No. _____

In The
Supreme Court of the United States

LITO MARTINEZ ASIGNACION,

Petitioner,

v.

RICKMERS GENOA
SCHIFFAHRTGESELLSCHAFT MBH & CIE KG,

Respondent.

**On Petition For Writ Of Certiorari
To The United States Court Of Appeals
For The Fifth Circuit**

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

Petitioner, a Filipino, was severely burned over 35% of his body while working as a seaman on respondent's vessel in the Mississippi River in New Orleans, Louisiana. After suing in state court for damages under the general maritime law of the United States, petitioner was ordered to arbitrate his claim before an arbitral forum in the Philippines. The Philippine forum refused to consider petitioner's claims under United States law and awarded him just $1,870.00 US Dollars under Philippine law. Petitioner returned to state court seeking to void the Philippine award. Respondent removed the case to federal district court under The Convention on the Recognition and Enforcement of Foreign Arbitral Awards and sought to enforce the Philippine award. The District Court denied respondent's motion finding the United States general maritime law governed the case and that enforcement of the Philippine award was contrary to the public policy of this country. The Court of Appeals for the Fifth Circuit nevertheless reversed the District Court and reinstated the Philippine award.

This Petition asks:

1. Has the court of appeals' enforcement of this egregiously unfair Philippine arbitral award nullified this Court's eight-factor test of *Lauritzen v. Larsen*, 345 U.S. 571 (1953) and *Hellenic Lines, Ltd. v. Rhoditis*, 398 U.S. 306 (1970) for determining which law should govern petitioner's maritime tort claim?

QUESTIONS PRESENTED FOR REVIEW–
Continued

2. Does the "prospective waiver doctrine" established in *Vimar Seguros y Reaseguros et al. v. M/V SKY REEFER*, 515 U.S. 528 (1995) and *Mitsubishi Motors Corporation v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614 (1985) apply to claims under the general maritime law of the United States or is it limited solely to statutory claims?

LIST OF PARTIES

The following were parties to the proceeding in the United States Court of Appeals for the Fifth Circuit Court:

Lito Martinez Asignacion ("Asignacion" or "petitioner") was the Plaintiff/Appellant below and is the petitioner in these proceedings.

Rickmers Genoa Schiffahrtgesellschaft MBH & CIE KG (hereinafter sometimes "Rickmers" or "respondent") was the Defendant/Appellee below and is the respondent in these proceedings.

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The decision of the Court of Appeals for the Fifth Circuit, reported at ___ F.3d ___ (5th Cir. 2015), is reprinted in the Appendix at App. 1-22.

The District Court's opinion, reported at ___ F.Supp. 2d ___ (E.D. La. 2014), is reprinted in the Appendix at App. 23-49.

JURISDICTION

Petitioner brought suit in the 25th Judicial District Court for the Parish of Plaquemines, State of Louisiana, seeking damages under United States law for severe burns to his body. The district court judge granted respondent's Exceptions and ordered arbitration in the Philippines. The Philippine arbitration produced an arbitral award to petitioner of just $1,870.00 US Dollars. It refused to consider petitioner's claim under United States law and applied only Philippine law. Petitioner then brought a motion in state court to void the Philippine arbitral award. Respondent removed the case to federal district court citing 9 U.S.C. § 205, the Federal Arbitration Act; 9 U.S.C. § 1-307 ("Title 9") which permits removal of disputes relating to arbitration agreements covered by The Convention on the Recognition and Enforcement of Foreign Arbitral Awards, 21 U.S.T. 2517, 330 U.N.T.S. 3 ("The Convention").

On February 7, 2014, the federal district court found that this country's general maritime law applied to petitioner's maritime tort claims and it refused to enforce the Philippine arbitral decision finding it invalid and against the public policy of this country.

On April 16, 2015, the Court of Appeals for the Fifth Circuit reversed the decision of the district court.

On June 10, 2015, the Court of Appeals denied petitioner's timely filed petition for panel rehearing or for rehearing *en banc*. This petition is filed within ninety (90) days of June 10, 2015. 28 U.S.C. § 2101(c). Supreme Court Rule 13.3.

The jurisdiction of this Court is invoked pursuant to the provisions of 28 U.S.C. § 1254(1).

PROVISIONS INVOLVED

The Convention on the Recognition and Enforcement of Foreign Arbitral Awards, 21 U.S.T. 2517, 330 U.N.T.S. 3 is reproduced at App. 65-75.

STATEMENT OF THE CASE AND FACTS

While working as a seaman on board M/V RICKMERS DALIAN in the Mississippi River in Louisiana on October 27, 2010, petitioner Lito Martinez

Asignacion ("petitioner"), a Filipino national, sustained severe burns to nearly 35% of his body, including his abdomen, genitalia and upper and lower extremities. Following emergency treatment for the accident in New Orleans, petitioner spent more than one month in the Burn Unit of Baton Rouge General Hospital in Baton Rouge, Louisiana, where he was treated for second and third-degree burns, including skin grafting.

Respondent Rickmers Genoa Schiffahrts ("respondent" or "Rickmers") owns M/V RICKMERS DALIAN. It is a German company but its vessel is registered in the Republic of the Marshall Islands and it flies the flag of that Republic. The Republic of the Marshall Islands has specifically adopted in its Maritime Act the general maritime law of the United States. The seafarers serving on the M/V RICKMERS DALIAN with petitioner at the time of his accident were from five different countries, i.e., Russia, Romania, China, Poland and the Republic of the Philippines. Both United States law and the law of the Republic of the Marshall Islands require so-called Shipping Articles as a seafarer's contract of employment.

Petitioner was also required to sign a Philippine Overseas Employment Administration standard contract ("POEA") in order to obtain an exit visa from the Philippines to be employed on the M/V RICKMERS DALIAN. The POEA contract contained an arbitration clause in Section 29 and a choice-of-law clause in Section 31 calling for the application of Philippine law during the arbitration process. However, the

Maritime Act of the Republic of the Marshall Islands, the country whose flag under which M/V RICKMERS DALIAN navigates, prohibits such clauses as those contained in the POEA contract, rendering them null and void.

On November 20, 2010, petitioner brought suit in the state courts of Louisiana seeking damages for his injuries under the Jones Act and the general maritime law of the United States. The state court granted exceptions filed by respondent, stayed litigation of petitioner's claims and ordered arbitration in the Philippines, pursuant to the arbitration clause in petitioner's POEA contract.

On February 13, 2013, the Philippine arbitral body entered an award of just $1,870.00 US Dollars in petitioner's favor for his pervasive burn injuries (App. 50-62). It noted that petitioner, a senior engine fitter, was injured when, during a pressure test of water tubes in the engine works, a cascade tank overflowed and hot water splashed over petitioner's abdomen and lower extremities as he stood nearby (App. 53). With full knowledge of the extent of his injuries, the arbitral body rejected the idea that it should apply the law of the Marshall Islands (and therefore United States general maritime law) in assessing his remedies and his recovery of damages (App. 55-59).

Instead, it thought it was bound by Philippine law under the POEA contract as interpreted by the Philippine Supreme Court; and because petitioner's

injuries were categorized by respondent's medical doctor in the Philippines as only a grade 14 disability under the POEA, petitioner was entitled to just $1,870.00 US Dollars (App. 54;60-62). In doing so, the arbitral panel believed that Section 31 of the POEA "precludes [it] from considering the application of any other law other than Philippine law" (App. 57).

In the aftermath of this decision, petitioner brought a motion in the Louisiana state courts to void the arbitral award as against the public policy of the United States. Respondent removed the case to the federal district court for the Eastern District of Louisiana, citing 9 U.S.C. § 205 of the Federal Arbitration Act, and by motion sought to enforce the Philippine arbitral award of $1,870.00 pursuant to The Convention on the Recognition and Enforcement of Foreign Arbitral Awards ("The Convention") (App. 65-75).

In the course of discovery, petitioner's counsel adduced the expert reports of petitioner's attending physicians, including that of Dr. Darrell Henderson, which stated that petitioner required surgery on his abdomen at an anticipated cost of at least $35,500.00 and that he also needed additional surgeries for "skin break downs" and "skin ulcerations." Respondent never provided any of the required surgery for petitioner and no hearing was ever afforded petitioner for the issues of maintenance and cure, unmet medical needs, economic losses or future medical needs. The District Court was aware of petitioner's unmet medical needs.

On February 7, 2014, the District Court, Zainey, J., denied respondent's motion to recognize and enforce the Philippine arbitral award (App. 23-49). As the district court judge found, petitioner

> sustained severe burns to 35% of his body, including his abdomen, upper and lower extremities, and genitalia. On May 7, 2012, [petitioner] underwent plastic surgery in the Philippines, where a significant amount of scar tissue was removed from [his] lower abdomen. [Petitioner's] burns resulted in an insufficiency of skin in various areas of his body, affecting his body heat control mechanism. Furthermore, [petitioner] experienced the formation of multiple skin ulcerations and sexual dysfunction.

(App. 25). Reasoning that since both the United States and the Philippines are signatories to The Convention, the provisions of The Convention govern any consideration of the award under this international arbitration agreement; and because the award was rendered in the Philippines, the United States has secondary jurisdiction over the award and the authority to consider only whether to enforce the award in the United States (App. 27-28).

Petitioner argued that under Article V(2)(b) of The Convention, enforcement of the Philippine arbitral award should be denied because recognizing and enforcing this egregiously unfair award "would be contrary to the public policy of" the United States, the signatory country where respondent was seeking

to enforce it (App. 29-30). That is, the Philippine panel refused to apply United States law in its forum, depriving petitioner of his rights under the general maritime law and his statutory rights under the Jones Act (App. 30).

Specifically, petitioner first relied on the public policy of the United States as espoused by this Court in both *Vimar Seguros y Reaseguros et al. v. M/V SKY REEFER*, 515 U.S. 528, 539-540 (1995), and *Mitsubishi Motors Corporation v. Soler Chrysler-Plymouth, Inc.,* 473 U.S. 614, 629 (1985) (App. 30-31). Those cases recognized that a foreign arbitration agreement violates our public policy where the choice-of-forum and choice-of-law clauses operate in tandem, like here, as a "prospective waiver" of a party's right to pursue certain remedies he is entitled to under law. Because this case was now at the "award-enforcement" state, we now know for a fact that the Philippine arbitral panel refused to consider any remedies under any law other than Philippine law. The district court judge correctly thought that the resolution of petitioner's claim required him to address this choice-of-law issue (App. 30-34).

While the Philippine arbitral panel thought it was bound to apply Philippine law under the POEA contract petitioner signed in order to work as a seaman, this Court in *Lauritzen v. Larsen*, 345 U.S. 571, 588-589 (1953) made clear that the tendency to apply the law which the parties intended under the terms of a contract like the POEA should not be given sway when the contract attempts "to avoid applicable law,

for example, so as to apply foreign law to an American ship" *id*.; and where there is a disparity of bargaining power between the seaman and his employer (App. 35-36).

Pursuing its own choice-of-law inquiry for this maritime injury, the district court judge assiduously applied the eight-factor test enunciated by the Court in *Lauritzen* and *Hellenic Lines v. Rhoditis*, 398 U.S. 306 (1970) (App. 36-39). He concluded that while some factors favored the United States, the Philippines or Germany, the most important one, the one to be given the most weight, see *Rhoditis*, 398 U.S. at 308, is that respondent's vessel M/V RICKMERS DALIAN flew the flag of the Marshall Islands, a country which has adopted the general maritime law of the United States (App. 37-39). This factor *alone* could be sufficient for determining the applicable law (App. 39).

The district court concluded that where the *Lauritzen/Rhoditis* factors failed to point clearly to another jurisdiction's law, the law of the vessel's flag should be applied and that the Marshall Islands "have the greatest interest in this dispute, as the injury occurred on a vessel registered under the Marshall Islands" and petitioner's claims should therefore be governed by the general maritime law of the United States, as adopted by the Marshall Islands (App. 39).

After reviewing petitioner's rights and remedies under United States general maritime law, Judge

Zainey reviewed the Philippine arbitral proceeding and found that in rendering petitioner's award of just $1,870.00 US Dollars for his injuries, the Philippine arbitral panel refused to consider petitioner's claims for maintenance and cure, negligence, and unseaworthiness under our general maritime law, i.e., "any evidence of petitioner's lost wages and medical expenses or the moral and compensatory damages and punitive damages to which he had a right to seek." (App. 41-42).

The district court further ruled that the substantive rights provided petitioner by the United States' general maritime law should not be categorically excluded from the "prospective waiver" defense created by the Court in *Mitsubishi* and *Vimar* simply because those cases involved a deprivation of statutory rights (App. 48). As it concluded,

> the Philippine law applied by the arbitral panel did not simply provide less favorable remedies than United States general maritime law would have. Instead, the Philippine law provided *no such* remedies. Accordingly, the remedies available under Philippine law were not less favorable, but rather were nonexistent.

(App. 45) (emphasis in original).

On appeal, the court of appeals reversed the district court and remanded the matter to enforce the Philippine arbitral award (App. 1-22). Without any meaningful discussion of the eight factors delineated

in *Lauritzen* and *Rhoditis* for determining the proper choice of law to apply to petitioner's maritime injury, it determined that United States public policy does not necessarily disfavor lesser or different remedies under foreign law and that the importance to the Philippine economy of the POEA's terms "also weighs in favor of enforcement" (App. 11-13;14-16). It ignored the "cardinal importance" of the law of the flag under which respondent's vessel navigated; and even after conceding that an award should not be enforced when it violates the forum state's "most basic notions of morality and justice," it nonetheless ruled that the POEA contract respondent made with petitioner through the Philippine government takes precedence as a sound reflection of its public policy, rendering enforceable an arbitral award of just $1,870.00 for petitioner's extensive injuries (App. 13-16).

As the court of appeals concluded, given respondent's payment of some of petitioner's medical costs before he was repatriated to the Philippines, "our careful review of the record has found no evidence that the Philippine arbitral award was inadequate relative to [petitioner's] unmet medical needs, let alone so inadequate as to violate this nation's 'most basic notions of morality and justice'" (App. 19, quoting *M & C Corp. v. Erwin Behr GmbH & Co., KG*, 87 F.3d 844, 851 n.2 (6th Cir. 1996)). For this reason, it ruled that the district court erred in determining that the Philippine arbitral award violated the public policy of the United States (App. 19).

As for the "prospective waiver" defense enunciated by the Court in *Mitsubishi* and *Vimar* and relied upon by the district court to afford petitioner an opportunity to pursue his claims under the general maritime law, it ruled that the doctrine only applies when statutory rights and remedies are implicated rather than general maritime law, ignoring the fact that the POEA is a classic contract of adhesion, to petitioner's detriment (App. 20-22).

On June 10, 2015, the court of appeals denied petitioner's timely filed petition for panel rehearing or for rehearing *en banc* (App. 63-64).

ARGUMENT

The Decision Below Nullifies The Eight-Factor Test Of *Lauritzen/Rhoditis* For Determining Which Law Should Govern A Maritime Tort Claim.

This petition presents the exceptionally important question about the continued vitality of this Court's eight-factor test enunciated in *Lauritzen* and *Rhoditis* for determining what law should govern in a foreign arbitration forum addressing a seaman's maritime tort claim. The district court exhaustively applied these eight factors to conclude that petitioner, a Filipino, who was injured in the United States while working as a seaman on a German-owned vessel navigating under the flag of the Marshall Islands which has adopted the maritime law of the United

States, should as a matter of public policy have his tort claims adjudicated under the general maritime law of the United States rather than the law of the Philippines.

In reversing the district court, the court of appeals failed to engage in a genuine discussion of any of the *Laurtizen/Rhoditis* factors; it ignored the "cardinal importance" of the law of the flag under which respondent's vessel navigates; and even after conceding that an award should not be enforced when it violates the forum state's "most basic notions or morality and justice," it nonetheless ruled that the POEA contract mandated by the Philippine government overrode the *Lauritzen/Rhoditis* factors, including the general maritime law of the United States, because the POEA was too important to the Philippine economy in "promot[ing] and monitor[ing] the overseas employment of Filipinos. . . ." (App. 13, quoting *Balen v. Holland America Line, Inc.,* 583 F.3d 647, 651 (9th Cir. 2009)). The court of appeals thereby enforced the public policy of the Republic of the Philippines, not the public policy of the United States, and accordingly enforced an arbitral award of just $1,870.00 for petitioner's horrendous injuries. The court of appeals failed to recognize that under The Convention Article V(2)(b), it is the public policy of the forum state that is to be enforced, which is, in this case, the public policy of the United States.

In reversing the district court, the court of appeals failed to engage in a genuine discussion of any of the *Lauritzen/Rhoditis* factors; it ignored the

"cardinal importance" of the law of the flag under which respondent's vessel navigates; and even after conceding that an award should not be enforced when it violates the forum state's "most basic notions of morality and justice," it nonetheless ruled that the POEA contract that petitioner signed with respondent overrode the *Lauritzen/Rhoditis* factors, including the general maritime law of the United States, because the POEA was too important to the Philippine economy in "promot[ing] and monitor[ing] the overseas employment of Filipinos. . . ." (App. 13, quoting *Balen v. Holland America Line, Inc.*, 583 F.3d 647, 651 (9th Cir. 2009)). It thereby enforced an arbitral award of just $1,870.00 for petitioner's horrendous injuries.

This ruling is not only at odds with any rational analysis founded upon the *Lauritzen/Rhoditis* factors but it also constitutes a complete abnegation of *Lauritzen* and *Rhoditis* in this proceeding. The Fifth Circuit Court of Appeals has effectively declared that it will make up its own rules in deciding what law applies when a foreign arbitral panel considers the maritime tort claims of a seaman injured while within the navigable waters of the United States. This nullification of the *Lauritzen/Rhoditis* factors by the court of appeals warrants a grant of certiorari by this Court in order to reassert the primacy of these factors in any resolution of a seaman's claims for injuries sustained while aboard a vessel anywhere in the world.

In performing its proper choice-of-law analysis under the *Lauritzen/Rhoditis* factors, the district court meticulously found that:

1. petitioner was injured while respondent's vessel was in the United States;
2. respondent's vessel, M/V RICKMERS DALIAN, is registered in the Republic of the Marshall Islands and flies the flag of that Republic which has adopted United States maritime law;
3. petitioner is a resident and citizen of the Philippines;
4. the M/V RICKMERS DALIAN is owned by respondent, a German corporation;
5. the POEA contract was executed in the Philippines;
6. the foreign forum was not a factor;
7. the law of the forum is United States maritime law; and
8. respondent's principal place of operations is in Germany.

(App. 36-37).

These are the lodestar considerations for determining what law applies in resolving petitioner's maritime tort claims, most especially the law of the flag under which respondent's vessel M/V RICKMERS DALIAN navigates, a prevailing factor of "cardinal importance" which is decisive "unless some heavy

counterweight appears." *Lauritzen*, 345 U.S. at 584-586.

Analyzing these factors, the district court most importantly found that respondent, a German corporation, voluntarily chose to register and flag its vessel under the laws of the Republic of the Marshall Islands with full knowledge that the Republic had adopted the law of the United States as its general maritime law. Assessing this fact together with the other *Lauritzen/Rhoditis* factors, including that petitioner was injured while in navigable waters of the United States which was also the law of the forum, the district court reasonably concluded there was no "heavy counterweight" to these core factors which point to a public policy which affords petitioner the substantive rights and remedies as a seaman he would have under the general maritime law of the United States.

As the district court judge correctly observed,

> "The law of the flag is given great weight in determining the law to be applied in maritime cases." The Supreme Court has held that "the law of the flag" is 'the most venerable and universal rule of maritime law' which 'overbears most other connecting events in determining applicable law . . . unless some heavy counterweight appears.'" The Supreme Court has stated that the law of the flag alone can be sufficient for determining applicable law.

(App. 38-39, quoting *Schexnider v. McDermott Int'l, Inc.*, 817 F.2d 1159, 1162 (5th Cir. 1987); *Lauritzen*,

345 U.S. at 584; and *Rhoditis*, 398 U.S. at 308) (footnotes omitted)).

None of the other *Lauritzen/Rhoditis* factors dilutes this core, overriding factor that respondent chose to register and flag its vessel under the law of the Marshall Islands with full knowledge that the Republic has adopted the law of the United States as its general maritime law. The district court judge therefore ruled that petitioner was entitled to such rights and remedies that our maritime law provides seamen. Because the Philippine arbitral panel's egregiously unfair award of $1,870.00 demonstrated that it had altogether failed to address the substantive rights and remedies to which petitioner was entitled as a seaman under the general maritime of the United States, the district court refused to enforce it.

The district court judge had it right. Having been injured aboard respondent's vessel in New Orleans while it navigated under the flag of the Marshall Islands which adopts the general maritime law of the United States, petitioner possessed a cause of action for maintenance and cure, a claim for unseaworthiness and a cause of action for employer negligence resulting in injury or death (App. 39-40). Judge Zainey made the point succinctly:

> what forms the basis of the public policy violation [under Article V(2)(b) of the Convention] is the effective denial of [petitioner's] opportunity to pursue the remedies to which he was entitled as a seaman that resulted from the panel's application of Philippine

> law. Had the panel applied a set of foreign laws which provided a basis for pursuing similar rights and protections, public policy would have been satisfied. However, such a process was absent under Philippine law, as evidenced by the proceedings [in the Philippines].

(App. 47).

After all, as both courts below acknowledged, the United States has an explicit, well-defined and dominant public policy with respect to seaman, providing a "special solicitude" and protection to them because they are wards of admiralty who deserve special status inasmuch as the conditions of sea service are dramatically different from the conditions of any other service, even harbor workers (App. 11-12;43-44). Their fate is tied to that of their ship; their freedom is restricted; and even though they are not technically incapable of entering into a valid contract, they are treated in the same manner as courts of equity treat wards with their guardians (App. 43-44 quoting *Pope & Talbot, Inc. v. Hawn*, 346 U.S. 406, 423-424 (1953) (Jackson, J., dissenting), and *Harden v. Gordon*, 11 F. Cas. 480, 485 (D. Me. 1823) (Story, J.)). *Accord*, *U.S. Bulkcarriers, Inc. v. Arguelles*, 400 U.S. 351, 355 (1971); *Robinson v. Baldwin*, 165 U.S. 275, 282-284 (1897).

In direct contrast to the United States' established public policy of protecting seamen at every turn, the Philippine government has developed through its POEA contracts applicable to would-be Filipino

seamen a public policy of providing shipowners in the world market with cheap Filipino labor with the lowest possible financial risk of paying them damages in the event they are injured at sea. While providing these Filipino workers to shipowners under such conditions is financially attractive to shipowners, this government policy of the Philippines does little to protect Filipino seamen who are contractually bound under the POEA to a disability payment schedule for full payment for their tort injuries which is egregiously unfair because it lacks any correlation to the injuries they actually suffer.

Under this POEA-imposed regime, once the Philippine degree or grade of disability is established by the shipowner-designated physician, *no* additional medical care is provided, only the contractually imposed amount under the disability payment schedule, which is likewise a full settlement for any damages caused by tortious conduct occurring anywhere in the world. In petitioner's case, the shipowner-designated physician gave petitioner's serious and debilitating injuries over 35% of his body only a Grade 14 disability rating, the lowest possible rating, which resulted in an arbitral award of just $1,870.00. Yet, a year later, petitioner had to undergo extensive surgery in the Philippines by his own physician for excessive scar tissue that was restricting his movements; and he faces years of continued therapy, further surgeries and medical costs without any reimbursement.

None of this squares with the established public policy of the United States of protecting seafarers

whenever and wherever they are injured at sea. As a signatory to The Convention, the United States had the right to refuse to enforce the Philippine arbitral award under Article V(2)(b) of The Convention if it violated the public policy of this country. The district court justifiably ruled that to enforce this egregiously unfair Philippine arbitral award would subvert the longstanding public policy in the United States of special solicitude for seamen. As the district court found, Philippine law provided not just less favorable remedies for petitioner, it provided him *no* remedies at all for his pervasive injuries.

Moreover, allowing a foreign state to export its laws limiting – indeed extinguishing – any recovery by its citizens who are injured in the United States while working on those ocean going vessels that have chosen a higher standard of protection, i.e., the general maritime law of the United States, places American shipowners in a less competitive position. In this case, respondent voluntarily chose the general maritime law of the United States by registering its vessel and flying its vessel's flag under the laws of the Republic of the Marshall Islands. It should be held to its voluntary choice and petitioner's rights and remedies when injured at sea should be governed by this country's law, as established by any rational application of the *Lauritzen/Rhoditis* factors.

Yet the court of appeals flatly refused to apply the *Lauritzen/Rhoditis* factors in order to determine the choice of law here; and it elevated the importance of POEA contracts to the Philippine economy to a

status which overcomes every one of the factors which this Court has identified as crucial to a proper determination of the choice of law applicable to a foreign arbitral proceeding. This nullification of *Lauritzen* and *Rhoditis* invokes an opportunity for this Court to reassert the primacy of these factors in any resolution by a forum here of a seaman's claims for injuries sustained aboard a vessel anywhere in the world.

The court of appeals also misinterpreted *Lauritzen* as enunciating a rule that "contractual choice-of-law provisions for foreign seamen are generally enforceable" and that this rule favors respondent (App. 15). This is not the rule of *Lauritzen* in maritime *tort* cases, only in contract cases. Moreover, in bolstering the importance of the POEA contract, petitioner as a Filipino was forced to sign if he wanted to work as a seaman, it noted that *Lauritzen* holds "that the tendency of the law is to apply in contract matters the law which the parties intended to apply. . . ." (App. 15). Yet, again, this is *not* a contract case but a maritime tort case and the *Lauritzen* Court expressly mandated that all seven of its factors (and subsequently the eighth factor from *Rhoditis*) were to be considered in any analysis of the choice of law to be applied in a foreign arbitral proceeding addressing a maritime tort case. The court of appeals simply ignores this mandate.

The *Lauritzen* Court further noted that while there is a tendency in the law to apply in contract matters the law which the parties intended to apply,

> [w]e think a quite different result would follow if the contract attempted to avoid applicable law, for example, so as to apply foreign law to an American ship.

345 U.S. at 589. This is exactly what has happened here. The POEA contract attempts to apply Philippine law in circumstances where respondent's vessel navigates under the flag of the Republic of the Marshall Islands, a country which specifically rejects such contracts. As Section 858 of the Marshall Islands Maritime Act provides:

> It shall be unlawful for any employer . . . to enter into any labor contract containing any labor provision which attempts to set aside the application of or is inconsistent with or is in violation of the rights of the Republic or which prescribes terms or conditions less favorable for the seafarer than those set forth in this chapter. . . .

Moreover, as the *Lauritzen* Court further observed, the laws of a sovereign nation which seek to limit suits by injured seamen only to its own courts are of "doubtful" validity "in view of our holding that such venue restrictions by one of the states of the Union will not preclude action in a sister state." 345 U.S. at 589-590. Indeed, the parties to any contract like the POEA contract which contemplates performance in a multitude of territorial jurisdictions on the high seas, can settle nonetheless "upon the law of the flag-state as their governing code" because "[t]his arrangement is so natural and compatible with the

policy of the law that even in the absence of an express provision it would probably be implied." *Id*. at 589. It was therefore a total abnegation of the *Lauritzen/Rhoditis* factors for the court of appeals to rule that the POEA contract warranted enforcement of the Philippine arbitral award, one which rejects entirely the general maritime law of the United States.

Finally, the court of appeals' further refusal to acknowledge that the "prospective waiver doctrine" established in *Vimar Seguros y Reaseguros et al. v. M/V SKY REEFER*, 515 U.S. 528 (1995) and *Mitsubishi Motors Corporation v. Soler Chrysler-Plymouth, Inc.,* 473 U.S. 614 (1985) applies here rests on its similar misapprehension that the POEA contract should be given precedence over the *Lauritzen/Rhoditis* factors, ignoring the fact that the POEA contract is an adhesion contract where petitioner had no bargaining power and should not be enforced precisely for this reason.

There is no dispute on this record that petitioner could not pursue or vindicate his general maritime law claims before any lawful body in the Philippines, including the Philippine arbitral panel. Both *Mitsubishi* and *M/V SKY REEFER* in these circumstances require a finding that choice-of-forum and choice-of-law clauses together constitute a violation of the public policy of the United States. In addition, there is nothing in either decision limiting the application of the prospective waiver doctrine to only claims for statutory violations as opposed to claims under the general maritime law of the United States

which is well defined and dominant. The court of appeals' reasoning otherwise rests only on a distinction without any meaningful difference.

Nor would acknowledging the prospective waiver doctrine here be at odds with *Romero v. International Terminal Operating Co.*, 358 U.S. 354, 384 (1989), as the court of appeals believed. The plaintiff in *Romero* was injured in the United States and he argued that this fact alone was sufficient to apply the general maritime law of the United States. The Court disagreed stating that the application of neither the Jones Act nor general maritime law would depend "on the wholly fortuitous circumstance of the place of the injury." *Id*.

Here, however, the district court did not apply the general maritime law of this country simply because petitioner's injuries occurred while on the Mississippi River in the United States. After an exhaustive analysis of the *Lauritzen/Rhoditis* factors, especially that the law of the flag of the vessel (Marshall Islands) applies and that the Marshall Islands has adopted the general maritime law of this country, the district court applied the general maritime law of the United States. The district court importantly found that respondent, a German corporation, voluntarily chose this law when it registered and flagged its vessel under the laws of the Marshall Islands with full knowledge that the Republic had adopted the law of the United States as its general maritime law.

Assessing this fact together with other *Lauritzen*/*Rhoditis* factors, including that petitioner was injured while in navigable waters of the United States which was also the law of the forum, the district court properly concluded there was no "heavy counterweight" to these core factors which point to a public policy which affords petitioner the substantive rights and remedies as a seaman he would have under the general maritime law of the United States. Applying the prospective waiver doctrine in these circumstances is in no way at odds with *Romero* or any other decision of this Court. Indeed, applying the doctrine here is entirely consistent with this Court's precedents which apply "an explicit public policy that is well defined and dominant" in light of the fact that seamen are wards of the court entitled to special solicitude.

The upshot of the decision below, then, is to allow a German shipowner who pays no income taxes under the laws of the Republic of the Marshall Islands to hire impoverished Third-World seafarers like petitioner at extremely low wages and then, when petitioner sustains serious injuries during work aboard its vessel, to ignore the laws of the Marshall Islands which nullify the POEA's choice-of-forum and choice-of-law clauses thereby denying petitioner any meaningful rights or remedies. A faithful application of the *Lauritzen*/*Rhoditis* factors would have avoided this result and the court of appeals' refusal to employ these factors effectively nullifies this eight-factor

test to determine what law governs a maritime tort claim.

CONCLUSION

For all of the reasons identified herein, this Court should grant the petition and remand this matter to the District Court for the Eastern District of Louisiana for further proceedings consistent with that court's refusal to enforce the decision of the Philippine arbitral panel and in furtherance of petitioner's pursuit of his rights and remedies under the general maritime law and the Jones Act as a result of the injuries he sustained as a seaman on board M/V RICKMERS DALIAN in the Mississippi River in Louisiana on October 27, 2010; or provide petitioner with such other relief as is fair and just in the circumstances of this case.

Respectfully submitted,

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IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 14-30132

LITO MARTINEZ ASIGNACION,

Plaintiff-Appellee,

v.

RICKMERS GENOA
SCHIFFAHRTSGESELLSCHAFT MBH & CIE KG,

Defendant-Appellant.

RICKMERS GENOA
SCHIFFAHRTSGESELLSCHAFT MBH & CIE KG,

Plaintiff-Appellant,

v.

LITO MARTINEZ ASIGNACION,

Defendant-Appellee.

Appeal from the United States District Court
for the Eastern District of Louisiana

(Filed Apr. 16, 2015)

Before STEWART, Chief Judge, and BENAVIDES and OWEN, Circuit Judges.

PRISCILLA R. OWEN, Circuit Judge:

Rickmers Genoa Schiffahrtsgesellschaft mbH & Cie KG (Rickmers) sought to enforce a Philippine arbitral award given to Lito Martinez Asignacion for maritime injuries. The district court refused to enforce the award pursuant to the public-policy defense found in the Convention on the Recognition and Enforcement of Foreign Arbitral Awards (the Convention)[1] and the prospective-waiver doctrine. Rickmers appeals. We reverse and remand for the district court to enforce the award.

I

Asignacion, a citizen and resident of the Philippines, signed a contract to work aboard the vessel M/V RICKMERS DAILAN. Rickmers, a German corporation, owned the vessel, which sailed under the flag of the Marshall Islands.

Philippine law mandates that foreign employers hire Filipino workers through the Philippine Overseas Employment Administration (POEA), an arm of the Philippine government. POEA requires Filipino seamen's contracts to include the Standard Terms and Conditions Governing the Employment of Filipino Seafarers On Board Ocean Going Vessels (Standard Terms). Asignacion's contract incorporated the Standard Terms.

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[1] Convention on the Recognition and Enforcement of Foreign Arbitral Awards, June 10, 1958, 21 U.S.T. 2517, 330 U.N.T.S. 3.

The Standard Terms include several provisions related to dispute resolution. Section 29, in part, provides:

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

Section 31 provides:

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

Section 20(B) provides that when a seaman suffers work-related injuries, the employer must provide the full cost of medical treatment until the seaman is declared fit to work or his level of disability is declared after repatriation to the Philippines. If the seaman is permanently disabled, he is entitled to scheduled disability benefits. Section 20(G) provides

that the contract covers "all claims arising from or in the course of the seafarer's employment, including but not limited to damages arising from the contract, tort, fault or negligence under the laws of the Philippines or any other country."

While the M/V RICKMERS DAILAN was docked in the Port of New Orleans, Asignacion suffered burns when a cascade tank aboard the vessel overflowed. After receiving treatment at a burn unit in Baton Rouge for nearly a month, Asignacion was repatriated to the Philippines, where he continued to receive medical attention. The court below found that Asignacion sustained severe burns to 35% of his body, suffered problems with his body-heat control mechanism, and experienced skin ulcerations and sexual dysfunction. The record and the district court's opinion do not address Asignacion's current condition.

Asignacion sued Rickmers in Louisiana state court to recover for his injuries. Rickmers filed an exception seeking to enforce the arbitration clause of Asignacion's contract. The state court granted the exception, stayed litigation, and ordered arbitration in the Philippines.

Arbitration commenced before a Philippine panel, which convened under the auspices of the Philippine Department of Labor and Employment. The panel refused to apply, or even consider applying, United States or Marshall Islands law, finding that Section 31 of the Standard Terms prevented the panel from applying any law besides Philippine law. The

arbitrators accepted Rickmers's physician's finding that Asignacion had a Grade 14 disability – the lowest grade of compensable disability under the Standard Terms – which entitled Asignacion to a lump sum of $1,870.

Asignacion then filed a motion in the Louisiana state court asking that Rickmers show cause as to why the Philippine arbitral award should not be set aside for violating United States public policy. Rickmers removed the suit to federal court and brought a second action in the district court seeking to enforce the award.

The district court determined that the Convention provided the legal framework for analyzing the award and that the only defense Asignacion invoked was Article V(2)(b) of the Convention. Article V(2)(b) allows a signatory country to refuse enforcement if "recognition or enforcement of the award would be contrary to the public policy of that country."[2]

The district court proceeded to apply the traditional choice-of-law analysis for maritime injury cases, the *Lauritzen*[3]*-Rhoditis*[4] test, and concluded that the law of the vessel's flag – the Marshall Islands – should apply absent a valid choice-of-law clause. The court also found that the Marshall

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[2] Convention art. V(2)(b).

[3] *Lauritzen v. Larsen*, 345 U.S. 571 (1953).

[4] *Hellenic Lines Ltd. v. Rhoditis*, 398 U.S. 306 (1970).

Islands adopts the general maritime law of the United States. The court then held that enforcing the arbitral award would violate the United States public policy protecting seamen. The public-policy violation arose not from the arbitrator's failure to apply United States law but rather because applying Philippine law effectively denied Asignacion the "opportunity to pursue the remedies to which he was entitled as a seaman," i.e., maintenance and cure, negligence, and unseaworthiness. The court additionally held that the prospective-waiver doctrine, which invalidates certain combined choice-of-law and choice-of-forum provisions, applied to Asignacion's contract. Thus, the court entered an order refusing to enforce the Philippine arbitral award. Rickmers now appeals.

II

We review the district court's decision refusing to enforce the Philippine arbitral award under the same standard as any other district court decision.[5] We accept findings of fact that are not clearly erroneous and review questions of law *de novo*.[6]

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[5] *See Karaha Bodas Co. v. Perusahaan Pertambangan Minyak Dan Gas Bumi Negara*, 364 F.3d 274, 287 (5th Cir. 2004) (reviewing a district court judgment enforcing a foreign arbitral award).

[6] *Hughes Training Inc. v. Cook*, 254 F.3d 588, 592 (5th Cir. 2001).

III

The Convention applies when an arbitral award has been made in one signatory state and recognition or enforcement is sought in another signatory state.[7] Both forums in this case, the United States and the Philippines, are signatories to the Convention.[8] An award's enforcement is governed by the Convention, as implemented at 9 U.S.C. § 201 *et seq.*, if the award arises out of a commercial dispute and at least one party is not a United States citizen.[9] The award issued as a result of arbitration between Asignacion, a Filipino seaman, and Rickmers, a German corporation, is governed by the Convention.

A party to an award governed by the Convention may bring an action to enforce the award in a United States court that has jurisdiction.[10] The court "shall confirm" the award unless a ground to refuse enforcement or recognition specified in the Convention applies.[11] The Convention permits a signatory to

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[7] Convention, 21 U.S.T. at 2566 ("The United States of America will apply the Convention, on the basis of reciprocity, to the recognition and enforcement of only those awards made in the territory of another Contracting State."); *see also id.* art. I(3).

[8] *See, e.g.*, *Lim v. Offshore Specialty Fabricators, Inc.*, 404 F.3d 898, 900-01 (5th Cir. 2005).

[9] *See* 9 U.S.C. § 202 (providing that commercial arbitral awards fall under the Convention except for certain awards entirely between United States citizens).

[10] 9 U.S.C. § 207.

[11] *Id.*

refuse to recognize or enforce an award if "recognition or enforcement of the award would be contrary to the public policy of that country."[12]

Arbitral awards falling under the Convention are enforced under the Federal Arbitration Act (FAA).[13] An "emphatic federal policy" favors arbitral dispute resolution.[14] The Supreme Court has noted that this policy "applies with special force in the field of international commerce."[15] The FAA permits courts to "vacate an arbitrator's decision 'only in very unusual circumstances.'"[16] A district court's review of an award is "extraordinarily narrow."[17] Similarly, a court reviewing an award under the Convention cannot refuse to enforce the award solely on the ground that the arbitrator may have made a mistake of law or fact.[18] The party opposing enforcement of the award

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[12] Convention art. V(2)(b).

[13] *See Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614, 631 (1985); *see also* 9 U.S.C. § 201 ("The [Convention] shall be enforced in United States courts in accordance with this chapter.").

[14] *Mitsubishi*, 473 U.S. at 631 (1985).

[15] *Id.*

[16] *Oxford Health Plans LLC v. Sutter*, 133 S. Ct. 2064, 2068 (2013) (quoting *First Options of Chi., Inc. v. Kaplan*, 514 U.S. 938, 942 (1995)).

[17] *Kergosien v. Ocean Energy, Inc.*, 390 F.3d 346, 352 (5th Cir. 2004), *abrogated on other grounds by Hall St. Assocs., L.L.C. v. Mattel, Inc.*, 552 U.S. 576 (2008).

[18] *Karaha Bodas Co. v. Perusahaan Pertambangan Minyak Dan Gas Bumi Negara*, 364 F.3d 274, 288 (5th Cir. 2004).

on one of the grounds specified in the Convention has the burden of proof.[19]

We have held that the Convention's "public policy defense is to be 'construed narrowly to be applied only where enforcement would violate the forum state's most basic notions of morality and justice.'"[20] In the context of domestic arbitral awards, the Supreme Court has recognized a public-policy defense only when an arbitrator's contract interpretation violates "'some explicit public policy' that is 'well defined and dominant, and is to be ascertained by reference to the laws and legal precedents and not from general considerations of supposed public interests.'"[21] The Eleventh Circuit has held that the "explicit public policy" requirement applies with the same force to international awards falling under the Convention.[22] We see no reason to depart from that standard here.[23]

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[19] *Id.* (citing *Imperial Ethiopian Gov't v. Baruch-Foster Corp.*, 535 F.2d 334, 336 (5th Cir. 1976)).

[20] *Id.* at 306 (quoting *M & C Corp. v. Erwin Behr GmbH & Co., KG*, 87 F.3d 844, 851 n.2 (6th Cir. 1996)).

[21] *United Paperworkers Int'l Union, AFL-CIO v. Misco, Inc.*, 484 U.S. 29, 43 (1987) (quoting *W.R. Grace & Co. v. Local Union 759, Int'l Union of United Rubber, Cork, Linoleum and Plastic Workers of Am.*, 461 U.S. 757, 766 (1983)) (some internal quotation marks omitted).

[22] *Indus. Risk Insurers v. M.A.N. Gutehoffnungshütte GmbH*, 141 F.3d 1434, 1445 (11th Cir. 1998).

[23] *Cf. Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614, 631 (1985) (noting that the federal policy in

(Continued on following page)

The parties do not dispute these standards. Rather, they disagree whether Asignacion's case provides the narrow circumstances that would render the arbitral award unenforceable under the Convention because it violates United States public policy.

A

Asignacion's public-policy defense primarily turns on the adequacy of remedies under Philippine law. But at oral argument, Asignacion's counsel also urged that United States public policy requires that foreign arbitral panels give seamen an adequate choice-of-law determination; he argued that the arbitrators' exclusive reliance on the choice-of-law provision in Asignacion's contract did not constitute a choice-of-law determination, let alone a fair one.

To the extent that Asignacion's defense turns on the Philippine arbitrators' exclusive reliance on the contract's choice-of-law provision, courts are unable to correct this sort of unexceptional legal error (if one was in fact made) when reviewing an arbitral award.[24] Applying Philippine law to a Filipino seaman

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favor of arbitral dispute resolution "applies with special force in the field of international commerce").

[24] *See Karaha Bodas*, 364 F.3d at 288 ("The court may not refuse to enforce an arbitral award solely on the ground that the arbitrator may have made a mistake of law or fact."); *id.* at 290 & n.27 ("Under the New York Convention, the rulings of the [arbitrators] interpreting the parties' contract are entitled to deference.").

in Philippine arbitration, by itself, is not cause for setting aside the award, even if American choice-of-law principles would lead to the application of another nation's law.

B

Asignacion has the burden of proving that the Convention's public-policy defense applies.[25] The Philippine arbitrators awarded Asignacion $1,870. Were he to prevail in a suit under United States general maritime law, we have little doubt his recovery would be greater.

As detailed above, the United States has a public policy strongly favoring arbitration, which "applies with special force in the field of international commerce."[26] On the other hand, the United States has an "explicit public policy that is well defined and dominant"[27] with respect to seamen: maritime law provides "special solicitude to seamen."[28] Seamen have long been treated as "wards of admiralty,"[29] and the causes of action and the remedies available to seamen

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[25] *See id.* at 288 (citing *Imperial Ethiopian Gov't v. Baruch-Foster Corp.*, 535 F.2d 334, 336 (5th Cir. 1976)).

[26] *Mitsubishi*, 473 U.S. at 631 (1985).

[27] *United Paperworkers Int'l Union, AFL-CIO v. Misco, Inc.*, 484 U.S. 29, 43 (1987) (internal quotation marks omitted).

[28] *Miles v. Melrose*, 882 F.2d 976, 987 (5th Cir. 1989).

[29] *U.S. Bulk Carriers, Inc. v. Arguelles*, 400 U.S. 351, 355 (1971).

reflect this special status.[30] In addition to the foundational policies favoring arbitration and protecting seamen, other policies concerning international dispute resolution weigh in our decision.

The Supreme Court has rejected the "concept that all disputes must be resolved under our laws and in our courts,"[31] even when remedies under foreign law do not comport with American standards of justice. The Supreme Court has stated: "To determine that American standards of fairness . . . must [apply] demeans the standards of justice elsewhere in the world, and unnecessarily exalts the primacy of United States law over the laws of other countries."[32] Similarly, in *Romero v. International Terminal Operating Co.*, which addressed the application of choice-of-law principles to a seaman's claim, the Court stated:

> To impose on ships the duty of shifting from one standard of compensation to another as

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[30] *See Mitchell v. Trawler Racer, Inc.*, 362 U.S. 539, 550 (1960) (noting that unseaworthiness liability is not tied to negligence); *Boudreaux v. Transocean Deepwater, Inc.*, 721 F.3d 723, 725-26 (5th Cir. 2013) (noting that the right to maintenance and cure cannot be "contracted away by the seaman, does not depend on the fault of the employer, and is not reduced for the seaman's contributory negligence" (footnotes omitted)).

[31] *M/S Bremen v. Zapata Off-Shore Co.*, 407 U.S. 1, 9 (1972).

[32] *Scherk v. Alberto-Culver Co.*, 417 U.S. 506, 517 n.11 (1974) (citation and internal quotation marks omitted); *see also Haynsworth v. The Corporation*, 121 F.3d 956, 966 (5th Cir. 1997).

> the vessel passes the boundaries of territorial waters would be not only an onerous but also an unduly speculative burden, disruptive of international commerce and without basis in the expressed policies of this country. The *amount and type of recovery which a foreign seaman may receive* from his foreign employer while sailing on a foreign ship should not depend on the wholly fortuitous circumstance of the place of injury.[33]

Therefore, even with regard to foreign seamen, United States public policy does not necessarily disfavor lesser or different remedies under foreign law.

The importance of the POEA Standard Terms to the Philippine economy also weighs in favor of enforcement. As the Ninth Circuit has noted, "[a]rbitration of all claims by Filipino overseas seafarers is an integral part of the POEA's mandate to promote and monitor the overseas employment of Filipinos and safeguard their interests."[34] Asignacion points out, correctly, that the Convention directs a court to consider the public policy of the country in which it sits,[35] not the

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[33] 358 U.S. 354, 384 (1959) (emphasis added).

[34] *Balen v. Holland America Line, Inc.*, 583 F.3d 647, 651 (9th Cir. 2009); *see also Marinechance Shipping, Ltd. v. Sebastian*, 143 F.3d 216, 221 n.25 (5th Cir. 1998) ("The effect of POEA intervention in employment contracts is to shift the balance of power slightly in favor of the employee in much the same way that a labor union or legislative enactment of minimum work standards increases the level of protection for employees in the United States.").

[35] Convention art. V(2)(b).

public policy of the arbitral forum. But, while Philippine public policy does not apply of its own force, our analysis of a foreign arbitral award is colored by "concerns of international comity, respect for the capacities of foreign and transnational tribunals, and sensitivity to the need of the international commercial system for predictability in the resolution of disputes . . . even assuming that a contrary result would be forthcoming in a domestic context."[36]

Asignacion maintains that in particularly egregious circumstances, a United States court may apply our choice-of-law and forum-selection laws as a means of implementing the Convention's public-policy defense and refusing to enforce an award.

The seminal maritime-injuries choice-of-law case is *Lauritzen v. Larsen*.[37] In *Lauritzen*, a Danish seaman injured in Cuba aboard a Danish-owned and flagged ship brought suit in the United States.[38] The seaman's contract provided that Danish law applied.[39] Unlike United States law, Danish law fixed maintenance and cure to a twelve-week period and provided a no-fault compensation scheme "similar to [American] workmen's compensation."[40] The Court

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[36] *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614, 629 (1985).

[37] 345 U.S. 571 (1953).

[38] *Id.* at 573.

[39] *Id.*

[40] *Id.* at 575-76.

enumerated a seven-factor test to determine choice of law[41] but also commented that "[e]xcept as forbidden by some public policy, the tendency of the law is to apply in contract matters the law which the parties intended to apply."[42] The Court then cautioned that "a different result would follow if the contract attempted to avoid applicable law," such as applying foreign law to a United States flagged ship.[43] The Court thus had little hesitation applying the contracted-for Danish law, as the law of the ship's flag.[44]

Lauritzen's rule – that contractual choice-of-law provisions for foreign seamen are generally enforceable – favors Rickmers. However, the reach of the exception – which condemns a choice-of-law provision that attempts to "avoid applicable law" – is less clear. On one hand, Rickmers did little, if anything, to avoid applicable law through its contract with Asignacion. Rickmers had no say in the choice-of-law provision; POEA's Standard Terms mandated Philippine law. On the other hand, the Philippine government has arguably attempted to avoid the application of foreign law to its seamen. But it is far from certain that the

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[41] *See id.* at 583-92 ((1) place of injury; (2) the vessel's flag; (3) plaintiff's domicile or allegiance; (4) shipowner's allegiance; (5) place of contract; (6) inaccessibility of a foreign forum; and (7) law of the forum); *see also Hellenic Lines Ltd. v. Rhoditis*, 398 U.S. 306, 309 (1970) (noting the *Lauritzen* factors are not exhaustive and considered the shipowner's base of operations).

[42] *Lauritzen*, 345 U.S. at 588-89.

[43] *Id.* at 589.

[44] *Id.* at 588-89.

Lauritzen Court condemned such choice-of-law clauses mandated by a foreign sovereign rather than a party to the contract.

Several cases from our court have ordered that a Filipino seamen's claims be resolved in Philippine arbitration or under Philippine law. Rickmers argues that these cases establish that applying Philippine law to Asignacion's claims does not violate public policy. Many of these cases simply weigh the *Lauritzen-Rhoditis* factors without addressing any public-policy concerns.[45] The decisions that reach public-policy considerations address policies irrelevant to the remedies at issue in the present case.[46]

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[45] *See Quintero v. Klaveness Ship Lines*, 914 F.2d 717, 722-23 (5th Cir. 1990); *Cuevas v. Reading & Bates Corp.*, 770 F.2d 1371, 1378-79 (5th Cir. 1985), *abrogated on other grounds by In re Air Crash Disaster Near New Orleans, La.*, 821 F.2d 1147 (5th Cir. 1987) (en banc).

[46] *See Lim v. Offshore Specialty Fabricators, Inc.*, 404 F.3d 898, 900, 906 (5th Cir. 2005) (rejecting a public-policy challenge to Philippine arbitration based on Louisiana's policy disfavoring forum-selection clauses in employment litigation); *Marinechance Shipping Ltd. v. Sebastian*, 143 F.3d 216, 219-21 (5th Cir. 1998) (citing *Carnival Cruise Lines, Inc. v. Shute*, 499 U.S. 585 (1991)) (rejecting a challenge to contracts containing the POEA Standard Terms because individual Filipino seamen lacked bargaining power); *cf. Francisco v. STOLT ACHIEVEMENT MT*, 293 F.3d 270, 277-78 (5th Cir. 2002) (upholding an order to arbitrate in the Philippines and finding that the *suspension* of a Philippine law that would have otherwise limited remedies did not compel against arbitration).

Our decision in *Calix-Chacon v. Global International Marine, Inc.*[47] addressed the question of reduced remedies in foreign law. In *Calix-Chacon*, a Honduran seaman signed a contract providing that Honduran law would apply and specifying a Honduran forum.[48] He brought a claim in an American court for maintenance and cure, and the district court held the forum-selection clause unenforceable on public-policy grounds because both general maritime law and the Shipowner's Liability Convention of 1936 (Shipowner's Convention) "express[ed] a strong public policy" against abridging maintenance and cure liability in contract.[49] On appeal, we concluded that under our precedents, the Shipowner's Convention did not require us to invalidate a foreign forum-selection clause when foreign law imposed a lower standard of care.[50] We vacated the district court's decision because it relied on the Shipowner's Convention and remanded for further analysis of the public-policy question under the general maritime law.[51]

In *Calix-Chacon*, we expressly refrained from addressing the general maritime law's weight in the public-policy analysis. Nonetheless, our conclusion that the Shipowner's Convention did not, as a matter

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[47] 493 F.3d 507 (5th Cir. 2007).

[48] *Id.* at 509.

[49] *Id.* at 510.

[50] *Id.* at 514 (citing *In re McClelland Eng'rs, Inc.* 742 F.2d 837, 839 (5th Cir. 1984)).

[51] *Id.*

of policy, prevail over a reduced standard of care in Honduran law, suggests we should be reluctant to conclude that lesser remedies make an award unenforceable on policy grounds.

In *Aggarao v. MOL Ship Management Co.,*[52] the District of Maryland, relying on the district court's decision in the present case, refused to enforce a Filipino seaman's arbitral award. The Philippine arbitrators determined that Aggarao had a Grade 1 disability – the highest grade under the POEA contract – and awarded him $89,100 in disability benefits, sick pay, and attorney's fees.[53] The district court found that Aggarao had over $700,000 in unpaid medical debts, had to forgo necessary treatments, and would require lifetime care.[54] The Maryland district court found that Aggarao's limited remedies under the POEA contract violated public policy and refused to enforce the arbitral award.[55]

Asignacion contends that *Aggarao* is on all fours with his claims. We disagree. Unlike in *Aggarao*, the arbitrators found that Asignacion had a Grade 14 disability – the lowest compensable grade – and the district court made no findings related to the adequacy of the award vis-à-vis Asignacion's lasting injuries

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[52] Civ. No. CCB-09-3106, 2014 WL 3894079 (D. Md. Aug. 7, 2014).

[53] *Id.* at *6-7.

[54] *Id.* at *5.

[55] *Id.* at *14.

or unmet medical expenses. Rather, the district court only determined that the arbitration and award "effective[ly] deni[ed]" Asignacion the right to pursue his general maritime remedies. But that finding is insufficient to support the conclusion that the public policy of the United States requires refusing to enforce the award.

Asignacion's arbitral award does not represent the sum total of Rickmers's obligation to Asignacion under the POEA Standard Terms contract. Section 20(B) required Rickmers to pay Asignacion's medical costs until he was repatriated to the Philippines and his disability level was established. There is no dispute that Rickmers met its obligations under Section 20(B). At oral argument, Asignacion's counsel represents that he has incurred medical expenses after Rickmers's Section 20(B) obligation terminated. But our careful review of the record has found no evidence that the Philippine arbitral award was inadequate relative to Asignacion's unmet medical needs, let alone so inadequate as to violate this nation's "most basic notions of morality and justice."[56] We conclude that the district court erred in determining that Asignacion's award violated the public policy of the United States.

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[56] *Karaha Bodas Co. v. Perusahaan Pertambangan Minyak Dan Gas Bumi Negara*, 364 F.3d 274, 288 (5th Cir. 2004) (quoting *M & C Corp. v. Erwin Behr GmbH & Co., KG*, 87 F.3d 844, 851 n.2 (6th Cir. 1996)).

C

Finally, Rickmers contends that the district court erred by also relying on the prospective-waiver doctrine to refuse to recognize the Philippine arbitral award. We agree.

In *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, the Supreme Court addressed a district court's enforcement of an agreement to arbitrate, which forced an auto dealer to arbitrate its antitrust claims under the Sherman Act, 15 U.S.C. § 1 *et seq.*, in Japan.[57] The Court commented, in dictum, 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."[58] Similarly, in *Vimar Seguros y Reaseguros, S.A. v. M/V Sky Reefer*, the Court, again in dictum, suggested that *Mitsubishi*'s prospective-waiver doctrine might apply to contracts under the Carriage of Goods by Sea Act, 46 U.S.C. app. § 1300 *et seq.*[59] In both cases, the Court declined to apply the doctrine, in part, because it would be premature to do so; each case addressed the enforceability of an agreement to arbitrate, as opposed to awards in

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[57] 473 U.S. 614, 619-21 (1985).

[58] *Id.* at 637 n.19.

[59] 515 U.S. 528, 540-41 (1995).

which the arbitrators actually failed to address causes of action under American statutes.[60]

The present case is at the award-enforcement stage, unlike *Mitsubishi* and *Vimar*, and the district court applied the prospective-waiver doctrine. The district court noted that the antitrust laws in *Mitsubishi* and COGSA in *Vimar* applied to "business disputes between sophisticated parties." Because seamen are afforded special protections under United States law, unlike sophisticated parties, the district court concluded that the prospective-waiver doctrine prevented the enforcement of the Philippine arbitral award.

However, the prospective-waiver doctrine is limited to statutory rights and remedies. From *Mitsubishi* onwards, the Supreme Court has referred only to "statutory" rights and remedies when discussing the doctrine.[61] The Court recently continued that phrasing in *American Express Co. v. Italian Colors Restaurant*, where the Court refused to apply the doctrine to a waiver of class arbitration.[62] The

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[60] *See Mitsubishi*, 473 U.S. at 637 n.19; *Vimar*, 515 U.S. at 540.

[61] *See Mitsubishi*, 473 U.S. at 637 ("so long as the prospective litigant effectively may vindicate its statutory cause of action in the arbitral forum"); *id.* at 637 n.19 ("take cognizance of the statutory cause of action"); *id.* ("right to pursue statutory remedies"); *see also Vimar*, 515 U.S. at 540 ("right to pursue statutory remedies" (quoting *Mitsubishi*, 473 U.S. at 637 n.19)).

[62] *See* 133 S. Ct. at 2310 (2013) ("agreement forbidding the assertion of certain statutory rights"); *id.* at 2311 ("it is not

(Continued on following page)

Supreme Court has not extended the prospective-waiver doctrine beyond statutory rights and remedies. The district court therefore erred when it relied on the doctrine to afford Asignacion an opportunity to pursue his claims under the general maritime law. Additionally, to apply that doctrine in every case in which a seaman agreed to a choice-of-law provision that would result in lesser remedies than those available under laws of the United States would be at odds with the rationale of the Supreme Court's reasoning in *Romero v. International Terminal Operating Co.,*[63] discussed above.

* * *

For the foregoing reasons, we REVERSE the order of the district court and REMAND for the district court to enforce the arbitral award.

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worth the expense involved in *proving* a statutory remedy"); *id.* ("[i]t no more eliminates those parties' right to pursue their statutory remedy"); *see also id.* at 2319 (KAGAN, J., dissenting) (arguing that the doctrine should apply but noting that the doctrine "asks about the world today, not the world as it might have looked when Congress passed a given statute").

[63] 358 U.S. 354, 384 (1959).

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF LOUISIANA

LITO MARTINEZ ASIGNACION	CIVIL ACTION
VERSUS	No. 13-0607 c/w 13-2409
RICKMERS GENOA SCHIFFAHRTS	SECTION: "A" (4)

ORDER AND REASONS

Before the Court is a *Motion to Recognize and Enforce Arbitral Award* (Rec. Doc. 29) filed by Defendant Rickmers Genoa Schiffahrtsgesellschaft mbH & Cie KG. Plaintiff Lito Martinez Asignacion opposes the motion. The motion, set for hearing on October 23, 2013, is before the Court on the briefs without oral argument.

I. BACKGROUND

Plaintiff, a citizen of the Republic of the Philippines, was employed by Defendant, a German corporation, to work as a fitter in the engine room of the M/V RICKMERS DALIAN, a vessel owned by Defendant and flagged in the Republic of the Marshall Islands. Plaintiff and Defendant entered into a written employment contract that was executed by the Philippine government through the Philippine Overseas Employment Administration ("POEA").[1] The employment contract incorporates the Philippine

[1] Rec. Doc. 29-3.

government's Standard Terms and Conditions Governing Employment of Filipino Seafarers On Board Ocean-Going Vessels ("Standard Terms"). The Standard Terms require that all employment claims must be resolved through arbitration in the Philippines. Specifically, Section 29 of the Standard Terms states that:

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

Disputes submitted to the NLRC are resolved by arbitration.[2] As a result, all employment disputes subject to the POEA's Standard Terms are resolve by arbitration.[3] In addition, Section 31 of the Standard Terms provides that all claims arising out of a

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[2] *Lim v. Offshore Specialty Fabricators, Inc.,* 404 F.3d 898, 900 (5th Cir. 2005).

[3] *See id.*

seaman's employment shall be governed by Philippine law.

On October 26, 2010, Plaintiff was working aboard the M/V RICKMERS DALIAN, as it was docked in the Port of New Orleans, when a cascade tank in the vessel's engine room overflowed and splashed scalding water on Plaintiff who was standing nearby. Plaintiff was immediately rushed by ambulance to West Jefferson Medical Center in Marrero, Louisiana. After receiving emergency medical attention and evaluation, Plaintiff was transferred to the burn unit of Baton Rouge General Medical Center in Baton Rouge, Louisiana, where he stayed and received treatment for nearly a month. Plaintiff was then repatriated to the Philippines, where he continued to receive medical attention.

As a result of the accident aboard Defendant's vessel, Plaintiff sustained severe burns to 35% of his body, including his abdomen, upper and lower extremities, and genitalia. On May 7, 2012, Plaintiff underwent plastic surgery in the Philippines, where a significant amount of scar tissue was removed from Plaintiff's lower abdomen.[4] Plaintiff's burns resulted in an insufficiency of skin in various areas of his body, affecting his body heat control mechanism. Furthermore, Plaintiff experienced the formation of multiple skin ulcerations and sexual dysfunction.

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[4] Rec. Doc. 30-2 at 2 (picture from surgery).

Plaintiff filed suit in state court on November 12, 2010, against Defendant to recover for his injuries pursuant to the Jones Act and the general maritime law of the United States. Defendant filed exceptions to enforce the arbitration clause in Plaintiff's employment contract. On May 16, 2012, the state court granted Defendant's exceptions, stayed litigation of Plaintiff's claims, and ordered arbitration to take place in the Philippines, pursuant to the arbitration clause in Plaintiff's employment contract.

Arbitration commenced before the Department of Labor and Employment, National Conciliation of Mediation Board in Manila. On February 15, 2013, the Philippine arbitral panel issued a decision finding that United States law would not be applied, that Philippine law controlled and accordingly, that Plaintiff was entitled only to scheduled benefits based on his level of disability resulting in an award of $1,870.00.[5]

On March 4, 2013, Plaintiff filed a motion in state court requesting that the court order Defendant to show cause as to why the stay of litigation should not be lifted and why the decision of the Philippine arbitrators should not be set aside as being against public policy of the United States. On April 3, 2013, Defendant removed the action to this Court. In addition, Defendant filed Civil Action 13-2409 seeking to have the Court enforce the award. The Court consolidated Civil Actions 13-0607 and 13-2409.

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[5] Rec. Doc. 30-4 at 2-11.

In the instant motion, Defendant moves for the Court to recognize and enforce the award. Plaintiff opposes Defendant's motion, arguing that enforcement of the award would violate the public policy of the United States. For the reasons that follow, Defendant's motion is **DENIED**.

II. APPLICABLE LAW

The United States and the Philippines are both signatory States of the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards ("the Convention").[6] "Among the Convention's provisions are jurisdictional grants giving the federal district courts original and removal jurisdiction over cases related to arbitration agreements falling under the Convention."[7] This Court has previously established that the international arbitration agreement between the parties in this case falls under the Convention.[8] Thus, the Convention governs this Court's consideration of the award.

The Convention provides a carefully structured framework for the review and enforcement of international arbitral awards.[9] When an award is rendered

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[6] 9 U.S.C. § 201, *et seq*.

[7] *Acosta v. Master Maintenance and Const. Inc.,* 452 F.3d 373, 375 (5th Cir. 2006).

[8] Rec. Doc. 23.

[9] *Karaha Bodas Co., L.L.C. v. Perusahaan Pertambangan Minyak Dan Gas Bumi Negara,* 364 F.3d 274, 287 (5th Cir. 2004).

in a signatory country, courts in that country have primary jurisdiction over the award, giving them the exclusive authority to annul the award.[10] Courts in other signatory countries have secondary jurisdiction over the award, which limits them to consider only whether to enforce the award in their country.[11] Since the award was rendered in the Philippines, this Court has secondary jurisdiction over the award and the authority to consider only whether to enforce the award in the United States.

Article V of the Convention enumerates the seven exclusive grounds on which a court with secondary jurisdiction may refuse enforcement of an international arbitral award.[12] Under the Convention, if the court having secondary jurisdiction does not find any of the Article V grounds to be applicable, it must enforce the award.[13]

The party defending against enforcement of the arbitral award bears the burden of proof that one of these defenses applies.[14] "Absent extraordinary circumstances, a confirming court is not to reconsider an

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[10] *Id.*

[11] *Id.*

[12] *Id.* (*citing* 9 U.S.C. § 201, Art. V(1)-(2)).

[13] "The court shall confirm the award unless it finds one of the grounds for refusal or deferral of recognition or enforcement of the award specified in the said Convention." 9 U.S.C. § 207.

[14] *Karaha Bodas Co., L.L.C.,* 364 F.3d at 288.

arbitrator's findings."[15] Furthermore, courts "may not refuse to enforce an arbitral award solely on the ground that the arbitrator[s] may have made a mistake of law or fact."[16]

The only Article V ground for refusal that Plaintiff invokes is the public policy defense found in Art. V(2)(b). The public policy defense provides that recognition and enforcement of an arbitral award may be refused if the competent authority in the country where recognition and enforcement is sought finds that "[t]he recognition or enforcement of the award would be contrary to the public policy of that country." The public policy defense is to be construed narrowly and applied only where enforcement of an award would violate the forum state's most basic notions of morality and justice.[17]

III. ANALYSIS

Defendant has filed the instant *Motion to Recognize and Enforce Arbitral Award* (Rec. Doc. 29) to have the Court recognize the award rendered in the Philippines. Defendant argues that there exist no grounds for the Court to refuse enforcement of the

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[15] *Id. (quoting Europcar Italia, S.p.A. v. Maiellano Tours, Inc .,* 156 F.3d 310, 315 (2d Cir. 1998)).

[16] *Id.*

[17] *Id.* at 306 (*citing M & C Corp. v. Erwin Behr GmbH & Co., KG,* 87 F.3d 844, 851 n.2 (6th Cir. 1996)).

award and that the Court must enforce the award pursuant to the Convention.

In opposition, Plaintiff argues that enforcement of the foreign arbitral award would violate the public policy of the United States due to the arbitral panel's refusal to apply United States law, depriving him of his rights under United States general maritime law, as well as his statutory rights under the Jones Act. For this reason, Plaintiff argues that the Court should refuse to enforce the award pursuant to Article V(2)(b) of the Convention.

Plaintiff argues that enforcement of the award violates public policy under the Supreme Court cases of *Mitsubishi*[18] and *Vimar*.[19] In these cases, the Supreme Court contemplates condemning arbitration awards as being in violation of public policy when the choice-of-forum and choice-of-law clauses operate in tandem as a prospective waiver of a party's right to pursue certain remedies they are entitled to under law. This has been referred to as the "prospective waiver" defense. Plaintiff argues that by providing for the arbitration proceedings to take place in the Philippines and to apply Philippine law, the arbitration agreement prospectively waived his right to

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[18] *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.,* 473 U.S. 614, 629 (1985).

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

pursue the rights he was entitled to under United States law.

In *Mitsubishi,* the Supreme Court expressed the importance of enforcing forum selection clauses under the Convention, finding that:

> [C]oncerns of international comity, respect for the capacities of foreign and transnational tribunals, and sensitivity to the need of the international commercial system for predictability in the resolution of disputes require that we enforce the parties' agreement, even assuming that a contrary result would be forthcoming in a domestic context.[20]

The Supreme Court in *Mitsubishi* concluded that an agreement to arbitrate claims in Japan arising under the Sherman Act was enforceable because United States law would be applied and the federal policy favoring arbitration supported arbitration.[21] Although it was clear that American law would be applied, the Court made the following observation: "We merely note that in the event the choice-of-forum and choice-of-law clauses operated in tandem as a prospective waiver of a party's right to pursue statutory remedies for antitrust violations, we would have little hesitation in condemning the agreement as against public policy."[22]

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[20] *Mitsubishi Motors Corp.,* 473 U.S. at 629.

[21] *Id.* at 637.

[22] *Id.* at 637 n.19.

Following the *Mitsubishi* decision, the Supreme Court also upheld a foreign arbitration clause in *Vimar*.[23] In *Vimar,* the plaintiff argued that a foreign arbitration clause in a bill of lading, which provided for arbitration in Japan, was unenforceable because there was no guarantee that the foreign arbitrators would apply the Carriage of Goods by Sea Act ("COGSA").[24]

The Supreme Court in *Vimar* found the plaintiff's argument to be premature given that the plaintiff failed to establish that the foreign arbitrators would not apply COGSA and that there would be no subsequent opportunity for review.[25] As a result, the Court enforced the arbitration agreement. Nevertheless, the Court quoted *Mitsubishi,* stating that "[w]ere there no subsequent opportunity for review and were we persuaded that 'the choice-of-forum and a choice-of-law clauses operated in tandem as a prospective waiver of a party's right to pursue statutory remedies . . . we would have little hesitation in condemning the agreement as against public policy.' "[26]

Mitsubishi and *Vimar* gave rise to the "prospective waiver" defense. They also have lead to much

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[23] *Vimar Seguros y Reaseguros, S.A. v. M/V Sky Reefer,* 515 U.S. 528, 540 (1995).

[24] *Id.* at 539.

[25] *Id.* at 540.

[26] *Id.* (*quoting Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.,* 473 U.S. 614, 637 n.19 (1985)).

confusion about when this defense is to be applied. To help understand this timing issue, it is useful to recognize the two-stage process for a federal district court dealing with actions falling under the Convention.

The first stage is the "arbitration-enforcement" stage. This is when the court must determine whether or not to compel arbitration pursuant to an arbitration agreement between the parties. In this case, this stage was complete when the parties were ordered to conduct arbitration proceedings in the Philippines.

The second stage is known as the "award-enforcement" stage. This is when the court must determine whether or not to confirm an award that has been rendered by an arbitral tribunal. This is the stage at which proceedings in this matter currently stand.

Mitsubishi and Vimar provide that when there will be subsequent opportunity for review of the foreign award, a court should enforce the arbitration agreement at the agreement-enforcement stage, despite the appearance that arbitration under the terms of the agreement will likely result in a deprivation of rights. This is because at the agreement-enforcement stage "it is not established what law the arbitrators will apply to petitioner's claims or that petitioner will receive diminished protection as a result." Even though the arbitration agreement may provide that a certain country's law will be applied, the Supreme Court contends that it is proper "to reserve judgment

on the choice-of-law question," since this "must be decided in the first instance by the arbitrator."[27]

The liberal enforcement of arbitration agreements at the agreement-enforcement stage is justified by the district court's retention of jurisdiction over the case.[28] Since the district court retains jurisdiction, it "will have the opportunity at the award-enforcement stage to ensure that the legitimate interest in the enforcement of the . . . laws has been addressed."[29] Thus, it is at the award-enforcement stage of proceedings, where this case currently stands, where the court is to apply the prospective waiver defense to ensure that the award has addressed the plaintiff's legitimate interest in the enforcement of the laws. The Court will now conduct that review.

As an initial step of the Court's review of the award, the Court must address the choice-of-law issue. As previously stated, the Supreme Court leaves this question to be decided "in the first instance by the arbitrator."[30]

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[27] *Id.* at 541 (*citing Mitsubishi Motors Corp.,* 473 U.S. at 637 n.19).

[28] *Id.* at 540 (*quoting Mitsubishi Motors Corp.,* 473 U.S. at 637 n.19).

[29] *Id.* (*quoting Mitsubishi Motors Corp.,* 473 U.S. at 638).

[30] *Id.* at 541 (*citing Mitsubishi Motors Corp.,* 473 U.S. at 637 n.19).

The arbitral panel in the parties' proceedings applied the law of the Philippines. The standard POEA terms incorporated in Plaintiff's employment contract provide for the application of Philippine law to any dispute arising from the employment. Despite Plaintiff's argument for the application of United States law at the arbitral proceedings, the panel ruled that the contract precluded it from "considering the application of any law other than Philippine law."[31] Further, the panel stated that it could not "find any case in which foreign law was applied to the case of a Filipino seaman who executed a POEA employment contract incorporating the Standard Terms and Conditions."[32]

In contractual matters such as this, the Supreme Court has indicated a tendency to apply the law which the parties intended under the terms of the contract.[33] However, the Supreme Court has expressed doubt for adhering to this logic when a contract attempts "to avoid applicable law, for example, so as to apply foreign law to an American ship."[34] Similarly here, the parties' contract attempted to apply Philippine law to a Marshall Islands ship. Furthermore, the Fifth Circuit has found that in light of "the disparity in bargaining power between the

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[31] Rec. Doc. 30-4 at 8.

[32] Rec. Doc. 30-4 at 9.

[33] *Lauritzen v. Larsen,* 345 U.S. 571, 588-89 (1953).

[34] *Id.* at 589.

seaman and his employer, American courts have generally accorded little determinative weight to such contractual choice of law provisions."[35] As such, the Court proceeds to conduct its own choice-of-law inquiry.

The choice-of-law inquiry in a maritime injury case[36] requires application of the *Lauritzen-Rhoditis* test which considers the following factors: (1) the location of the injury; (2) the law of the flag; (3) the domicile of the injured party; (4) the allegiance of the shipowner; (5) the place of the contract; (6) the inaccessibility of a foreign forum; (7) the law of the forum; and (8) the base of operations of the shipowner.[37]

The *Lauritzen-Rhoditis* test is not a mechanical one in which the court simply counts the relevant contacts; instead, the significance of each factor must be considered within the particular context of the

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[35] *Fisher v. Agios Nicolaos V.,* 628 F.2d 308, 316 n.13 (5th Cir. 1980).

[36] "Maritime choice-of-law rules are identical in Jones Act and General Maritime Law cases." *Chirag v. MT Marida Marguerite Schiffahrts,* 2013 WL 6052078, 7 n.7 (D. Conn. 2013) (*citing Espana v. Am. Bureau of Shipping, Inc.,* 691 F.3d 461, 467 (2d Cir. 2012)).

[37] *Coats v. Penrod Drilling Corp.,* 5 F.3d 877, 886 (5th Cir. 1993) (*citing Hellenic Lines, Ltd. v. Rhoditis,* 398 U.S. 306, 308-09 (1970); *Lauritzen,* 345 U.S. at 583-91).

claim and the national interest that might be served by the application of United States law.[38]

In this case, the applicable[39] factors of the *Lauritzen-Rhoditis* test play out as follows: (1) Plaintiff's injury occurred while the vessel was located in the United States; (2) the vessel flew the flag of the Marshall Islands; (3) Plaintiff is a resident and citizen of the Philippines; (4) the vessel was owned by Defendant, a German corporation; (5) the contract between the parties was executed in the Philippines; (7) the law of the forum is United States maritime law;[40] (8) Defendant's base of operations is in Germany, its principal place of business.[41]

While the first and seventh factors tend to support application of United States law, these factors have been said to carry minimal weight in the maritime context.[42] The third and fifth factors tend to support application of Philippine law; however, the fifth factor (place of contract) is said to be of "little

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[38] *Id.* at 886-87 (*citing Fogleman v. ARAMCO (Arabian Am. Oil Co.*), 920 F.2d 278, 282 (5th Cir. 1991)).

[39] The Court finds that the sixth factor is inapplicable, as the Fifth Circuit has found it only relevant when analyzing forum non conveniens. *Coats,* 61 F.3d at 1120 (*citing Lauritzen,* 345 U.S. at 589-90).

[40] *See Fogleman,* 920 F.2d at 283.

[41] Plaintiff asserts that Defendant's base of operations is in the United States (Rec. Doc. 30 at 15), but provides no support for this contention.

[42] *Fogleman,* 920 F.2d at 282-83.

import due to its 'fortuitous' occurrence for the traditional seaman."[43] And the fourth and eighth factors tend to support application of German law.

With regard to the second factor, Defendant's vessel flew the flag of the Marshall Islands. The Republic of the Marshall Islands is an island nation in the Pacific Ocean. The Marshall Islands obtained independence in 1986 after almost four decades as a United Nations territory under United States administration.[44] The Marshall Islands Maritime Act, enacted in 1990, states the following: "Insofar as it does not conflict with any other provisions of this Title or any other law of the Republic, the non-statutory general maritime law of the United States of America is hereby declared to be and is hereby adopted as the general maritime law of the Republic."[45]

"The law of the flag is given *great* weight in determining the law to be applied in maritime cases."[46] The Supreme Court has held that "the law of the flag is 'the most venerable and universal rule of maritime law,' which 'overbears most other connecting events in

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[43] *Id.* at 283 (*citing Lauritzen,* 345 U.S. at 589).

[44] *United States v. Jho,* 534 F.3d 398, 408 n.9 (5th Cir. 2008) (*citing* CIA World Factbook, Marshall Islands, https://www.cia.gov/library/publications/the-world-factbook/geos/rm.html (last updated January 28, 2014)).

[45] Marshall Islands Maritime Act (MI-107) Part 1, Section 113.

[46] *Schexnider v. McDermott Int'l, Inc.,* 817 F.2d 1159, 1162 (5th Cir. 1987).

determining applicable law . . . unless some heavy counterweight appears.'"[47] The Supreme Court has stated that the law of the flag alone can be sufficient for determining applicable law.[48]

The Court having applied the *Lauritzen-Rhoditis* test and determined that the other factors fail to point clearly to another jurisdiction's law, the Court finds that the law of the vessel's flag should be applied. The Marshall Islands have the greatest interest in this dispute, as the injury occurred on a vessel registered under Marshall Islands law. Plaintiff's claims should be governed by the general maritime law of the United States, as adopted by the Marshall Islands.

The general maritime law of the United States is common law developed by federal courts exercising the maritime authority conferred on them by the Admiralty Clause of the Constitution.[49] General maritime law affords plaintiffs certain causes of action that may entitle them to monetary damages for pain and suffering, medical expenses, lost wages, and the like.

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[47] *Id.* (*quoting Lauritzen,* 345 U.S. at 584.

[48] *Hellenic Lines Ltd. v. Rhoditis,* 398 U.S. 306, 308 (1970) (*citing Lauritzen,* 345 U.S. at 585).

[49] *McBride v. Estis Well Serv., L.L.C.,* 731 F.3d 505, 507-08 (5th Cir. 2013) (*citing Romero v. Int'l Terminal Operating Co.,* 358 U.S. 354, 360-61 (1959)).

When a seaman is injured while in the service of a ship, his employer and the ship's owner owe the injured seaman compensation for room and board (maintenance) and medical care (cure), without regard to fault.[50] If these remedies are not provided, then the injured seaman has a "maintenance and cure" cause of action against his employer or the vessel owner.[51]

When a seaman sustains injury upon a vessel due to the ship's operational unfitness, the seaman has a cause of action for "unseaworthiness."[52] The Fifth Circuit holds that punitive damages are available to a seaman as a remedy for a claim of unseaworthiness upon a showing of willful and wanton misconduct by the shipowner in failing to provide a seaworthy vessel.[53]

General maritime law also affords seamen a cause of action for employer negligence resulting in injury or death.[54] "The analysis of a maritime tort is guided by general principles of negligence law."[55]

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[50] *Id.* at 508.

[51] *Id.*

[52] *Id.*

[53] *Id.* at 518 (*citing Atlantic Sounding Co., Inc. v. Townsend,* 557 U.S. 404 (2009)).

[54] *Id.* at 509 (*citing Norfolk Shipbuilding & Drydock Corp. v. Garris,* 532 U.S. 811, 818-20 (2001)).

[55] *In re Signal Int'l, LLC,* 579 F.3d 478, 491 (5th Cir. 2009) (*citing Consol. Aluminum Corp. v. C.F. Bean Corp.,* 833 F.2d 65, 67 (5th Cir. 1987)).

Having determined that United States general maritime law applies to Plaintiff's claim and having reviewed the remedies that Plaintiff is entitled to under that law, the Court must now review the arbitral proceedings to determine whether the Plaintiff's interests in the enforcement of the law were properly addressed. The Supreme Court has provided some guidance as to the review a court performs at this stage. "While the efficacy of the arbitral process requires that substantive review at the award-enforcement stage remain minimal, it would not require intrusive inquiry to ascertain that the tribunal took cognizance of the . . . claims and actually decided them."[56]

In rendering Plaintiff's award, the arbitral panel refused to consider Plaintiffs' claims for maintenance and cure, negligence, and unseaworthiness under United States general maritime law. Instead, the panel applied Philippine law which required that Plaintiff's compensation be based on the Schedule of Disability Allowances found in Plaintiff's employment contract.[57] In determining the amount of recovery Plaintiff was entitled to under the schedule, the panel

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

[57] The Schedule of Disability Allowances provided for a maximum compensation of $60,000 and a minimum compensation of $1,870. Plaintiff was awarded the minimum compensation of $1,870. (Rec. Doc. 30-5 at 6).

considered Plaintiff's disability level as designated by the physician Defendant had chosen.

In conducting a non-intrusive inquiry into the foreign arbitration, as this Court is permitted to do, it is obvious that the rights Plaintiff was entitled to under the general maritime law of the United States were not available to him in the arbitration. The arbitral panel did not consider, nor did Philippine law require or allow that it consider, any evidence pertaining to Plaintiff's lost wages and medical expenses or the moral and compensatory damages and punitive damages to which he had a right to seek.

It is clear to the Court that the arbitral proceedings and the award of $1,870.00 did not address Plaintiff's legitimate interest in the enforcement of United States general maritime law. The arbitral panel did not take cognizance of these claims and decide them.

Next, the Court must determine whether Plaintiff's prospective waiver and deprivation of his rights under general maritime law constitutes a violation of United States public policy. The Supreme Court in *Mitsubishi* and *Vimar* contemplated a violation of public policy when arbitral awards result from the prospective waiver of one's rights in the context of United States antitrust law and COGSA.[58] This Court

[58] The Carriage of Goods by Sea Act is an international scheme of rules that provides a uniform system of governing carrier and shipper liability. 46 U.S.C. app. § 1300 *et seq*.

must determine whether this reasoning should extend to a seaman's rights under the general maritime law of the United States.

The Fifth Circuit has stated that the twin aims of maritime law include: "achieving uniformity in the exercise of admiralty jurisdiction and providing special solicitude to seamen."[59] The Fifth Circuit has cited Justice Jackson's rationale for treating seamen more favorably than other types of laborers:

> From ancient times admiralty has given to seamen rights which the common law did not give to landsmen, because the conditions of sea service were different from conditions of any other service, even harbor service. . . . While his lot has been ameliorated, even under modern conditions, the seagoing laborer suffers an entirely different discipline and risk than does the harbor worker. His fate is still tied to that of the ship. His freedom is restricted.[60]

The Fifth Circuit has long recognized the special solicitude afforded to seamen and the need to protect them as wards of admiralty.[61] In *Karim v. Finch*

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[59] *McBride v. Estis Well Serv., L.L.C.,* 731 F.3d 505, 510 (5th Cir. 2013) (*citing Miles v. Melrose,* 882 F.2d 976, 987 (5th Cir. 1989)).

[60] *Coats v. Penrod Drilling Corp.,* 61 F.3d 1113, 1136 (5th Cir. 1995) (*quoting Pope & Talbot,* 346 U.S. 406, 423-24 (1953) (Jackson, J., dissenting).

[61] *See Karim v. Finch Shipping Co. Ltd.,* 374 F.3d 302, 310-11 (5th Cir. 2004).

Shipping Co. Ltd., the Fifth Circuit delineated the various protections afforded to seamen and the need to liberally construe statutes in their favor.[62] The Fifth Circuit reasoned that seamen are afforded fervent protections based on the doctrine that seamen are wards of admiralty.[63] The Fifth Circuit quoted Justice Story's oft-cited support for the doctrine, as follows:

> Every court should watch with jealousy an encroachment upon the rights of seamen, because they are unprotected and need counsel; because they are thoughtless and require indulgence; because they are credulous and complying; and are easily overreached. They are emphatically the wards of the admiralty; and though not technically incapable of entering into a valid contract, they are treated in the same manner, as courts of equity are accustomed to treat young heirs, dealing with their expectancies, wards with their guardians, and cestuis que trust with their trustees.[64]

The Court finds that based on the aforementioned precedent, as well as similar notions found in many decades of binding court decisions, the deprivation of the rights and protections that injured seamen

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[62] *Id.* at 311.

[63] *Id.* at 310-11.

[64] *Id.* at 310 (*quoting Harden v. Gordon,* 11 F. Cas. 480, 485 (D. Me. 1823) (Story, J.)).

are afforded under United States general maritime law constitutes a violation of this country's public policy. The Supreme Court has stated that a public policy must be well defined and dominant, and is to be ascertained by reference to the laws and legal precedents rather than from general considerations of supposed public interests.[65] The Court finds these requirements to be satisfied.

The Fifth Circuit has stated that public policy is not offended simply because the body of foreign law upon which the judgment is based is different from the law of the forum or less favorable to plaintiff than the law of the forum would have been.[66] However, in this case, the Philippine law applied by the arbitral panel did not simply provide less favorable remedies than United States general maritime law would have. Instead, the Philippine law provided *no such* remedies. Accordingly, the remedies available under Philippine law were not less favorable, but rather were nonexistent.

In arguing that the award does not violate public policy, Defendant cites cases in which the Supreme Court and Fifth Circuit have denied the application of United States law to foreign seamen by enforcing

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[65] *W.R. Grace & Co. v. Local Union 759, Int'l Union of United Rubber, Cork, Linoleum & Plastic Workers of Am.,* 461 U.S. 757, 766 (1983).

[66] *Society of Lloyd's v. Turner,* 303 F.3d 325, 332-33 (5th Cir. 2002).

contractual provisions requiring resolution of claims in foreign forums under foreign law. Defendant argues that if this Court were to render a decision finding that the arbitral panel's failure to apply United States law were a violation of public policy, such decision would override these previous binding decisions.

A proper characterization of the Court's decision here shows that it does comply with precedent. As an initial matter, the contractual provisions of the parties' contract, which required resolution of all claims in the Philippine forum under Philippine law, *was* enforced when the parties were ordered to participate in foreign arbitration. Upon review of the award from those proceedings, it is not the arbitral panel's failure to apply the law of the United States law that serves as the basis for this Court's finding that enforcement of the award would violate public policy. Rather, the Court finds a violation of public policy in that the panel and the award altogether failed to address the substantive rights afforded to Plaintiff by the United States general maritime law.

Defendant directs the Court to the Fifth Circuit's decision in *Haynsworth*.[67] The parties in *Haynsworth* had entered into a business contract which required controversies to be decided by proceedings held in England, applying English law.[68] In the arbitration-enforcement stage, the plaintiffs argued that the choice-of-forum and choice-of-law clauses in the contract

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[67] *Haynsworth v. The Corp.,* 121 F.3d 956 (5th Cir. 1997).

[68] *Id.* at 959.

operated in combination to extinguish their statutory rights under United States securities laws.[69]

After considering plaintiffs' argument, the Fifth Circuit found no violation of public policy because the "plaintiffs' remedies in England [we]re adequate to protect their interests and the policies behind the statutes at issue."[70] The Fifth Circuit found that in some respects, English law provided even greater protection than the laws of the United States.[71] The Court finds the instant case easily distinguishable from *Haynsworth* in that Philippine law, unlike English law, did not afford Plaintiff adequate protection to pursue the rights to which he was entitled.

The Court reiterates that its finding of a public policy violation lies neither in the arbitral panel's failure to apply United States law nor its decision to apply foreign law. Rather, what forms the basis of the public policy violation is the effective denial of Plaintiff's opportunity to pursue the remedies to which he was entitled as a seaman that resulted from the panel's application of Philippine law. Had the panel applied a set of foreign laws which provided a basis for pursuing similar rights and protections, public policy would have been satisfied. However, such a basis was absent under Philippine law, as evidenced by the proceedings.

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[69] *Id.* at 968.

[70] *Id.* at 970.

[71] *Id.* at 969-70.

Defendant also argues that whatever United States laws the Marshall Islands might "borrow," those laws must still be viewed as being of the Marshall Islands. For this reason, Defendant contends that the arbitral panel's failure to apply Marshall Island law cannot constitute a violation of the public policy of the United States. However, as before, a proper characterization of the Court's finding renders this argument unpersuasive. The Court's public policy finding is based on the following: this country's strong policy of protecting seamen; the substantive rights to which Plaintiff, as a seaman, was entitled under the applicable law (albeit of the Marshall Islands); and the unavailability of those rights in the law applied by the arbitral panel. For these reasons, Defendant's argument is unavailing.

The Court notes that the violations of public policy identified by the Supreme Court in *Mitsubishi* and *Vimar* involved the deprivation of statutory rights in the contexts of antitrust law and COGSA. The Court further notes that antitrust law and COGSA are both typically applied to govern business disputes between sophisticated parties, whereas the general maritime law of the United States protects seamen. Having already established this country's public policy in favor of seamen, the Court sees no reason why the substantive rights provided by United States general maritime law should be categorically precluded from the prospective waiver defense created by the Supreme Court in *Mitsubishi* and *Vimar*.

After considering the foreign arbitral award in this matter, as well as this country's strong public policy in favor of protecting seamen, the Court finds that enforcement of the award would violate this country's most basic notions of morality and justice. As such, the Court refuses to enforce the award on public policy grounds pursuant to Art. V(2)(b) of the Convention.

IV. CONCLUSION

Accordingly;

IT IS ORDERED that the *Motion to Recognize and Enforce Arbitral Award* (Rec. Doc. 29) filed by Defendant Rickmers Genoa Schiffahrtsgesellschaft mbH & Cie KG is hereby **DENIED**.

This 7th day of February 2014.

/s/ Jay C. Zainey
JAY C. ZAINEY
UNITED STATES
DISTRICT JUDGE

Republic of the Philippines
Department of Labor and Employment
Office of the Panel of Voluntary Arbitrators
National Conciliation and Mediation Board
National Capital Region
Ground Floor, DOLE Building, Manila

IN RE: Voluntary Arbitration
Case By and Between:

LITO MARTINEZ ASIGNACION,

Complainant,

-versus-

RICKMERS MARINE AGENCY PHILIPPINES, INC., GLOBAL MANAGEMENT LIMITED, and NAVIS MARITIME SERVICES, INC.,

Respondents.

AC-305-NCMB-NCR-100-07-11-12
MVA Jesus S. Silo – Chairman
MVA Leonardo B. Saulog – Member
MVA Gregorio C. Biares, Jr. – Member

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DECISION

Submitted for decision is the issue contained in the parties' Submission Agreement dated November 21, 2012, which read as follows:

> "FOR THE BURN INJURIES THAT COMPLAINANT SUFFERED DURING HIS EMPLOYMENT WITH RESPONDENTS, WHAT

IS THE EXTENT OF BENEFITS THAT HE CAN RECOVER."

To resolve the issue, counsels of both parties have chosen their respective Panel members, namely: Hon. Gregorio C. Biares Jr. for complainant and Hon. Leonardo B. Saulog for respondents and Hon. Jesus S. Silo as Chairman of the Panel as contained in the Submission Agreement officially conveyed to him by the Hon. Walfredo D. Villazor, Director II, NCMB-NCR DOLE.

Scheduled for initial conference on 14, November 2012, counsels of parties and a Norwegian observer appeared. Parties were given time to consult their principals for possible amicable settlement and for the complainant to be personally present and be interviewed by the Panel. As no settlement was reached in spite of the Panel's encouragements, parties were instead required to submit their pleadings and evidences, the last of which was on 7 January 2013 when respondents submitted their Rejoinder while complainant did not. Thus, the case is deemed submitted for decision.

THE PARTIES

1. Complainant LITO MARTINEZ ASIGNACION, a Filipino, is a seafarer, of legal age, married and with residence address at 4018-C Kalayaan Avenue, Makati City, Philippines.

2. Respondent RICKMERS MARINE AGENCY PHILIPPINES, INC. is a duly registered and licensed manning agency with address at 9th Floor, Chatham House, 116 Rufino corner Valero Streets, Makati City, Philippines.

Respondent manning agency's principal for the vessel MV RICKMERS DALIAN is respondent GLOBAL MANAGEMENT LIMITED.

The principal subsequently changed its local agent and named respondent NAVIS MARITIME SERVICES, INC., (a corporation duly organized and existing under Philippine laws with address at 4th Floor, Naess House, 2215 Leon Guinto Street, Malate, Manila, Philippines) which, pursuant to POEA rules and regulations executed an Affidavit of Assumption of Responsibility dated 14 June 2012.

STATEMENT OF FACTS

As culled from the records and stripped of non-essentials, the uncontroverted facts of the case are summarized as follows:

1. Complainant signed a POEA-approved contract dated 08 February 2010 to serve as SENIOR ENGINE FITTER for nine (9) months on board the vessel MV RICKMERS DALIAN (MARSHALL ISLAND flag) with RICKMERS MARINE AGENCY PHILIPPINES INC. as local manning agent for principal GLOBAL MANAGEMENT LIMITED. He

also signed the Standard Terms and Conditions of the POEA contract.

2. He departed and joined the vessel on 19 February 2012.

3. On his eighth month on board, on 27 October 2010, at 9:40 HRS., while the vessel was in the port of New Orleans, U.S.A. alongside of 7th Street Wharf, and during engine works (pressure test of water tubes), the cascade tank overflowed and hot water splashed over the abdomen and lower extremities of complainant who was standing close to the cascade tank.

4. Complainant was rushed by ambulance to the nearest hospital (West Jefferson Medical Center). After emergency medical attention and evaluation, he was transferred to the Baton Rouge General Medical Center in Louisiana, U.S.A. which had a burn unit and is well known for treatment of burn victims. He was admitted and treated (skin grafting) for 35% burns.

5. After discharge from the Baton Rouge General Medical Center, he was repatriated to the Philippines on 21 November 2010. He was immediately referred and admitted to the St. Luke's Medical Center and was attending to by Dr. Natalio G. Alegre. On 22 November 2010, he was discharged and advised of follow-up examination on 06 December 2010.

6. On 06 December 2010, Dr. Alegre recommended jobst pressure dressing to prevent burn and keloid formation.

7. Complainant was also referred to Dr. Ramon Lao of the Chinese General Hospital and Metropolitan Medical Center who recommended excision of the scar (plastic surgery).

8. After consultations with vessel owners and complainant's counsel in Louisiana, U.S.A., a third opinion from Dr. Benjamin G. Herbosa was obtained. Complainant's counsel expressed preference that the plastic surgery be done by Dr. Herbosa at Makati Medical Center. Dr. Herbosa successfully conducted the plastic surgery on 07 May 2012 and complainant tolerated the procedure very well.

9. Prior to the plastic surgery done by Dr. Herbosa at Makati Medical Center, the company doctor (Dr. Natalio C. Alegre of St. Luke's Medical Center) gave a ***grade 14*** disability assessment on complainant pursuant to Section 20B 2 and 3 of the POEA contract.

ANTECEDENT PROCEEDINGS

1. While still in the U.S.A. (confined at the Baton Rouge General Medical Center in Louisiana) complainant, through counsel, filed a Petition for Damages dated 12th November 2010 with the 25th Judicial District Court, Parish of Plaquemines, State of Louisiana, Suit No. 58275, Division A.

2. On 16 May 2012, Judge Kevin D. Conner of the 25th Judicial District Court issued Judgment, the dispositive portion of which reads:

> "IT IS ORDERED, ADJUDGED, AND DECREED BY THE COURT that the defendant's Exception of No Right of Action, Improper Venue and Arbitration be and are hereby GRANTED."

Complainant then went to the Court of Appeal, Fourth Circuit, State of Louisiana, which on 3 August 2012 denied review, and complainant was ordered to proceed with arbitration in the Philippines.

3. In view of the Orders to proceed with arbitration in the Philippines, complainant thereafter, complainant sought assistance with the NCMB Single Entry Approach – SENA) DOLE, 5th Floor, 860 Arcadia Building, Quezon Avenue, Quezon City, Philippines.

4. After several conferences, the "parties failed to reach an amicable settlement" and "mutually agreed to submit the labor dispute to voluntary arbitration" before the office of the Maritime Voluntary Arbitration with the NCMB – NCR Office.

CONTENTIONS OF THE PARTIES

1. Complainant contends that he is entitled to damages under the laws of the United States of America, where the accident happened and the laws of the vessel's flag, the Marshall Islands, which has

adopted American general maritime law. He claims that he is entitled to past and future loss of wages in the amount of USD $353,006; past and future medical expense, past and future maintenance and cure, moral and compensatory damages totaling USD $12 million, plus an additional USD $10 million in exemplary damages.

2. On the other hand, respondents contend that this case is controlled totally by Philippine law; that under the POEA Standard Terms and Conditions governing the employment of Filipino seafarers on board ocean-going vessels, complainant suffered a ***grade 14*** disability which would entitled him to only 3.74% of USD $50,000 or a total award of USD $1,870.00. Respondents further stated in their Position Paper that:

> "Out of compassion and generosity, respondents increased the offer to U.S. $25,000 or *grade 6* (50% of U.S. $50,000) but Complainant rejected the offer."

OUR RULING

1. This panel cannot consider in this case the application of United States law or the law of Marshall Island where the vessel is registered. Specifically, Section 31 of the POEA employment contract provides:

> "Any unresolved dispute, claim or grievance arising out of or in connection with his Contracts, including the annexes thereof,

> shall be governed by the ***laws of the Republic of the Philippines***, international conventions, treaties and covenants ***where the Philippines is a signatory***."
>
> (Emphasis Supplied)

This Section precludes this panel from considering the application of any law other than Philippine law.

2. Additionally, Section 20(G) provides that payment of scheduled damages covers any liability under the laws of the Philippines or any other country for both contract and tort, to wit:

> "Section 20(G) The seafarer or his successor-in-interest acknowledges that for payment for injury, illness, incapacity, disability or death to a seafarer under this contract shall ***cover all claims arising from or in relation with or in the course of the seafarer's employment, including, but not limited to damages arising from the contract for tort, fault or negligence under the laws of the Philippines of any other country***."
>
> (Emphasis Supplied)

This Section (Section 20(G) of the POEA contract was added in the year 2000 by Memorandum Circular No. 9, Series 2000.

It should be noted that soon after the adoption of this memorandum circular, two lawsuits were brought to restrain the implementation of the provision,

contending that Department of Labor Order No. 4 did not vest the POEA with the authority to issue Memorandum Circular No. 9 and amend the standard terms and conditions of the employment contract, to lessen the rights of seafarers. The Supreme Court issued a Temporary Restraining Order on 11 September 2000 and the POEA then issued Memorandum Circular No. 11, series of 2000, suspending the implementation of Section 20(E) and Section 20(G) of the revised Terms and Conditions. Subsequently, on 17 April 2002, the Philippine Supreme Court dismissed the two suits. The POEA then issued Memorandum Circular No. 2 series of 2000 on 5 June 2002 reinstating the implementation of the provisions of Section 20. In dismissing the two Petitions, the Philippine Supreme Court stated:

> "The Philippines has been a major source of seafarers deployed for work in vessels navigating international waters. To protect our seafarers, the POEA adopted and approved in 1989, revised in 1996, the Standard Terms and Conditions Governing the Employment of Filipino Seafarers on Board Ocean-Going Vessels. (Revised STC for brevity). Meanwhile, as more and more Filipino seamen became aware of their rights, they filed cases for "tortuous [sic] damages" mostly in foreign jurisdictions where the vessels of the principals could be attached, much to the discontent of their foreign employers. Because of the tort claims, our seafarers were perceived as "Filipinos who complain too much." In fact, foreign employers were no longer

> willing to hire Filipino seafarers in large scale unless the Revised STC is amended in order that better terms and conditions in favor of employers' sector are inserted in the revised STC. Thus, the Labor Secretary was constrained to issue the assailed Department Order No. 04, Series of 2000 amending the Revised STC. [G.R. No. 143476, September 10, 2001, *Pedro L. Linsanagan, et al v. Hon Laguesma, et al*, Third Division, Supreme Court].

As such, this application of the Philippine law and the payment of scheduled benefits in the POEA contract in full and final settlement for tort and contract have been specifically sanctioned by the Supreme Court. This panel cannot find any case in which foreign law was applied to the case of a Filipino seaman who executed a POEA employment contract incorporating the Standard Terms and Conditions.

3. As early as in *Ang Tibay v. Court of Industrial Relations*, *69 Phil. 635 (1940)*, the Supreme Court laid down the requisites of procedural due process administrative proceedings, among which are: (1) the right to a hearing, which includes the right to present one's case and submit evidence in support thereof; (2) the tribunal must consider the evidence presented; (3) the decision must have something to support itself; (4) the evidence must be substantial; (5) the decision must be based on the evidence presented at the hearing, or least contained in the record and disclosed to the parties affected. This ruling has been reiterated in many other cases and remains in

many other cases and remains to be the doctrine until the present.

Applying this jurisprudence to the present case, the panel can take into consideration only the evidence before us. Respondents have presented no less than the medical certificate issued by the company physician, Dr. Natalio C. Alegre, of St. Luke's Medical Center, giving a ***grade 14*** disability assessment on complainant pursuant to Section 20 B 2 and 3 of the POEA contract, to which this panel has to give due respect.

As the Supreme Court said in *Panganiban vs. Tara Trading Shipmanagement, et al., G.R. No. 187032, 18 October 2010*:

> "xx It says that, in order to claim disability benefits under the Standard Employment Contract, it is the 'company-designated' physician who must proclaim that the seaman suffered a permanent disability, whether total or partial, due to either injury or illness, during the term of the latter's employment. In *German Marine Agencies, Inc. v. NLRC*, the Court's discussion on the seafarer's claim for disability benefits is enlightening. Thus:
>
> > "[In] order to claim disability benefits under the Standard Employment Contract, it is the "company-designated" physician who must proclaim that the seaman suffered a permanent disability, whether total or partial, due to either injury or

> illness, during the term of the latter's employment. xxx It is a cardinal rule in the interpretation of contracts that if the terms of a contract are clear and leave no doubt upon the intention of the contracting parties, the literal meaning of its stipulation shall control. There is no ambiguity in the wording of the Standard Employment Contract – the only qualification prescribed for the physician entrusted with the task of assessing the seaman's disability is that he be 'company-designated.' When the language of the contract is explicit, as in the case at bar, leaving no doubt as to the intention of the drafters thereof, the courts may not read into it any other intention that would contradict its plain import. [Emphasis supplied]"

Consequently, this panel can only give award pursuant to the evidence on record, i.e., a grade 14 disability benefit which is 3.74% of US$50,000.00 or US$1,870.00.

The fact that respondents have earlier offered to complainant US$25,000.00 or ***grade 6*** (50% of US$50,000.00), out of compensation and generosity, is of no moment considering that complainant has rejected this offer.

WHEREFORE, Premises considered, judgment is hereby rendered finding respondents jointly and solidarily liable to pay complainant his disability benefit based on Grade 14 of the POEA SEC in the amount of US$1,870.00, or its equivalent in Philippine currency at the time of payment.

All other claims are dismissed for lack of basis and merit.

SO ORDERED.

February 15, 2013, Manila Philippines.

/s/ Jesus S. Silo
MVA JESUS S. SILO
Panel Chairperson

/s/ Leonardo B. Saulog
MVA LEONARD B. SAULOG
Panel Member

/s/ Gregorio C. Biares, Jr.
MVA GREGORIO C. BIARES, JR.
Panel Member

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 14-30132

LITO MARTINEZ ASIGNACION,

Plaintiff-Appellee

v.

RICKMERS GENOA
SCHIFFAHRTSGESELLSCHAFT MBH & CIE KG,

Defendant-Appellant

RICKMERS GENOA
SCHIFFAHRTSGESELLSCHAFT MBH & CIE KG,

Plaintiff-Appellant

v.

LITO MARTINEZ ASIGNACION,

Defendant-Appellee

Appeal from the United States District Court for the
Eastern District of Louisiana, New Orleans

ON PETITION FOR REHEARING EN BANC

(Filed June 10, 2015)

(Opinion 04/16/2015, 5 Cir., ___, ___, F.3d ___)

Before STEWART, Chief Judge, and BENAVIDES and OWEN, Circuit Judges.

PER CURIAM:

(✓) Treating the Petition for Rehearing En Banc as a Petition for Panel Rehearing, the Petition for Panel Rehearing is DENIED. No member of the panel nor judge in regular active service of the court having requested that the court be polled on Rehearing En Banc (FED R. APP. P. and 5TH CIR. R. 35), the Petition for Rehearing En Banc is DENIED.

( ) Treating the Petition for Rehearing En Banc as a Petition for Panel Rehearing, the Petition for Panel Rehearing is DENIED. The court having been polled at the request of one of the members of the court and a majority of the judges who are in regular active service and not disqualified not having voted in favor (FED R. APP. P. and 5TH CIR. R. 35), the Petition for Rehearing En Banc is DENIED.

ENTERED FOR THE COURT:

/s/ Priscilla R. Owen
UNITED STATES
CIRCUIT JUDGE

UNITED NATIONS CONFERENCE ON
INTERNATIONAL COMMERCIAL ARBITRATION

CONVENTION
ON THE RECOGNITION AND ENFORCEMENT
OF FOREIGN ARBITRAL AWARDS

[LOGO]

UNITED NATIONS
1958

CONVENTION ON THE RECOGNITION AND ENFORCEMENT OF FOREIGN ARBITRAL AWARDS

Article I

1. This Convention shall apply to the recognition and enforcement of arbitral awards made in the territory of a State other than the State where the recognition and enforcement of such awards are sought, and arising out of differences between persons, whether physical or legal. It shall also apply to arbitral awards not considered as domestic awards in the State where their recognition and enforcement are sought.

2. The term "arbitral awards" shall include not only awards made by arbitrators appointed for each case but also those made by permanent arbitral bodies to which the parties have submitted.

3. When signing, ratifying or acceding to this Convention, or notifying extension under article X hereof, any State may on the basis of reciprocity

declare that it will apply the Convention to the recognition and enforcement of awards made only in the territory of another Contracting State. It may also declare that it will apply the Convention only to differences arising out of legal relationships, whether contractual or not, which are considered as commercial under the national law of the State making such declaration.

Article II

1. Each Contracting State shall recognize an agreement in writing under which the parties undertake to submit to arbitration all or any differences which have arisen or which may arise between them in respect of a defined legal relationship, whether contractual or not, concerning a subject matter capable of settlement by arbitration.

2. The term "agreement in writing" shall include an arbitral clause in a contract or an arbitration agreement, signed by the parties or contained in an exchange of letters or telegrams.

3. The court of a Contracting State, when seized of an action in a matter in respect of which the parties have made an agreement within the meaning of this article, shall, at the request of one of the parties, refer the parties to arbitration, unless it finds that the said agreement is null and void, inoperative or incapable of being performed.

Article III

Each Contracting State shall recognize arbitral awards as binding and enforce them in accordance with the rules of procedure of the territory where the award is relied upon, under the conditions laid down in the following articles. There shall not be imposed substantially more onerous conditions or higher fees or charges on the recognition or enforcement of arbitral awards to which this Convention applies than are imposed on the recognition or enforcement of domestic arbitral awards.

Article IV

1. To obtain the recognition and enforcement mentioned in the preceding article, the party applying for recognition and enforcement shall, at the time of the application, supply:

(*a*) The duly authenticated original award or a duly certified copy thereof;

(*b*) The original agreement referred to in article II or a duly certified copy thereof.

2. If the said award or agreement is not made in an official language of the country in which the award is relied upon, the party applying for recognition and enforcement of the award shall produce a translation of these documents into such language. The translation shall be certified by an official or sworn translator or by a diplomatic or consular agent.

Article V

1. Recognition and enforcement of the award may be refused, at the request of the party against whom it is invoked, only if that party furnishes to the competent authority where the recognition and enforcement is sought, proof that:

(*a*) The parties to the agreement referred to in article II were, under the law applicable to them, under some incapacity, or the said agreement is not valid under the law to which the parties have subjected it or, failing any indication thereon, under the law of the country where the award was made; or

(*b*) The party against whom the award is invoked was not given proper notice of the appointment of the arbitrator or of the arbitration proceedings or was otherwise unable to present his case; or

(*c*) The award deals with a difference not contemplated by or not falling within the terms of the submission to arbitration, or it contains decisions on matters beyond the scope of the submission to arbitration, provided that, if the decisions on matters submitted to arbitration can be separated from those not so submitted, that part of the award which contains decisions on matters submitted to arbitration may he recognized and enforced; or

(*d*) The composition of the arbitral authority or the arbitral procedure was not in accordance with the agreement of the parties, or, failing such agreement,

was not in accordance with the law of the country where the arbitration took place; or

(*e*) The award has not yet become binding on the parties, or has been set aside or suspended by a competent authority of the country in which, or under the law of which, that award was made.

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

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

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

Article VI

If an application for the setting aside or suspension of the award has been made to a competent authority referred to in article V(1)(*e*), the authority before which the award is sought to be relied upon may, if it considers it proper, adjourn the decision on the enforcement of the award and may also, on the application of the party claiming enforcement of the award, order the other party to give suitable security.

Article VII

1. The provisions of the present Convention shall not affect the validity of multilateral or bilateral agreements concerning the recognition and enforcement of arbitral awards entered into by the Contracting States nor deprive any interested party of any right he may have to avail himself of an arbitral award in the manner and to the extent allowed by the law or the treaties of the country where such award is sought to be relied upon.

2. The Geneva Protocol on Arbitration Clauses of 1923 and the Geneva Convention on the Execution of Foreign Arbitral Awards of 1927 shall cease to have effect between Contracting States on their becoming bound and to the extent that they become hound, by this Convention.

Article VIII

1. This Convention shall he open until 31 December 1958 for signature on behalf of any Member of the United Nations and also on behalf of any other State which is or hereafter becomes a member of any specialized agency of the United Nations, or which is or hereafter becomes a party to the Statute of the International Court of Justice, or any other State to which an invitation has been addressed by the General Assembly of the United Nations.

2. This Convention shall be ratified and the instrument, of ratification shall be deposited with be Secretary-General of the United Nations.

Article IX

1. This Convention shall be open for accession to all States referred to in article VIII.

2. Accession shall be effected by the deposit of an instrument of accession with the Secretary-General of the United Nations.

Article X

1. Any State may, at the time of signature, ratification or accession, declare that this Convention shall extend to all or any of the territories for the international relations of which it is responsible. Such a declaration shall take effect when the Convention enters into force for the State concerned.

2. At any time thereafter any such extension shall be made by notification addressed to the Secretary-General of the United Nations and shall take effect as from the ninetieth, day after the day of receipt by the Secretary-General of the United Nations of this notification, or as from the date of entry into force of the Convention for the State concerned, whichever is the later.

3. With respect to those territories to which this Convention is not extended at the time of signature,

ratification or accession, each State concerned shall consider the possibility of taking the necessary steps in order to extend the application of this Convention to such territories, subject, where necessary for constitutional reasons, to the consent of the Governments of such territories.

Article XI

In the case of a federal or non-unitary State, the following provisions shall apply:

(*a*) With respect to those articles of this Convention that come within the legislative jurisdiction of the federal authority, the obligations of the federal Government shall to this extent be the same as those of Contracting States which are not federal States;

(*b*) With respect to those articles of this Convention that come within the legislative jurisdiction of constituent states or provinces which are not, under the constitutional system of the federation, bound to take legislative action, the federal Government shall bring such articles with a favourable recommendation to the notice of the appropriate authorities of constituent states or provinces at the earliest possible moment;

(*c*) A federal State Party to this Convention shall, at the request of any other Contracting State transmitted through the Secretary-General of the United Nations, supply a statement of the law and practice of the federation and its constituent units in

regard to any particular provision of this Convention, showing the extent to which effect has been given to that provision by legislative or other action.

Article XII

1. This Convention shall come into force on the ninetieth day following the date of deposit of the third instrument of ratification or accession.

2. For each State ratifying or acceeding to this Convention after the deposit of the third instrument of ratification or accession, this Convention shall enter into force on the ninetieth day after deposit by such State of its instrument of ratification or accession.

Article XIII

1. Any Contracting State may denounce this Convention by a written notification, to the Secretary-General of the United Nations. Denunciation shall take effect one year after the date of receipt of the notification by the Secretary-General.

2. Any State which has made a declaration or notification under article X may, at any time thereafter, by notification to the Secretary-General of the United Nations, declare that this Convention shall cease to extend to the territory concerned one year after the date of the receipt of the notification by the Secretary-General.

3. This Convention shall continue to be applicable to arbitral awards in respect of which recognition or enforcement proceedings have been instituted before the denunciation takes effect.

Article XIV

A Contracting State shall not be entitled to avail itself of the present Convention against other Contracting States except to the extent that it is itself bound to apply the Convention.

Article XV

The Secretary-General of the United Nations shall notify the States contemplated in article VIII of the following:

(*a*) Signatures, and ratifications in accordance with article VIII;

(*b*) Accessions in accordance with article IX;

(*c*) Declarations and notifications under articles I, X and XI;

(*d*) The date upon which this Convention enters into force in accordance with article XII;

(*e*) Denunciations and notifications in accordance with article XIII.

Article XVI

1. This Convention, of which the Chinese, English, French, Russian and Spanish texts shall be equally authentic, shall be deposited in the archives of the United Nations.

2. The Secretary-General of the United Nations shall transmit a certified copy of this Convention to the States contemplated in article VIII.