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## Arbitration Clauses in Seafarers' Employment Contracts in the Fifth Circuit

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# Arbitration Clauses in Seafarers' Employment Contracts in the Fifth Circuit

*Martin Davies\**

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## INTRODUCTION

It is well-established that arbitration clauses in seafarers' employment contracts are enforceable if the seafarer is not a U.S. citizen. This rule stands even if the foreign seafarer's claims might be governed by the Jones Act<sup>1</sup> or general maritime law about unseaworthiness or maintenance and cure, or if there is some doubt over whether the arbitral tribunal will apply U.S. law to the seafarer's claims.<sup>2</sup> The same is true of arbitration clauses

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1. 46 U.S.C. § 30104 (2012).

2. *Francisco v. Stolt Achievement MT*, 293 F.3d 270 (5th Cir. 2002) (Filipino seaman); *Lim v. Offshore Specialty Fabricators, Inc.*, 404 F.3d 898 (5th Cir. 2005) (Filipino seamen, claim under Fair Labor Standards Act); *Bautista v. Star Cruises*, 396 F.3d 1289 (11th Cir. 2005) (Filipino seamen); *Balen v. Holland Am. Line, Inc.*, 583 F.3d 647 (9th Cir. 2009) (Filipino seaman, Seamen's Wage Act claim); *Razo v. Nordic Empress Shipping Ltd.*, 362 F. App'x 243 (3d Cir.

within American seafarers' employment contracts if the contract calls for "performance abroad,"<sup>3</sup> which has been held to include both "blue-water" (that is, oceangoing) service in foreign ports and foreign waters,<sup>4</sup> as well as any work done traveling to or from a foreign country.<sup>5</sup> Any action brought in a United States court by a seafarer in these circumstances must be stayed pending arbitration<sup>6</sup> by operation of the Convention on the Recognition and Enforcement of Foreign Arbitral Awards (the New York Convention).<sup>7</sup> Seafarers' employment contracts are "considered as commercial"<sup>8</sup> for purposes of the legislation implementing the New York Convention,<sup>9</sup> which mandates a stay of proceedings unless the court finds the arbitration agreement to be "null and void, inoperative or incapable of being performed."<sup>10</sup>

These well-established principles govern only if the New York Convention applies to the arbitration agreement that the defendant seeks to enforce when sued by a seafarer plaintiff. Article II(1) of the New York Convention provides that Contracting States—including the United States—must recognize an "agreement in writing" for arbitration of disputes, and article II(2) provides that: "The term 'agreement in writing'

2009) (Filipino seaman); *Lindo v. NCL (Bahamas) Ltd.*, 652 F.3d 1257 (11th Cir. 2012) (Nicaraguan seaman); *Navarette v. Silversea Cruises*, 620 F. App'x 793 (11th Cir. 2015) (Filipino seaman); *Escobar v. Celebration Cruise Operator, Inc.*, 805 F.3d 1279 (11th Cir. 2015) (Honduran seaman).

3. 9 U.S.C. § 202 (2012).

4. *Freudensprung v. Offshore Tech. Serv. Inc.*, 379 F.3d 327 (5th Cir. 2004) (American seaman working in Nigerian territorial waters); *Johnson v. NCL (Bahamas) Ltd.*, 163 F. Supp. 3d 338 (E.D. La. 2016) (American seaman working on ship visiting various Caribbean ports).

5. *Alberts v. Royal Caribbean Ltd.*, 834 F.3d 1202 (11th Cir. 2016) (American musician injured on cruise ship traveling to foreign ports).

6. Actions brought in federal court are stayed under 9 U.S.C. § 3, which applies to Chapter 2 by operation of 9 U.S.C. § 208, and orders compelling arbitration are made under 9 U.S.C. § 206. Actions brought in state court may be removed to federal court under 9 U.S.C. § 205 and then stayed by the federal court. *See, e.g., Johnson v. NCL (Bahamas) Ltd.*, 163 F. Supp. 3d 338 (E.D. La. 2016).

7. Convention on the Recognition and Enforcement of Foreign Arbitral Awards, *opened for signature* June 10, 1958, 21 U.S.T. 2517, 330 U.N.T.S. 3 [hereinafter "New York Convention"]. The United States ratified the New York Convention on September 30, 1970; the Convention is given the force of law in U.S. courts by 9 U.S.C. § 201, "in accordance with this chapter."

8. 9 U.S.C. § 202.

9. 9 U.S.C. §§ 201–08.

10. New York Convention, *supra* note 7, art. II(3).

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.”

In *Sphere Drake Insurance PLC v. Marine Towing, Inc.*,<sup>11</sup> the United States Court of Appeals for the Fifth Circuit interpreted article II(2) of the New York Convention as follows:

We would outline the Convention definition of ‘agreement in writing’ to include either:

- (1) an arbitral clause in a contract or
- (2) an arbitration agreement,
  - (a) signed by the parties or
  - (b) contained in an exchange of letters or telegrams.

The insurance contract indisputably contains an arbitral clause. Because what is at issue here is an arbitral clause in a contract, the qualifications applicable to arbitration agreements do not apply. A signature is therefore not required . . . The district court properly did not require that the contract containing an arbitral provision be signed to constitute an agreement in writing under the Convention.<sup>12</sup>

This interpretation of article II(2) is at odds with that preferred by the Second, Third, Ninth and Eleventh Circuits.<sup>13</sup> It is also at odds with the grammatical structure of the English language version of article II(2) and the French and Spanish texts of the New York Convention, which are “equally authentic” to the English text.<sup>14</sup> In short, the *Sphere Drake* interpretation of article II(2) seems to be plainly incorrect; nevertheless, it remains good law in the Fifth Circuit. A proper interpretation of article II(2) would hold that the New York Convention does require signature of a contract containing a clause providing for arbitration of disputes that may arise in the future—a *clause compromissoire*—just as much as it requires signature of an arbitration agreement entered into after a dispute has arisen—a *compromis*. This Essay explains why that is so and explores the implications for actions brought by seafarers in the Fifth Circuit, where *Sphere Drake* is still binding. Those implications may be far-reaching for seafarers wishing to bring court proceedings, notwithstanding the presence of an arbitration clause in their employment contracts.

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11. *Sphere Drake Ins. PLC v. Marine Towing*, 16 F.3d 666 (5th Cir. 1994).

12. *Id.* at 669.

13. *Infra* notes 19, 24, 25, 26.

14. New York Convention, *supra* note 7, art. XVI(1).

Part I describes the textual basis for the interpretation preferred by the other circuits. Part II explains the significance of that interpretation in seafarers' personal injury cases by describing the Ninth Circuit's decision in *Yang v. Majestic Blue Fisheries, LLC*.<sup>15</sup> Part III shows that the interpretation adopted in the other Circuits is consistent with previous Supreme Court and Fifth Circuit authority about binding non-signatories to arbitration agreements, despite first appearances. Part IV considers whether a district court in the Fifth Circuit could adopt the interpretation used in the other Circuits while nevertheless remaining true to the authority of *Sphere Drake*. Part V illustrates why it is important to determine whether that possibility remains open by considering cases involving borrowed servants, crewing agencies, and guest workers.

### I. A OR (B IF C)? OR (A IF C) OR (B IF C)?

Article II(2) of the New York Convention takes the form "A or B, if C," where A is "an arbitral clause in a contract," B is "an arbitration agreement," and C is "signed by the parties or contained in an exchange of letters or telegrams." So far as the grammatical structure of article II(2) is concerned, the question is whether C qualifies both A and B, or whether it qualifies only B. The rule of statutory construction known as the Doctrine of the Last Antecedent states that a qualifying word or phrase qualifies only the term that appears immediately before it<sup>16</sup> *unless* the qualifying word or phrase is separated from the preceding terms by a comma, in which case it qualifies all that appears before the comma.<sup>17</sup> In other words, the Doctrine of the Last Antecedent says that "A or B if C"

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15. 876 F.3d 996 (9th Cir. 2017).

16. See, e.g., *Quindlen v. Prudential Ins. Co. of Am.*, 482 F.2d 876, 878 (5th Cir. 1973); *United States v. Campbell*, 49 F.3d 1079, 1086 (5th Cir. 1995); *United States v. Zacarias*, 260 F.3d 623 (5th Cir. 2001).

17. *Sobranes Recovery Pool I, LLC v. Todd & Hughes Const. Corp.*, 509 F.3d 216, 223 (5th Cir. 2007) ("[W]hen there is a serial list followed by modifying language that is set off from the last item in the list by a comma, this suggests that the modification applies to the whole list and not only the last item."); see also *Stepnowski v. Comm'r of Internal Revenue*, 456 F.3d 320, 324 (3d Cir. 2006) ("[W]here there is a comma before a modifying phrase, that phrase modifies all of the items in a series and not just the immediately preceding item."); *Finisar Corp. v. DirecTV Grp., Inc.*, 523 F.3d 1323, 1336 (Fed. Cir. 2008); *Am. Int'l Grp., Inc. v. Bank of Am. Corp.*, 712 F.3d 775, 781–82 (2d Cir. 2013) ("When there is no comma . . . the subsequent modifier is ordinarily understood to apply only to its last antecedent . . . . When a comma is included . . . the modifier is generally understood to apply to the entire series."); *Davis v. Devanlay Retail Grp., Inc.*, 785 F.3d 359, 364 n.2 (9th Cir. 2015).

means “A or (B if C),” but the comma exception means that “A or B, if C” means “(A if C) or (B if C).”

Thus, the ordinary rules of English grammar suggest that the words “signed by the parties or contained in an exchange of letters or telegrams,” (C) in the language of article II(2) of the New York Convention, apply to both “an arbitral clause in a contract” (A) *and* “an arbitration agreement” (B). That interpretation is supported by reference to the French and Spanish texts of article II(2),<sup>18</sup> which read as follows:

On entend par ‘convention écrite’ une clause compromissoire insérée dans un contrat, ou un compromis, signés par les parties ou contenus dans un échange de lettres ou de télégrammes.

La expresión ‘acuerdo por escrito’ denotará una cláusula compromisoria incluida en un contrato o un compromiso, firmados por las partes o contenidos en un canje de cartas o telegramas.

The adjectives “signés,” “contenus,” “firmados,” and “contenidos” are all in the plural form, indicating that they apply to more than one thing, namely both items appearing in the list before the comma. If the French and Spanish equivalents of “signed by the parties or contained in an exchange of letters or telegrams” (C) were to apply only to “an arbitration agreement” (B)—“un compromis” or “un compromiso”—they would be in the singular form, “*signé* par les parties ou *contenu* dans un échange de lettres ou de télégrammes” and “*firmado* por las partes o *contenido* en un canje de cartas o telegramas,” respectively.

This analysis of the grammatical structure of the English version of article II(2) and of the “equally authentic” French and Spanish texts led the United States Court of Appeals for the Second Circuit to conclude, in *Kahn Lucas Lancaster, Inc. v. Lark International Ltd.*,<sup>19</sup> that the words “signed by the parties or contained in an exchange of letters or telegrams” apply both to “an arbitral clause in a contract”—a *clause compromissoire*—and to “an arbitration agreement”—a *compromis*. Thus, where purchase orders containing arbitration provisions were signed only by the New York-based buyer in *Kahn Lucas* and not also by the Hong Kong-based seller’s agent, the arbitral clauses did not constitute an

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18. The English text is quoted above in the Introduction: “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.”

19. *Kahn Lucas Lancaster, Inc. v. Lark Int’l Ltd.*, 186 F.3d 210, 216 (2d Cir. 1999).

“agreement in writing” for purposes of article II(2) of the New York Convention.<sup>20</sup> As a result, the seller’s agent was not obliged to arbitrate a claim brought by the buyer in court in the United States, notwithstanding the arbitration provisions in the purchase orders.<sup>21</sup>

The Second Circuit’s decision in *Kahn Lucas* that article II(2) should be interpreted as “(A if C) or (B if C)” is directly contrary to the Fifth Circuit’s *Sphere Drake* interpretation that article II(2) should be interpreted to mean “A or (B if C),” that is, that the signature requirement applies only to an agreement in writing—a *compromis* (B)—and not also to an arbitral clause in a contract—a *clause compromissoire* (A).<sup>22</sup> The *Kahn Lucas* court explicitly rejected the *Sphere Drake* interpretation, stating:

[T]he rules governing our construction do not allow us to follow the Fifth Circuit’s interpretation of article II, section 2 as expressed in *Sphere Drake*. Upon review of the Convention’s text, punctuation and subject matter, as well as an examination of the Convention’s legislative history, we hold that the modifying phrase “signed by the parties or contained in an exchange of letters or telegrams” applies to both “an arbitral clause in a contract” and “an arbitration agreement.”<sup>23</sup>

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20. *Id.* at 218–19.

21. The Hong Kong-based seller’s agent moved to dismiss for lack of personal jurisdiction when the New York-based buyer sued in district court in the United States. *Id.* at 213. The district court held that it did not have personal jurisdiction over the seller’s agent, but it would have personal jurisdiction if the buyer sought to compel arbitration of the pending claims. *Id.* The final decision of the United States Court of Appeals for the Second Circuit was that there was no personal jurisdiction over the seller’s agent because it was not bound by the arbitration provisions in the purchase orders, so the buyer could not move to compel arbitration. *Id.* at 219.

22. *Sphere Drake Ins. PLC v. Marine Towing*, 16 F.3d 666 (5th Cir. 1994).

23. *Kahn Lucas*, 186 F.3d at 218.

The Third,<sup>24</sup> Ninth,<sup>25</sup> and Eleventh<sup>26</sup> Circuits have subsequently followed the *Kahn Lucas* interpretation, specifically preferring it to the Fifth Circuit's alternative *Sphere Drake* interpretation.<sup>27</sup>

Thus, both the weight of authority and general principles of statutory and treaty construction strongly suggest the *Sphere Drake* interpretation of article II(2) is incorrect as a matter of principle. One of the more recent of the conflicting circuit court decisions, *Yang v. Majestic Blue Fisheries, LLC*,<sup>28</sup> illustrates the significance of that conclusion for court proceedings brought by injured seafarers who appear to have agreed to arbitrate their claims.

## II. *YANG V. MAJESTIC BLUE FISHERIES, LLC*

Chang Cheol Yang was a seaman employed on a fishing vessel, *Majestic Blue*, which was owned by Majestic Blue Fisheries, LLC (“Majestic Blue”), a U.S. company.<sup>29</sup> Yang’s employment contract with Majestic Blue provided for arbitration of all disputes in the country of the seafarer’s nationality, which in Yang’s case was South Korea.<sup>30</sup> A South Korean company, Dongwon Industries Co. Ltd. (“Dongwon”), had agreed with Majestic Blue that Dongwon would supply the ship’s crew—including Yang—and would remain responsible for maintenance and repairs of the ship.<sup>31</sup> Dongwon had previously owned *Majestic Blue*, but it had recently sold the vessel to Majestic Blue for \$10.<sup>32</sup>

Yang died, rather heroically, when *Majestic Blue* sank in unexplained circumstances in fair weather.<sup>33</sup> Yang’s widow sued Dongwon and

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24. *Standard Bent Glass Corp. v. Glassrobots OY*, 333 F.3d 440 (3d Cir. 2003).

25. *Yang v. Majestic Blue Fisheries, LLC*, 876 F.3d 996 (9th Cir. 2017).

26. *Czarina, LLC v. W.F. Poe Syndicate*, 358 F.3d 1286 (11th Cir. 2004); *Outokumpu Stainless USA, LLC v. Convertteam SAS*, 902 F.3d 1316 (11th Cir. 2018).

27. *Standard Bent Glass*, 333 F.3d at 449 (“We agree with the Court of Appeals for the Second Circuit.”); *Yang*, 876 F.3d at 1000 (“We are persuaded by *Kahn Lucas*’s faithful adherence to the principles of treaty interpretation.”).

28. *Yang*, 876 F.3d 996.

29. *Id.* at 998.

30. *Yang v. Majestic Blue Fisheries, LLC*, No. 13-00015, 2015 WL 5001190, at \*3–4 (D. Guam 2015).

31. *Yang*, 876 F.3d at 998.

32. *Id.*

33. The crew of *Majestic Blue* abandoned ship when the ship began to founder, leaving the master, Captain Hill, alone on the ship trying to execute critical abandon ship procedures on his own. *Id.* Yang returned to the sinking ship in an attempt to save Captain Hill, but both died when the ship sank. *Id.*

Majestic Blue in the United States District Court for the District of Guam, claiming damages for: (1) pre-death pain and suffering in a Jones Act survival action; (2) wrongful death under general maritime law; (3) wrongful death under the Death on the High Seas Act (DOHSA),<sup>34</sup> and (4) wrongful death under the Jones Act.<sup>35</sup> Dongwon and Majestic Blue moved to compel arbitration under the New York Convention, relying on the arbitration clause in Yang's employment contract.<sup>36</sup> The United States District Court for the District of Guam stayed the proceedings that Yang's widow brought against Majestic Blue, following binding Ninth Circuit authority for the proposition stated at the beginning of this Essay, namely that a claim that a foreign seafarer brings against his or her employer in a United States court must be stayed if there is an arbitration provision in the seafarer's employment contract.<sup>37</sup> The district court refused, however, to stay the proceedings against Dongwon, holding that it was not party to the employment contract containing the arbitration agreement; thus, it was not entitled to a stay or an order compelling arbitration of the claims against it.<sup>38</sup>

Dongwon appealed unsuccessfully to the United States Court of Appeals for the Ninth Circuit, which held that Dongwon could not compel arbitration under the New York Convention.<sup>39</sup> Dongwon was not a party to the contract containing the arbitral clause and had not signed that contract, nor was the contract contained in "an exchange of letters or telegrams" between Yang and Dongwon.<sup>40</sup> Thus, Dongwon was not party to "an agreement in writing" for arbitration of claims against it for purposes of the New York Convention.<sup>41</sup> The court preferred the *Kahn Lucas* interpretation of article II(2) to the *Sphere Drake* interpretation, holding that it was not sufficient for purposes of article II(2) that there was a contract containing an arbitral clause—the Yang/Majestic Blue contract—if the party seeking to rely on that clause, namely Dongwon, had not signed that contract.<sup>42</sup> Dongwon was not one of the parties to the signed contract containing the arbitration clause, so it could not rely on it.

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34. 46 U.S.C. §§ 30301–308 (2012).

35. *Yang*, 876 F.3d at 998.

36. *Id.*

37. *Balen v. Holland Am. Line, Inc.*, 583 F.3d 647 (9th Cir. 2009).

38. *Yang v. Majestic Blue Fisheries, LLC*, 13-00015, WL 5001190, at \*3–4 (D. Guam 2015).

39. *Yang*, 876 F.3d 996. Yang's widow did not cross-appeal the district court's decision staying her action against Majestic Blue.

40. *Id.* at 999, 1001.

41. *Id.*

42. *Id.* at 999–1000.

If the facts of *Yang* had led to litigation in the Fifth Circuit, the result might well have been different.<sup>43</sup> According to the *Sphere Drake* interpretation of article II(2) of the New York Convention, it would have been immaterial that Dongwon did not sign the Yang/Majestic Blue employment contract containing the arbitral clause because “the qualifications applicable to arbitration agreements do not apply” to arbitral clauses in contracts, and so “[a] signature is therefore not required.”<sup>44</sup> The question in front of the Fifth Circuit would then have been whether Dongwon was entitled to rely on the Yang/Majestic Blue employment contract as a third-party beneficiary. As Part III of this Essay demonstrates, there is Fifth Circuit authority to the effect that contract and agency principles of state law govern whether an arbitration agreement applies to a non-signatory.<sup>45</sup> This authority repeats the *Sphere Drake* proposition that “an arbitration clause in a contract provides an ‘agreement in writing’ that satisfies the Convention, even when the party that is forced to arbitrate has not signed the contract.”<sup>46</sup> In stark contrast, the Ninth Circuit’s decision in *Yang* stated a bright-line rule that a non-signatory cannot rely on an arbitration clause in a contract to compel arbitration of court proceedings brought against it under the New York Convention.

### III. BINDING NON-SIGNATORIES TO ARBITRATION AGREEMENTS

In *In re Talbott Big Foot, Inc.*<sup>47</sup> and *Zimmerman v. International Companies & Consulting, Inc.*,<sup>48</sup> the United States Court of Appeals for the Fifth Circuit held that an arbitration clause in an insurance contract did not bind an injured worker bringing suit against the insurer under

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43. In *Dahiya v. Talmidge Int’l Ltd.*, 371 F.3d 207 (5th Cir. 2004), the Fifth Circuit employed a *Sphere Drake* analysis to conclude that an injured Indian seafarer should be compelled to arbitrate all claims that he had brought in relation to his injuries, including claims against parties who had not signed the employment contract to which he was party. The majority of the court did not find it necessary to consider the question of the enforceability of the arbitration agreement, disposing of the appeal on the ground that it was subject to the statutory bar in 28 U.S.C. § 1447(d), which precludes appellate review of orders remanding cases to state court for lack of subject matter jurisdiction.

44. *Sphere Drake Ins. PLC v. Marine Towing*, 16 F.3d 666, 669 (5th Cir. 1994).

45. *Todd v. Steamship Mut. Underwriting Ass’n (Bermuda) Ltd.*, 601 F.3d 329 (5th Cir. 2010).

46. *Id.* at 334, n.11.

47. 887 F.2d 611 (5th Cir. 1989).

48. 107 F.3d 344 (5th Cir. 1997).

Louisiana's direct action statute<sup>49</sup> because the worker was not a party to the agreement containing the arbitration clause. In *Todd v. Steamship Mutual Underwriting Ass'n (Bermuda) Ltd.*,<sup>50</sup> the United States Court of Appeals for the Fifth Circuit held that the Supreme Court's decision in *Arthur Andersen L.L.P. v. Carlisle*<sup>51</sup> overruled *Big Foot* and *Zimmerman*. *Carlisle* held that non-signatories to arbitration agreements, such as direct-action plaintiffs, may be compelled to arbitrate if the applicable principles of state contract law so provide.<sup>52</sup>

At first look, cases such as *Kahn Lucas* and *Yang* may appear to be inconsistent with *Carlisle* in their insistence that only the signatories to a written arbitration agreement may enforce the obligation to arbitrate under the New York Convention. That is not so. *Carlisle* was concerned with a stay under the Federal Arbitration Act (FAA), which is Chapter One of Title 9 of the United States Code.<sup>53</sup> The *Carlisle* Court said:

Respondents argue that, as a matter of federal law, claims to arbitration by nonparties are not "referable to arbitration *under* an agreement in writing," 9 U.S.C. § 3 (emphasis added), because they "seek to bind a signatory to an arbitral obligation *beyond* that signatory's strictly contractual obligation to arbitrate" . . . . Perhaps that would be true if § 3 mandated stays only for disputes between parties to a written arbitration agreement. But that is not what the statute says. It says that stays are required if the claims are "referable to arbitration under an agreement in writing." If a written arbitration provision is made enforceable against (or for the benefit of) a third party under state contract law, the statute's terms are fulfilled.<sup>54</sup>

In contrast, article II(3) of the New York Convention *does* only mandate stays for disputes between the parties to a written arbitration agreement. It provides:

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 [that is, an "agreement in writing"] shall, at

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49. Then LA. REV. STAT. § 22:655 (1989), now LA. REV. STAT. ANN. § 22:1269 (2011).

50. *Todd*, 601 F.3d at 329.

51. 556 U.S. 624 (2009).

52. *Id.* at 630–31.

53. 9 U.S.C. §§ 1–16 (2012).

54. *Arthur Andersen*, 556 U.S. at 631.

the request of one of the parties, refer the parties to arbitration . . . .<sup>55</sup>

It is clear from the words of article II(3) that only the parties to the agreement in writing are entitled to request the court to refer their dispute to arbitration. As the *Yang* Court pointed out, each chapter of Title Nine imposes unique requirements on a party seeking to compel arbitration.<sup>56</sup> The requirements under Chapter Two, which deal with the New York Convention, are different from the requirements under Chapter One, which the *Carlisle* Court considered. Indeed, the basic premise of the cases enforcing arbitration clauses in “international” seafarers’ employment contracts<sup>57</sup> is that they are “commercial contracts” falling within Chapter Two, rather than ordinary contracts falling within Chapter One, which specifically provides that it does not apply to seafarers’ employment contracts.<sup>58</sup> To be consistent with that basic premise, courts should look only to the requirements of Chapter Two when considering whether to stay court actions brought by seafarers. The circuit courts of appeals that have followed *Kahn Lucas*<sup>59</sup> have effectively held that the rules governing binding non-signatories to arbitration agreements are different under the New York Convention than those that apply under Chapter One of Title Nine, with the result that no non-signatory may move to compel arbitration. The United States Court of Appeals for the Eleventh Circuit recently reaffirmed that proposition in unequivocal terms in *Outokumpu Stainless U.S.A., LLC v. Converteam SAS*,<sup>60</sup> holding that: “Private parties . . . cannot contract around the Convention’s requirement that the parties *actually sign* an agreement to arbitrate their disputes in order to compel arbitration.”<sup>61</sup>

*Carlisle* held that nothing in the federal law created by Chapter One of Title Nine purported to alter “background principles of state contract law regarding the scope of agreements (including the question of who is bound by them).”<sup>62</sup> In contrast, the New York Convention is the “supreme Law of the Land” in those cases to which it applies by virtue of the

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55. New York Convention, *supra* note 7, art. II(3).

56. *Yang v. Majestic Blue Fisheries, LLC*, 876 F.3d 996, 1002 (9th Cir. 2017).

57. For contracts involving foreign seafarers or American seafarers “perform[ing] abroad,” see *supra* text accompanying notes 2, 4.

58. 9 U.S.C. § 1 provides, in pertinent part: “[N]othing herein contained shall apply to contracts of employment of seamen, railroad employees, or any other class of workers engaged in foreign or interstate commerce.”

59. *Supra* notes 24–26.

60. 902 F.3d 1316 (11th Cir. 2018).

61. *Id.* at 1326.

62. *Arthur Andersen L.L.P. v. Carlisle*, 556 U.S. 624, 630 (2009).

Supremacy Clause of the United States Constitution,<sup>63</sup> which means that it precludes application of state law.<sup>64</sup> Thus, there is no room for application of “background principles of state contract law” that conflict with the specific requirements of the New York Convention about who may enforce an arbitral agreement.<sup>65</sup> The *Yang* court made this quite clear when it stated:

While the FAA permits arbitration where an arbitration agreement is enforceable under state law, the Convention Act requires a litigant to satisfy additional prerequisites established by the Convention Treaty. One such prerequisite is that the litigant prove the agreement is in writing and “signed by the parties.” Another is that the dispute at issue be one between the “parties.” To the extent the FAA provides for arbitration of disputes with non-signatories or non-parties, it conflicts with the Convention Treaty and therefore does not apply. Accordingly, cases interpreting the FAA as allowing a non-signatory or non-party to compel arbitration where an arbitration agreement is enforceable under state law offer no guidance in interpreting the Convention Act’s requirement that an agreement in writing be signed by the parties.<sup>66</sup>

Only the Fifth Circuit takes the opposite view, which clearly seems to be incorrect. Could a district court in the Fifth Circuit follow *Yang*, notwithstanding the authority of *Sphere Drake*? That is the question considered in the next Part.

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63. U.S. CONST. art. VI, cl. 2.

64. See *Armstrong v. Exceptional Child Ctr., Inc.*, 135 S. Ct. 1378, 1383–84 (2015) (“It is apparent that this Clause creates a rule of decision: Courts . . . must not give effect to state laws that conflict with federal laws.”).

65. *But see Todd v. Steamship Mut. Underwriting Ass’n (Bermuda) Ltd.*, No. 08-1195, 2011 WL 1226464 (E.D. La. Mar. 28, 2011). On remand, the United States District Court for the Eastern District of Louisiana applied Louisiana state law to determine whether a third-party non-signatory was bound by an arbitration agreement. The court’s choice-of-law inquiry was questionable, to say the least, because it included the application of *renvoi* to the parties’ contractual choice of English law. The court’s application of *renvoi* meant that the court considered the English choice of law rules, which referred back to Louisiana law. *Id.* at \*5. That approach was unorthodox because it is generally accepted that there is no *renvoi* in contract cases, and that a contractual choice of governing law is a choice of the local law of the relevant jurisdiction, excluding that jurisdiction’s choice of law rules. See RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 187(3) (AM. LAW INST. 1971).

66. *Yang v. Majestic Blue Fisheries, LLC*, 876 F.3d 996, 1002 (9th Cir. 2017) (internal citations omitted).

## IV. WHAT IS A DISTRICT COURT IN THE FIFTH CIRCUIT TO DO?

The Fifth Circuit has never questioned the authority of *Sphere Drake* in the quarter century since it was decided. No panel of the United States Court of Appeals for the Fifth Circuit can now overrule it.<sup>67</sup> District courts in the Fifth Circuit are obliged to follow it, regardless of any compelling arguments for a different interpretation of article II(2) of the New York Convention. It may be possible, however, to confine the decision narrowly, so as to allow court proceedings to continue in situations such as those faced by the *Yang* court.

In *Sphere Drake*, the owner of the ship *St. Jude* insured it with an English insurer, but the ship sank and four members of its crew died before the policy was delivered to the shipowner.<sup>68</sup> The policy contained a clause requiring arbitration of all coverage disputes in London, but the shipowner and several other related plaintiffs brought suit against the insurer in state court in Louisiana, seeking a declaration that the insurance policy covered the loss of *St. Jude* and the death of the four crew members.<sup>69</sup> The court eventually stayed the litigation because of the presence of the arbitration clause, despite the fact that the insured shipowner had not yet signed the contract.<sup>70</sup> Thus, the decision is authority for the proposition that a party to a written contract containing an arbitration clause must arbitrate any claim based on that contract, whether or not the contract is signed by both

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67. *United States v. Albert*, 675 F.2d 712, 713 (5th Cir. 1982); *Alexander v. Chevron*, U.S.A., 806 F.2d 526, 529 (5th Cir. 1987) (“in this circuit one panel may not overrule the holding of a previous panel”); *Texas Employers’ Ins. Ass’n v. Jackson*, 862 F.2d 491, 510 (5th Cir. 1988) (collecting cases). There is no basis in statute or any of the federal rules for the interpanel doctrine that only an en banc court (or the Supreme Court) can overrule a panel decision; it is simply a practice adopted by all federal circuit courts of appeals, including the Fifth Circuit. See Phillip M. Kannan, *The Precedential Force of Panel Law*, 76 MARQ. L. REV. 755 (1993).

68. *Sphere Drake Ins. PLC v. Marine Towing, Inc.*, No. 92-2058, 1992 WL 404345, at \*1 (E.D. La. Dec. 28, 1992).

69. *Id.*

70. The district court held, in the alternative, that the agreement was “contained in an exchange of letters or telexes” for purposes of article II(2) because the insurer had initialed and stamped a slip presented by the shipowner’s broker, which offered to be bound by the terms of the insurer’s standard policy. See *id.* at \*5. Oddly, no mention of this finding was made by the appeals court, which proceeded on the basis that the owner was claiming on an unsigned insurance contract containing an arbitration clause. The district court’s alternative finding would have obviated any need for the circuit court to make its controversial interpretation of article II(2).

parties. The case did not directly deal with the situation in which a party to a written contract containing an arbitration clause, signed or not, sues or is sued by a non-signatory third party. As a result, a district court in the Fifth Circuit could find it possible to confine the authority of *Sphere Drake* to the two-party situation with which it dealt, namely that of an unsigned contract containing an arbitration clause. A willing district court could faithfully follow the *Sphere Drake* interpretation of article II(2) of the New York Convention while also holding that a non-signatory third party is not entitled to request the court to compel arbitration because of the words of article II(3). The Ninth Circuit's decision in *Yang* shows that *no* non-signatory third party may enforce arbitration under the New York Convention, a situation that simply was not considered by the Fifth Circuit in *Sphere Drake*. That situation is, nevertheless, one that frequently arises in maritime employment contracts, as the next Part shows.

#### V. BORROWED SERVANTS, CREWING AGENCIES, AND GUEST WORKERS

It is quite common for seafarers working on a vessel to be employed by someone other than the vessel's owner or operator. For example, the seafarer may be a "borrowed servant" working on a vessel operated by someone other than his or her contractual employer.<sup>71</sup> This may be the result of a relatively informal labor-sharing arrangement,<sup>72</sup> or it may be the result of the seafarer's employment contract being with a crewing agency that has contracted to provide a crew to the vessel operator.<sup>73</sup> On cruise

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71. See, e.g., *Freudensprung v. Offshore Tech. Serv. Inc.*, 379 F.3d 327 (5th Cir. 2004).

72. See, e.g., *Ogden v. GlobalSantaFe Offshore Services*, 31 F. Supp. 3d 832 (E.D. La. 2014) (seafarer paid by one company but working for another); *Daughtry v. Jenny G. L.L.C.*, 703 F. App'x 883 (11th Cir. 2017) (same); *Yang v. Majestic Blue Fisheries, LLC*, 876 F.3d 996 (9th Cir. 2017).

73. See, e.g., *Spinks v. Chevron Oil Co.*, 507 F.2d 216, 224–25 (5th Cir. 1975) (crew employed by labor agency that contracted with vessel operator), *overruled in part on other grounds by Gautreaux v. Scurlock Marine, Inc.*, 107 F.3d 331, 339 (5th Cir. 1997) (en banc); *Sablic v. Armada Shipping A.P.S.*, 973 F. Supp. 745 (S.D. Tx. 1997) (seafarer contracted with Croatian crewing agency, which contracted to provide crew for Panamanian-owned, Danish-operated ship). See also *Freudensprung v. Offshore Tech. Serv. Inc.*, 379 F.3d 327 (5th Cir. 2004) (worker's services provided by employer to another pursuant to "Offshore Personnel Supply Agreement"). Crewing agencies do not always contract as principal employer in this way; they often act only as intermediaries, finding the crew who then directly contract the ship operator. See, e.g., *Calix-Chacon v. Global Int'l Marine, Inc.*, 493 F.3d 507 (5th Cir. 2007) (seafarer hired by U.S. company through services of Honduran crewing agency).

lines and other passenger ships, it is not uncommon for workers to contribute to the mission of the vessel as a whole—and thus to be seafarers in relation to that vessel—but be employed by a concessionaire, such as a spa operator.<sup>74</sup> If the seafarer’s employment contract contains an arbitration clause, but the seafarer sues the ship operator rather than his or her direct employer, the court must squarely face the New York Convention issues outlined in this Essay if the seafarer is foreign, or if he or she is an American working “abroad.”<sup>75</sup>

For example, in *Freudensprung v. Offshore Technical Services Inc.*,<sup>76</sup> the plaintiff seafarer contracted with Offshore Technical Services, Inc. (“OTSI”) but was injured while working off the coast of Nigeria on a barge operated by Wilbros West Africa, Inc. (“WWAI”).<sup>77</sup> The plaintiff sued both OTSI and WWAI in the United States District Court for the Southern District of Texas.<sup>78</sup> OTSI moved successfully for a stay of the proceedings against it, relying on an arbitration clause in the plaintiff’s employment contract.<sup>79</sup> Although both OTSI and the plaintiff were American citizens, the United States Court of Appeals for the Fifth Circuit held that the New York Convention applied; thus, a stay was mandated because the plaintiff’s performance of the contract occurred “abroad.”<sup>80</sup> The plaintiff’s action against WWAI was dismissed for want of personal jurisdiction.<sup>81</sup> WWAI was a Panamanian corporation that did not have sufficient minimum contacts with Texas, where the action was brought.<sup>82</sup> If, however, WWAI had been subject to the court’s personal jurisdiction, a

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74. See, e.g., *Haasbroek v. Princess Cruise Lines, Ltd.*, 286 F. Supp. 3d 1352 (S.D. Fla. 2017) (operator of cruise ship held not entitled to enforce arbitration provision in employment contract between spa operator and its employee).

75. *Francisco v. Stolt Achievement MT*, 293 F.3d 270 (5th Cir. 2002); *Lim v. Offshore Specialty Fabricators, Inc.*, 404 F.3d 898 (5th Cir. 2005); *Bautista v. Star Cruises*, 396 F.3d 1289 (11th Cir. 2005); *Balen v. Holland Am. Line, Inc.*, 583 F.3d 647 (9th Cir. 2009); *Razo v. Nordic Empress Shipping Ltd.*, 362 F. App’x 243 (3d Cir. 2009); *Lindo v. NCL (Bahamas) Ltd.*, 652 F.3d 1257 (11th Cir. 2012); *Navarette v. Silversea Cruises*, 620 F. App’x 793 (11th Cir. 2015); *Escobar v. Celebration Cruise Operator, Inc.*, 805 F.3d 1279 (11th Cir. 2015); *Freudensprung v. Offshore Tech. Serv. Inc.*, 379 F.3d 327 (5th Cir. 2004); *Johnson v. NCL (Bahamas) Ltd.*, 163 F. Supp. 3d 338 (E.D. La. 2016); *Alberts v. Royal Caribbean Ltd.*, 834 F.3d 1202 (11th Cir. 2016).

76. *Freudensprung*, 379 F.3d 327.

77. *Id.* at 332.

78. *Id.* at 333.

79. *Id.* at 347.

80. *Id.* at 341.

81. *Id.* at 333.

82. *Id.* at 344–45.

question virtually identical to that in *Yang* would have arisen: could WWAI, a non-signatory third party, seek a stay of proceedings relying on the arbitration agreement in the contract between the plaintiff and OTSI?

The United States Court of Appeals for the Ninth Circuit would answer that question in the negative, as it did in *Yang*.<sup>83</sup> It seems likely that courts in the Second, Third, Ninth, and Eleventh Circuits would also answer no because WWAI did not itself sign the contract containing the arbitration clause and so was not a party to an “agreement in writing” for purposes of article II(2) of the New York Convention.<sup>84</sup> A district court in the Fifth Circuit would not be forced by *Sphere Drake* to answer in the affirmative because *Sphere Drake* says nothing about the situation where a third party seeks to rely on an “agreement in writing” under the New York Convention. Such a district court might choose to look to state law principles to determine whether WWAI could rely on the contract as a non-signatory,<sup>85</sup> but a proper reading of the New York Convention should lead it to conclude that only the parties who signed the written arbitration agreement can compel arbitration under article II(3).

#### CONCLUSION

In international commercial arbitration, for which the New York Convention was designed, the narrowness of the definition of “agreement in writing” in article II(2) is now regarded as a serious shortcoming because it is obviously ill-suited to a 21st century climate of informal electronic communication, smart contracts, and other ways in which the conduct of international business has changed since the treaty was made in 1958. In 2006, the United Nations Commission on International Trade Law (UNCITRAL) counseled against strict interpretation of article II(2) in a document entitled “Recommendation regarding the interpretation of article II, paragraph 2, and article VII, paragraph 1, of the Convention on the Recognition and Enforcement of Foreign Arbitral Awards, done in New York, 10 June 1958.”<sup>86</sup> In that document, UNCITRAL recommended

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83. *Yang v. Majestic Blue Fisheries, LLC*, 876 F.3d 996 (9th Cir. 2017).

84. *Standard Bent Glass Corp. v. Glassrobots OY*, 333 F.3d 440, 449 (3d Cir. 2003); *Czarina, LLC v. W.F. Poe Syndicate*, 358 F.3d 1286 (11th Cir. 2004); *Yang*, 876 F.3d at 1000; *see also Haasbroek v. Princess Cruise Lines, Ltd.*, 286 F. Supp. 3d 1352 (S.D. Fla. 2017).

85. *See, e.g., Todd v. Steamship Mut. Underwriting Ass’n (Bermuda) Ltd.*, 601 F.3d 329 (5th Cir. 2010).

86. United Nations Comm’n on Int’l Trade Law, *Recommendation Regarding the Interpretation of Article II(2) and Article VII(1) of the Convention on the Recognition and Enforcement of Foreign Arbitral Awards*, UNITED

that the interpretation of the writing requirement in article II(2) “recogniz[e] that the circumstances described therein are not exhaustive.”<sup>87</sup> The UNCITRAL Secretariat’s “Guide on the Convention on Recognition and Enforcement of Foreign Arbitral Awards,” published in 2016,<sup>88</sup> states that since the 2006 Recommendation, national courts have been more willing to apply the less stringent formal requirements available under their national laws, which article VII(1) suggests may be possible.<sup>89</sup> The nature of the arguments for a broader interpretation based on article VII(1) of the New York Convention lie beyond the scope of this Essay. For present purposes, it suffices to say that the United States Court of Appeals for the Ninth Circuit in *Yang* showed no interest in arguments based on UNCITRAL’s pronouncements about article II(2), pointing out that:

[T]he Convention Treaty was not drafted by the United Nations commission that issued the 2006 recommendation, and its recommendation has never been implemented by Congress . . . . While we have occasionally interpreted an ambiguous treaty term in light of the signatory nations’ post-ratification understanding, the 2006 recommendation is nothing like the kind of evidence we have found persuasive.<sup>90</sup>

In short, recommendations from international bodies like UNCITRAL about how article II should be interpreted cannot carry a court beyond the words of the provision itself, which are, as pointed out above, “the supreme Law of the Land” in the United States.<sup>91</sup> The anachronistic formula in article II(2) will almost certainly never be amended by Protocol, since the New York Convention is, in a sense, a victim of its own success. At the time of writing,<sup>92</sup> 161 countries were parties to the New York Convention,<sup>93</sup> far too large a number to be likely to agree

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NATIONS (adopted July 7, 2006), <https://uncitral.un.org/sites/uncitral.un.org/files/media-documents/uncitral/en/a2e.pdf> [<https://perma.cc/3HZN-PKAP>].

87. *Id.* at Recommendation 1.

88. United Nations Comm’n on International Trade Law, *UNCITRAL Secretariat Guide on the Convention on the Recognition and Enforcement of Foreign Arbitral Awards*, UNITED NATIONS [https://www.uncitral.org/pdf/english/texts/arbitration/NY-conv/2016\\_Guide\\_on\\_the\\_Convention.pdf](https://www.uncitral.org/pdf/english/texts/arbitration/NY-conv/2016_Guide_on_the_Convention.pdf) [<https://perma.cc/A753-8TP9>] (last visited January 18, 2020).

89. *Id.* at p. 51, ¶ 37.

90. *Yang v. Majestic Blue Fisheries, LLC*, 876 F.3d 996, 1001 (9th Cir. 2017).

91. *See supra* text accompanying notes 63–64.

92. November 2019.

93. New York Convention, *supra* note 7.

unanimously to any proposed amendment to the words of the original 1958 text. Any proposed change to those words would most probably be accepted by some, but not all, Contracting States. This would mean that any amending Protocol would destroy the uniformity that is such an important part of the international success of the New York Convention. There being no move to amend the words of the New York Convention, the task of courts in the United States is simply to interpret the words that have appeared in the treaty since 1958. Inconvenient though that may be in disputes that are genuinely concerned with international commerce, it may provide a lifeline for seafarers attempting to make an “end run” around the provisions of the New York Convention in cases that U.S. courts have declared to be commercial and unprotected by the FAA’s exclusion of seafarer’s employment contracts from the effectiveness of arbitration agreements.<sup>94</sup> The Ninth Circuit’s decision in *Yang* shows that the “end run” is clearly available outside of the Fifth Circuit, particularly in cases involving non-signatories.<sup>95</sup> This Essay has attempted to show that the “end run” may be available in the Fifth Circuit, too, notwithstanding the awkward authority of *Sphere Drake*. If no district court in the Fifth Circuit can be persuaded to countenance such an “end run,” it can be expected that injured seafarers who have agreed to arbitration in their employment contracts may seek to bring court proceedings elsewhere in the United States—perhaps anywhere other than the Fifth Circuit, given the existing state of authority.

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94. 9 U.S.C. § 1 (2012).

95. See *supra* Part II.