 1355 (pointing out that the seafarers signed contracts including arbitration clauses); *see also The SS Norway - An Important Decision on*

seafarer contracts.[66] The court disagreed, citing precedent in the Fifth Circuit.[67] But most telling was the court's noticeable reliance on *Mitsubishi* in expressing a favorable public policy for arbitration, especially as it relates to international agreements.[68] The district court found for NCL and the Plaintiffs appealed.[69] Also relying on *Mitsubishi*, the Eleventh Circuit upheld the lower court's decision, sending into motion the popularity of arbitration clauses in seafarer employment agreements.[70]

iii. Thomas Put the Brakes on Bautista

After *Bautista*, cruise lines began incorporating arbitration clauses into all foreign crewmember contracts.[71] This practice came to a head

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Crew Claims in the United States, GARD.NO 2 (May 1, 2005), http://www.gard.no/web/updates/content/51640/the-ss-norway-an-important-decision-on-crew-claims-in-the-united-states (reporting on NCL's motion to compel arbitration).

66. *See Star Cruises*, 286 F. Supp. 2d at 1358 (indicating the plaintiffs argued that the Convention Act did not include seafarer contracts in its language); *see also* Gang Chen & Desai Shan, *Seafarers' Access to Jurisdictions over Labour Matters*, MARINE POLICY 77, 6 (Dec. 16, 2016), https://www.humanrightsatsea.org/wp-content/uploads/2017/10/Seafarers-access-to-jurisdictions-over-labour-matters-Desai-Shan.pdf (emphasizing that the Convention Act excluded seafarer contracts).

67. *See* Francisco v. Stolt Achievement MT, 293 F.3d 270, 274 (5th Cir. 2002) (determining that the Convention Act does not exclude seafarer contracts). It should be noted that the Fifth Circuit has developed many important maritime laws that are still applicable and followed among the circuits. *See also Influential U.S. 5th Circuit Court of Appeals: Jones Act Seaman Can Recover Punitive Damages in General Maritime Law Unseaworthiness Claim*, TOWBOATLAW 1, https://towboatlaw.wordpress.com/2013/10/18/influential-u-s-5th-circuit-court-of-appeals-jones-act-seaman-can-recover-punitive-damages-in-general-maritime-law-unseaworthiness-claim/ (last visited Mar. 20, 2019) ("[T]he U.S. Fifth Circuit Court of Appeals, [is] one of, if not the, most respected federal appellate courts when it comes to the development of maritime law in the United States . . . ."); *see also* W. Eugene Davis & Kenneth G. Engerrand, *Recent Developments in Admiralty Law in the United States Supreme Court, the Fifth Circuit, and the Eleventh Circuit*, 20 HOUS. J. OF INT'L L. 265, 266 (identifying the Fifth Circuit as one of the primary sources of reliance for the Supreme Court in maritime law).

68. *See* Bautista v. Star Cruises, 286 F. Supp. 2d 1352, 1361 (S.D. Fla. 2003) (citing to *Mitsubishi* and its favorability toward arbitration); *see also Homeward Bound – Judge Orders Filipino Seamen or Their Survivors to Arbitrate Miami Explosion Claims Back Home*, MOORE & COMPANY 3, http://www.moore-and-co.com/pdf/cruiseindustry.pdf (last visited Mar. 20, 2019) (emphasizing that the court relied on *Mitsubishi* in favoring arbitration).

69. *See Star Cruises*, 286 F. Supp. 2d at 1367 (holding that the plaintiffs must arbitrate their claims); *see also* MOORE & COMPANY, *supra* note 68 (showing that the district court found for NCL).

70. *See* Bautista v. Star Cruises, 396 F.3d 1289, 1295, 1303 (11th Cir. 2005) (affirming the district court's decision to compel arbitration); *see also* Justin Samuel Wales, *Beyond The Sail: The Eleventh Circuit's Thomas Decision and Its Ineffectual Impact On The Life, Work, and Legal Realities Of The Cruise Industry's Foreign Employees*, 65 U. MIAMI L. REV. 1215, 1237 (2014) (noting that the Eleventh Circuit affirmed the district court's judgment).

71. *See* White, *supra* note 61, at 177–78 (revealing the fallout from the *Bautista* decision); *see also* Jim Walker, *Lindo v. NCL: Crewmembers Lose Rights as Harsh Cruise Arbitration*

when the Eleventh Circuit took the opportunity to review *Bautista*.[72] In 2004, a head waiter, Thomas, a foreigner, was employed by Carnival Cruise Lines ("CCL").[73] Thomas was carrying a coffee pot when he slipped on a wet substance.[74] Even though the resulting fall injured his spine, shoulder, and caused burns to his leg, Thomas continued working for CCL.[75] Notably, under his contract at the time of the injury, there was no arbitration clause.[76]

A year later, Thomas executed a new agreement with CCL which now contained an arbitration clause.[77] After a medical examination, a CCL doctor concluded that Thomas' injuries precluded him from continuing his employment, and he was promptly discharged.[78] Thomas filed suit in district court, alleging negligence under the Jones Act, unseaworthiness of

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Decisions Continue, CRUISELAWNEWS.COM 3 (Aug. 30, 2011), https://www.cruiselawnews.com/2011/08/articles/crew-member-rights/lindo-v-ncl-crewmembers-lose-rights-as-harsh-cruise-arbitration-decisions-continue/ (signaling the importance of *Bautista* in upholding an arbitration agreement in a seafarer employment agreement).

72. *See* White, *supra* note 61, at 178–81 (noting the Eleventh Circuit's decision in *Thomas*); *see also* Paul Friedland, *Eleventh Circuit Troubled by Choice of Law Not Choice of Arbitration in Thomas v. Carnival*, KLUWER ARBITRATION BLOG 1 (Aug. 26, 2009), http://arbitrationblog.kluwerarbitration.com/2009/08/26/eleventh-circuit-troubled-by-choice-of-law-not-choice-of-arbitration-in-thomas-v-carnival/ (reporting on the Eleventh Circuit's *Thomas* decision).

73. *See* Thomas v. Carnival Corp., 573 F.3d 1113, 1115–16 (11th Cir. 2009) (noting that Thomas was employed on CCL's ship, the IMAGINATION); *see also* Wales, *supra* note 70 at 1232 (describing Thomas' injuries while working for CCL).

74. *See Carnival Corp.*, 573 F.3d at 1116 (describing a "wet substance in the dining room" at the time of Thomas' accident); *see also* Wales, *supra* note 70, at 1232 (describing Thomas' injuries while working for CCL).

75. *See Carnival Corp.*, 573 F.3d at 1116 (revealing that Thomas did not miss time from work despite his injuries); *see also* Wales, *supra* note 70, at 1232 (describing Thomas' injuries while working for CCL).

76. *See Carnival Corp.*, 573 F.3d at 1116 (specifying that Thomas did not have an arbitration clause in the contract governing his employment at the time of the accident); *see also* Wales, *supra* note 70, at 1232 (noting that Thomas' employment agreement before the accident did not contain an arbitration clause).

77. *See Carnival Corp.*, 573 F.3d at 1116 (explaining that Thomas' new contract with CCL included an arbitration clause); *see also* Wales, *supra* note 70, at 1232 (stating that Thomas was required to sign a new contract including an arbitration clause).

78. *See Carnival Corp.*, 573 F.3d at 1116 (revealing that two months into his new contract, CCL doctors determined he was unfit to continue employment with CCL); *see also* Wales, *supra* note 70, at 1232 (noting that CCL's shipboard doctors told Thomas that his injuries "rendered him unfit for continuing his duties").

the ship, and failure to provide M&C.[79] The court granted CCL's motion to compel arbitration.[80] Thomas then appealed to the Eleventh Circuit.[81]

On appeal, Thomas argued that the Convention Act did not apply because, at the time of his accident, there was no written arbitration agreement.[82] Thomas also invoked footnote 19's prospective waiver doctrine, arguing that arbitration of his claims was contrary to public policy.[83] In ruling against CCL, the court based their consideration primarily on footnote 19, and the Supreme Court's holding in *Vimar*.[84] In effect, the *Thomas* court agreed with Thomas' assertion that compelling arbitration was indeed a waiver of his statutory rights, and this was exactly the contravention of public policy the Court cautioned against in *Mitsubishi*.[85]

iv. The Lindo Majority Brings Bautista Back to Life

The applicability of the prospective waiver doctrine in the Eleventh Circuit under *Thomas* was short-lived.[86] In *Lindo*, a Nicaraguan citizen, Harold Lindo ("Lindo"), injured his back after transporting heavy trash

79. *See Carnival Corp.*, 573 F.3d at 1115 (listing the causes of action Thomas filed against CCL); *see also* Wales, *supra* note 70, at 1232 (indicating that Thomas filed suit for several causes of action, including under the Jones Act).

80. *See Carnival Corp.*, 573 F.3d at 1115 (providing that the district court compelled arbitration in favor of CCL); *see also* Wales, *supra* note 70, at 1232–33 (noting the district court's decision in favor CCL).

81. *See Carnival Corp.*, 573 F.3d at 1115 (pointing out Thomas' appeal of the lower court's decision); *see also* Wales, *supra* note 70, at 1233 (showing that Thomas appealed the district court's decision in favor of CCL).

82. *See Carnival Corp.*, 573 F.3d at 1115 (describing Thomas' arguments on appeal to the Eleventh Circuit); *see also* Wales, *supra* note 70, at 1233 (enumerating Thomas' arguments on appeal).

83. *See Carnival Corp.*, 573 F.3d at 1115 (highlighting Thomas' reliance on footnote 19's prospective waiver doctrine); *see also* Wales, *supra* note 70, at 1233 (presenting Thomas' assertion that compelling arbitration was a prospective waiver of his statutory rights).

84. *See Carnival Corp.*, 573 F.3d at 1121–23 (quoting *Vimar* in holding that compelling arbitration would be a prospective waiver of Thomas' federal statutory rights); *see also M/V Sky Reefer*, 515 U.S. at 540 (relying on footnote 19 in *Mitsubishi* to strike down an arbitration clause as contrary to public policy, a rare example of the Court invoking a public policy defense to arbitration).

85. *See Carnival Corp.*, 573 F.3d at 1124–25 (holding that arbitration of Thomas' claims should not be compelled); *see also* Wales, *supra* note 70, at 1236 (pointing out the court's reliance on *Vimar*).

86. *See* Lindo v. NCL (Bahamas) Ltd., 652 F.3d 1257, 1287 (11th Cir. 2011) (upholding an arbitration clause in a foreign seafarer's employment agreement); *see also* Walker, *supra* note 71, at 4–5 (highlighting how *Lindo* overrides the progress made in *Thomas*).

bags to his assigned ship.[87] The injury required surgery.[88] Lindo's employment contract with NCL included a binding arbitration clause.[89] Lindo sued in state court asserting Jones Act negligence, failure to pay M&C, and other related claims.[90] NCL removed to federal district court and moved to compel arbitration; the motion was granted, and Lindo appealed.[91]

On appeal, the Eleventh Circuit gave a comprehensive review of the major arbitration cases decided by the Supreme Court.[92] Significantly, the court set aside footnote 19, refused to follow the reasoning *Thomas* relied on under *Vimar*, and stripped away the foundation it previously laid in *Thomas*.[93] As a result, the Eleventh Circuit restored the principles it originally set out in *Bautista*, reestablishing the broad arbitrability of seafarer claims, and reintroducing *Bautista* as gospel in the Eleventh Circuit.[94]

87. *See NCL (Bahamas), Ltd.*, 652 F.3d at 1260 (explaining Lindo's injury while under the employ of NCL); *see also* Walker, *supra* note 71, at 5 (highlighting the serious injury Lindo suffered while working for NCL).

88. *See NCL (Bahamas), Ltd.*, 652 F.3d at 1260 (noting that Lindo's injury was serious enough to require surgery); *see also U.S. – Enforcement of Arbitration Clauses in Crew Contracts*, STEAMSHIP MUTUAL 1 (Feb. 2012), https://www.steamshipmutual.com/publications/Articles/LindoNCL0212.htm (showing that Lindo underwent surgery to repair the damage caused by his injury).

89. *See NCL (Bahamas), Ltd.*, 652 F.3d at 1260 (reproducing the language in Lindo's arbitration clause); *see also* Convention on the Recognition and Enforcement of Foreign Arbitral Awards, *supra* note 19, at 2 (providing further information on the Convention).

90. *See NCL (Bahamas), Ltd.*, 652 F.3d at 1261 (noting that Lindo brought suit in state court seeking a jury trial); *see also U.S. – Enforcement of Arbitration Clauses in Crew Contracts*, *supra* note 88, 1 (pointing out the procedural history of the *Lindo* case).

91. *See NCL (Bahamas), Ltd.*, 652 F.3d at 1261–62 (stating that Lindo appealed the decision compelling arbitration of his statutory claims); *see also U.S. – Enforcement of Arbitration Clauses in Crew Contracts*, *supra* note 88 (revealing that Lindo appealed the district court's decision in favor of NCL).

92. *See NCL (Bahamas), Ltd.*, 652 F.3d at 1264–68 (reviewing the Supreme Court's decisions in *Mitsubushi, Scherk,* and *Vimar*); *see also Soler Chrysler-Plymouth, Inc.*, 473 U.S. at 620; *Alberto-Culver Co.*, 417 U.S. at 534; *see also M/V Sky Reefer*, 515 U.S. at 540.

93. *See NCL (Bahamas), Ltd.*, 652 F.3d at 1267–76 (refusing to apply the prospective waiver doctrine); *see also* Walker, *supra* note 71, at 5 (pointing out that *Lindo* "effectively overruled the *Thomas* decision").

94. *See NCL (Bahamas), Ltd.*, 652 F.3d at 1271–73 (affirming the principles the court first set forth in *Bautista*); *see also* Walker, *supra* note 71, at 5 (noting that *Lindo* "essentially upheld *Bautista*").

D. CONGRESS HAS (SORT OF) SPOKEN

Congress has considered mandatory arbitration of employment-related sexual assaults on multiple occasions.[95] The Rape Victims Act of 2009 ("Rape Victims Act") was proposed to directly address the issue presented in this Comment.[96] In describing the purpose of the Rape Victims Act, Congress wrote: "[i]t is the intent of Congress that employees not be compelled by an employer to arbitrate any claim related to a tort arising out of rape."[97] The bill was not passed.[98] Similarly, in 2017, Sen. Kirsten Gillibrand introduced the Ending Arbitration of Sexual Harassment Act of 2017.[99] As of this writing, the future of the bill is up in the air.[100]

Yet Congress did pass the Department of Defense Appropriations Act of 2010 ("Defense Act") which includes a clause relating to mandatory

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95. *See* Rape Victims Act of 2009, S. 2915, 111th Cong. § 2(b) (2009) (providing that employment-related arbitration agreements are invalid when related to a tort arising out of rape); *see also* Department of Defense Appropriations Act of 2010, H.R. 3326, 111th Cong. § 8116(a) (2009) (prohibiting appropriation of funds for contracts over $1 million to contractors that compel their employees to arbitrate sexual assaults).

96. *See* Rape Victims Act of 2009, *supra* note 95, at § 2(b) (providing that employment-related arbitration agreements are invalid when related to a tort arising out of rape); *see also S. 2915 — 111th Congress: Rape Victims Act of 2009,* WWW.GOVTRACK.US 1 (February 18, 2019), https://www.govtrack.us/congress/bills/111/s2915 (U.S. Senator Bob Corker introduced legislation in 2009, providing that "employment-related arbitration agreements shall not be enforceable with respect to any claim related to a tort arising out of rape").

97. Rape Victims Act of 2009, *supra* note 95, at § 2(a)(2), (providing that employment-related arbitration agreements are invalid when related to a tort arising out of rape); *see also S. 2915 — 111th Congress: Rape Victims Act of 2009,* , *supra* note 96, at 1 (revealing Corker sponsored the Rape Victims Act of 2009).

98. *See* Rape Victims Act of 2009, *supra* note 95, at § 2(b) (providing that employment-related arbitration agreements are invalid when related to a tort arising out of rape); *see also S. 2915 — 111th Congress: Rape Victims Act of 2009,* , *supra* note 96, at 2 (revealing the Rape Victims Act of 2009 did not pass).

99. *See* Ending Forced Arbitration of Sexual Harassment Act of 2017, S. 2203, 115th Cong. § 402(a) (2017) (prohibiting forced arbitration of sexual harassment claims); *see also* Jessica Guynn, *'Enough is Enough': Gretchen Carlson Says Bill Ending Arbitration Would Break Silence in Sexual Harassment Cases*, USA TODAY 1 (Dec. 6, 2017, 12:06 PM), https://www.usatoday.com/story/money/2017/12/06/bipartisan-bill-would-eliminate-forced-arbitration-break-silence-sexual-harassment-cases/925226001/ (reporting on the proposed bill that "would eliminate forced arbitration clauses in employment agreements that advocates say silence women in sexual harassment and gender discrimination cases").

100. *See* Jacqueline Thomsen, *AGs Demand Congress End Mandatory Arbitration in Sexual Harassment Cases*, THE HILL 2 (Feb. 13, 2018, 6:33 PM), https://thehill.com/regulation/administration/373715-all-us-ags-demand-congress-end-mandatory-arbitration-in-sexual (reporting that the bill is still being debated in Congress); *see also* Manatt Phelps & Phillips LLP, *AGs Urge Legislation Ending Arbitration for Sexual Harassment Claims*, LEXOLOGY 2 (Mar. 8, 2018), https://www.lexology.com/library/detail.aspx?g=60c97620-b1af-4180-97ef-3531be1411da (reporting that the bill is still pending before the Senate Health, Education, Labor, and Pensions Committee).

arbitration of sexual assaults, known as the "Franken Amendment."[101] The Franken Amendment prohibits the use of funds made available under the Defense Act for contracts over $1 million if the contractor compels its employees to arbitrate sexual assault claims.[102]

More recently, House Democrats introduced the Restoring Justice for Workers Act.[103] If passed, this bill would prohibit all companies from requiring their employees to sign arbitration clauses.[104] In describing the impetus of the bill, one of its sponsors, Rep. Jerrold Nadler, said that: "[f]orced arbitration strips working Americans of their day in court to hold employers accountable for wage theft, discrimination, harassment and many other forms of misconduct[.]"[105]

101. Department of Defense Appropriations Act of 2010, *supra* note 95, at § 8116(a) (precluding appropriation of funds for contracts over $1 million to contractors that compel their employees to arbitrate sexual assaults); *see also* Frank Murray, *Assessing the Franken Amendment*, LAW360 1 (Feb. 16, 2011), https://www.foley.com/files/Publication/b7719898-db14-44bc-bc2d-b47ede0b7e6c/Presentation/PublicationAttachment/fdc6a5db-da4a-4517-bc83-b6679194089b/AssessingTheFrankenAmendment.pdf (reviewing the implementation of the Franken Amendment).

102. *See* Department of Defense Appropriations Act of 2010, *supra* note 95, at § 8116(a) (prohibiting appropriation of funds for contracts over $1 million to contractors that compel their employees to arbitrate sexual assaults); *see also* Murray, *supra* note 101, at 1 (describing the terms of the Franken Amendment).

103. *See* Restoring Justice for Workers Act, H.R. 7109, 115th Cong. § 3(2) (2018) (prohibiting companies from requiring their employees to sign arbitration clauses); *see also* Alexia F. Campbell, *House Democrats Have A Sweeping Plan to Protect Millions of Worker' Legal Rights*, VOX 2 (Nov. 14, 2018, 1:40 PM), https://www.vox.com/policy-and-politics/2018/11/14/18087490/mandatory-arbitration-house-democrats (reporting on the proposed bill that would end the practice of requiring employees to sign arbitration clauses).

104. *See* Restoring Justice for Workers Act, *supra* note 103, at § 3(2) (explaining how companies may be prohibited from requiring their employees to sign arbitration clauses); *see also* Campbell, *supra* note 103, at (stating how the proposed bill that would end the practice of requiring employees to sign clauses for arbitration).

105. Campbell, *supra* note 103, at 2 (reporting on the proposed bill that would end the practice of requiring employees to sign arbitration clauses); *see Ranking Members Nadler, Scott & Murray Release Bill to End Forced Arbitration in the Workplace, Restoring Critical Rights for American Workers*, JERROLD NADLER 1 (Oct. 30, 2018), https://nadler.house.gov/press-release/ranking-members-nadler-scott-murray-release-bill-end-forced-arbitration-workplace (quoting Rep. Nadler on the purpose of the Restoring Justice for Workers Act).

III. DISCUSSION

A. MANDATORY ARBITRATION OF SEXUAL ASSAULT DOES NOT BENEFIT THE VICTIM

As discussed in Part II, seafarers have traditionally enjoyed greater forms of recovery than land-based employees.[106] By forcing arbitration, seafarers may have the causes of action of M&C, unseaworthiness, and negligence under the Jones Act taken away from them.[107] Seafarers also lose their unique option to pursue federal claims in state court—and therefore, a right to a jury trial—under the "saving to suitors" clause.[108]

In particular, when the dispute being arbitrated involves a claim of sexual assault, the fallout is more than just the loss of remedies traditionally reserved for seafarers: it also enables wrong-doers and their employers to silence their victims.[109] This is because arbitration is often kept confidential, and the public is in the dark about the wrongful act.[110] Ultimately, the beneficiary of this hush-hush practice is not the victim, it is the corporation wishing to keep their dirty laundry from being aired in public.[111]

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106. *See supra* Part II.

107. *See supra* Part II.

108. *Supra* Part II.

109. *See* Marina Fang, *Business Groups Might Be Quietly Killing A Bill That Would Bring Sexual Abuse Claims to Light*, THE HUFFINGTON POST 2 (May 17, 2018, 4:02 PM), https://www.huffingtonpost.com/entry/forced-arbitration-sexual-harassment_us_5afda846e4b0a59b4e019e0a (commenting that arbitration "can effectively silence victims of sexual harassment and assault by giving employers disproportionate power"); *see also* Debra S. Katz, *30 Million Women Can't Sue Their Employer Over Harassment. Hopefully That's Changing.*, THE WASHINGTON POST 1 (May 17, 2018), https://www.washingtonpost.com/opinions/companies-are-finally-letting-women-take-sexual-harassment-to-court/2018/05/17/552ca876-594e-11e8-b656-a5f8c2a9295d_story.html?utm_term=.a66e2b3bb287 (arguing that the "secrecy [of arbitration] enables predatory harassers, such as Roger Ailes, the late Fox News executive, to target women for decades without public exposure").

110. *See infra* Part III.

111. *See* Galen Sherwin, *The Supreme Court Favors Forced Arbitration at the Expense of Workers' Rights*, ACLU 3 (May 22, 2018, 5:30 PM), https://www.aclu.org/blog/womens-rights/womens-rights-workplace/supreme-court-favors-forced-arbitration-expense-workers ("[A]rbitration has been criticized as biased in favor of companies and employers, and lacking in the procedural protections afforded by the justice system."); *see also* Jessica Silver-Greenberg & Robert Gebeloff, *Arbitration Everywhere, Stacking the Deck of Justice*, THE NEW YORK TIMES 4 (Oct. 31, 2015), https://www.nytimes.com/2015/11/01/business/dealbook/arbitration-everywhere-stacking-the-deck-of-justice.html ("Thousands of cases brought by single plaintiffs over fraud, wrongful death and rape are now being decided behind closed doors. And the rules of arbitration largely favor companies, which can even steer cases to friendly arbitrators, interviews and records show.").

In persuasive dissents, Supreme Court Justice Ruth Bader Ginsburg explains why arbitration clauses do not favor workers who are forced to sign them, while Judge Rosemary Barkett argues that the prospective waiver doctrine is a legitimate tool to curb the inequities arbitration clauses may create.[112]

B. PERSUASIVE DISSENTS ABOUT ARBITRATION THAT SHOULD BE FOLLOWED

In *Epic Systems*, the Court held that employees who sign individual arbitration agreements as a condition of their employment can be prohibited from joining class action lawsuits.[113] In her dissent, Justice Ginsburg revisits an early 1900s trend where employers would require their employees to sign, as a condition of their employment, contracts prohibiting them from joining labor unions; these contracts were known as "yellow-dog contracts."[114] In response to this practice, Congress passed the Norris-La Guardia Act of 1932.[115] In doing so, Justice Ginsburg points out that Congress intended to "render ineffective employer-imposed contracts proscribing employees' concerted activity of any and every kind."[116]

To this end, Justice Ginsburg warns that the Court's decision in *Epic Systems* will lead to a lack of enforcement of statutes intended to protect

112. *See infra* Part III.

113. *See* Epic Sys. Corp. v. Lewis, 138 S. Ct. 1612, 1631–32 (2018) (finding class action lawsuits against employers improper when employee agreements contained individual arbitration clauses); *see also* Scott Bomboy, *Supreme Court Rules for Employers in Significant Arbitration Case*, CONSTITUTION DAILY 2 (May 21, 2018), https://constitutioncenter.org/blog/supreme-court-rules-for-employers-in-significant-arbitration-case (reporting on Justice Ginsburg's dissent).

114. *Lewis*, 138 S. Ct. at 1634 (Ginsburg, J., dissenting) (outlining the history of unfair labor practices relating to unions); *see also* Ray Mullman, *Arbitration: "Yellow Dog Contracts"*, S.C. NURSING HOME L. BLOG 1 (Nov. 24, 2014), https://scnursinghomelaw.com/2014/11/24/arbitration-yellow-dog-contracts/ (calling mandatory arbitration "a new kind of yellow dog contract").

115. *See* Norris-La Guardia Act of 1932, 29 U.S.C. § 103 (2019) (prohibiting federal courts from enforcing "yellow-dog" contracts); *see also Norris LaGuardia Act*, SHRM 1–2 (Apr. 28, 2016), https://www.shrm.org/resourcesandtools/legal-and-compliance/employment-law/pages/norris-laguardia-act.aspx (describing the Norris-La Guardia Act as prohibiting "yellow-dog contracts").

116. *Lewis*, 138 S. Ct. at 1633, 1635 (Ginsburg, J., dissenting) (revealing Congressional action on "yellow-dog contracts"); *see also* David Seligman & Nick Clark, *Corporate America's Oily Trick: How Big Business Uses "Yellow-Dog Contracts" to Crush Basic Rights*, SALON 2 (Nov. 8, 2014, 3:58 AM), https://www.salon.com/2014/11/07/corporate_americas_oily_trick_how_big_business_uses_yellow_dog_contracts_to_crush_basic_rights/ (linking current arbitration clauses to "yellow-dog contracts" of the early 1900s).

the welfare of defenseless workers.[117] Further, Justice Ginsburg cautions that the confidential nature of arbitration and its lack of precedential effect will lead to "conflicting awards" in similar cases and leave "irreconcilable answers" abandoned.[118]

As stated in Part II, *Lindo* stands as the controlling stamp of approval governing arbitration clauses in the Eleventh Circuit.[119] However, Judge Barkett's dissent in *Lindo* highlights fundamental concerns with the majority's ruling.[120] First, Judge Barkett argues that the arbitration clause in Lindo's contract is precisely the kind of prospective waiver that the Supreme Court said it "would have little hesitation in condemning . . . as against public policy."[121]

Second, Judge Barkett points out that the Supreme Court has set precedent by applying the prospective waiver doctrine in *Vimar*.[122] In fact, Judge Barkett maintains the prospective waiver doctrine is not simply dicta—as the *Lindo* majority argued—because the Supreme Court has twice reaffirmed it.[123] Still, while Justice Ginsburg and Judge Barkett's

117. *See Lewis*, 138 S. Ct. at 1646, 1648 (Ginsburg, J., dissenting) (warning of the fallout from the Court's decision in cases like *Epic Systems*); *see also* Jean R. Sternlight, *Disarming Employees: How American Employers Are Using Mandatory Arbitration to Deprive Workers of Legal Protection*, 80 BROOK. L. REV. 1309, 1310 (2015) ("Today employers, with substantial assistance from the Supreme Court, are using mandatory arbitration clauses to 'disarm' employees, effectively preventing them from bringing most individual or class claims and thereby obtaining access to justice.").

118. *Lewis*, 138 S. Ct. at 1633, 1648 (Ginsburg, J., dissenting) (cautioning that confidentiality in arbitration leads to "anomalous results"); *see also* Hiba Hafiz, *How Legal Agreements Can Silence Victims of Workplace Sexual Assault*, THE ATLANTIC 4 (Oct. 18, 2017), https://www.theatlantic.com/business/archive/2017/10/legal-agreements-sexual-assault-ndas/543252/ (shining light on the negative impact of keeping arbitration confidential in cases of sexual assaults).

119. *See supra* Part II.

120. *See* White, *supra* note 61, at 184 (presenting Judge Barkett's "fiery dissent" that relies on footnote 19 in *Mitsubishi*); *see also* Walker, *supra* note 71, at 5 (calling Judge Barkett's dissent "well written and compelling").

121. Lindo v. NCL (Bahamas), Ltd., 652 F.3d 1257, 1267, 1287 (11th Cir. 2011) (Barkett, J., dissenting) (quoting footnote 19 in *Mitsubishi*); *see* Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc., 473 U.S. 614, 637 (1985) (establishing the much-debated prospective waiver doctrine).

122. *See NCL (Bahamas), Ltd.*, 652 F.3d at 1287, 1291 (Barkett, J., dissenting) (reinforcing the weight of the *Vimar* decision in upholding the prospective waiver doctrine); *see also* Vimar Seguros y Reaseguros, S.A. v. M/V Sky Reefer, 515 U.S. 528, 540 (1995) (reaffirming the prospective waiver doctrine).

123. *See* 14 Penn Plaza LLC v. Pyett, 556 U.S. 247, 273 (2009) (reaffirming the prospective waiver doctrine by noting that a "substantive waiver of federally protected civil rights will not be upheld"); *see also M/V Sky Reefer*, 515 U.S. at 540 (reaffirming the prospective waiver doctrine); *NCL (Bahamas) Ltd.*, 652 F.3d at 1294 (Barkett, J., dissenting) ("The majority asserts that footnote 19 of Mitsubishi is 'undisputably dicta.' This cannot be the case, as this footnote was critical to the Court's reasoning and the outcome of the case.").

arguments speak directly to the issue at hand, they are, of course, dissents that serve as appetizers to the main course.

C. SILICON VALLEY'S TECH GIANTS ARE SETTING A NEW TREND

In late 2017, Microsoft was the first major corporation to announce that they would stop the practice of forcing arbitration of sexual harassment claims.[124] They also declared their support for the Ending Arbitration of Sexual Harassment Act of 2017.[125] Brad Smith, Microsoft's president and chief legal officer, said "[b]ecause the silencing of voices has helped perpetuate sexual harassment, the country should guarantee that people can go to court to ensure these concerns can always be heard."[126]

Only a few months later, Uber announced they would stop forcing arbitration of sexual assaults.[127] Lyft, Uber's biggest competitor, promptly followed along.[128] Recently, mandatory arbitration of sexual assault or

124. *See* Ending Forced Arbitration of Sexual Harassment Act of 2017, *supra* note 99 (prohibiting forced arbitration of sexual harassment claims); *see also* Samantha Cooney, *Microsoft Won't Make Women Settle Sexual Harassment Cases Privately Anymore. Here's Why That Matters*, TIME 1 (Dec. 19, 2017), http://time.com/5071726/microsoft-sexual-harassment-forced-arbitration/ ("Microsoft announced . . . that it will no longer require women to settle sexual harassment cases privately, becoming one of the first major companies to eliminate what are known as forced arbitration clauses."); Matt Weinberger, *Microsoft is Taking a Stand on an Employment Practice That Can Silence Victims of Sexual Harassment*, BUSINESS INSIDER 1 (Dec. 19, 2017, 2:12 PM), https://www.businessinsider.com/microsoft-removes-mandatory-arbitration-clauses-2017-12 ("The company is removing language found in some of its employees' contracts that barred them from filing suit over workplace sexual harassment claims.").

125. *See* Cooney, *supra* note 124, at 1–2 ("The tech giant also threw its support behind federal legislation introduced by a group of bipartisan lawmakers, including Democratic Sen. Kirsten Gillibrand and Republican Sen. Lindsey Graham, to bar companies from using forced arbitration for sexual harassment."); *see also* Weinberger, *supra* note 124, at 1–2 (noting that Microsoft supports the Ending of Forced Arbitration of Sexual Harassment Act of 2017).

126. Weinberger, *supra* note 124, at 2 (quoting Microsoft president and chief legal officer); *see* Jing Cao, *Microsoft Eliminates Arbitration in Sexual Harassment Cases*, BLOOMBERG 1 (Dec. 19, 2017, 12:14 PM), https://www.bloomberg.com/news/articles/2017-12-19/microsoft-eliminates-arbitration-in-sexual-harassment-cases (expressing that Microsoft Corp. eliminated the requirement for sexual harassment and gender bias claims to be pursued through arbitration).

127. *See* Johana Bhuiyan, *Uber Will Now Allow Riders, Drivers and Employees to Pursue Individual Claims of Sexual Assault in Open Court*, RECODE 1 (May 15, 2018, 6:00 AM), https://www.recode.net/2018/5/15/17353978/uber-lawsuit-sexual-assault-arbitration-open-court (reporting on Uber ending mandatory arbitration of sexual assaults for its employees, drivers and passengers); *see also* Daisuke Wakabayashi, *Uber Eliminates Forced Arbitration for Sexual Misconduct Claims*, THE NEW YORK TIMES 1 (May 15, 2018), https://www.nytimes.com/2018/05/15/technology/uber-sex-misconduct.html ("Uber . . . [is] eliminating forced arbitration agreements for employees, riders and drivers who make sexual assault or harassment claims against the company.").

128. *See* Johana Bhuiyan, *Following Uber's Lead, Lyft Is Also Allowing Alleged Victims of Sexual Assault to Pursue Cases in Open Court*, RECODE (May 15, 2018, 2:08 PM),

harassment suffered a major blow when Google, Facebook, Airbnb, and eBay all announced they would end the practice.[129] In sum, a growing list of Silicon Valley's tech giants seem to understand that forcing their employees to arbitrate sexual misconduct claims is not equitable.

IV. SOLUTION

A. UNLESS THE SUPREME COURT GIVES TEETH TO THE PROSPECTIVE WAIVER DOCTRINE, RELYING ON IT IS ALL BARK AND NO BITE

As Judge Barkett argues in her dissent in *Lindo*, the Supreme Court has twice reaffirmed the prospective waiver doctrine.[130] Judge Barkett also relied heavily on the doctrine in guiding her opinion in *Thomas* before the *Lindo* majority overruled it.[131] At the same time, despite Judge Barkett's sound reasoning, the doctrine's use remains limited because the Court has refused to invoke it more times than not.[132] In fact, the Court's recent

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https://www.recode.net/2018/5/15/17357148/uber-lyft-arbitration-sexual-assault-lawsuit (reporting on Lyft ending mandatory arbitration of sexual assaults for its employees, drivers and passengers); *see also* Sara A. O'Brien, *Lyft Joins Uber to End Forced Arbitration For Sexual Assault Victims*, CNN BUSINESS 1 (May 15, 2018, 3:03 PM), https://money.cnn.com/2018/05/15/technology/lyft-forced-arbitration/index.html ("The news came just hours after Uber announced the same change . . . .").

129. *See* Didi Martinez, *Facebook, Airbnb and eBay Join Google in Ending Forced Arbitration for Sexual Harassment Claims*, NBC NEWS 3 (Nov. 12, 2018, 6:18 PM), https://www.nbcnews.com/tech/tech-news/facebook-airbnb-ebay-join-google-ending-forced-arbitration-sexual-harassment-n935451 ("Facebook, Airbnb and eBay have joined Google in changing a crucial policy that allowed them to handle sexual harassment and misconduct claims in private, a system that critics said provided a way for perpetrators and companies to avoid serious consequences."); *see also* Adi Robertson, *eBay and Airbnb Will End Mandatory Arbitration for Sexual Harassment Claims*, THE VERGE 1–2 (Nov. 12, 2018, 5:21 PM), https://www.theverge.com/2018/11/12/18089398/ebay-airbnb-end-forced-arbitration-clauses-sexual-harassment-discrimination-google-protest-backlash ("Backlash against forced arbitration has been building for years, and some state and federal lawmakers have attempted (unsuccessfully, so far) to end the process. Microsoft, Lyft, and Uber all dropped their policies before the Google protests, and Microsoft supported a federal bill that would ban it.").

130. *See NCL (Bahamas), Ltd.*, 652 F.3d at 1291 (Barkett, J., dissenting) (arguing that the Supreme Court has reaffirmed the prospective waiver doctrine on two occasions); *see also M/V Sky Reefer*, 515 U.S. at 540–41 (reaffirming the prospective waiver doctrine); 14 Penn Plaza LLC v. Pyett, 556 U.S. 247, 249 (reaffirming the prospective waiver doctrine by noting that a "substantive waiver of federally protected civil rights will not be upheld").

131. *See* Thomas v. Carnival Corp., 573 F.3d 1113, 1124 (holding that arbitration of Thomas' claims should not be compelled); *see also* Wales, *supra* note 70, at 1236 (pointing out the court's reliance on the prospective waiver doctrine and *Vimar*).

132. *See* Brubaker & Daly, *supra* note 58, at 1245 (noting that circuit courts are uncertain about footnote 19's applicability); *see also* Menz, *supra* note 58, at 2 ("Despite being invoked with some regularity, the nature and scope of the effective vindication doctrine has not been articulated adequately and remains conceptually vague.").

decision in *American Express* chipped away at the doctrine even further.[133] And so, if the prospective waiver doctrine is to survive and find teeth, the Court would need to quash any concerns that it is mere dicta, and would have to re-evaluate the doctrine's application by addressing it directly, not hypothetically.[134]

B. THE ORIGINAL PURPOSE OF THE FAA WAS TO SOLVE CONTRACTUAL DISPUTES, NOT STATUTORY CLAIMS

This Comment shows the emergence of a strong public policy toward arbitration to resolve disputes traditionally reserved for litigation.[135] But the FAA was originally intended to solve contractual disputes, not statutory claims (as stated in Part II, a seafarer's statutory right is to bring a claim of negligence under the Jones Act for a sexual assault by a co-worker).[136] It is the Supreme Court that opened the door to arbitration of statutory rights in *Mitsubishi*, and the Court's jurisprudence since then has emboldened this trend.[137]

Reanalyzing the original purpose of the FAA may illuminate the importance and legitimacy of judicial discretion via the prospective waiver doctrine.[138] What is more, if Congress's original intent is to be observed, then arbitration and contracts should be viewed on an equal footing,

133. *See* Am. Express Co. v. Italian Colors Rest., 570 U.S. 228, 236 (2013) (upholding an arbitration clause that prohibited class action suits); *see also* Okezie Chukwumerije, *The Evolution and Decline of the Effective-Vindication Doctrine in U.S. Arbitration Law*, 14 PEPP. DISP. RESOL. L.J. 375, 377 (2014) (noting that the Court's decision in *American Express* narrowed the prospective waiver doctrine).

134. *See Italian Colors Rest.*, 570 U.S. at 235 ("The [prospective waiver] exception to which respondents allude originated as dictum in Mitsubishi Motors, where we expressed a willingness to invalidate, on 'public policy' grounds, arbitration agreements that operat[e] . . . as a prospective waiver of a party's right to pursue statutory remedies."); *see also In re* Am. Express Merchs.' Litig., 681 F.3d 139, 147 (2d Cir. 2012) ("The [*Mitsubishi*] Court was there concerned with a hypothetical arbitral panel that might, relying on provisions concerning choice of forum or choice of law, refuse to apply American law to a federal statutory claim.").

135. *See supra* Part I–III.

136. *See* Szalai, *supra* note 18, at 124 ("[T]he FAA was designed for contractual disputes, not statutory claims."); *see also* Sky Pettey, *Power and Knowledge in Agreements to Arbitrate Statutory Employment Rights*, 14 OHIO ST. J. DISP. RESOL. 927, 939 (1999) ("[M]ost commentators have concluded that the FAA was envisioned as applying to consensual transactions between two merchants of roughly equal bargaining power[.]").

137. *See supra* Part II.

138. *See* Szalai, *supra* note 18, at 126 ("Understanding the original purpose behind the FAA helps one understand the development of the [prospective waiver doctrine.]"); *see also* Jodi Wilson, *How the Supreme Court Thwarted the Purpose of the Federal Arbitration Act*, 63 CAS. W. RES. 91, 94 (2012) ("Almost thirty years ago, the Court announced that the FAA evidenced a policy favoring arbitration, despite the apparent conflict such a policy has with Congress's stated intent to place arbitration agreements on the same footing as other contracts.").

without showing favorability to one over the other.[139]

C. CONGRESS SHOULD PASS LEGISLATION ENDING MANDATORY ARBITRATION OF SEXUAL ASSAULTS

That Congress has spoken on the issue before reflects on the legitimacy of the problem.[140] Although the Defense Act is a positive step toward acknowledging the problem at large, this solution alone is too limited in scope.[141] The better solution is to enact broader legislation that bans all employers from forcing their employees to sign arbitration clauses, as the newly proposed Restoring Justice for Workers Act aims to do.[142]

D. CORPORATIONS SHOULD FOLLOW THE GROWING TREND IN SILICON VALLEY

As mentioned above, major corporations such as Google, Facebook, eBay, and Uber, have all recognized the inequity of forced arbitration clauses in cases of sexual misconduct.[143] True, it took a large outcry—and in some cases mass employee walkouts—to pull the plug on this controversial practice.[144] But if some of the world's most powerful corporations can do it, then why can't cruise line employers?

V. CONCLUSION

Seafarers have historically enjoyed preferential treatment under the law.[145] However, introducing mandatory arbitration clauses into seafarer employment contracts has slowly chipped away at this preferential treatment, leaving seafarers wondering whether they are truly protected by

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139. *See* Brian T. Burns, *Note: Freedom, Finality, And Federal Preemption: Seeking Expanded Judicial Review of Arbitration Awards Under State Law After Hall Street*, 78 FORDHAM L. REV. 1813, 1817–18 ("[The FAA], in effect, replaced the common-law prohibition on specific enforcement of arbitration agreements and effectuated Congress's intent to place arbitration agreements upon the same footing as other contracts, where [they] belong[]."); *see also* Wilson, *supra* note 138, at 93, 96 (highlighting Congress's intent to view arbitration and contracts as equals).

140. *See supra* Part II.

141. *See* Department of Defense Appropriations Act of 2010, *supra* note 95, at § 8116(a) (prohibiting appropriation of funds for contracts over $1 million to contractors that compel their employees to arbitrate sexual assaults).

142. *See* Restoring Justice for Workers Act, *supra* note 103, at § 3(2) (prohibiting companies from requiring their employees to sign arbitration clauses).

143. *See supra* Part III.

144. *See supra* Part III.

145. *See supra* Part II.

the remedies that have governed their employment for so long.[146] This problem is magnified when a seafarer is sexually assaulted while working for a cruise liner.[147]

The following solutions have been proposed: (1) until the Supreme Court squarely revisits the prospective waiver doctrine, and clears the air of confusion about it in the circuit courts, reliance on the doctrine is not fruitful;[148] (2) Congress's original intent in promulgating the FAA—and that no special preference be given to arbitration—should be respected;[149] (3) Congress should pass the proposed Restoring Justice for Workers Act;[150] and (4) cruise line corporations should follow in the footsteps of several Silicon Valley tech giants and voluntarily end the practice of mandatory arbitration of sexual assaults.[151]

146. *See supra* Part I.
147. *See supra* Part I–II.
148. *See supra* Part IV.
149. *See supra* Part IV.
150. *See supra* Part IV.
151. *See supra* Part IV.