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 government's Standard Terms and Conditions Governing Employment of Filipino

[1]Rec. Doc. 29-3.

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 resolved by arbitration.[3] In addition, Section 31 of the Standard Terms provides that all claims arising out of a 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

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

[3] *See id.*

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.

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.

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

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.

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

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

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 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

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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).

[10]*Id.*

[11]*Id.*

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 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

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[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.

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

[16] *Id.*

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 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

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

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 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

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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).

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

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]

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

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[21] *Id.* at 637.

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

[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.

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 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

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

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

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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).

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]

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

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

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

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

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 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

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

[34] *Id.* at 589.

[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)).

(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 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]

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[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).

[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.

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 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

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

[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)).

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 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

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[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).

[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).

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.

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

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[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)).

[50] *Id.* at 508.

[51] *Id.*

[52] *Id.*

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

employer negligence resulting in injury or death.[54] "The analysis of a maritime tort is guided by general principles of negligence law."[55]

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

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[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)).

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

Allowances found in Plaintiff's employment contract.[57] In determining the amount of recovery Plaintiff was entitled to under the schedule, the panel 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

[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).

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 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

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[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.*

[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).

admiralty.[61] In *Karim v. Finch 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 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

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

[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.)).

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 non-existent.

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 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

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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).

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 operated

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

[68] *Id.* at 959.

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,

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[69] *Id.* at 968.

[70] *Id.* at 970.

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

such a basis was absent under Philippine law, as evidenced by the proceedings.

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.

JAY C. ZAINEY
UNITED STATES DISTRICT JUDGE