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LeRoy Lambert[a1] Brian McEwing[d1]

ENFORCEMENT OF ARBITRATION AGREEMENTS IN SEAFARER EMPLOYMENT CONTRACTS: MAY STATE LAW ARBITRATION STATUTES APPLY?

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I. The Issue

Enacted in 1925, the Federal Arbitration Act (FAA)[1] applies to "[m]aritime transactions" as defined in § 1.[2] Section two provides:

> A written provision in any maritime transaction or a contract evidencing a transaction involving commerce to settle a controversy thereafter arising out of such contract ... shall be valid, irrevocable, ***56** and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract.[3]

However, § 1 also provides: "[N]othing herein contained shall apply to contracts of employment of seamen, railroad employees, or any other class of workers engaged in foreign or interstate commerce."[4]

As a result, an arbitration agreement in an employment contract of a seafarer is not enforceable under the FAA.[5] Does, or may, a state law pro-arbitration statute, which does not exempt seafarer employment contracts, apply to render the arbitration agreement enforceable?

According to developing case law,[6] an arbitration clause in a seafarer's employment contract which chooses the arbitration law of a ***57** state that does not except seafarer employment contracts is valid and enforceable.[7]

This Article first situates the enactment in 1925 of the FAA in its historical context, including legislative attempts to provide alternative and supplemental redress for workers injured in the workplace, the judicial response, judicial attitudes toward arbitration, the meaning of "seaman" at the time, the powers of federal courts exercising maritime jurisdiction, and the procedural rules then in place. The Article then discusses the developing case law in the context of the employment contracts of

"transportation workers," and then in the context of seafarer contracts of employment. It concludes with a summary of the case law today and factors a court should consider in deciding whether **arbitration** agreements in seafarer employment contracts are enforceable under state law **arbitration** statutes enacted after 1925 which favor **arbitration** and do not except seafarer employment contracts from their scope.

II. Background and Context

Under the common law, employees faced an unholy trinity of bars to recovery of monetary damages for workplace injuries: fellow servant negligence, assumption of risk, and contributory negligence.[8] In *The Osceola*,[9] the Supreme Court confirmed that, under **maritime law**, seafarers could not recover damages based on negligence if the injury was caused by the negligence of a fellow crew member, including the vessel's master.[10]

As industrialization and workplace injuries increased in the last quarter of the nineteenth century and the first quarter of the twentieth century, Congress and state legislatures reacted to the lack of redress for ***58** workplace injuries under the common law in two ways: (1) by enacting statutory causes of action for employees sounding in negligence or (2) by enacting workers compensation statutes making employers strictly liable for workplace injuries and setting the amount of damages recoverable for such injuries.[11]

An example of the former is the Federal Employers Liability Act,[12] enacted in 1908, which provided railroad workers with the right to sue their employers for negligence and to have a jury determine the liability and damages.

Another example is a provision in the "Jones Act,"[13] enacted by Congress in 1920:

> 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.[14]

By enacting the Jones Act, Congress legislatively overruled the holding in *The Osceola* that seafarers had no negligence cause of action against their employers and did so by incorporating by reference the provisions of FELA. The Supreme Court upheld Congress's right to enact such legislation with respect to seafarers.[15]

In 1920, however, when Congress enacted the Jones Act and, in 1925, when Congress enacted the FAA exempting "seamen" employment contracts from the scope of the FAA, the law was not settled on whether a "seaman" referred only to a member of the crew of a ship; it could also encompass longshore workers working to load or discharge a ship. Indeed, in 1926, in *International Stevedoring Co. v. Haverty*,[16] the Court held that a longshore worker was a "seaman" entitled to sue under the Jones Act.

***59** Meanwhile, many states adopted workers' compensation statutes to solve the problem created by the common law rule limiting an employee's ability to recover damages for workplace injuries: The employer agreed in principle to be strictly liable for workplace injuries in amounts determined by statute; the employee and the employee's family gained the certainty of prompt compensation without having the delay and risk of a trial.[17]

During the period 1917-1927,[18] the Supreme Court grappled with attempts by Congress, following the lead of the states, to extend coverage under state worker compensation statutes to "seamen." In 1917, the Court held that applying the New York state workers compensation statute to the claim of a longshore worker was unconstitutional in *Southern Pacific Co. v. Jensen*.[19]

Congress then enacted a statute[20] to include state compensation schemes in the saving to suitors clause, but the Court ruled in *Knickerbocker Ice Co. v. Stewart*[21] that this statute, too, was unconstitutional. In 1922, Congress tried again, but the Court struck this statute down in 1924 in *Washington v. W.C. Dawson & Co*.[22]

Against this backdrop, Congress enacted the Longshore and Harbor Workers' Compensation Act (LHWCA)[23] in 1927. The LHWCA created a new legal status, defined as a **maritime** worker. Those who qualified as a **maritime** worker gained the right to elect to accept the compensation remedy under the LHWCA or sue the ship owner or other third party in ***60** tort.[24] Notwithstanding the *Haverty* decision,[25] the LHWCA did not include ""seamen" in the definition of "**maritime** worker."[26]

Accordingly, post-LHWCA, a seafarer who was a member of the crew of a ship (as well as a "seaman" under *Haverty* until 1959) could "elect"[27] a trial by jury against the seafarer's employer under the Jones Act for workplace injuries based on negligence or before a judge for maintenance and cure or unseaworthiness under the general **maritime** **law**.[28] The Jones Act was not the exclusive remedy for seafarer personal injuries when enacted in 1920.

III. 1925: The FAA

The common law was not friendly to **arbitration** agreements either.[29] In the midst of the developments recounted above, Congress, following the lead of New York, enacted the FAA in 1925[30] to reverse, by statute, ***61** the historical refusal of common law courts to order a party to proceed with an **arbitration** by an order of specific performance.[31]

In 1925, courts sitting in admiralty and deciding cases arising under **maritime** **law** were less hostile to agreements to **arbitrate** than the common law courts; however, admiralty courts in 1925 were thought not to have equitable powers and hence no power to order the specific enforcement of an agreement to **arbitrate** in a **maritime** contract.[32] By including **maritime** contracts within the scope of the FAA, Congress provided **maritime** courts the power to order specific performance of **arbitration** agreements in **maritime** contracts.[33]

In 1984, in *Southland Corp. v. Keating*,[34] the Supreme Court held that the FAA "rests on the authority of Congress to enact substantive rules under the Commerce Clause"[35] and that the FAA applied to contracts covered by the FAA in federal and state courts. "In creating a substantive rule applicable in state as well as federal courts, Congress intended to foreclose state legislative attempts to undercut the enforceability of **arbitration** agreements" and held the California law "violate[d] the Supremacy Clause."[36] In subsequent cases, the Court has reiterated that the FAA applies in federal and state courts and preempts state law that conflicts with the FAA.[37]

***62** IV. The FAA Does not Preempt Parties from Choosing State Law **Arbitration** Statutes Which Do not Conflict with the FAA

What if a state **arbitration** statute does not conflict with the FAA with respect to an **arbitration** agreement *within* the scope of the FAA? In *Volt Information Sciences, Inc. v. Board of Trustees of the Leland Stanford Junior University*,[38] the Court had before it an **arbitration** clause in a standard form construction contract which stated: "[t]he Contract shall be governed by the law of the place where the Project is located."[39] The contract evidenced a transaction involving commerce under § 1 of the FAA. The Court, however, declined to give the FAA preemptive effect and held that the parties' choice of "the law of the place where the Project is located" (here, California) included California state law governing **arbitrations**.[40] "There is no federal policy favoring **arbitration** under a certain set of procedural rules; the federal policy is simply to ensure the enforceability,

according to their terms, of private agreements to **arbitrate**."[41] The Court stated further: "The FAA contains no express pre-emptive provision, nor does it reflect a congressional intent to occupy the entire field of **arbitration**."[42]

The Court held that application of the California procedural rule to stay **arbitration** to the agreement, in accordance with the California choice-of-law provision contained in the contract, was appropriate because[43] the application of the state procedural rule, "in accordance with ***63** the terms of the **arbitration** agreement itself, would [not] undermine the goals and policies of the FAA."[44]

V. "Transportation Worker" Employment Contracts Excepted from the Scope of the FAA

Volt established that the FAA does not preclude parties in a contract *to which the FAA applies* from choosing a state law *other* than the FAA to apply to the **arbitration** of disputes arising thereunder, provided that the state law does not conflict with the provisions of the FAA.[45] What, however, about application of state law to **arbitration** agreements in employment contracts *excepted* by § 1 from the scope of FAA coverage: railroad workers, seafarers, and "any other class of workers engaged in foreign or interstate commerce"?[46]

During the last twenty-five years, the Supreme Court has considered the meaning and scope of the exception for employment contracts of "workers engaged in foreign interstate commerce."[47] The Court has held that **arbitration** agreements in employment contracts of those workers are not enforceable under the FAA.

In *Circuit City Stores, Inc. v. Adams*,[48] the Court held that § 1 of the FAA "exempts from the FAA only employment contracts of transportation workers," not all employment contracts.[49] The Court held that the employee who signed the **arbitration** agreement[50] was a "transportation worker."[51] Hence, the **arbitration** agreement was not enforceable under the FAA, and the Court remanded the disputes to be resolved by litigation, not **arbitration**.[52]

In *New Prime, Inc. v. Oliveira*,[53] the Court held that a contract between a trucking company and an independent contractor fell within the transportation worker exception and affirmed the lower court's decision to deny the employer's motion to compel under the FAA.[54]

***64** In *Southwest Airlines Co. v. Saxon*,[55] the Court considered an **arbitration** agreement in the employment contract of a worker whose work required her to load and unload baggage and goods on and off airplanes that travel across the country. The Court held she was a transportation worker whose employment contracts were excepted from the scope of the FAA under § 1 and affirmed the Seventh Circuit decision denying the employer's motion to compel **arbitration** under the FAA.[56]

More recently, the Court held that "[a] transportation worker need not work in the transportation industry to fall within the exemption from the FAA provided by § 1 of the Act."[57]

***65** VI. If an Arbitration Agreement in a "Transportation Worker" Employment Contract Is not Enforceable Under § 1, Do/May State Law Arbitration Statutes Apply?

Volt allows parties to choose state law **arbitration** statutes to apply to an **arbitration** agreement to which the FAA otherwise applies to the extent that the state law does not conflict with the FAA. In *Circuit City*, *New Prime*, and *Southwest Airlines*, the Court did not address whether a state law **arbitration** statute could apply to **arbitration** agreements in "transportation worker" employment contracts which are excepted from the FAA's coverage. The disputes returned to the federal or state court for resolution under state and/or federal law.

Lower federal courts and state courts have, however, addressed the issue of whether state law **arbitration** statutes may apply to "transportation worker" employment contracts exempted from the FAA.

In *Palcko v. Airborne Express, Inc.*, an airline employee filed a Title VII claim.[58] In her employment contract, she agreed: "Except as provided in this Agreement, the Federal **Arbitration** Act shall govern the interpretation, enforcement, and all proceedings pursuant to this Agreement. To the extent that the Federal **Arbitration** Act is inapplicable, Washington law pertaining to **arbitration** shall apply."[59]

The district court[60] found Palcko's employment contract fell into the third category and was exempt from the scope of the FAA under § 1, excepting contracts of employment of "workers engaged in foreign or interstate commerce."[61] However, the district court was of the view that state law "may nonetheless be pre-empted to the extent that it actually conflicts with federal law--that is, to the extent that it 'stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress.'"[62] The district court denied the employer's motion to compel Palcko to **arbitrate**, reasoning:

> ***66** Congress explicitly exempted a class of workers, those "engaged in interstate commerce," from a federal law otherwise favoring **arbitration**. Exempting the plaintiff from **arbitration** under the FAA, but then requiring that she **arbitrate** her federal claims in accordance with state laws favoring **arbitration** would directly conflict with Congress's express purpose.[63]

The Third Circuit reversed the district court. It agreed that Palcko's contract was excepted from coverage under the FAA, relying on *Circuit City*. However, it disagreed that the FAA's excepting such contracts from the scope of the FAA meant that Congress preempted[64] application of state law **arbitration** statutes to such contracts; rather, where contracts are exempt under § 1 of the FAA, the analysis of enforceability of the **arbitration** clause should proceed "as if the FAA had not been enacted."[65]

Applying *Volt* and other Supreme Court precedent,[66] the court concluded that the district court erred in holding that the exempted status ***67** of Palcko's employment contract under § 1 of the FAA preempted the enforcement of the **arbitration** agreement under Washington state law. The court noted that the **arbitration** agreement provided for the contingency that the employment contract could be deemed exempt from the FAA's coverage and provided: "To the extent that the Federal **Arbitration** Act is inapplicable, Washington law pertaining to agreements to **arbitrate** shall apply."[67] The court saw "no reason to release the parties from their own agreement."[68]

Since the parties chose Washington state law to apply if the FAA did not, and since Washington state law did not prohibit **arbitration** of such a dispute, the court compelled Ms. Palcko to **arbitrate** pursuant to Washington state law.[69]

In *Arafa v. Health Express Corp.*,[70] the New Jersey Supreme Court considered the interplay between the FAA and the New Jersey **Arbitration** Act (NJAA)[71] in disputes arising out of two employment contracts involving transportation workers excepted by § 1 of the FAA. In one case, the **arbitration** agreement provided that the "laws of the state of residence of the [Employer], without regard to the conflict of laws principles thereof, shall govern this Agreement" and that "[t]he parties agree to be bound by the [FAA]."[72] The **arbitration** clause in the other contract had no ***68** choice of law clause but provided: "This Agreement is governed by the [FAA]."[73]

In both cases, the New Jersey Supreme Court applied New Jersey choice of law principles and held that New Jersey law applied.

Accordingly, and if the workers subject to the contracts were workers exempt from coverage by § 1 of the FAA, the New Jersey Supreme Court had to decide "whether the disputed **arbitration** agreements would be enforceable under the [NJAA] if they are exempt from the FAA."[74]

The Court considered several arguments.[75]

> 1. Because the text of the **arbitration** agreements made them subject to the FAA, there was no mutual assent because the FAA did not cover such contracts.
>
> 2. The **arbitration** agreements were silent as to the NJAA and showed no "clear intent" to apply the NJAA in place of the FAA.
>
> 3. The exception for transportation workers under § 1 showed that "Congress intended to reserve more specific dispute resolution legislation for [exempt] transportation workers for itself ... [and that] allowing **arbitration** of claims brought by transportation workers engaged in interstate commerce is preempted through its conflict with the FAA as contrary to Congress's intent."[76]

Addressing these arguments, the New Jersey Supreme Court referred first to *Volt* and its statement that by enacting the FAA, Congress did not intend to "occupy the entire field of **arbitrations**."[77] It then cited its own precedent that "although the FAA preempts state laws that treat **arbitration** agreements differently from other contracts, 'the FAA specifically permits states to regulate contracts containing **arbitration** agreements[,] under general contract principles.'"[78] Accordingly, the court declined to conclude that Congress's exempting transportation workers from the scope of the FAA, when it had the power to do so, showed that Congress's intent was not to "exclude transportation workers from **arbitration** altogether, but rather to subject their agreements to other statutes that may or may not require **arbitration**."[79]

***69** The court dispensed with the arguments about the lack of "mutual assent" to the NJAA and the lack of "clear intent" for the NJAA to apply on the basis that the NJAA's application is "automatic" to all **arbitration** agreements subject to New Jersey law.[80] To the extent that the **arbitration** agreements could be read to displace the NJAA in favor of the FAA and thereby vitiate the entire agreement to **arbitrate**, the court held that the "Enforcement Clause," which was a severability clause, showed that the parties intended that "the agreement as a whole survives the excision of an unenforceable provision."[81]

In the Second Circuit decision in *Bissonette v. LePage Bakeries Park St., LLC*,[82] the court noted that it had "not ruled on the application of state law to **arbitration** agreements under the FAA," but cited district court cases within the Second Circuit and from other circuits which rejected the proposition that state law **arbitration** was preempted when a worker's contract is excluded by the FAA.[83]

VII. What, Then, of Arbitration Agreements in Seafarer Employment Contracts?

The cases referred to above arose in connection with the third category of employment contracts excluded in § 1, those of transportation workers. The employment contracts of seafarers and transportation workers are both excepted by § 1 from the scope of the FAA. Does the reasoning in the transportation worker cases apply in the case of an **arbitration** clause in a seafarer's

employment contract? Or, is there something about a seafarer's employment contract which calls for a different result than the result in *Palcko* and *Arafa*? Several courts have ruled on this issue.

In *Sherwood v. Marquette Transportation Co.*,[84] the district court considered an **arbitration** agreement in a seafarer employment contract.[85] ***70** It took a tack similar to the district court in *Palcko* and held that the FAA, by excluding seafarer employment contracts, preempted "any state law that concerns **arbitration**," and, if the FAA does not apply, ""**arbitration** is forbidden," because it would "interfere with the [FAA's] objectives."[86] The court denied the employer's motions to stay the litigation and to compel **arbitration**.

On appeal, the Seventh Circuit[87] held it did not have appellate jurisdiction to hear the appeal from the district court order denying a stay of **arbitration**. However, citing the Third Circuit's decision in *Palcko*[88] reversing the district court decision, it noted that the district court, in reaching its decision, did not consider the possibility that state law could/did apply if the FAA does not: "[W]hen a contract is not covered by the [FAA], states are free to favor, disfavor, or even ban **arbitration**."[89]

More recently, the Seventh Circuit revisited the issue in *Rodgers-Rouzier v. American Queen Steamboat Operating Company*.[90] Plaintiff was a bartender employed by the defendant aboard steamboats performing river cruises. Her employment contract contained an **arbitration** clause. Her seafarer status was not in dispute on appeal,[91] and there was no dispute that the **arbitration** contract in her employment contract fell within the category of seafarer employment contracts excepted by § 1 of the FAA.[92]

The **arbitration** agreement provided that the parties would settle all claims by binding **arbitration** "under the rules of the American ***71** **Arbitration** Association ... or another **arbitration** service selected by [defendant]."[93] It further provided that "[t]his Agreement and the applicability/construction of any **arbitration** decision shall be governed by the Federal **Arbitration** Act."[94] The **arbitration** agreement had a severability clause providing that if any provision was invalid or unenforceable, the remaining portions of the agreement would not be affected.[95]

The court acknowledged that the FAA "generally preempts conflicting state law within its sphere"[96] and that this preemption "invalidates state law that discriminates against **arbitration**."[97] However, "it does not follow that the FAA preempts state laws that favor **arbitration** in means different from the FAA or beyond the FAA's own scope."[98]

Here, the relevant state law was the Indiana Uniform **Arbitration** Act, Ind. Code §§ 34-57-2-1 to -22 (IUAA). The IUAA applies to employment contracts; it does not except seafarer employment contracts, and the parties agreed that state law "can render an **arbitration** agreement in a seaman's contract of employment valid and enforceable, despite the FAA exemption."[99]

After a detailed discussion of the history of the interplay between federal and state law with respect to substance and procedure, the court concluded that "the [federal] district court had the authority under Indiana law to the extent and by means substantially equivalent to those that Indiana law grants to the Indiana state court system."[100]

Section 34-57-2-1(a) of the IUAA includes employment contracts and makes the IUAA applicable "unless otherwise provided in the [**arbitration**] agreement."[101] The court concluded that section six of the **arbitration** agreement, making the agreement subject to the FAA, was "in essence, a choice of law clause."[102] Under Indiana law, choice of law clauses are favored.[103] After reviewing Indiana law, the court concluded: "Because the parties agreed that **arbitration** would be governed by the ***72** FAA, which would not permit [the defendant employer] to compel **arbitration**, we conclude that Indiana law also would not compel [the plaintiff] to **arbitrate** under this agreement."[104]

As a result, the court denied the defendant's motion to compel **arbitration**. By making the **arbitration** agreement subject to the FAA only, which excepted the underlying seafarer employment contract from its scope, the parties rendered their agreement to **arbitrate** unenforceable under the FAA, the only law the parties chose.[105]

In *Kozur v. F/V Atlantic Bounty*,[106] the United States District Court for the District of New Jersey had before it an **arbitration** clause which provided:

> I understand and agree that any dispute, claim or controversy arising out of my work as a crewmember, including but not limited to statutory Jones Act claims, negligence, unseaworthiness, maintenance and cure ... or disputes relating to this agreement ... shall be determined by one **arbitrator** sitting in Philadelphia, Pennsylvania ... **ARBITRATION** SHALL BE MY EXCLUSIVE REMEDY AND I UNDERSTAND THAT I GIVE UP MY RIGHT TO SUE. I FURTHER UNDERSTAND AND AGREE THAT I GIVE UP MY RIGHT TO SELECT THE VENUE FOR ANY CLAIM OR CONTROVERSY AND THAT I GIVE UP MY RIGHT TO A TRIAL BY JUDGE OR JURY FOR ANY AND ALL CLAIMS, INCLUDING BUT NOT LIMITED TO STATUTORY JONES ACT, NEGLIGENCE, MAINTENANCE AND CURE, UNSEAWORTHINESS, AND WAGES.[107]

The clause further provided that "if the agreement to **arbitrate** is determined to be exempt from the [sic] enforcement under the Federal **Arbitration** Act, the laws of the State of New York shall be applied in determining the validity and enforcement of this agreement."[108]

***73** The court held an evidentiary hearing at which the plaintiff testified with respect to his signing of the contract and found that "the parties have an agreement to **arbitrate** under both New York and New Jersey law."[109]

The parties did not dispute that § 1 of the FAA exempted the plaintiff's seafarer contract of employment from the scope of the FAA, and the court found that the contract was exempt from the FAA; therefore, the issue before the court was "whether this seaman's agreement to **arbitrate** is enforceable as a matter of state law."[110]

The plaintiff contended that the agreement to **arbitrate** was not enforceable as a matter of state law, because (1) the FAA preempts state **arbitration** laws and (2) admiralty law "requires uniform application."[111]

As to the preemption argument, the plaintiff contended that "Congress has occupied the field with respect to seamen's personal injury claims against their employers through the Jones Act, and state **arbitration** statutes must defer to Congress' occupation" and that "the rights afforded by the Jones Act cannot be contractually waived."[112] The court, however, referred to the legislative history of § 1, as recounted in *Circuit City*, and declined to draw the inference that by *exempting* seafarer's contracts from the scope of the FAA, Congress intended to preempt state law from applying to **arbitration** agreements in seafarer employment contracts.[113]

If, however, the § 1 exemption in the FAA was not sufficient to infer preemption, what of the Jones Act itself? The plaintiff in *Kozur* contended ***74** that "Congress has passed a dispute resolution for seamen, [with] the Jones Act, and this must take preeminence over any state-developed dispute resolution system."[114]

As the Court counseled in *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, the key in determining whether a right created by statute is **arbitrable** is whether "Congress itself has evinced an intention to preclude a waiver of judicial remedies for the statutory rights at issue."[115] As noted by the New York Court of Appeals, the Jones Act predated the FAA by five years and "contains no expression of intent to limit the pursuit of its remedies to the judicial forum."[116] The Jones Act allows a

plaintiff to "elect" to pursue his claim as a **maritime** claim before a judge under Federal Rules of Civil Procedure 9(h) and otherwise waive a jury trial.[117]

The *Kozur* court further relied[118] on the Supreme Court decision in *Kernan v. American Dredging Co.*, where the Court stated that Congress's general intent in passing the Jones Act "was to provide liberal recovery for injured workers, and it is also clear that Congress intended no static remedy, but one which would be developed and enlarged to meet changing conditions and changing concepts of industry's duty toward its workers."[119]

Moreover, in *Mitsubishi*,[120] the Court held that an antitrust claim was **arbitrable** before an **arbitration** panel in Tokyo. "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."[121]

As part of the plaintiff's preemption argument in *Kozur*, the plaintiff also argued that the Jones Act incorporated FELA and that FELA rendered **arbitration** clauses in railroad worker employment contracts unenforceable by virtue of FELA's venue provisions.[122] Under the Supreme Court's holding in *Boyd v. Grand Trunk W.R. Co.*[123] that ***75** "contracts limiting the choice of venue are void as conflicting with [FELA]."[124]

After noting decisions under the Jones Act refused to enforce forum selection clauses based on *Boyd* and that these involved forum selection clauses, not **arbitration** agreements,[125] the Court in *Kozur* cited decisions holding that FELA's venue provision is inapplicable in Jones Act cases[126] and held that FELA's venue provision "is not incorporated into the Jones Act."[127]

The court then turned to the plaintiff's argument that there was, or should be, "a requirement for the uniform application of admiralty laws," which "precludes state law from compelling **arbitration** of a seaman's claim."[128] The court held that "the general requirement of uniformity with regard to **maritime law** does not preclude application of state law to the issue of **arbitration**."[129]

In reaching this holding, the court acknowledged that the Jones Act should "have a uniform application throughout the country unaffected by 'local views' of common law rules,"[130] but that this "requirement of uniformity is not, however, absolute."[131] The court then quoted from *Romero v. International Terminal Operating Co.*, to address federal-state accommodation in cases arising under the court's admiralty jurisdiction, stating:

> It is true that state law must yield to the needs of a uniform federal **maritime law** when this Court finds inroads on a harmonious system [,] [b]ut this limitation still leaves the States a wide scope ... State rules for the partition and sale of ships, state laws governing *the specific performance of* ***arbitration*** *agreements*, state laws regulating the effect of a breach of warranty under contracts of **maritime** insurance--all these laws and others have been accepted ***76** as rules of decision in admiralty cases, even, at times, when they conflicted with a rule of **maritime law** which did not require uniformity.[132]

In the view of the court in *Kozur*, applying New Jersey **arbitration** law to a seafarer's contract excepted from the scope of the FAA did not offend any substantive **maritime law** doctrine, and the court granted the defendant's motion to compel **arbitration** under New Jersey law.[133]

The United States District Court for the District of Massachusetts considered the issue in *Trejo v. Sea Harvest, Inc.*[134] The text of the **arbitration** agreement[135] was the same as the court quoted in *Kozur*,[136] except the court in *Kozur*, in quoting the

clause "in relevant part," omitted the following text which the court in *Trejo* included, namely that the **arbitration** "shall be administered by JAMS pursuant to its Comprehensive **Arbitration** Rules and Procedures ['JAMS Rules'].'D'[137] The court in *Trejo* agreed that because the contract was exempt from the FAA, "enforceability is a matter of state, rather than federal law."[138]

The text of the **arbitration** agreement chose New York law to apply if the FAA did not, and neither party disputed the application of New York law.[139] Under New York law, "if the parties to an **arbitration** agreement clearly and unmistakably delegate the question of **arbitrability** to an **arbitrator**, a court must respect that decision."[140]

Quoting the JAMS Rule that "[j]urisdictional and **arbitrability** disputes, including disputes over the formation, existence, validity, interpretation or scope of the agreement ... shall be submitted to and ruled upon by the **Arbitrator**," the court held that the **arbitrator** had to decide the **arbitrability** issue, not the court.[141] The court dismissed Mr. Trejo's claim without prejudice for determination as to **arbitrability**.[142]

*77 VIII. Summary of the Case Law Today and Concluding Remarks

As shown above, the Supreme Court has not decided whether **arbitration** agreements in employment contracts of "transportation workers" excepted from coverage of the FAA may be enforced under state **arbitration** laws which favor **arbitration**. Lower courts (and at least one state court) considering the issue in generic "transportation worker" cases have, however, consistently rejected this "reverse preemption" argument that by *excluding* the employment contracts of such "transportation workers" from the scope of the FAA in 1925, Congress preempted enforcement of state **arbitration** laws even if favorable to **arbitration**.

Although most of the cases concern **arbitration** agreements in employment contracts of generic "transportation workers," the Seventh Circuit in *Marquette* and *Rodgers-Rouzier* and the district courts in *Kozur* and *Trejo* rejected the argument that the exclusion of seafarer contracts in § 1 preempts state law **arbitration** statutes which favor **arbitration**.

The reverse preemption argument depends on what inference, if any, that courts should draw from the fact that Congress, in 1925, could have included, but did not, the employment contracts of the workers it exempted from the scope of the FAA. There is no dispute Congress had, and has, the power to do so: "We see no paradox in the congressional decision to exempt the workers over whom the commerce power was most apparent."[143]

The district court in *Palcko* refused to enforce the **arbitration** clause in a transportation worker case, reasoning: "Exempting the plaintiff from **arbitration** under the FAA, but then requiring that she **arbitrate** her federal claims in accordance with state laws favoring **arbitration** would directly conflict with *Congress's express purpose*."[144] The district court in *Marquette*,[145] before being instructed to the contrary by the Seventh Circuit on remand, refused to enforce the **arbitration** clause in a seafarer contract, reasoning that the exceptions "evinced a secondary goal of the FAA, that of protecting seamen from the binding effects of **arbitration** when those provisions are tied to their contracts of employment," and "compelling **arbitration** [under Illinois law] would not be fully consistent *with the goals* of the FAA."[146] While the Third and Seventh Circuits ***78** reversed the district courts on appeal, the argument will likely continue to be made in other courts.

Underlying such reasoning is an assumption that the excepted contracts in § 1 have the purpose or goal of leaving **arbitration** agreements in employment contracts excluded by § 1 unenforceable and that Congress intended that its failing to do so could be used offensively to preempt state laws which would enforce **arbitration** agreements in such contracts.

Regarding this assumption, the Court in *Circuit City* provides guidance. It stated it did not need to "assess the legislative history of the [§ 1] exclusion provision[s]" because the result it reached was "directed by the text of § 1."[147] The Court nevertheless

cantered through what it deemed a ""quite sparse"[148] legislative history of the § 1 exceptions. It noted that Congress had already enacted legislation concerning dispute resolution for seafarers and railroad employees and that a comprehensive statute providing for mediation and **arbitration** of labor disputes was then thought "imminent."[149] The Court concluded that it was "reasonable to assume that Congress excluded 'seamen' and 'railroad employees' for the simple reason that it did not wish to unsettle established or developing statutory dispute resolution schemes covering specific workers."[150] Although not mentioned by the Court, Congress would also have certainly been aware of the back and forth between Congress and the Court between 1917 and 1927, described above, about providing a workers' compensation remedy for seafarers/**maritime** workers.

Given this mix of politics, economics, and jurisprudence, it seems a heavy lift to draw any inference about what Congress "intended" by excluding certain employment contracts in § 1. As the Court stated:

> We ought not attribute to Congress an official purpose based on the motives of a particular group that lobbied for or against a certain proposal-- even assuming the precise intent of the group can be determined, a point doubtful as a general rule and in the instant case. It is for the Congress, not the courts, to consult political forces and ***79** then decide how best to resolve conflicts in the course of writing the objective embodiments of law we know as statutes.[151]

Moreover, drawing an inference of preemption from Congress's decision in 1925 to exclude, when it could have included, the employment contracts in § 1 would mean finding that Congress intended to preempt and preclude application of pro-**arbitration** laws by state legislatures after 1925.[152]

The minimum, and perhaps all, that one may prudently conclude is the obvious one based on the text: These contracts are excluded from the scope of the FAA.

Indeed, the Third Circuit in *Palcko*, overruling the decision of the district court, concluded that no inference about preemption should be drawn and that disputes about enforcement of **arbitration** agreements in employment contracts falling within an excluded category should be decided "as if the FAA had never been enacted" and doing so "does not contradict any of the language of the FAA."[153]

As the plaintiff in *Kozur* contended, Congress's enactment of the Jones Act in 1920 is another basis for preempting the application of pro-**arbitration** state law to an **arbitration** agreement in a seafarer employment contract.

However, the Court in *Mitsubishi* set a high bar for a court to clear before concluding that a statute, here, the Jones Act, "evinced an intention to preclude a waiver of judicial remedies for the statutory rights at issue."[154] As found by the New York Court of Appeals, the Jones Act predated the FAA by five years and "contains no expression of intent to limit the pursuit of its remedies to the judicial forum."[155] The Jones Act created an additional remedy for seafarers which they did not have under **maritime law**; it did not eliminate a seafarer's traditional **maritime** rights to recover maintenance and cure and damages based on unseaworthiness. Rather, it provided that seafarers could elect the remedy of a jury trial at a time when federal courts had separate rules for cases arising on the law side or in admiralty and thirty-eight years prior to the Court's decision in ***80** *Fitzgerald*, allowing a seafarer to have its Jones Act and maintenance and cure claims decided by a jury.

If preemption of state law by inference from the exclusion of seafarer contracts in § 1 of the FAA and/or by putting the text of the Jones Act on interpretive anti-**arbitration** steroids is not sufficient to preclude enforcement, courts are left with the "uniformity" argument of the plaintiff seafarer in *Kozur*: allowing **arbitration** agreements in seafarer employment contracts to be enforceable under state law favoring **arbitration** offends the uniformity clause.

The court in *Kozur* held that enforcing an **arbitration** agreement in a seafarer employment contract did not run afoul of the uniformity clause. This issue is highlighted in the *Red Cross Line, Inc. v. Atlantic Fruit Co*. decision.[156] The dispute in *Red Cross Line* arose after New York had enacted the 1920 NY **Arbitration** Act and before Congress enacted the FAA in 1925. The **arbitration** agreement was contained in a charter party calling for **arbitration** in New York. The 1920 NY **Arbitration** Act, as the FAA would do, declared that an **arbitration** agreement is "valid, enforceable, and irrevocable save upon such grounds as exist at law or in equity for the revocation of any contract" and provided that a party seeking to enforce the agreement could apply for a court order compelling the recalcitrant party to proceed with the **arbitration**.[157]

When the charterer refused to proceed with the **arbitration**, the shipowner petitioned a New York state court for an order compelling the charterer to **arbitrate**. The lower court granted the request, and the appellate court affirmed it, but the New York Court of Appeals reversed it.[158]

In the view of the New York Court of Appeals, the dispute was "one of admiralty ... within the exclusive jurisdiction of the admiralty courts, and that [New York] state had no power to compel the charter[er] to proceed to **arbitration**."[159]

The Supreme Court granted certiorari to review the decision of the New York Court of Appeals that **maritime** contracts were "excluded ... from the operation of the [1920 NY **Arbitration** Act] law, not as a matter ***81** of statutory construction, but because ... the federal Constitution required such action."[160]

Addressing this constitutional question, the Court reversed and held that the order compelling **arbitration** by means of the 1920 NY **Arbitration** Act was constitutional as a "remedy provided by New York for use in its own courts ... not dependent upon the practice or procedure which may prevail in admiralty."[161]

In reaching this result, the Court provided relevant and valuable insight for a court today considering the effect of the exclusion of seafarer employment contracts from the scope of the FAA, especially since the opinion was written in 1924 amidst the judicial and statutory developments from 1917-1927 described above.

The Court noted first that the federal courts have "both in equity and in law, denied, in large measure, the aid of their processes to those seeking to enforce executory agreements to **arbitrate** disputes."[162] In admiralty, however, "[r]eference of **maritime** controversies to **arbitration** has long been common practice."[163] Admiralty courts were not hostile to **arbitration** agreements in the same way that courts of law and equity were; nevertheless, an admiralty court could not compel specific performance of **arbitration** agreements, "because [it] lacks the power to grant equitable relief."[164] This inability of the admiralty court "goes, however, merely to the remedy" and "[t]he substantive right created by an agreement to submit ... disputes to **arbitration** is recognized as a perfect obligation."[165]

The Court then stated that under the saving to suitors clause, state courts have concurrent jurisdiction to decide **maritime** causes of action,[166] ***82** provided that the state law does not change the "substantive admiralty law."[167]

> But otherwise the state, having concurrent jurisdiction, is free to adopt such remedies, and to attach to them such incidents, as it sees fit. New York, therefore, had the power to confer upon its courts the authority to compel parties within its jurisdiction to specifically perform an agreement for **arbitration**, which is valid by the general **maritime law**, as well as by the law of the State, which is contained in a contract made in New York and which, by its terms, is to be performed there.[168]

The Court then found that recent cases in which it held that state laws violated uniformity were "wholly unlike" this one under the 1920 NY **Arbitration** Statute,[169] which dealt "merely with the remedy in state courts" and did "not attempt either to modify the substantive **maritime** **law** or to deal with the remedy in courts of admiralty."[170]

Justice McReynolds issued a lone, but vigorous dissent. In his view, the New York Court of Appeals decided the case correctly, and, he asked, "[W]hat will become of the uniformity of **maritime** rules which the Constitution undertook to establish?"[171]

Accordingly, if the preemption argument is not accepted and a court is to decide whether a pro-**arbitration** state law applies to a contract excluded by § 1 "as if the FAA had not been enacted," the decision in *Red Cross Line* is precedent for the proposition that applying a pro-**arbitration** state law to enforce an agreement to **arbitrate** in a **maritime** contract, which a contract of employment of a seafarer is, does not offend the requirement of uniformity in **maritime** **law**.

Of course, "[t]he issue of federalism in admiralty and the scope of application of state **law** in **maritime** cases is one of the most perplexing in the law."[172] The court in *Kozur* found that enforcing an **arbitration** agreement in an employment contract of a seafarer under a state law allowing the same did not run afoul of the uniformity principle. The ***83** substantive law was not altered, merely the forum in which it was to be resolved.[173]

As to practical consequences if the holding in *Kozur* is adopted by the courts and becomes widespread, the U.S. crews on U.S. flag blue water ships are unionized. The seafarer employment contracts of unionized workers are subject to, and the results of, collective bargaining, including grievance and **arbitration** procedures with respect to the employment contracts of a seafarer with the seafarer's employer, including disputes arising under federal statutes.[174] Union members and management will decide by collective bargaining whether **arbitration** of disputes arising out of workplace injuries will be adopted or, if not adopted for all, allowed to an individual seafarer as an option. However, in the fishing industry, inland waters, and coastwise trade, which are typically not unionized, one may expect that employers will insert *Kozur*-style **arbitration** agreements in their employment contracts.

Seafarers who are injured (or die) during their work have families who wait years for a resolution in court. During that time, they are often in precarious financial condition and may be forced to go into debt waiting for a resolution. This debt then becomes an impediment to settlement. All too often during this grinding process, a vicious spiral develops which turns employee against employer and vice versa. There is thus a personal and social toll in addition to the monetary toll of protracted litigation and a trial.[175]

Meanwhile, a pool of **maritime** lawyers, including retired judges, who have spent years dealing with seafarer workplace injuries, is available to decide these disputes. They know and will respect the laws applicable to seafarer workplace injuries and can resolve these disputes ***84** fairly and more promptly and more cost-effectively than they can be resolved in overburdened state and federal courts. Lawyers who represent injured seafarers and those who defend their employers may, in time, realize the advantages to their clients--injured seafarers and their families and employers--of prompt **arbitration** and resolution of workplace injury disputes by experienced **maritime** lawyers and retired judges such that **arbitrating** such claims will be welcomed, not feared.

Footnotes

a1 © 2025 LeRoy Lambert. President, Society of **Maritime** **Arbitrators**, Inc., New York; Principal Lambert Alternative Dispute Resolution LLC, New Orleans.

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1 Federal **Arbitration** Act, 9 U.S.C. §§ 1-16.

2 9 U.S.C. § 1.

3 9 U.S.C. § 2.

4 9 U.S.C. § 1. In *Circuit City Stores, Inc. v. Adams*, the court rejected the argument that this provision excepted all employment contracts from the scope of the FAA. 532 U.S. 105, 109 (2001). Rather, applying the canon of *ejusdem generis*, the Court held that the phrase "class of workers engaged in ... commerce" should be "controlled and defined by reference to the enumerated categories of workers which are recited just before it" and confined the § 1 exemption to employment contracts of transportation workers. *Id.* at 115.

5 This Article uses the terms "seafarer" or "seafarers" instead of ""seaman" or "seamen" unless quoting from a source that uses the latter or the context makes use of the latter more meaningful for the point being made. Also, many U.S. seafarers are members of unions such as the International Organization of Masters, Mates & Pilots, Seafarers International Union ("SIU"), and American **Maritime** Officers. The terms of employment of members of those unions (and others) with respect to compensation, benefits, and workplace conditions are agreed in collective bargaining agreements between the unions and employer organization and have for years provided for **arbitration** of disputes arising out these seafarer employment contracts (not including personal injury), notwithstanding their exclusion from the scope of the FAA in § 1. For example, the 2022 Standard Freightship Agreement between the SIU and Contracted Companies (seen by the authors but not generally available) ("SIU CBA") is more than sixty-six pages long and defines the terms of employment as between SIU members and employers. Article II, Section 3, is entitled "Grievance and **Arbitration**." If a grievance cannot be resolved, it is submitted to **arbitration**. Further, if a grievance arises under any of five listed statutes (Title VII of the Civil Rights Act, the Age Discrimination in Employment Act, the Equal Pay Act, the Family and Medical Leave Act, or the Americans with Disabilities Act), the "sole and exclusive means for the employee or Union to address those claims will be in **arbitration** ... in accordance with the A[merican] **A[rbitration]** A[ssociation] Employment **Arbitration** and Mediation Rule available on the AAA website, www.adr.org." Accordingly, seafarers have agreed to, and do, **arbitrate** disputes arising under their employment contracts, and it sweeps to broadly to contend the § 1 exception precludes seafarers from doing so.

6 *E.g.*, Rodgers-Rouzier v. Am. Queen Steamboat Operating Co., 104 F.4th 978 (7th Cir. 2024); Sherwood v. Marquette Transp. Co., 587 F. 3d 841 (7th Cir. 2009); Kozur v. F/V Atlantic Bounty, No. 18-08750, 2020 WL 5627019 (D.N.J. August 18, 2020); Trejo v. Sea Harvest, Inc., No. 21-cv-10978, 2021 WL 4311958 (D. Mass. September 22, 2021). This case law grew out of cases dealing with **arbitration** agreements in employment contracts of "workers engaged in foreign or interstate commerce." *See also*, *e.g.*, *Cir. City Stores, Inc.*, 532 U.S. at 109. In these "transportation worker" cases, courts have routinely held that state law **arbitration** laws apply when the FAA does not. *See also*, *e.g.*, Palcko v. Airborne Express, Inc., 372 F.3d 788 (3d Cir. 2004); Arafa v. Health Express Corp., 243 N.J. 147, 233 A. 3d 495 (N.J. 2020); and cases cited *infra* note 59.

7 This Article is not concerned with enforceability of **arbitration** clauses contained in seafarer employment contracts which are subject to the United Nations Convention on the Recognition and Enforcement of Foreign **Arbitral** Awards (9 U.S.C. §§ 201-208) or with **arbitration** clauses contained in post-injury "advanced wage agreements" between an employer and a seafarer. For cases dealing with enforceability of **arbitration** clauses in those circumstances, *see* Robert Force, ***Arbitration*** *of Seamen's (Personal Injury) Claims*, 47 Tul. Mar. L.J. 71 (2023).

8 Mary Kati Haupt, *Workers' Compensation Law & the Remedial Waiver*, 21 Barry L. Rev. 217, 218 (2016).

9 *See* The Osceola, 189 U.S. 158, 177, 2000 AMC 1207 (1903).

10 *Id*. at 175. However, unlike employees under the common law, seafarers injured during their employment had redress, namely, a right under **maritime law** to "maintenance and cure" and a right to recover from the shipowner if the seafarer's injury was caused by the unseaworthiness of the ship. *Id*.

11 "The initial form of legislative relief was to abolish the unholy trinity of tort defenses through state and federal 'employers liability acts' ... Shortly after the turn of the century, organized labor switched its support from employers' liability acts to comprehensive systems of workers' compensation." Nicholas Healy & David Sharpe, Cases and Materials on Admiralty 492 (3d ed. 1999).

12 Federal Employers' Liability Act (FELA) of 1908, 45 U.S.C. §§ 51-60.

13 Merchant Marine Act of 1920 ("Jones Act"), 46 U.S.C. § 30104 (1920). *See generally* Charlie Papavizas, Journey to the Jones Act: U.S. Merchant Marine Policy 1776-1920 280-317 (2024).

14 *Id*.

15 *See generally* Panama R.R. Co. v. Johnson, 264 U.S. 375, 1924 AMC 551 (1924).

16 *See* 272 U.S. 50, 1926 AMC 1638 (1926).

17 *See* Haupt, *supra* note 8 at 218.

18 *See generally* John W. Sims, *The American **Law** of **Maritime** Personal Injury and Death: An Historical Review*, 55 Tul. L. Rev. 973, 988-91 (1981) (describing the legislative and judicial developments during the period 1917-27).

19 *See* 244 U.S. 205, 218, 1996 AMC 2076 (1996) (constitutional grant of admiralty jurisdiction required uniformity and saving to suitors clause did not "save" a statutory remedy as opposed to a common law remedy).

20 40 Stat. 395 (1917).

21 *See* 253 U.S. 149, 166 (1920).

22 *See* 264 U.S. 219, 228, 1924 AMC 403 (1924) (holding Congress had the power to enact a compensation system but could not delegate it to the states); *See also* Int'l Stevedoring Co. v. Haverty, 272 U.S. 50 (1926) (holding that a longshore worker was a "seaman" entitled to sue under the Jones Act).

23 The Federal Longshore and Harbor Workers' Compensation Act, 33 U.S.C. §§ 901-950. *See generally* Kathleen Krail Charvet et al., *Gilding the Lily: The Genesis of the Longshoremen's and Harbor Workers' Compensation Act in 1927, the 1972 Amendments, the 1984 Amendments, and the Extension Acts*, 91 Tul. L. Rev. 881 (2017).

24 It was not until 1959 that the LHWCA was amended to allow the worker to take the compensation remedy and sue a third party. Sims, *supra* note 18 at 990-91.

25 272 U.S. at 50-52.

26 Sims, *supra* note 18 at 988 ("[T]he [seaman's] union opposed the proposed inclusion of seamen in the Longshore and Harbor Workers' Compensation Act, unless they were guaranteed retention of all existing remedies.") (citing H.R. Doc. No. 623, 79th Cong., 2d Sess. 53)).

27 When the Jones Act was enacted in 1920, and when the FAA was enacted in 1925, and decades prior, the federal district courts had separate sets of procedural rules to govern cases brought on the "law side," on the "equity side," and "in admiralty." In 1938, the "law" and "equity" rules were combined to create the first "civil rules" to govern actions in law and equity, but it was not until 1966 that the admiralty rules were "unified" with those 1938 rules to create the present Federal Rules of Civil Procedure. *See* Healy & Sharpe, *supra* note 11 at 124-25; 39 F.R.D. 146 (1966); 39 F.R.D. 369 (1964); *see also* Rodgers-Rouzier v. Am. Queen Steamboat Operating Co. 104 F. 4th 978, 987 (7th Cir. 2024) (noting that the era of "Conformity Act" ended in 1938 when law and equity procedural rules were combined to create the Federal Rules of Civil Procedure).

28 It was not until the 1963 Supreme Court decision in *Fitzgerald v. United States Lines* that the Court resolved a conflict in lower court decisions and held that a seafarer could submit the seafarer's claim under the Jones Act (at law) and a maintenance and cure action (in admiralty) to a jury and was not required to have the jury decide the former and the judge the latter:

> "While the Court has held that the Seventh Amendment [jury trials] does not require jury trials in admiralty cases, neither that amendment nor any other provision of the Constitution forbids them. Nor does any statute of Congress or rule of procedure, civil or admiralty, forbid jury trials in **maritime** cases."

374 U.S. 16, 20, 1963 AMC 1093 (1963) (footnote omitted).

29 In *Kulukundis v. Amtorg Trading Corp.*, the Second Circuit described the history of this hostility, the effect of the enactment of the FAA on this hostility, and concluded: "In the light of the clear intention of Congress, it is our obligation to shake off the old judicial hostility to **arbitration**." 126 F.2d 978, 982-85, 1942 AMC 364 (2d Cir. 1942) (footnote omitted).

30 New York enacted its **arbitration** statue in 1920. Act of April 19, 1920, ch. 275, 1920 N.Y. Laws 803 (codified with subsequent amendments at Code of Civil Practice & Laws ("CPLR") §§ 7501-14) ("1920 NY **Arbitration** Act").

31 *Kulukundis*, 126 F.2d at 988; AT&T Mobility LLC v. Concepcion, 563 U.S. 333, 339 (2011); *Rodgers-Rouzier*, 104 F.4th at 987.

32 *See* Red Cross Line v. Atlantic Fruit Co., 264 U.S. 109, 123, 1924 AMC 418 (1924); 40 Stat. 395 (1917); *supra* note 6 (collecting cases). The Court subsequently held that admiralty courts do have the power to grant equitable relief. Vaughan v. Atkinson, 369 U.S. 527, 530, 1962 AMC 1131 (1962) ("Equity is no stranger in admiralty; admiralty courts are, indeed, authorized to grant equitable relief."). *See also* Swift & Co. v. Compania Caribe, 339 U.S. 684, 691-92, 1950 AMC 1089 (1950) ("We find no restriction upon admiralty by chancery so unrelenting as to bar the grant of any equitable relief even when that relief is subsidiary to issues wholly within admiralty jurisdiction.").

33 *See* Marine Transp. v. Dreyfus, 284 U.S. 263, 1932 AMC 161 (1932) (Although contracts of employment of seafarers are **maritime** contracts.); *See, e.g.*, Kossick v. United Fruit Co., 365 U.S. 731, 1961 AMC 833 (1961) ("Without doubt a contract for hire ... of the sailors and officers to man her is within the admiralty jurisdiction."). § 1 of the FAA omits these seafarer employment contracts from the definition of "**maritime** transactions" to which the FAA applies, namely, "charter parties, bills of lading of water carriers, agreements relating to wharfage, supplies, furnished vessels or repairs to vessels, collisions, or any other matters in foreign commerce which, if the subject of controversy, would be embraced within admiralty jurisdiction." 9 U.S.C. § 1.

34 465 U.S. 1 (1984).

35 *Id*. at 11.

36 *Id*. at 16 (footnotes omitted).

37 *E.g.*, Allied-Bruce Terminix Cos. v. Dobson, 513 U.S. 265, 268 (1995) (stating that § 2 of the FAA should be read "broadly, extending the [FAA's] reach to the limits of Congress' Commerce Clause power" and holding the FAA preempted an Alabama state law which would not have enforced an **arbitration** agreement).

38 489 U.S. 468 (1989); *See generally* R.A. Connell, *The Federal **Arbitration** Act: The Expanding Impact of State Law upon Rigorous Enforcement*, 20 J. Mar. L. & Comm. 327 (1989).

39 *Volt Info. Scis., Inc.*, 489 U.S. at 489.

40 *Id*. at 470.

41 *Id*. at 476.

42 *Id*. at 477. For the dissenting Justices, Brennan and Marshall, the issue was whether the parties in *Volt* had in fact agreed to have California **arbitration** law apply in this case:

> "Since the FAA merely requires enforcement of what the parties have agreed to ... they are free if they wish to write an agreement to **arbitrate** outside the coverage of the FAA. Such an agreement would permit a state rule, otherwise preempted by the FAA, to govern their **arbitration**. The substantive question in this case is whether or not they have done so."

Id. at 485 (Brennan, J. dissenting). The dissenting justices disagreed with the majority that the parties had done so, not whether the FAA prohibited the parties from doing so.

43 *Id*. at 477-78 (internal quotations and citations omitted).

44 *Id*.

45 *Id*. at 477.

46 9 U.S.C. § 1.

47 *Id*.

48 532 U.S. 105 (2001).

49 *Id*. at 119.

50 The **arbitration** agreement made no reference to the FAA or to state law. *Id*. at 109-10 (quoting the text of the agreement).

51 *Id*.

52 *Id*. at 124.

53 586 U.S. 105, 2019 AMC 1 (2019).

54 *Id*. at 113. The Court did not quote the **arbitration** agreement. However, the text can be found in a subsequent district court decision. The **arbitration** agreement provided that the agreement "SHALL BE GOVERNED BY THE LAWS OF THE STATE OF MISSOURI" and that any disputes "INCLUDING THE **ARBITRABILITY** OF DISPUTES BETWEEN THE PARTIES, SHALL BE FULLY RESOLVED BY **ARBITRATION** IN ACCORDANCE WITH MISSOURI'S **ARBITRATION** ACT AND/OR THE FEDERAL **ARBITRATION** ACT." New Prime, Inc. v. Oliveira, 424 F. Supp. 3d 206, 209 n.2 (D. Mass. 2019). It appears that the defendant did not contend in the courts below or before the Supreme Court that Missouri law should apply if the FAA did not. With the dispute back in the district court after litigating the issue to a Supreme Court decision, the district court held that the defendant had waived any rights it might have had to argue that Missouri **arbitration** law applied to make the **arbitration** agreement enforceable. *Id*. at 212. The district court appeared, however, not to doubt that the defendant could have moved in the alternative to have its motion to compel decided under Missouri law:

> [Defendant] spent more than four years litigating a threshold issue regarding **arbitration** under the FAA. A timely motion to compel **arbitration** under the [Missouri Uniform **Arbitration** Act "MUAA"] could have saved the Plaintiffs, including the opt-in plaintiffs, and the Court unnecessary time and expense. But [Defendant] chose not to invoke the MUAA until it faced a potential loss on the FAA issue in the Supreme Court.

Id. at 213.

55 596 U.S. 450 (2022).

56 *Id*. at 463. The Court did not quote the **arbitration** clause. However, when the case returned to the district court, the defendant, as in *New Prime*, moved to compel **arbitration** under Illinois law, and the plaintiff, as in *New Prime*, contended that the defendant had waived its right to **arbitrate**. The district court in *Saxon*, unlike the district court in *New Prime*, found there was no waiver and compelled the plaintiff to **arbitrate** pursuant to Illinois **arbitration** law. Saxon v. Southwest Airlines Co., No. 19-cv-00403, 2023 WL 2456382 (N.D. Ill. March 10, 2023). The court stayed the action pending **arbitration** and refused to certify the case for an interlocutory appeal. Docket Entry #105, June 1, 2023, No. 19-cv-00403 (available on PACER).

57 Bissonette v. LePage Bakeries Park St., LLC, 601 U.S. 246, 256 (2024). The district court and the Second Circuit both found that the workers' contracts did not fall within the § 1 exception and compelled the parties to **arbitrate**, albeit on different rationales. *Id*. at 250. The **arbitration** clause was subject to the FAA. *Id*. The full text of the clause is provided in the district court opinion and states that it is "governed by the FAA and Connecticut law to the extent Connecticut law is not inconsistent with the FAA." Bissonette v. LePage Bakeries Park St., LLC, 460 F. Supp. 3d 191, 195 (D. Conn. 2020). To the extent this clause made Connecticut law applicable, the district court ruled that "it would be 'inconsistent with the FAA' for the Court to exercise its authority under Connecticut law to compel **arbitration** if the Court would lack authority to do the same under the FAA." *Id*. at 197 n.7. On appeal, the Second Circuit did not decide whether Connecticut law would apply under this clause if the FAA did not because the court held that the workers were not exempt under the FAA and affirmed the order compelling **arbitration**. Bissonette v. LePage Bakeries Park St., LLC, **49** F.4th 655, 660 (2d Cir. 2022) (citing Hamrick v. Partsfleet LLC, 1 F.4th 1337, 1353 (11th Cir. 2021) (holding that courts should look to state law only after deciding if the exemption applied)). The Supreme Court "express[ed] no opinion on any alternative grounds in favor of **arbitration** raised below ..." *Bissonette*, 601 U.S. 246 at 256.

58 372 F.3d 588 (3d Cir. 2004).

59 *Id*. at 590.

60 Palcko v. Airborne Express, Inc., No. 02-2990, 2003 WL 2107748 (E.D. Pa. Apr. 23, 2003) ("Palcko District Court").

61 *Id*. at *2.

62 *Id*. at *4 (relying on Volt Info. Scis. v. Bd. Of Trs. of the Leland Stanford Junior Univ., 489 U.S. 468, 474 (1989); Hines v. Davidowitz, 312 U.S. 52, 67 (1941)).

63 *Id*. at *9.

64 In *Shanks v. Swift Transp. Co.*, the court characterized this argument as "reverse preemption":

> While the FAA does not require **arbitration**, the question remains whether the exemption of Section 1 operates as a form of reverse preemption, so as to prohibit **arbitration** of the dispute altogether. Plainly, it does not. The weight of authority shows that even if the FAA is inapplicable, state **arbitration** law governs.

No. 07-55, 2008 WL 2513056, at *4 (S.D. Tex. June 19, 2008). However, if the claim is for personal injuries, the Texas General **Arbitration** Act ("TAA") requires that an **arbitration** agreement must be signed by both parties and their attorneys to be enforceable. Tex. Civ. Prac. & Rem. Code § 171.002(a)(3). *See* Gotreau v. Stevens Transp., Inc., No. 1:23-00159, 2024 WL 1164445, at *6 (E.D. Tex. February 29, 2024) (finding that the claim in that case was not for personal injury and not excluded by the TAA and that the relationship between the TAA and the FAA with respect to personal injury claims arising out of a seafarer employment contract, should there be one which chooses Texas law, will no doubt be the subject of future cases).

65 Palcko v. Airborne Express, Inc., 372 F.3d 588, 596 (3d Cir. 2004) (quoting Mason-Dixon Lines, Inc. v. Local Union No. 560, 443 F.2d 807, 809 (3d Cir. 1971) ("the effect of Section 1 is merely to leave the **arbitrability** of disputes in the excluded categories as if the [Federal] **Arbitration** Act had never been enacted")). Enforcing the **arbitration** under Washington state law, "as if the FAA 'had never been enacted' does not contradict any of the language of the FAA, but in contrast furthers the general policy goals of the FAA favoring **arbitration**." *Id*. at 596.

66 In *Palcko*, the Court stated that Congress enacted the FAA "to ensure judicial enforcement of privately made agreements to **arbitrate**." *Id*. at 595 (citing Dean Witter Reynold, Inc. v. Byrd, 470 U.S. 213, 219 (1985)). The court went on to explain that "passage of the Act was motivated, first and foremost, by a congressional desire to enforce agreements into which parties had entered, and [courts] must not overlook this principal objective when construing the statute, or allow the fortuitous impact of the Act on efficient dispute resolution to overshadow the underlying motivation." *Id*. (citing *Dean Witter Reynold*, 470 U.S. at 220 (footnote omitted)). Further, the court in *Palcko* stated that the FAA represents a "liberal federal policy favoring **arbitration** agreements." *Id*. (citing Moses H. Cone Mem'l Hosp. v. Mercury Constr. Corp., 460 U.S. 1, 24 (1983)). Finally, *Palcko* stated that parties to an **arbitration** agreement, "[h]aving made the bargain 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." *Id*. (citing Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc., 473 U.S. 614, 628 (1985)).

67 *Id*. at 590.

68 *Id*. at 596. Federal courts in these § 1 "transportation worker" cases have *routinely* held that when the FAA does not apply, state law pro-**arbitration** statutes may apply to render the **arbitration** agreement in the employment contract enforceable. *See* Waithaka v. Amazon.com, Inc., 960 F.3d 10, 33-34 (1st Cir. 2020), *cert. denied*, 141 S. Ct. 2794 (2021) (where worker's employment contract is exempt under the FAA, "[state] policies remain intact where, as here, the FAA does not preempt state law."); Davis v. EGL Eagle Global Logistics L.P., 243 F. App'x 39, 44 (5th Cir. 2007) (Texas **arbitration** statute applies if contract is excepted from FAA); Smith v. Allstate Power Vac, Inc., 482 F. Supp. 3d 40, 47 (E.D.N.Y.) ("That plaintiff [transportation worker] is exempt from the

FAA does not mean ... that state **arbitration** law is preempted and that the **arbitration** agreement is therefore unenforceable"); Diaz v. Michigan Logistics Inc., 167 F. Supp. 3d 375, 381 (E.D.N.Y. 2016) (stating the "inapplicability of the FAA does not render the parties' **arbitration** provision unenforceable"); Michel v. Parts Auth., Inc., No. 15-5730, 2016 WL 5372797, at *3 (E.D.N.Y. Sept. 26, 2016) ("Even assuming the FAA does not apply, New York state law governing **arbitration** does apply"); *Shanks*, No. 07-55, 2008 WL 2513056 at *4.

69 *Palcko*, 372 F. 3d at 596.

70 243 N.J. 147 (2020).

71 N.J.S.A. 2A-23B-1 to -36.

72 *Arafa*, 243 N.J. at 155.

73 *Id*. at 158.

74 *Id*. at 153.

75 *Id*. at 160-62.

76 *Id*. at 162.

77 *Id*.

78 *Id*. at 165 (quoting Martindale v. Sandvik, Inc., 173 N.J. 76, 85 (2002)).

79 *Id*. at 168.

80 *See id*.

81 *Id*. at 169 n.2.

82 **49** F.4th 655 (2d Cir. 2022).

83 *Id*. at 659 n.3.

84 No. 08-849, 2009 WL 839024 (S.D. Ill. Mar. 31, 2009) ("Marquette District Court I").

85 The **arbitration** agreement provided:

In consideration for [employer] considering your application and conditionally offering you employment, you and [employer] agree that if you are or become a resident of either Illinois or Missouri and/or you or [employer] bring an action in either Missouri or Illinois state or federal court relating to your recruitment, employment with termination of employment, or personal injury which is not covered by either Illinois or Missouri Workers Compensation laws, then the plaintiff in such action agrees to waive his or her

right to a trial by jury, and further agrees that no demand, request or motion will be made for trial by jury, This program includes claims brought under the Jones Act.

Id. at *1. The agreement goes on to specify, "You and your employer agree that the option to **arbitrate** any dispute is governed by Illinois **arbitration** statutes if you either reside in Illinois or file suit in Illinois." *Id*.

86 Sherwood v. Marquette Transp. Co., 587 F.3d 841, 842 (7th Cir. 2009).

87 *Id*. at 843.

88 *Id*. (citing Palcko v. Airborne Express, Inc., 372 F.3d 588, 595-96 (3d Cir. 2004); Davis v. EGL Eagle Global Logistics, L.P., 243 Fed. App'x 39, 44 (5th Cir. 2007)).

89 *Id*. On remand, the district court "acknowledge[d] the words the Seventh Circuit has chosen to share and will heed its warning." It entered an order compelling the plaintiff to **arbitrate**. Sherwood v. Marquette Transp. Co., No. 08-849, 2010 WL 99688, at *2 (S.D. Ill. Jan. 7, 2010).

90 104 F.4th 978 (7th Cir. 2024).

91 *Id*. at 985. *See, e.g.*, Mahramas v. American Export Isbrandtsen Lines, 475 F.2d 165, 170, 1973 AMC 587 (2d Cir. 1973) (considering a hairdresser aboard a passenger ship a seafarer, because "remedies afforded by the Jones Act and maintenance and cure are designed to protect those who perform services upon ships and are exposed to the unique hazards of work upon the sea" and collecting cases).

92 *Rodgers-Rouzier*, 104 F.4th at 985. The case had a tangled procedural history which the court untangled before reaching the issue with which this Article is concerned.

93 *Id*. at 982.

94 *Id*.

95 *Id*.

96 *Id*. at 985 (citing Southland Corp. v. Keating, 465 U.S. 1, 15-16 (1984)).

97 *Id*. (citing Viking River Cruises, Inc. v. Moriana, 596 U.S. 639, 650-51 (2022)).

98 *Id*. (citing Volt Info. Scis., Inc. v. Bd of Trs. of the Leland Stanford Junior Univ., 489 U.S. 468, 477 (1989); Sherwood v. Marquette Transp. Co., 587 F.3d 841 (7th Cir. 2009)).

99 *Id*. at 986.

100 *Id*. at 990.

101 *Id*. at 992.

102 *Id*.

103 *Id*.

104 *Id*. at 993. The court further held that the severability clause did not assist the defendant, because the court was not severing the choice of law clause but enforcing it. *Id*.

105 *Id*.

106 No. 18-08750, 2020 WL 5627019, 2020 AMC 258 (D.N.J. August 18, 2020). Because the district court stayed the action pending **arbitration**, the Third Circuit found it to be an appeal of an interlocutory order and dismissed the appeal for lack of appellate jurisdiction. Kozur v. F/V Atlantic Bounty, No. 20-2911 (3d Cir. May 5, 2021).

107 *Kozur*, No. 18-08750, 2020 WL 5627019, at *3.

108 *Id*. at *4. Although the court stated that it quoted the **arbitration** agreement "in relevant part," it omitted part of the agreement requiring the employer to pay the costs of the **arbitration**. The full text of the clause is quoted in Trejo v. Sea Harvest, Inc., No. 21-10978, 2021 WL 4311958 (D. Mass. September 22, 2021), *see supra* note 7 and accompanying text.

109 *Kozur*, No. 18-08750, 2020 WL 5627019, at *7. While the **arbitration** agreement chose New York law, the court noted that the contract "was entered into in New Jersey, between a New Jersey individual and New Jersey companies." *Id*. at *16. Neither party contended that New York law should apply or that New York and New Jersey differed "with regard to compelling **arbitration**," and the court applied New Jersey law "in determining the enforceability of the parties' **arbitration** agreement." *Id*. at *17. The court rejected the plaintiff's argument that the solicitude admiralty courts have historically shown to seafarers, as wards of the court, with respect to seamen's releases applies to a seafarer's agreement to pursue claims in **arbitration** instead of in litigation. *Id*. at *12 (relying on Schreiber v. K-Sea Transp. Corp., 9 N.Y.3d 331, 340 (2007); Barbieri v. K-Sea Transp. Corp., 566 F. Supp. 2d 187, 192, 2008 AMC 2176 (2008)). In *Schreiber v. K-Sea Transportation Corp.*, the New York Court of Appeals held that the ward of the admiralty doctrine does not shift the burden of proof in cases concerning the enforceability of an **arbitration** clause in an advanced wage agreement. 9 N.Y.3d at 340.

110 *Kozur*, No. 18-08750, 2020 WL 5627019, at *15.

111 *Id*. at *15. The plaintiff made a third argument, that the **arbitration** agreement was unenforceable under New Jersey law, N.J. Stat. § 10:5-12.7, prohibiting waiver of discrimination claims in employment contracts. The court rejected this argument because the statute did not go into effect until after the contract in dispute and applied prospectively only. The court also pointed out that New Jersey courts had not yet ruled on the statute's applicability to **arbitration** agreements or its scope. *Id*. at *9.

112 *Id*. at *18.

113 *Id*. at *19.

114 *Id*.

115 473 U.S. 614, 628 (1985).

116 Kozur, No. 18-08750, 2020 WL 5627019, at *8 (citing Schreiber v. K-Sea Transp. Corp., 9 N.Y.3d 331, 340 (2007)).

117 *Id*. at *23-24.

118 *Id*. at *19.

119 *Id*. (citing Kernan v. Am. Dredging Co., 355 U.S. 426, 432, 1958 AMC 251 (1958)).

120 473 U.S. at 628.

121 *Id.*; *see also Kozur*, No. 18-08750, 2020 WL 5627019, at *23.

122 45 U.S.C. §§ 55-56.

123 338 U.S. 263, 265, 1950 AMC 26 (1949).

124 *Kozur*, No. 18-08750, 2020 WL 5627019, at *20 (citing *Boyd*, 338 U.S. at 265).

125 *Id*. at *20-21.

126 *Id*. at *21 (citing Terrebonne v. K-Sea Transp. Corp., 477 F.3d 271, 283, 2007 AMC 442 (5th Cir. 2007); Harrington v. Atl. Sounding Co., 602 F.3d 113, 121-22, 2010 AMC 1358 (2d Cir. 2010) ("FELA § 6 therefore cannot reasonably be read to include a blanket prohibition on seamen **arbitration** agreements when, at the time of enactment, that provision did not contemplate, either in letter or spirit, the existence of an **arbitral** forum.") (original emphasis omitted)).

127 *Id*.

128 *Id*. at *24.

129 *Id*. at *25.

130 *Id*. (quoting Garrett v. Moore-McCormack Co., 317 U.S. 239, 244, 1942 AMC 1645 (1942) (internal quotation marks omitted) (citing Panama R.R. Co. v. Johnson, 264 U.S. 375, 392, 1924 AMC 551 (1924)).

131 *Id*. (quoting Am. Dredging Co. v. Miller, 510 U.S. 443, 451 (1994)).

132 *Id*. (quoting Romero v. Int't Terminal Operating Co., 358 U.S. 354, 373-74 (1959)) (emphasis added by the judge in *Kozur*).

133 *Id*.

134 No. 21-10978, 2021 WL 43111958, 2021 AMC 433 (D. Mass. Sept. 22, 2021).

135 *Id*. at *1-2.

136 *Kozur*, No. 18-08750, 2020 WL 5627019, at *3-4.

137 *Trejo*, No. 21-10978, 2021 WL 43111958, at *1.

138 *Id*. at *2. The *Trejo* court relied on numerous opinions to come to this determination. *Id*. (citing Palcko v. Airborne Express, Inc., 372 F.3d 588, 596 (3d Cir. 2004); Waithaka v. Amazon.com, Inc., 404 F. Supp. 3d 335, 343-44 (D. Mass. 2019), *aff'd*, 960 F.3d 10 (1st Cir. 2020), *cert. denied*, 141 S. Ct. 2794 (2021)).

139 *Id*. at *3.

140 *Id*. (quoting Smith Barney Shearson Inc. v. Sacharow, 689 N.E.2d 884, 887 (N.Y. 1997)).

141 *Id*. at *4.

142 *Id*. at *5.

143 Circuit City Stores, Inc. v. Adams, 532 U.S. 105, 120 (2001).

144 Palcko v. Airborne Express, Inc., No. 02-2990, 2003 WL 2107748, *9 (E.D. Pa. Apr. 23, 2003) (emphasis added).

145 Sherwood v. Marquette Transp. Co., No. 08-849, 2009 WL 839024, at *2 (S.D. Ill. Mar. 31, 2009).

146 *Id*. (emphasis added).

147 *Circuit City*, 532 U.S. at 119 (quoting Ratzlaf v. United States, 510 U.S. 135, 147-48 (1994) ("no need to resort to legislative history to cloud a statutory text that is clear")).

148 *Id*. at 119-21.

149 *Id*. at 121 (emphasis added). The Court does not mention the Jones Act as one of the existing statutes which Congress might have considered in deciding to exclude seafarer employment contracts from the FAA.

150 *Id*.

151 *Id*. at 120.

152 In 1925, New York may have been the only state to have enacted a pro-**arbitration** statute; Congress modeled the FAA on the 1920 NY **Arbitration** Act.

153 Palcko v. Airborne Express, Inc., 372 F.3d 588, 596 (3d Cir. 2004). A court deciding the issue should also consider the fact that seafarers, through their unions, *do* agree to, and abide by, **arbitration** agreements in their employment contracts. *See supra* note 5.

154 Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc., 473 U.S. 614, 628 (1985).

155 Kozur v. F/V Atlantic Bounty, LLC, No. 18-08750, 2020 WL 5627019, at *8, 2020 AMC 258 (D.N.J. August 18, 2020).

156 264 U.S. 109, 1924 AMC 418 (1924).

157 *Id*. at 118.

158 *Id*. at 119.

159 *Id*. at 119-20. In other words, if a court sitting in admiralty at the time could not compel **arbitration** because it was thought to have no equitable power to do so, then a state court cannot provide a remedy in admiralty cause of action where the court sitting in admiralty could not.

160 *Id*. at 120.

161 *Id*. at 125.

162 *Id*. at 120-21.

163 *Id*. at 122.

164 *Id*. at 123; *supra* note 6 (collecting cases). The Court has subsequently held that admiralty courts do have the power to grant equitable relief. Vaughan v. Atkinson, 369 U.S. 527, 530, 1962 AMC 1131 (1962) ("Equity is no stranger in admiralty; admiralty courts are, indeed, authorized to grant equitable relief.") The Court in *Vaughan v. Atkinson* stated "[w]e find no restriction upon admiralty by chancery so unrelenting as to bar the grant of any equitable relief even when that relief is subsidiary to issues wholly within admiralty jurisdiction." *Id*. (citing Swift & Co. v. Compania Caribe, 339 U. S. 684, 691-692 (1950)). Neither judge-made common **law** nor general **maritime** **law** is static.

165 *Red Cross Line*, 264 U.S. at 123.

166 *Id*. The Court referred specifically to disputes arising under charter parties, but the subsequent text is clear that the Court's reasoning extends to all causes of action within the Court's **maritime** jurisdiction.

167 *Id*. at 125 (collecting cases in which the Court held state statutes valid which "supplemented the substantive **maritime** **law**, and did not conflict with [the] essential feature of it").

168 *Id*. at 124.

169 *Id*. (including Southern Pacific Co. v. Jensen, 244 U.S. 205, 1996 AMC 2076 (1996); Knickerbocker Ice Co. v. Stewart, 253 U.S. 149 (1920)).

170 *Id*. The "remedy in courts of admiralty" referred to the **maritime** right *in rem*. *Id*.

171 *Id*. at 127 (McReynolds, J., dissenting).

172 *See* Thomas J. Schoenbaum, Admiralty and **Maritime** **Law** § 2-1 to 2-5 (5th ed. 2011).

173 As to concerns about the substantive law and that **arbitrators** will somehow be unfair to the seafarer, the court in *Kozur* ordered the parties to **arbitrate**, and the **arbitration** occurred. The lawyers for Mr. Kozur posted on their website that the **arbitrator** awarded Mr. Kozur in excess of $1.1 million for his injuries.

174 *See supra* note 5 (the SIU CBA provides for **arbitration** of disputes arising under seafarer employment contracts, including those arising under five federal statutes).

175 Another solution which would better serve uniformity and fairness would be for Congress to amend the LHWCA to include seafarers or at least give seafarers and their families an option to choose a certain and prompt recovery which any other employee has today for a workplace injury under no-fault workers compensation statutes. *See, e.g.*, Schoenbaum, *supra* note 172 at §6-9 (Congressional solution needed because present system is "inefficient, arbitrary, and devoid of principled judgments"); LeRoy Lambert and Rebecca Hamra, *The Law in the United States of **Maritime** Personal Injury and Death Since 1981: An Update*, 91 Tul L. Rev. 909, 926 (2017) ("Yes, much learning and many prized skill sets would become moot, but the injured, the spouse and children left behind, and all those who go down to the sea in ships would be more promptly, predictably, and uniformly served.").