Admiralty

by Robert S. Glenn, Jr.*
Colin A. McRae**
and Jessica L. McClellan***

I. INTRODUCTION

The Eleventh Circuit Court of Appeals presented practitioners of maritime law with important new admiralty case law in 2004. Although the Eleventh Circuit published only four admiralty opinions in 2004, the United States Supreme Court handed down two decisions in the areas of cargo and longshore law that will have a far-reaching impact on maritime law. The Eleventh Circuit dealt with two passenger cruise line cases and a salvage dispute, both of which serve as the subject of considerable litigation in the Eleventh Circuit. In addition, the Eleventh Circuit Court of Appeals handed down an important decision involving the enforcement of arbitration clauses, which has become an increasingly popular procedure for resolving maritime disputes.

---

* Partner in the firm of Hunter, Maclean, Exley & Dunn, P.C., Savannah, Georgia. Princeton University (A.B., magna cum laude, 1972); University of Georgia (J.D., 1976). Certification as a mediator by Association of Attorney Mediators, Inc. (1993). Member, Savannah and American Bar Associations; State Bar of Georgia; Maritime Law Association of the United States (Board of Directors, 2002-2005); Southeastern Admiralty Law Institute (Chairman, 1986).

** Associate in the firm of Hunter, Maclean, Exley & Dunn, P.C., Savannah, Georgia. Yale University (B.A., 1995); University of Georgia (J.D., cum laude, 1999). Member, Savannah and American Bar Associations; State Bar of Georgia; Maritime Law Association of the United States; Southeastern Admiralty Law Institute.

*** Associate in the firm of Hunter, Maclean, Exley & Dunn, P.C., Savannah, Georgia. University of Georgia (B.A., 2000, Phi Beta Kappa; J.D., cum laude, 2003). Member, Savannah and American Bar Associations; State Bar of Georgia; Maritime Law Association of the United States; Southeastern Admiralty Law Institute.

II. UNITED STATES SUPREME COURT OPINIONS

A. Norfolk Southern Railway Co. v. James N. Kirby, Pty. Ltd.

On November 9, 2004, the United States Supreme Court decided *Norfolk Southern Railway Co. v. James N. Kirby, Pty. Ltd.*,[1] a landmark opinion that will have far-reaching effects on maritime cargo law. In *Kirby* the Court reversed the Eleventh Circuit and held that Himalaya Clauses[2] in both a Non-Vessel Operating Common Carrier's ("NVOCC") bill of lading and a Vessel Operating Common Carrier's ("VOCC") bill of lading extended the bill of lading's package limitation[3] to the participating inland carrier, the Norfolk Southern Railway Co.[4] The Supreme Court's opinion also upheld the enforcement of the package limitation contained in the VOCC's bill of lading, even though no strict privity of contract between Kirby, the cargo interest, and the VOCC existed.[5]

Kirby involved a shipment of cargo from Australia to Athens, Alabama by way of Huntsville, Alabama. Kirby received a bill of lading from a NVOCC, International Cargo Control, for the carriage from Australia to Huntsville. The NVOCC in turn contracted with Hamburg Süd, the VOCC, to perform the ocean carriage. The VOCC issued its bill of lading for the same carriage from Australia to Huntsville.[6]

The cargo was discharged in good condition in Savannah, Georgia and was delivered to the Norfolk Southern Railway to carry the cargo from Savannah to Huntsville, Alabama. The cargo was damaged during the rail carriage.[7]

Kirby sued Norfolk Southern Railway in tort and argued that the railroad could not limit its liability because no contractual relationship existed between the cargo interest and the VOCC carrier, which was necessary to give the railroad the package limitation protection available under the VOCC bill of lading. The railroad maintained that its liability

---

1. 125 S. Ct. 385 (2004).

2. A Himalaya Clause is an exculpatory provision that extends the protections that are available to the ocean carrier under the Carriage of Goods by Sea Act ("COGSA") to other entities (46 App. U.S.C. §§ 1300-15). 2 THOMAS J. SCHOENBAUM, ADMIRALTY AND MARITIME LAW § 10-8, at 40-41 (Practitioners Treatise Series, 2d ed. 1994).

3. The "package limitation" is a provision under COGSA that will, under certain circumstances, limit an ocean carrier's liability for cargo damage to $500 per package or "customary freight unit." 46 U.S.C. § 1304(5) (2000).

4. *Kirby*, 125 S. Ct. at 400.

5. *Id.* at 397.

6. *Id.* at 390.

7. *Id.* at 391.

was limited under the Carriage of Goods by Sea Act ("COGSA") through the Himalaya Clause.[8]

The district court agreed with the railroad, but the Eleventh Circuit reversed, holding there was no privity of contract between the shipper and the railroad as required by state law.[9] The Eleventh Circuit granted Kirby complete recovery against the railroad without applying the COGSA and bill of lading package limitations.[10] The United States Supreme Court reversed on appeal.[11]

The Supreme Court, citing *North Pacific S.S. Co. v. Hall Bros. Marine Railway & Shipbuilding Co.*,[12] first examined whether the contract of inland carriage was an admiralty contract, which "'depends upon . . . the nature and character of the contract,' and whether it had 'reference to maritime service of maritime transactions.'"[13] The Court determined the contract was maritime in nature, and the need for a uniform maritime approach was not affected by the fact that the damage was incurred during the inland portion of the transit.[14] The Court explained that state interests in this matter could be accommodated without defeating the more important federal interest in efficient maritime commerce.[15] The Supreme Court thus held that Himalaya Clauses in both the NVOCC and the VOCC bill of lading were sufficient to extend the respective carrier defenses to the railroad.[16]

In perhaps the most significant aspect of the opinion, the Court in *Kirby* held that privity of contract is not necessary between cargo interests and the VOCC for the VOCC to enjoy the package limitation contained in its own bill of lading.[17] The Court reasoned that the NVOCC, although not an agent of the cargo interests, acted as a limited agent of cargo for the purpose of accepting the liability limit in the contract with the VOCC.[18]

The Court held strict privity of contract was not necessary for three reasons. First, binding the cargo interests to the limits its NVOCC negotiated with the VOCC tracks industry practices.[19] The Court

---

8. *Id.* at 392.
9. *Id.*
10. *Id.*
11. *Id.*
12. 249 U.S. 119 (1919).
13. *Kirby*, 125 S. Ct. at 393 (quoting *Hall Bros.*, 249 U.S. at 125).
14. *Id.* at 395.
15. *Id.* at 396.
16. *Id.* at 398.
17. *Id.* at 397.
18. *Id.* at 399.
19. *Id.*

explained that in intercontinental ocean shipping, carriers may not know whether they are dealing with an intermediary or the cargo owner.[20] Moreover, even if the carriers know that they are dealing with an intermediary, the Court explained they might not know how many other intermediaries came before or what obligations may be outstanding among them.[21] According to the Supreme Court, the "task of information gathering might be very costly or even impossible, given that goods often change hands many times in the course of intermodal transportation."[22]

Second, the Supreme Court concluded that if the VOCC could not depend on its bill of lading limits, it would likely charge higher freight rates to the NVOCCs to protect itself in the event the VOCC was not protected in suits brought by cargo interests.[23] Finally, the Court explained that granting the VOCC the package limitation—and extending the coverage of the VOCC's Himalaya Clause as well as the NVOCC's Himalaya Clause to the railroad—produced an equitable result.[24] That is, the cargo interests retained the option of suing the NVOCC for any loss suffered by cargo because the NVOCC had allowed the VOCC to lower its liability limits below the limit agreed upon between the cargo and the NVOCC.

In its conclusion, the Supreme Court declared that its task was not to structure the international shipping industry but to ensure that "[f]uture parties remain free to adapt their contracts to the rules set forth here, only now with the benefit of greater predictability concerning the rules for which their contracts might compensate."[25] Indeed, the decision in *Kirby* should help unify United States law governing the multimodal carriage of goods.

B. Stewart v. Dutra Construction Co.

The United States Supreme Court granted *certiorari* in the personal injury case of *Stewart v. Dutra Construction Co.*,[26] to clarify what the Longshore and Harbor Workers' Compensation Act ("LHWCA")[27] considers a "vessel."[28] In *Stewart* defendant employed plaintiff aboard

20. *Id.*
21. *Id.*
22. *Id.*
23. *Id.*
24. *Id.* at 399-400.
25. *Id.* at 400.
26. 125 S. Ct. 1118 (2005).
27. 33 U.S.C. § 901 (2000).
28. *Stewart*, 125 S. Ct. at 1121.

its vessels as a marine engineer. Although he spent the majority of his time aboard the SUPER SCOOP, a dredge with a clamshell bucket, Stewart was occasionally required to perform maintenance tasks aboard the SCOW 4, which transported dredged material and dumped it at sea. In July 1993 the SCOW 4's engine was replaced.[29] During the process of loading the new engine, Stewart was "precariously perched above the hatch" when the SUPER SCOOP's crew moved the SCOW 4, causing a jolt that threw Stewart headfirst to a deck below, resulting in serious injuries.[30] Stewart filed suit against his employer for damages under the Jones Act,[31] alleging that he was a seaman injured by Dutra's negligence and also under § 905(b) of the LHWCA,[32] which authorizes covered employees to sue a vessel owner as a third party for an injury caused by the owner's negligence.[33]

At trial Stewart argued his employer was negligent in (1) causing the SCOW 4 to crash suddenly into the SUPER SCOOP; (2) failing to sound a warning blast prior to moving the SCOW 4; and (3) creating an unsafe work environment by removing the protective railing around the hatch.[34] Dutra responded with motions for summary judgment on these counts. With respect to the Jones Act count, the district court concluded that because the SUPER SCOOP was not a "vessel," as defined by the Jones Act, defendant was entitled to summary judgment. Stewart appealed to the First Circuit, which affirmed, concluding the SUPER SCOOP was not "a vessel in navigation" as that term has developed in the jurisprudence of the Jones Act.[35] Following the decision in *Stewart I*, Dutra renewed its motion for summary judgment on Stewart's LHWCA claim. The district court granted the motion, and Stewart again appealed to the First Circuit.[36]

The key issue before the First Circuit was whether defendant's negligence was committed in its capacity as employer (for which it is immune from tort liability under § 905(a) of the LHWCA) or vessel owner (for which it may be held liable pursuant to § 905(b) of the

---

29. Stewart v. Dutra Constr. Co., 343 F.3d 10, 12 (1st Cir. 2003).

30. *Id.* at 13.

31. 46 App. U.S.C. § 688(a) (2000).

32. 33 U.S.C. § 905(b) (2000). This section provides, in pertinent part: "In the event of injury to a person covered under this chapter caused by the negligence of a vessel, then such person, or anyone otherwise entitled to recover damages by reason thereof, may bring an action against such vessel as a third party . . . ." *Id.*

33. *Stewart*, 343 F.3d at 13.

34. *Id.*

35. *Id.* (citing Stewart v. Dutra Constr. Co., 230 F.3d 461, 469 (1st Cir. 2001) (*Stewart I*)).

36. *Id.*

LHWCA).[37] The First Circuit applied the functional dual capacity test and rejected tort liability on the part of defendant employer and vessel owner. Citing *Morehead v. Atkinson-Kiewit*,[38] the First Circuit noted that maritime employees "'were expected as part of their employment duties to lend a hand with supporting maritime chores as well as to pursue their particular construction trade.'"[39] In affirming summary judgment, the First Circuit noted that Dutra had conceded the SUPER SCOOP was a vessel under § 905(b), but decided that Dutra's alleged negligence had been committed in its capacity as an employer and not as the vessel's owner.[40]

On February 23, 2004, the Supreme Court granted certiorari in *Stewart* to clarify the legal standard for determining whether a special purpose watercraft, such as a dredge, is a "vessel" for purposes of the LHWCA.[41] Oral argument was held on November 1, 2004,[42] and the Supreme Court issued a unanimous decision on February 22, 2005, reversing the First Circuit and holding that a dredge is a "vessel" under the LHWCA.[43]

Because the term "vessel" is not defined in the LHWCA, the Supreme Court based its holding in *Stewart* on sections 1 and 3 of the Revised Statutes of 1873,[44] which define "vessel."[45] Section 3 defines "vessel" to include "every description of watercraft or other artificial contrivance used, or capable of being used, as a means of transportation on water."[46] The Court explained that it is "often said that dredges and comparable watercraft qualify as vessels under the Jones Act and LHWCA."[47]

Reviewing the holding from the court of appeals, the Supreme Court noted that the First Circuit relied on its previous decision in *DiGiovanni v. Traylor Bros.*[48] in concluding that the SUPER SCOOP was not a vessel "because its primary purpose [was] not navigation or commerce,

---

37. *Id.* at 14.
38. 97 F.3d 603 (1st Cir. 1996).
39. *Stewart*, 343 F.3d at 14 (quoting Morehead v. Atkinson-Kiewit, 97 F.3d 603).
40. *Id.* at 13.
41. Stewart v. Dutra Constr. Co., 540 U.S. 1177 (2004)
42. Stewart v. Dutra Const. Co., 125 S. Ct. 1118 (2005).
43. *Id.* at 1129.
44. 18 Stat., pt. 1, p. 1 (1873). Section 3 was repealed and recodified in 1947 as part of the Rules of Construction Act, 1 U.S.C. § 3 (2000).
45. *Stewart*, 125 S. Ct. at 1120.
46. 1 U.S.C. § 3.
47. *Stewart*, 125 S. Ct. at 1126.
48. 959 F.2d 1119 (1st Cir. 1992).

and because it was not in actual transit at the time of Stewart's injury."[49] The Supreme Court held that "[n]either prong of the [First Circuit's] test [was] consistent with the text of § 3 or the established meaning of the term 'vessel' under the general maritime law."[50] The Court explained that § 3 only requires "that a watercraft be 'used, or capable of being used, as a means of transportation on water' in order to qualify as a vessel."[51] Similarly, the Supreme Court, relying on its holding in *Chandris, Inc. v. Latsis*,[52] held that "a watercraft need not be in motion to qualify as a vessel under § 3," and the "in navigation" requirement was not meant to be interpreted apart from the rest of the definition of § 3.[53] Accordingly, the Supreme Court held that "[u]nder § 3, a 'vessel' is any watercraft practically capable of maritime transportation, regardless of its primary purpose or state of transit at a particular moment."[54] Because "the SUPER SCOOP was engaged in maritime transportation at the time of Stewart's injury, it was a vessel within the meaning of 1 U.S.C. § 3."[55]

III. ELEVENTH CIRCUIT OPINIONS

A. *Passenger Cruise Lines*

The Eleventh Circuit, in *Doe v. Celebrity Cruises, Inc.*,[56] ruled that a cruise line is strictly liable for crewmember assaults on passengers during the cruise.[57] Plaintiff was a passenger on a cruise ship sailing from New York City to Bermuda. During the cruise, plaintiff reported to the cruise line's medical staff that she had been sexually assaulted by a crewmember and sexually battered by a dinner waiter. Plaintiff filed suit against four defendants alleging negligence, vicarious or strict liability for the crewmember's sexual assault, vicarious or strict liability for the waiter's sexual battery, and vicarious or strict liability for the crewmember and waiter's intentional infliction of emotional distress upon her.[58]

---

49. *Stewart*, 125 S. Ct. at 1127.
50. *Id.* at 1127-28.
51. *Id.* at 1128 (quoting 1 U.S.C. § 3).
52. 515 U.S. 347 (1995).
53. *Stewart*, 125 S. Ct. at 1128.
54. *Id.* at 1129.
55. *Id.*
56. 394 F.3d 891 (11th Cir. 2004).
57. *Id.* at 918.
58. *Id.* at 894.

The case proceeded to trial in which the jury returned a verdict for plaintiff on her sexual battery claim but returned a verdict for defendants on her sexual assault claim. Defendants filed several post-judgment motions, and at the hearing on the motions, the district court raised *sua sponte* the issue of whether any one of the four defendants was both a common carrier and the crewmember's employer.[59] Finding none of defendants met both requirements, the district court granted a Rule 50(b)[60] judgment as a matter of law to all defendants. The court concluded that no defendant could be liable for the crewmember's assault and vacated its judgment in favor of plaintiff.[61]

On appeal, the Eleventh Circuit first examined whether it had admiralty jurisdiction over the case.[62] The court explained that "[a]lthough this case may represent the outer boundaries of admiralty jurisdiction over torts," admiralty jurisdiction extends to the location of the sexual battery under the particular circumstances of the case.[63] After concluding it had admiralty jurisdiction, the Eleventh Circuit reversed the Rule 50(b) entry of judgment for defendants because the district court lacked authority to enter judgment under Rule 50(b) on a new ground not raised by any party before submission of the case to the jury.[64] Finally, the court explained that the cruise line was a common carrier and that a common carrier is strictly liable for the safety of its passengers without regard to who actually employed the individual crew member that committed the assault.[65] Accordingly, the Eleventh Circuit affirmed the jury's verdict for plaintiff and remanded the case to the district court to enter final judgment on the jury's verdict.[66]

In *NOVA Information Systems, Inc. v. Greenwich Insurance Co.*, [67] the Eleventh Circuit was presented with the challenge of determining which party in a cruise line bankruptcy context should bear the financial losses associated with reimbursing would-be passengers who had used their credit cards to pre-pay for cruise tickets.[68] The case arose out of the financial woes experienced by Premier Cruise Lines, which ceased operations in September 2001. Upon learning of the cancellation of Premier's cruise operations, numerous pre-paid passengers sought

59. *Id.* at 896.
60. FED. R. CIV. P. 50(b).
61. *Celebrity Cruises*, 394 F.3d at 896-97.
62. *Id.* at 900-01.
63. *Id.* at 901.
64. *Id.* at 902-03.
65. *Id.* at 909.
66. *Id.* at 918.
67. 365 F.3d 996 (11th Cir. 2004).
68. *Id.* at 1000.

reimbursement for amounts they had paid using their credit cards for tickets on future Premier cruises. The dispute arose when Premier's credit card processing company, plaintiff NOVA Information Systems, Inc. ("NOVA"), sought reimbursement from Premier's surety company, defendant Greenwich Insurance Co. ("Greenwich"), for amounts NOVA had to refund to the pre-paid passengers.[69]

The court in *NOVA* began its analysis by detailing the structure of credit card purchases of cruise tickets, under which NOVA, as the credit card processing company, would seek reimbursement from Premier if a passenger was given a refund by its card-issuing bank.[70] Realizing that it faced a substantial financial risk of loss, NOVA requested that Premier provide adequate assurances that this risk be covered under the surety bond Premier obtained to secure the transactions.[71] After Premier's original surety, Amwest, refused to provide such assurance of coverage for NOVA, Premier then contracted with defendant Greenwich to provide a surety bond that "inure[d] to the benefit of any and all passengers to whom the Principal [Premier] may be held legally liable . . . ."[72] Greenwich then prepared a proposed letter of assurance stating that NOVA would be covered under the bond. In exchange for obtaining such additional financial protection for NOVA, Premier requested that NOVA reduce the fees it charged for its credit processing services. NOVA continued to process Premier's credit card transactions but never agreed to the reduction in fees.[73]

After Premier ceased operations in September 2001, its credit card pre-paid passengers began demanding—and receiving—refunds from their card-issuing banks. After the card-issuing banks received reimbursements from NOVA for the passenger refund amounts, NOVA sought recourse against the Greenwich surety bond. Greenwich denied NOVA's claim for coverage under the Greenwich surety bond, and NOVA accordingly filed suit against Greenwich in the Southern District of Florida. NOVA's suit consisted of two legal theories—breach of contract and contractual subrogation—and four equitable claims—estoppel, equitable subrogation, contribution, and unjust enrichment—all of which

69. *Id.* at 1002.

70. *Id.* at 1000.

71. A surety bond was required by federal law and by the Federal Maritime Commission to "provide evidence that [Premier] could refund any unearned passenger deposits." *Id.* at 1000-01 (citing 46 App. U.S.C. § 817e(a) (repealed 1995); 46 C.F.R. §§ 540.3, 540.22 (2004)).

72. *Nova*, 365 F.3d at 1001.

73. *Id.*

were denied by the district court's grant of summary judgment to defendant.[74]

The court of appeals affirmed the district court's grant of summary judgment in favor of defendant Greenwich on NOVA's legal claims for breach of contract and conventional subrogation.[75] The breach of contract claim failed because NOVA was neither a party to the Premier/Greenwich surety bond contract nor a third-party beneficiary.[76] The Greenwich bond had been issued to protect Premier's passengers, not NOVA. The court of appeals rejected NOVA's somewhat counter-intuitive argument that "credit card companies" should be included in the definition of "passengers" under the Federal Maritime Commission's regulations.[77]

Next, NOVA argued that it should be entitled to subrogation rights against Greenwich because it had received an assignment of claim document from those passengers it had reimbursed.[78] The court of appeals quickly rejected this "misplaced" argument.[79] NOVA had received the assignments only *after* those passengers had been reimbursed.[80] After reimbursement the passengers no longer had a claim to be assigned, and thus, no subrogation rights existed.[81]

NOVA was similarly unsuccessful on its equitable theories of recovery—promissory or equitable estoppel, equitable subrogation, contribution, and unjust enrichment—each of which was considered and rejected in turn by the court of appeals.[82] The court first considered NOVA's estoppel argument—to wit, that it had reasonably relied, to its detriment, on a representation from Greenwich that NOVA would be covered under Premier's surety bond.[83] NOVA's estoppel argument relied on the notion that Greenwich had made an affirmative representation regarding coverage for NOVA, when the negotiations on that point were never concluded due to NOVA's refusal to lower its fees.[84] The court of appeals concluded that any reliance on such *proposed* language

74. *Id.* at 1002.
75. *Id.*
76. *Id.* at 1003-04.
77. *Id. See* 46 C.F.R. § 540.2(a), (g) (2004).
78. *Nova*, 365 F.3d at 1004.
79. *Id.*
80. *Id.*
81. *Id.*
82. *Id.* at 1004-06.
83. *Id.* at 1004-05.
84. *Id.* at 1005.

would be unreasonable, and therefore, NOVA's estoppel claims must fail.[85]

NOVA's next novel argument provided for reimbursement from Greenwich under the theory of "equitable subrogation." One element of an "equitable subrogation" cause of action is that the party seeking subrogation must show that it has paid for the debt of another.[86] NOVA was contractually obligated to reimburse the passengers' refund amounts regardless of whether the passengers ever made a claim against Greenwich's surety bond.[87] NOVA's claim for subrogation failed because NOVA paid its own debt when it reimbursed the passengers, not the debt of another.[88]

The court of appeals also rejected NOVA's claim for equitable contribution, a doctrine whose goal is to "'distribute equally among those who have a common obligation, the burden of performing that obligation.'"[89] The court of appeals noted that, technically, NOVA acted as the credit card processor for Premier's bank, First Union, and therefore, was responsible for making reimbursement payments directly to First Union.[90] Greenwich, on the other hand, was obligated under the surety bond to make reimbursement payments directly to the passengers themselves.[91] The obligations of NOVA and Greenwich were, therefore, not "common," and NOVA could not maintain a claim for equitable contribution from Greenwich.[92]

B. Arbitration

In *Bautista v. Star Cruises*,[93] the Eleventh Circuit considered the effect of the Federal Arbitration Act ("FAA")[94] on a mandatory arbitration clause found in a foreign seaman's employment contract.[95] Plaintiffs in *Bautista* were the representatives of six Filipino crewmembers of the cruise ship NORWAY who were killed when one of the ship's boilers exploded. Plaintiffs' representatives filed suit in Florida's

---

85. *Id.*

86. *Id.* (citing *In re* Munzenreider Corp., 58 B.R. 228, 231 (Bankr. M.D. Fla. 1986)).

87. The separate and distinct nature of NOVA's reimbursement obligation was also the court of appeals basis for denying NOVA's claim for unjust enrichment. *See id.* at 1006.

88. *Id.*

89. *Id.* (quoting Fletcher v. Anderson, 616 So. 2d 1201, 1202 (Fla. Dist. Ct. App. 1993) (per curiam)).

90. *Id.*

91. *Id.*

92. *Id.*

93. 396 F.3d 1289 (11th Cir. 2004).

94. 9 U.S.C. §§ 1-16 (2000).

95. *Bautista*, 396 F.3d at 1293.

state court system against defendant employers, the owners of the NORWAY, for negligence and unseaworthiness under the Jones Act[96] and for failure to provide maintenance, cure, and unearned wages under the general maritime law of the United States. The crewmembers had signed the Philippine Overseas Employment Administration's ("POEA")[97] standard employment contract, which incorporated a provision requiring that all disputes arising from the seaman's employment be arbitrated in the Philippines.[98] Defendants accordingly removed the case to federal district court where they invoked the United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards (the "Convention")[99] and successfully moved the court to compel arbitration in the Philippines pursuant to the mandatory arbitration clause of the POEA contract. Plaintiffs appealed the district court's enforcement of the arbitration provision on two grounds: jurisdiction and the affirmative defenses of the Convention.[100]

Plaintiffs first challenged the district court's jurisdiction to enforce the arbitration clause, arguing that the FAA exempted "seaman employment contracts" from mandatory arbitration provisions. In suits involving a motion to compel arbitration pursuant to the Convention Act, the court conducts a "very limited inquiry"[101] into the jurisdictional prerequisites.[102] The *Bautista* plaintiffs challenged two of the jurisdictional prerequisites, contending that the arbitration provision was not an "agreement in writing," and that it did not arise out of a "commercial legal relationship."[103] The court of appeals rejected plaintiffs' "agreement in writing" challenge by pointing to the deceased crewmembers'

---

96. 46 App. U.S.C. § 688 (2000).

97. The POEA is a division of the Department of Labor and Employment of the Republic of the Philippines. *Bautista*, 396 F.3d at 1293.

98. *Id.*

99. 21 U.S.T. 2517, T.I.A.S. No. 6997 (opened for signature June 10, 1958). The Convention was implemented by Congress via chapter 2 of the Federal Arbitration Act (the "Convention Act"). 9 U.S.C. §§ 202-08 (2000).

100. *Bautista*, 396 F.3d at 1294-95.

101. *Id.* at 1294 (quoting Francisco v. Stolt Achievement Mt, 293 F.3d 270, 273 (5th Cir. 2002)).

102. The four jurisdictional prerequisites for enforcement of an arbitration provision under the Convention are (1) an agreement in writing within the meaning of the Convention; (2) the agreement provides for arbitration in the territory of a signatory of the Convention; (3) the agreement arises out of a legal relationship, whether contractual or not, that is considered commercial; and (4) a party to the agreement is not an American citizen. *Bautista*, 396 F.3d at 1295 n.7 (citing Std. Bent Glass Corp. v. Glassrobots Oy, 333 F.3d 440, 449 (3d Cir. 2003)).

103. *Id.* at 1295.

signed POEA agreements.[104] The court of appeals then rejected plaintiffs' argument that "the Convention [and] the Convention Act impose upon the party seeking arbitration the burden of demonstrating notice . . ." of the arbitration provision.[105]

The court of appeals gave more attention to plaintiffs' commercial legal relationship argument but ultimately ruled in favor of arbitration.[106] Plaintiffs focused on the word "commercial" by noting that the FAA expressly exempts "seaman employment contracts" from its definition of the "commercial" relationships to which the FAA applies.[107] Although it recognized the inapplicability of the FAA to seamen's employment contracts, the court of appeals determined that a conflict existed between the FAA's "narrow and specific" exemptions, and the Convention Act's "broad and generic" application.[108] Unfortunately for plaintiffs, "Congress gave the treaty-implementing statutes [like the Convention Act] primacy in their fields, with FAA provisions applying only where they did not conflict."[109] Due to the conflict on this point between the FAA and the Convention Act, the Eleventh Circuit refused to apply the FAA's "seamen's employment contract" exemption to arbitration agreements covered by the Convention Act.[110]

After rejecting the jurisdictional arguments, the court in *Bautista* turned its attention to plaintiffs' affirmative defenses.[111] The first defense, unconscionability, was based on the allegedly unequal bargaining power of the crewmembers when faced with the "take it or leave it" employment contract.[112] The court of appeals disagreed, noting that the Philippine government protected the interests of its citizens through the involvement of the POEA in the hiring process.[113] Furthermore, the court of appeals rejected the unconscionability argument because plaintiffs failed to provide authority for the existence of this affirmative defense under the Convention.[114]

---

104. *Id.* at 1300-01.

105. *Id.* at 1301.

106. *Id.* at 1300.

107. *Id.* at 1296. The FAA's definition of "commerce" specifically states "nothing herein contained shall apply to contracts of employment of seamen . . . ." 9 U.S.C. § 1 (2000).

108. *Bautista*, 396 F.3d at 1299.

109. *Id.* at 1297 (quoting 9 U.S.C. § 208).

110. In so ruling, the Eleventh Circuit noted that the Fifth Circuit had refused on two occasions to apply the FAA's "seaman employment contract" exemption to arbitration agreements covered by the Convention Act. Freudensprung v. Offshore Tech. Servs., Inc., 379 F.3d 327, 337-38 (5th Cir. 2004); *Francisco*, 293 F.3d at 273.

111. *Bautista*, 396 F.3d at 1301-03.

112. *Id.* at 1302.

113. *Id.* at 1302 n.13.

114. *Id.* at 1302.

Plaintiffs next argued that, under the law of the Philippines, the arbitration provision was incapable of being performed because the dispute at issue did not arise out of the employer-employee relationship. In support of this theory, plaintiffs relied on *Tolosa v. N.L.R.C.*,[115] in which the Philippines Supreme Court held that a deceased seaman's claim was not a "claim arising from his employment," and thus, was not arbitrable.[116] *Tolosa* was distinguishable, however, because it involved a deceased crewmember's claim of gross negligence on the part of his fellow *shipmates*, not his employers. Plaintiffs' claims in the case at bar, on the other hand, were based on defendant employers' alleged breach of their duty to provide a seaworthy vessel, and thus, implicated the employer-employee relationship. The court of appeals, therefore, determined that plaintiffs' claims were arbitrable and affirmed the district court's grant of the motion to compel arbitration in the Philippines.[117]

C. Salvage

In *International Aircraft Recovery, L.L.C. v. Unidentified, Wrecked & Abandoned Aircraft*,[118] the Eleventh Circuit took a second look[119] at the question of what salvage rights, if any, plaintiff had to the wreckage of a World War II-era Navy aircraft.[120] After locating the resting place of a Navy "Devastator" TBD-1 torpedo bomber, plaintiff salvage company filed suit in federal court to enjoin any interference with its salvage efforts and potential salvage awards. The district court initially held that plaintiff could salvage the aircraft, and it retained jurisdiction to determine the amount, if any, of the salvage award.[121] On its first consideration of the case on appeal, the Eleventh Circuit reversed, holding that the United States could prohibit such private efforts at salvaging the aircraft.[122] It remanded the case to determine when plaintiff's salvage efforts had been effectively rejected by the govern-

---

115. G.R. No. 149578 (Phil. 2003), *available at* http://www.supremecourt.gov.ph/jurisprudence/2003/apr2003/149578/htm.

116. *Bautista*, 396 F.3d at 1302-03.

117. *Id.* at 1303.

118. 373 F.3d 1147 (11th Cir. 2004) (per curiam).

119. This salvage case was previously before the Eleventh Circuit in 2000 when the Court held that the United States government, as the original owner of the plane, could prohibit plaintiff's salvage efforts. Int'l Aircraft Recovery, L.L.C. v. Unidentified Wrecked & Abandoned Aircraft, 218 F.3d 1255, 1256 (11th Cir. 2000).

120. *Int'l Aircraft Recovery*, 373 F.3d at 1149-50.

121. *Id.* at 1149.

122. *Id.*

ment.[123] On remand, the district court held that the government had effectively rejected the salvage efforts when the director of the National Museum of Naval Aviation ("NMNA") sent plaintiff a letter asserting the Navy's continued ownership of the wreckage. Therefore, the district court held that plaintiff was not entitled to any salvage rights and potential fees.[124]

In its second appellate decision in this litigation, the Eleventh Circuit affirmed the district court's holding that the NMNA letter had effectively rejected the salvage efforts of the plaintiff.[125] The court of appeals focused its attention on the unequivocal language of the letter, which stated that "[a]ny attempt at salvaging [the aircraft] without the express written permission of the Department of the Navy . . . will result in a recommendation from this office to institute whatever action is appropriate to prevent an unauthorized taking."[126]

The court of appeals concluded that the NMNA letter had provided the salvors with ample notice that the government did not authorize any savage action undertaken by plaintiff. This conclusion was bolstered by the fact that the president of plaintiff salvage company had testified in his deposition that he had realized from the beginning that no agreement with the Navy had been reached and that the whole salvage operation was a "gamble."[127] Based on the determination that the government had rejected any salvage efforts of the company, and that the company understood that no agreement for salvaging had been reached, the Eleventh Circuit affirmed the district court's holding that plaintiff was not entitled to any rights or fees for unauthorized salvage efforts.[128]

IV. CONCLUSION

The admiralty opinions penned by the United States Supreme Court and Eleventh Circuit Court of Appeals were few in number in 2004, which is indicative of the decreasing number of maritime cases that are being filed in the federal court system. Despite the relatively small number of opinions, the courts succeeded in providing guidance on important issues in the traditional areas of cargo, longshore personal injury, and salvage, as well as the emerging areas of passenger cruise line law and alternative dispute resolution.

---

123. *Int'l Aircraft Recovery*, 218 F.3d at 1264.
124. *Int'l Aircraft Recovery*, 373 F.3d at 1150.
125. *Id.* at 1151.
126. *Id.* at 1150.
127. *Id.* at 1149 n.2.
128. *Id.* at 1150-51.

***