No. 17-617

In the
Supreme Court of the United States

CAROUSEL CRUISE LINES, INC.,

Petitioner,

v.

TARAS SHEVCHENKO,

Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

COMPETITION PACKET FOR THE TWENTY-FIFTH ANNUAL JUDGE JOHN R. BROWN ADMIRALTY MOOT COURT COMPETITION, 2018

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UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

No. 14-23206
D.C. No. CV 13-6838

TARAS SHEVCHENKO,
Plaintiff-Appellee,

v.

CAROUSEL CRUISE LINES, INC.
Defendant-Appellant.

Appeal from the Decision of the United States District Court
for the Western District of Washington,
Michele Y. Portia, District Judge, Presiding

Argued and Submitted, March 2, 2016
Seattle, Washington
[Filed May 5, 2017]

Before JUSTINIAN, SOLOMON, and HAMMURABI, Circuit Judges

HAMMURABI, Circuit Judge:

This is an action by a seaman, Taras Shevchenko, seeking recovery of compensatory damages from his employer, Carousel Cruise Lines, Inc., for an alleged breach of the warranty of seaworthiness. Carousel owned and operated the vessel aboard which Shevchenko was working when the injury in suit occurred.

The case is procedurally complicated by an arbitration decision rejecting Shevchenko's claim. Carousel sought to enforce the arbitral award, but the district court refused to do so pursuant to the public policy defense in the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards, June 10, 1958, 21 U.S.T. 2517, 330 U.N.T.S. 3.

By declining to enforce the arbitral award, the district court was free to reach the merits of the case. On the merits, the district court concluded after a bench trial that Carousel had breached its warranty of seaworthiness and awarded Shevchenko $254,174 in damages.

On appeal, Carousel first contends that the district court should have enforced the arbitral award, thus making it unnecessary to reach the merits. If the arbitral award is not enforced, Carousel contends that the district court nevertheless erred in concluding that Shevchenko's injury was proximately caused by a condition of transitory unseaworthiness rather than by an isolated act of operational negligence. We affirm.

I

The relevant facts and procedural history are adequately set forth in the two opinions of the court below. Shevchenko was a member of the crew of Carousel's vessel *Glacier Explorer*, where he worked as a cook. He argued that an independent contractor's actions in running an extension cord across a walkway in the galley of the vessel and leaving the cord in place when it was not in immediate use created a shipboard condition constituting unseaworthiness under the general maritime law.

Shevchenko filed suit in state court, but that court stayed the litigation and enforced the arbitration clause in his contract of employment. After an arbitration ruling in Monaco in favor of Carousel, Shevchenko returned to state court in an effort to have the arbitral award declared unenforceable so that he could proceed to litigate his unseaworthiness claim in this country. Carousel removed the case to federal court and moved to have the arbitral award enforced. *See* 9 U.S.C. § 205. The district court, applying the New York Convention's public policy defense, granted Shevchenko's motion.

With the arbitral award off the table, the district court turned to the merits. The principal issue for the district court (and the only merits issue on appeal to this Court) is whether Shev-

chenko's injury was proximately caused by an isolated act of operational negligence, as presented in *Usner v. Luckenbach Overseas Corp.*, 400 U.S. 494, 1971 AMC 277 (1971), or by a condition of transitory unseaworthiness, as presented in *Mitchell v. Trawler Racer, Inc.*, 362 U.S. 539, 1960 AMC 1503 (1960). The district court — relying primarily on its understanding of *Usner*; *Rawson v. Calmar Steamship Corp.*, 304 F.2d 202, 205, 1962 AMC 2153, 2157 (9th Cir. 1962); and a similar line of cases from the Second Circuit — held that Shevchenko's injury was proximately caused by transitory unseaworthiness.

This appeal followed.

II

On the arbitration issue, we agree with the district court's analysis. When the Supreme Court has enforced arbitration clauses, part of its rationale has regularly been that the U.S. courts will have jurisdiction (at the award-enforcement stage) to ensure that the plaintiff's rights under U.S. law were properly respected in the arbitration. At that subsequent stage of the proceedings, the court will have the opportunity to take a "second look" and ensure that the arbitration clause did not have the effect of preventing the "effective vindication" of the plaintiff's legitimate rights. With U.S. courts now routinely enforcing forum-selection clauses that require overseas arbitration, the effective-vindication and second-look doctrines have become the primary safeguard to ensure that plaintiffs' rights under U.S. law are respected.

The doctrines had their genesis in an antitrust case, *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614 (1985). The Court there explained:

> Having permitted the arbitration to go forward, the national courts of the United States will have the opportunity at the award-enforcement stage to ensure that the legitimate interest in the enforcement of the antitrust laws has been addressed. The [New York] Convention reserves to each signatory country the right to refuse enforcement of an award where the "recognition or enforcement of the award would be contrary to the public policy of that country." 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 antitrust claims and actually decided them.

473 U.S. at 638 (quoting the New York Convention art. V(2)(b)) (citation omitted).

In *Vimar Seguros y Reaseguros, S.A. v. M/V Sky Reefer*, 515 U.S. 528, 540-41, 1995 AMC 1817, 1826 (1995), the Supreme Court recognized the second-look doctrine in a maritime case. The Court held that a Japanese arbitration clause in a bill of lading could be enforced immediately, and — as in *Mitsubishi* — any difficulties could be corrected later ("at the award-enforcement stage"):

> The District Court has retained jurisdiction over the case and "will have the opportunity at the award-enforcement stage to ensure that the legitimate interest in the enforcement of the . . . laws has been addressed." . . . Were there no subsequent opportunity for review and were we persuaded that "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 . . . , we would have little hesitation in condemning the agreement as against public policy."

515 U.S. at 540 (quoting *Mitsubishi*, 473 U.S. at 638 & 637 n.19) (first and third omissions by *Sky Reefer* Court).

The Supreme Court has recognized the effective-vindication and second-look doctrines in subsequent cases. In *American Express Co. v. Italian Colors Restaurant*, 570 U.S. 228 (2013), for example, the Court acknowledged that "[t]he 'effective vindication' exception . . . originated . . . in *Mitsubishi Motors*," and that "[s]ubsequent cases have similarly asserted the existence of an 'effective vindication' exception." 570 U.S. at 234. The Court further explained that the doctrine "would certainly cover a provision in an arbitration agreement forbidding the assertion of certain statutory rights. And it would perhaps cover filing and administrative fees attached to arbitration that are so high as to make access to the forum impractical." 570 U.S. at 234-35. Because the Court concluded that the exception did not apply to the facts before it, however, it

was left to Justice Kagan (in dissent) to give the fullest explanation of the doctrine. *See* 570 U.S. at 237-40 (Kagan, J., dissenting).

The bottom line is that the effective-vindication doctrine enables a plaintiff to defeat an arbitration (or other forum-selection) clause, but only if the plaintiff can prove that the arbitration clause (perhaps in conjunction with the choice-of-law clause) made it impossible for the claimant to vindicate his or her rights effectively. Because the burden of proof is perhaps impossibly high, however, the doctrine rarely succeeds. The courts regularly say it would be premature even to consider what the arbitral panel will do, let alone give the plaintiff an opportunity to carry a nearly impossible burden. In the absence of a powerful effective-vindication doctrine, it has been left to the second-look doctrine to provide protection. After the arbitration has been completed, the plaintiff must have a chance to prove that the arbitral panel failed to consider and decide his or her claim. It is not enough for the plaintiff to have unjustifiably lost on the claim; the courts will not correct the arbitrators' errors of law. The plaintiff must show that the claim was never addressed or decided.

As the district court noted, 980 F. Supp. 2d at 1389 n.6, this may have been a case in which the state court should have applied the effective-vindication doctrine and refused to enforce the arbitration clause. In the present procedural posture, however, the present case is practically a poster child for the second-look doctrine. It is undisputed that the general maritime law gives Shevchenko the benefit of Carousel's warranty of seaworthiness — the promise of a safe place to work.[1] It is also undisputed that the Monaco arbitrator failed to consider and decide

[1] Carousel does not challenge the district court's choice-of-law analysis under the *Lauritzen-Romero-Rhoditis* factors, but instead contends that the governing law clause in the employment contract controls. More fundamentally, Carousel argues that it was for the arbitrator to decide the governing law, and a reviewing court must accept that determination even if it is erroneous.

his claim that the warranty was breached. Following the Supreme Court's teaching, therefore, we have "little hesitation" in declining to enforce the arbitral award "as against public policy."

III

Turning to the merits, we agree with the district court's core reasoning and result regarding the transitory unseaworthiness issue. We think the district court correctly interpreted the language of this Court's decision in *Rawson v. Calmar Steamship Corp.*, 304 F.2d 202, 205, 1962 AMC 2153, 2157 (9th Cir. 1962). And the result reached by the district court accords with this Court's decisions emphasizing that, despite the shipowner's complete innocence, a ship is nevertheless rendered culpably unseaworthy when independent contractors' methods or activities cause the ship to become less than reasonably fit. *Blassingill v. Waterman Steamship Corp.*, 336 F.2d 367, 1964 AMC 1932 (9th Cir. 1964); *Thorson v. Inland Navigation Co.*, 270 F.2d 432, 1959 AMC 1877 (9th Cir. 1959). *See also Radovich v. Cunard Steamship Co.*, 364 F.2d 149, 152, 1966 AMC 2426, 2429 (2d Cir. 1966) ("If anything emerges from [the body of case law distinguishing between transitory unseaworthiness and operational negligence] . . . , it is that the findings of the trier of facts should be left undisturbed, if the law to be applied to the facts is properly understood.").

We have two fundamental points of disagreement with our dissenting colleague. First, it is by no means accepted wisdom that the transitory unseaworthiness doctrine stemming from *Mitchell v. Trawler Racer, Inc.*, 362 U.S. 603, 1960 AMC 1503 (1960), is bad policy. The authors of Note, *The Doctrine of Unseaworthiness in the Lower Federal Courts*, 76 HARV. L. REV. 819, 822-23 (1963), took a markedly different view, concluding that "*Mitchell* appears to be sound." Second Circuit Judge Charles Edward Clark also defended the policy underpinnings of *Mitchell*, stating that the *Mitchell* "Court's manifest intent to safeguard human lives at sea and to enforce the shipowner's responsibility by strict liability is not one to combat." *Pinto v. States*

Marine Corporation of Delaware, 296 F.2d 1, 8, 1962 AMC 104, 115 (2d Cir. 1961) (Clark, J., dissenting from denial of rehearing en banc).

Second, we think our dissenting colleague is preaching to the wrong choir. The dissenter's subtext seems to be that the Supreme Court made a bad mess in *Mitchell* and then failed to clean it up in *Usner*. If that were true, it would be an observation best directed to the Supreme Court, not to us. If the *Usner* Court had wanted to impose a firm requirement of a significant and measurable interval of time between the creation of the unseaworthy condition and the accident in suit, it would have been easy enough to say so. Instead, by saying only that "isolated" and "single" acts of negligence are excluded from the realm of transitory unseaworthiness, *Usner*, 400 U.S. at 500, 1971 AMC at 282, the Court bequeathed us[2] the test from *Puddu v. Royal Netherlands Steamship Co.*, 303 F.2d 752, 757 (2d Cir. 1962) (en banc) (Hays, J., concurring in result):

> A ship is not unseaworthy because it has glass in a window which might be broken. The injuries of a seaman who negligently breaks such a glass are not the result of unseaworthiness, nor are the injuries of a seaman who is cut by the falling glass. But injury incurred in stepping on the broken glass does result from unseaworthiness.

Just as the *Puddu* hypothetical is unconcerned with the length of time the broken glass lay on the deck before being stepped on, in the present case we do not know precisely how long the extension cord lay on the galley walkway before being tripped on. But we do know that Shevchenko's accident was not analogous to the "falling glass" injury in the *Puddu* hypothetical.

IV

The decision of the district court is affirmed.

It is so ordered.

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[2] In his *Usner* dissent, Justice Douglas (joined by Justices Black and Brennan) associated the *Usner* majority's ruling with the *Puddu* test. 400 U.S. at 503 n.*, 1971 AMC at 284 n.*.

JUSTINIAN, Circuit Judge, dissenting:

I regret that I am unable to agree with the decision that the majority has reached in this case, and thus I must respectfully dissent. I disagree both with the conclusion that the arbitration award should not be enforced and also with the decision on the merits.

I

In my view, the New York Convention compels U.S. courts to enforce the arbitral award at issue here. The Supreme Court has regularly taught us to respect the parties' decision to submit their claims to arbitration, even in cases involving consumers and others who arguably have less bargaining power. *See, e.g.*, *AT&T Mobility LLC v. Concepcion*, 563 U.S. 333, 339 (2011). Even in the cases on which Shevchenko most heavily relies — *Mitsubishi* and *Sky Reefer* — the Court's actual holding was in favor of the arbitral process. Shevchenko is reduced to relying on mere dicta that neither this Court nor the Supreme Court has ever applied.

Shevchenko concedes that there is no basis for refusing to enforce the award other than article V(2)(b) of the New York Convention, but the Convention's "public policy" defense was clearly designed for more fundamental policies than the particular tort remedies available to an injured seaman. *See, e.g.*, Int'l Law Ass'n, Comm. on Int'l Commercial Arbitration, *Final Report on Public Policy as a Bar to Enforcement of International Arbitral Awards* (New Delhi Conference 2002). Prior to *Mahnich v. Southern Steamship Co.*, 321 U.S. 96, 1944 AMC 1 (1944), the United States did not clearly recognize a strict-liability cause of action for a vessel owner's breach of the warranty of seaworthiness. The public policy of recognizing such an action can hardly be that fundamental when the republic survived a century and two-thirds without it.

Even more importantly, one of our sister circuits has addressed this issue in almost exactly the same context as we face it today, and reached the opposite conclusion. I find the reasoning in *Asignacion v. Rickmers Genoa Schiffahrtsgesellschaft mbH & Cie KG*, 783 F.3d 1010, 2015 AMC 913 (5th Cir. 2015), to be entirely persuasive, and I would follow it here. I see no basis to depart from such a well-reasoned opinion, especially when doing so puts us in direct conflict with another court of appeals.

II

Even if I agreed that the district court was entitled to ignore the arbitration decision and proceed to the merits, I would still disagree with my colleagues. The district court misread the substantive maritime law governing Shevchenko's unseaworthiness claim. As a result of that misreading, the district court misunderstood its own proper role. The correct disposition here is to remand the case to the district court to make findings of fact as to whether the independent contractor (Raijin) left the 50-foot extension cord lying in the galley walkway overnight, or whether the cord had been lying on the walkway for only brief minutes before Shevchenko's trip-and-fall accident.[1] If Raijin left the cord lying on the walkway overnight, Carousel is potentially exposed to liability for transitory unseaworthiness.[2] If the cord was only briefly on

[1] In making such findings, the district court should keep firmly in mind the plaintiff's burdens of producing evidence and of persuasion.

[2] The decisions discussed in this dissent show that the proponent of transitory unseaworthiness liability must not only establish (i) the existence of a condition that might qualify as transitory unseaworthiness but also (ii) that the condition made the vessel less than reasonably fit and (iii) that the condition was a proximate cause of the plaintiff's injury. Each of those requirements might be assessed as a matter of law, but each might be an issue for the trier of fact if reasonable minds could differ. *Cf. Mitchell*, 362 U.S. at 550, 1960 AMC at 1512 ("[T]he owner is [not] obligated to furnish an accident-free ship. The duty is absolute, but it is a duty only to furnish a vessel and appurtenances reasonably fit for their intended use. The standard is not perfection, but reasonable fitness . . ."); *see also Usner*, 400 U.S. at 499, 1971 AMC at 281 ("A vessel's condition of unseaworthiness might arise from any number of circumstances. Her gear might be defective, her appurtenances in disrepair, her crew unfit. The number of men assigned

the walkway before Shevchenko encountered it, this may very well be a case of an independent contractor's operational negligence, for which Carousel should bear no responsibility.

The distinction between *transitory unseaworthiness* and *operational negligence* lies at the junction of the Supreme Court's decisions in *Mitchell* (1960) and *Usner* (1972). But the distinction has been causing confusion and disputatiousness in the lower courts for many decades, beginning before *Mitchell* and continuing past *Usner*. *See, e.g., Grillea v. United States,* 232 F.2d 919, 922-23, 1956 AMC 1009, 1013 (2d Cir. 1956); *Pinto v. States Maine Corporation of Delaware*, 296 F.2d 1, 1962 AMC 104 (2d Cir. 1961); Note, *The Doctrine of Unseaworthiness in the Lower Federal Courts,* 76 HARV. L. REV. 819 (1963); *Reid v. Quebec Paper Sales & Transportation Co.*, 340 F.2d 34, 1965 AMC 112 (2d Cir. 1965); *Smith v. Olsen & Ugelstad*, 459 F.2d 915, 919, 1973 AMC 468, 472 (6th Cir. 1972) (complaining that distinguishing between transitory unseaworthiness and operational negligence too often "involve[s] metaphysics."). In a vehement dissent in *Skibinski v. Waterman Steamship Corp.*, 360 F.2d 539, 544, 1966 AMC 873, 879-80 (2d Cir. 1966), Judge Friendly roundly condemned the concept of transitory unseaworthiness, declaring it innately unmanageable and incoherent:

> It is time to scuttle a doctrine which requires judges to make distasteful hair-splitting distinctions unrelated to any intelligible concepts of right and wrong; granted that liability for unseaworthiness does not rest on fault, it ought to rest on something more than casuistry. [We should] long since have revolted against a principle which capriciously imposes liability on a thoroughly well equipped ship . . . . [We should eschew] judicial legerdemain which helps one [plaintiff] but does nothing for another whose situation would appear similar to everyone except those lawyers and judges who have had to accustom themselves to the witty diversities of this branch of the law.

Judge Friendly's policy arguments were confined to the realm of transitory unseaworthiness. He did not challenge strict liability for *initial unseaworthiness,* which is loosely defined as a defec-

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to perform a shipboard task might be insufficient. The method of loading her cargo, or the manner of its stowage, might be improper.") (footnotes omitted).

tive condition that exists when "the vessel leaves her home port,"[3] or that is "existing at the start of the voyage,"[4] or that "render[s] the vessel not reasonably fit for the voyage."[5]

In a much more fully developed and informative policy critique, Justice Harlan's dissenting opinion in *Mitchell* (joined by Justices Frankfurter and Whittaker) thoroughly explained why strict liability for initial unseaworthiness may well make good policy sense whereas strict liability for transitory unseaworthiness plainly does not. *Mitchell*, 362 U.S. at 570-73, 1960 AMC at 1528-30.

In condemning the idea of transitory unseaworthiness, Judge Friendly went out of his way to note that the Supreme Court had provided the lower courts with no significant guidance for tracking their way between operational negligence and transitory unseaworthiness. *Skibinski*, 360 F.2d at 544, 1966 AMC at 879 (Friendly, J., dissenting). The Court has now answered Judge Friendly's call for help, in the form of the *Usner* decision. The district court and my colleagues have treated *Usner* more as a source of additional flexibility than as the clear limitation on transitory unseaworthiness that the Court plainly intended. If we lower-court federal judges are to do our job properly, we have to try to dissipate confusion, not foster it; the right way to do that is to deploy the *Usner* limitation energetically rather than tip-toeing around it. ***Properly understood,* Usner *forbids imposing transitory unseaworthiness liability in the absence of a significant and appreciable* (i.e., *conspicuous and measurable) interval of time between the creation of the putatively unseaworthy condition and the accident in suit.*** The two paragraphs below set forth decisions from the courts of the Ninth Circuit and from other circuits that can be used to further a suitably clear and robust interpretation of *Usner*.

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[3] *Mitchell*, 362 U.S. at 549, 1960 AMC at 1512.

[4] *Id*. at 553 n.2, 1960 AMC at 1504 n.2 (Frankfurter, J., dissenting).

[5] *Id*. at 571, 1960 AMC at 1528 (Harlan, J., dissenting).

Helpful decisions from the courts of the Ninth Circuit (set forth in chronological order) include *Green v. Grace Line*, 196 F. Supp. 399, 400, 1961 AMC 1354, 1355 (N.D. Cal. 1961) (injury to longshoreman when hatch board he was standing on was raised by safety net's entanglement with forklift was proximately caused by the negligence of the winch driver in hoisting the forklift, not by any unseaworthy condition); *Billeci v. United States*, 298 F.2d 703, 705-07, 1962 AMC 826, 827-30 (9th Cir. 1962) (winch operators' failure during 90-minute operation to use an available safety device did not make the ship unreasonably unfit; the sole proximate cause of the accident was the negligence of the winch operators); *Ryan v. Pacific Coast Shipping Co., Liberia*, 509 F.2d 1054, 1057 n.6, 1975 AMC 1224, 1227 n.6 (9th Cir. 1975) ("[A] condition of unseaworthiness must consist of more than one act and last longer than a few seconds or minutes."); *Burdett v. Matson Navigation Co.*, 2015 AMC 431, 439-40 (D. Haw. 2015) (quoting *Ryan, supra,* and holding that a duration of "ten to twenty seconds" was nowhere near long enough).

Helpful decisions from the courts of other circuits (set forth in chronological order) include *Rich v. Ellerman & Bucknall S.S. Co.*, 278 F.2d 704, 706-07, 1960 AMC 1580, 1582 (2d Cir. 1960) (emphasizing that the condition of transitory unseaworthiness at issue subsisted for 90 minutes prior to the accident in suit); *Blier v. United States Lines Co.*, 286 F.2d 920, 924, 1961 AMC 1134, 1139 (2d Cir. 1961) (upholding a general jury verdict against transitory unseaworthiness liability on the view that the jury might reasonably have found that a smear of grease on the ship's gangway was not of sufficient duration to constitute a condition of transitory unseaworthiness, or that the grease did not make the ship unreasonably unfit, or that the grease was not a proximate cause of plaintiff's accident); *Edynak v. Atlantic Shipping Inc.*, 562 F.2d 215, 224, 1977 AMC 2475, 2485 (3d Cir. 1977) ("Although the difference *Usner* draws between an act and a condition is difficult to apply in practice, we can make two explanatory observa-

tions. First, the distinction is in part temporal; an act occurs instantaneously, whereas there must be some period of time during which a condition exists. Second, a condition necessarily consists of more than one act.") (citations omitted).

III

I respectfully dissent.

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

No. 14-23206
D.C. No. CV 13-6838

TARAS SHEVCHENKO,
Plaintiff-Appellee,

v.

CAROUSEL CRUISE LINES, INC.
Defendant-Appellant.

Appeal from the Decision of the United States District Court
for the Western District of Washington,
Michele Y. Portia, District Judge, Presiding

June 12, 2017

Before JUSTINIAN, SOLOMON, and HAMMURABI, Circuit Judges

PER CURIAM:

IT IS ORDERED that the petition for rehearing filed in the above entitled and numbered cause be and the same is hereby DENIED.

JUSTINIAN, Circuit Judge, dissenting:

For the reasons expressed in my dissenting opinion, I would grant the petition for rehearing and set the case for argument *en banc*.

United States District Court
for the Western District of Washington

TARAS SHEVCHENKO,
Plaintiff,

v.

CAROUSEL CRUISE LINES, INC.,
Defendant.

No. CV 13-6838

October 21, 2013

PORTIA, J.:

Defendant Carousel Cruise Lines, Inc. has filed a motion to enforce an arbitration award. Plaintiff Taras Shevchenko has moved to lift the stay of litigation that was originally entered in state court; to declare the arbitration award unenforceable as contrary to public policy; and to proceed to trial on the merits of his general maritime law[1] claim for breach of the warranty of seaworthiness. For the reasons explained below, Carousel's motion is denied and Shevchenko's motion is granted. The clerk is directed to set the case for trial on the merits.

I

Shevchenko is a Ukrainian citizen who was a resident of Bulgaria when he first signed on as a crew member (a cook) on the *Glacier Explorer*, a cruise ship owned and operated by Carousel. Carousel, a Delaware corporation with its principal place of business in Seattle, Washington, owns a fleet of cruise ships that operate primarily out of the Port of Seattle.[2] During the summer of 2010, for example, the *Glacier Explorer* followed a regular itinerary on

[1] A frequent synonym for "general maritime law" is "judge-made federal common law." *See, e.g.*, *Yamaha Motor Corp., U.S.A. v. Calhoun*, 516 U.S. 199, 206, 1996 AMC 305, 310 (1996).

[2] In the winter, Carousel operates some cruises out of southern California.

each of its cruises, departing from Seattle; calling at Juneau, Sitka, Skagway, and Ketchikan (all in Alaska) and Victoria (British Columbia); then returning to Seattle.

Carousel requires each of its crew members to sign a standard-form Seafarer's Agreement before he or she is allowed to commence employment. Shevchenko signed the agreement, which provided that he would work up to ten hours a day, seven days a week, in the service of the ship. He was paid $49.10 per day. The agreement included both an arbitration clause and a governing law clause. The arbitration clause called for arbitration to occur in one of four places — London, Monaco, Panama City, or Manila — whichever is closest to the seaman's "home country."[3] Whether Shevchenko's home country is considered to be Ukraine (based on his citizenship) or Bulgaria (based on his residence at the time he signed the agreement), the parties agree that Monaco would be the closest of the four venues.[4] The governing law clause

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[3] The arbitration clause provides in full as follows:

> **Arbitration**. Any and all disputes arising out of or in connection with this Agreement, including any question regarding its existence, validity, or termination, or Seafarer's service on the vessel, shall be referred to and finally resolved by arbitration under the Arbitration Rules of the International Chamber of Commerce, which Rules are deemed to be incorporated by reference into this clause. The number of arbitrators shall be one. The place of arbitration shall be London, England, Monaco, Panama City, Panama, or Manila, Philippines, whichever is closer to Seafarer's home country. The Seafarer and Cruise Line must arbitrate in the designated jurisdiction, to the exclusion of all other jurisdictions. The language of the arbitration shall be English. Each party shall bear its own attorney's fees, and each shall pay one half of the costs of arbitration. Seafarer agrees to appear for medical examinations by doctors designated by Cruise Line in specialties relevant to any claims Seafarer asserts, and otherwise the parties agree to waive any and all rights to compel information from each other.

Rec. Doc. 29-3, clause 28.

[4] Monaco is over a thousand miles from either Varna, Bulgaria, where Shevchenko lived prior to his employment with Carousel, or Odessa, Ukraine, where Shevchenko spent his childhood. Prior to his accident, Shevchenko married a U.S. citizen and become a permanent resident of the United States. Since his accident, he and his wife have maintained their home in Denver, Colorado, which is over 7,000 miles from Monaco.

calls for the application of the law of the vessel's flag.[5] The *Glacier Explorer*, like most of Carousel's vessels, is flagged in Panama.

On August 18, 2010, Shevchenko was working on the *Glacier Explorer* in the Port of Seattle when he suffered serious injuries, allegedly as a result of the unseaworthy condition of the vessel. Shevchenko alleges that he tripped on an extension cord that Raijin Electrical Engineering Service, an independent contractor, used to run electricity into the galley of the vessel after an electrical breaker failed. As a result of the fall, Shevchenko injured his spine and his hip, has been required to undergo three surgeries, and has been unable to work again as a seaman.

Carousel has fulfilled its obligations under the general maritime law to furnish maintenance and cure, but it denies any further responsibility for Shevchenko's injuries or the resulting damages that Shevchenko has suffered. Shevchenko concedes that Carousel was not negligent; the relevant negligence was Raijin's, and Raijin is now in bankruptcy. But Shevchenko contends that the presence of the extension cord in the galley made the *Glacier Explorer* unseaworthy. Whether that contention is correct must await further developments. It is first necessary to resolve issues relating to the arbitration and governing law clauses.

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[5] The governing law clause provides in full as follows:

> **Governing Law**. This Agreement shall be governed by, and all disputes arising under or in connection with this Agreement or Seafarer's service on the vessel shall be resolved in accordance with, the laws of the flag of the vessel on which Seafarer is assigned at the time the cause of action accrues, without regard to principles of conflicts of laws thereunder. The parties agree to this governing law notwithstanding any claims for negligence, unseaworthiness, maintenance, cure, failure to provide prompt proper and adequate medical care, wages, personal injury, or property damage which might be available under the laws of any other jurisdiction.

Rec. Doc. 29-3, clause 29.

II

A few months after the accident, Shevchenko filed suit in state court against Carousel, seeking damages under the general maritime law for unseaworthiness. Carousel promptly moved to stay the litigation and order arbitration in Monaco, as required by the arbitration clause. The state court granted that motion. The parties then proceeded to arbitration before a single arbitrator in Monaco. On February 15, 2013, the arbitrator issued her decision in favor of Carousel. She concluded that Panamanian law governed the dispute, as provided in the governing law clause. And she accepted the testimony of Carousel's Panamanian law expert that Panamanian law does not recognize a strict-liability cause of action for a vessel owner's breach of the warranty of seaworthiness. She accordingly declined to consider Shevchenko's unseaworthiness claim and ruled that Carousel had no liability beyond what it had already paid in maintenance and cure.

On March 4, 2013, Shevchenko returned to the state court and moved that court to lift the stay of litigation, to declare the arbitration award unenforceable as contrary to the public policy of the United States, and to award damages for Carousel's alleged breach of the warranty of seaworthiness. Carousel removed the case to this Court and moved to enforce the arbitration decision. *See* 9 U.S.C. § 205. Shevchenko has renewed his state-court motion to lift the stay and declare the arbitration award unenforceable. This Court has now heard the parties' arguments and considered their written submissions, and those motions are ripe for decision.

III

The New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards, June 10, 1958, 21 U.S.T. 2517, 330 U.N.T.S. 3, and the so-called Convention Act, 9 U.S.C. §§ 201-208, provide the relevant legal framework here. When an arbitral award is rendered in a country that is a party to the New York Convention (such as Monaco), that nation's

courts have primary jurisdiction over the award. Among other things, this means that they have the exclusive authority to annul the award. Courts in other countries that are party to the Convention (such as the United States) have secondary jurisdiction, which permits them to decide whether to enforce the award in their own country. This Court accordingly has jurisdiction to decide whether to enforce the Monaco arbitral award in favor of Carousel in this country.

Article V of the New York Convention lists the seven grounds on which this Court may refuse to enforce the award, and Shevchenko has the burden of proving that one of those seven grounds applies. Shevchenko invokes only the public policy defense of article V(2)(b), which provides that recognition and enforcement of an arbitral award may be refused if the competent authority in the country where recognition and enforcement is sought finds that "[t]he recognition or enforcement of the award would be contrary to the public policy of that country." More specifically, he argues that enforcement of the award would deprive him of his right under U.S. general maritime law to the benefit of the warranty of seaworthiness.

In support of his argument, Shevchenko cites the Supreme Court's decisions in *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614 (1985), and *Vimar Seguros y Reaseguros, S.A. v. M/V Sky Reefer*, 515 U.S. 528, 1995 AMC 1817 (1995). In *Mitsubishi*, the Court enforced an agreement to arbitrate antitrust claims in Japan (when it was clear that U.S. law would apply) but added an important qualification:

> [I]n 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.

473 U.S. at 637 n.19. The Court thus endorsed what has often been described as the "prospective waiver" or "effective vindication" doctrine.

In *Sky Reefer*, a maritime case, the Supreme Court again upheld a clause requiring arbitration in Japan, but this time it was unclear whether the Japanese arbitrators would apply

U.S. law. The *Sky Reefer* Court nevertheless declined to apply the prospective waiver doctrine as a defense to enforcement of the clause on the grounds that doing so would be premature.[6] Because it was then unclear what law would be applied and whether the plaintiff would be prejudiced as a result, the Court explained that the proper time to apply the doctrine would be at the award enforcement stage:

> At this interlocutory 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. The arbitrators may conclude that [U.S. law governs]. Respondents seek only to enforce the arbitration agreement. The District Court has retained jurisdiction over the case and "will have the opportunity at the award-enforcement stage to ensure that the legitimate interest in the enforcement of the . . . laws has been addressed." . . . Were there no subsequent opportunity for review and were we persuaded that "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 . . . , we would have little hesitation in condemning the agreement as against public policy."

515 U.S. at 540, 1995 AMC at 1826 (quoting *Mitsubishi*, 473 U.S., at 638 & 637 n.19). This endorses what has been described as the "second look" doctrine.

The *Sky Reefer* Court's rule requiring the enforcement of an arbitration agreement at the agreement-enforcement stage was justified by the "opportunity at the award-enforcement stage to ensure that the legitimate interest in the enforcement of the . . . laws has been addressed." At the award-enforcement stage — which is the current stage of proceedings in this case — a court that is asked to enforce the arbitral award must take a "second look," that is, it must consider the

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[6] On the facts here, the state court may well have erred in failing to apply the prospective waiver doctrine. Unlike *Mitsubishi* and *Sky Reefer*, it was reasonably clear in advance that the arbitrator in Monaco would apply Panamanian law and that Shevchenko would be prejudiced as a result. Thus the present case closely resembles not *Mitsubishi* and *Sky Reefer* but *Knott v. Botany Mills*, 179 U.S. 69, 2010 AMC 901 (1900), and *The Hollandia*, [1983] A.C. 565, 574-75 (H.L. 1982), two cases that the *Sky Reefer* Court cited with approval. In *Knott* and *The Hollandia*, the courts refused to enforce choice-of-law and choice-of-forum clauses that would clearly have operated to prejudice the plaintiffs. But this Court does not sit to review state court judgments, and it would be impossible to "unenforce" the arbitration agreement.

prospective waiver doctrine and ensure that the award has addressed the plaintiff's legitimate interest in the enforcement of the laws.

The first issue to consider is the choice of law. As a general rule, the courts will give great weight to the law chosen by the parties. *See, e.g., Lauritzen v. Larsen*, 345 U.S. 571, 588-89, 1953 AMC 1210, 1223-24 (1953). But this presumption does not apply when a choice-of-law clause operates to deprive a seaman — a traditional "ward of the admiralty" — of his rights under U.S. law. *See generally, e.g., Hellenic Lines, Ltd. v. Rhoditis*, 398 U.S. 306, 1970 AMC 994 (1970) (applying the U.S. Jones Act to protect a Greek seaman notwithstanding Greek choice-of-law and choice-of-forum clauses); GRANT GILMORE & CHARLES L. BLACK, JR., THE LAW OF ADMIRALTY 476 (2d ed. 1975). This Court must instead conduct a choice-of-law inquiry under the familiar factors announced by the Supreme Court in *Lauritzen*, *Rhoditis*, and *Romero v. International Terminal Co.*, 358 U.S. 354, 1959 AMC 832 (1959).

The relevant factors are: (1) the location of the injury; (2) the law of the flag; (3) the domicile of the injured party; (4) the allegiance of the shipowner; (5) the place of the contract; (6) the inaccessibility of a foreign forum; (7) the law of the forum; and (8) the base of operations of the shipowner. The first, fourth, seventh, and eighth factors all point to the application of U.S. law. Now that Shevchenko is a U.S. permanent resident, the third factor probably points to the application of U.S. law, too. But even if it supports the application of Ukrainian or Bulgarian law, it most certainly does not support the application of Panamanian law. The record does not indicate where the contract was signed. It may have been Bulgaria, where Shevchenko resided at the time. It seems more likely to have been Seattle, where Carousel is based and where Shevchenko almost certainly joined the crew of the *Glacier Explorer*. Thus the fifth factor may support the application of U.S. law and almost certainly does not support the application of Panamanian law. The sixth factor seems largely irrelevant to determining the governing law when the

choice-of-forum and choice-of-law clauses provide for different jurisdictions. In any event, Monaco is a particularly inconvenient forum for Shevchenko, *see supra* note 4, and has no apparent connection whatsoever to Carousel, either. Panama is only slightly less inconvenient. In sum, only the second factor support the application of Panamanian law. Although the law of the flag is particularly important in maritime choice-of-law determinations, *see, e.g., Spector v. Norwegian Cruise Line, Ltd.*, 545 U.S. 119, 2005 AMC 1521 (2005), standing alone it is insufficient here to overcome the force of so many other factors favoring U.S. law.

Having determined that U.S. law applies to Shevchenko's claim, it is undisputed that Shevchenko is covered by Carousel's warranty of seaworthiness under the general maritime law. This Court must therefore review the arbitral proceedings to determine whether Shevchenko'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." *Mitsubishi*, 473 U.S. at 638.

In reaching her decision, the Monaco arbitrator explicitly declared that she would not consider Shevchenko's claim for unseaworthiness under U.S. general maritime law. She instead accepted the testimony of Carousel's Panamanian law expert that Panamanian law does not recognize a strict-liability cause of action for a vessel owner's breach of the warranty of seaworthiness. Conducting a non-intrusive inquiry into the foreign arbitration, as this Court is permitted to do, makes it obvious that the rights Shevchenko was entitled to under the general maritime law of the United States were not enforced, or even considered, in the arbitration.

Finally, this Court must determine whether the prospective waiver and deprivation of Shevchenko's rights under general maritime law constitutes a violation of U.S. public policy.

The Supreme Court in *Mitsubishi* and *Sky Reefer* contemplated a violation of public policy when arbitral awards result from the prospective waiver of a plaintiff's rights in the context of antitrust law and the Carriage of Goods by Sea Act.[7] This Court must determine whether that reasoning extends to a seaman's rights under the general maritime law. Carousel argues that the prospective waiver doctrine is limited to statutory rights, but this Court sees no basis for such a distinction. To be sure, the Supreme Court makes passing reference to "statutory" remedies in *Mitsubishi*, 473 U.S. at 637 n.19, and *Sky Reefer*, 515 U.S. at 540 (quoting *Mitsubishi*) but those references are readily explained by the context of the cases. The *Sky Reefer* Court also referred to a plaintiff's "'legitimate interest in the enforcement of the . . . laws'" without adding "statutory" or mentioning any specific statute. 515 U.S. at 540 (quoting *Mitsubishi*, 473 U.S. at 638) (omission by *Sky Reefer* Court).[8]

Rather than relying on passing references when the Supreme Court had no reason to address the issue at hand, it is more appropriate to consider the relevant policy. In *Mitsubishi*, the policy was to protect the victims of violations of the antitrust laws. In *Sky Reefer*, the policy was to protect cargo owners from carriers that might otherwise use their superior bargaining power to impose unfair terms in their contracts. Here, the policy is protecting the health and safety of seamen, and U.S. law has recognized that policy for centuries. *See, e.g.*, *Harden v. Gordon*, 11 F. Cas. 480, 485 (C.C.D. Me. 1823) (Story, J.). It would be appalling to argue that the public policy in favor of protecting a business's interest in recovering for property damage to

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[7] At the time of the *Sky Reefer* decision, COGSA was codified at 46 U.S.C. App. §§ 1300-15. In 2006, Congress completed the recodification of Title 46, but did not include COGSA in the recodification. *See generally* Michael F. Sturley, *Reflections on the Recodification of Title 46*, 2 BENEDICT'S MAR. BULL. 209 (2004). COGSA is now reprinted in the U.S. Code as a statutory note following 46 U.S.C. § 30701.

[8] The *Mitsubishi* Court had referred to "enforcement of the antitrust laws." 473 U.S. at 638. It is noteworthy that the *Sky Reefer* Court referred only to "laws," which would include the general maritime law, and not to the Carriage of Goods by Sea Act.

its cargo is more important than the long-established public policy in favor of protecting seamen from unsafe working conditions that result in personal injury or even death.

IV

In conclusion, Carousel's motion to enforce the arbitration award is denied; Shevchenko's motion to lift the stay of litigation is granted; and Shevchenko's motion to declare the arbitration award unenforceable is granted. The clerk is directed to set the case for trial on the merits.

United States District Court
for the Western District of Washington

TARAS SHEVCHENKO,
Plaintiff,

v.

CAROUSEL CRUISE LINES, INC.,
Defendant.

No. CV 13-6838

September 10, 2014

PORTIA, J.:

Plaintiff Taras Shevchenko was employed as a seaman (a cook) on the *Glacier Explorer*, a cruise ship owned and operated by defendant Carousel Cruise Lines, Inc., when he suffered serious injuries as a result of tripping on an extension cord in the ship's galley. He brought the present suit to recover damages under the general maritime law doctrine of unseaworthiness.[1] This Court has conducted a bench trial on the merits of Shevchenko's claim, and now holds that he is entitled to recover $254,174 in damages from Carousel.

I

On August 18, 2010, Shevchenko was working on the *Glacier Explorer* when he tripped on an extension cord that Raijin Electrical Engineering Service, an independent contractor, used to run electricity into the galley of the vessel after an electrical breaker failed. As a result of the fall, Shevchenko injured his spine and his hip, has been required to undergo three surgeries, and has been unable to work again as a seaman.

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[1] In a previous opinion, this Court ruled that it would not enforce an arbitration award in Carousel's favor that declined to consider Shevchenko's unseaworthiness claim. See *Shevchenko v. Carousel Cruise Lines, Inc.*, 980 F. Supp. 2d 1387, 2013 AMC 3333 (W.D. Wash. 2013). Familiarity with that opinion is presumed.

No one witnessed Shevchenko's fall, but after the accident there was a detailed investigation. The parties agree that Shevchenko's fall occurred at 4:15 a.m. on August 18. They also agree that the extension cord was placed on the galley walkway by Raijin. On August 17, Carousel engaged Raijin to repair a failed circuit breaker in the *Glacier Explorer*'s galley. The extension cord, 50 feet in length, provided access to substitute electricity for cooking until the circuit breaker could be repaired.[2] The Carousel-Raijin contract called for Raijin to work in the galley from 4:00 a.m. until 10:00 p.m. each day until the repairs were concluded. The repairs were still ongoing on August 18. When Shevchenko tripped on the cord, it was lying on the galley walkway; it was plugged into the galley stove but not into the substitute electricity source.

As is often true in litigation turning on the "transitory unseaworthiness" versus "operational negligence" dichotomy set up by the Supreme Court's decisions in *Mitchell v. Trawler Racer, Inc.*, 362 U.S. 539, 1960 AMC 1503 (1960), and *Usner v. Luckenbach Overseas Corp.*, 400 U.S. 494, 1971 AMC 277 (1971), the evidence in the present case was in conflict as to when the extension cord was placed across the galley walkway and how long it had been there when Shevchenko tripped on it. One of Shevchenko's fellow crew members testified that he noticed the cord lying on the galley walkway around midnight on August 17/18. If credited, the fellow seaman's testimony would support the inference that Raijin left the cord lying on the galley walkway overnight. In contrast, the foreman of the Raijin repair crew testified that the cord was not on the walkway at 4:10 a.m. on August 18th when he arrived at the galley to join his crew in resuming the repair work. If credited, the Raijin foreman's testimony would support the inference that the tripping hazard came into existence only brief minutes before Shevchenko

[2] It is not unusual for a ship in port to access dockside electricity should the need arise. *See, e.g., Huff v. Matson Navigation Co.*, 338 F.2d 205, 207, 1964 AMC 2219, 2221 (9th Cir. 1964).

encountered it. As explained in Part II below, this Court is thankfully not required to referee the credibility battle.

II

The parties agree on a number of issues. The *Glacier Explorer* qualifies as a "vessel" under 1 U.S.C. § 3. *See generally Lozman v. City of Riviera Beach*, 568 U.S. 115, 2013 AMC 1 (2013); *Stewart v. Dutra Construction Co.*, 543 U.S. 481, 2005 AMC 609 (2005). Carousel owns and operates the *Glacier Explorer*. As a member of the crew of that vessel, Shevchenko qualifies as a "seaman" within the meaning of the Jones Act, 46 U.S.C. § 30104, and the doctrine of unseaworthiness. *See generally Chandris, Inc. v. Latsis*, 515 U.S. 347, 1995 AMC 1840 (1995). At the time of his injury, Shevchenko was working in the course of his employment as a seaman with Carousel. And as a seaman, Shevchenko was entitled to invoke Carousel's warranty of seaworthiness. *Boudoin v. Lykes Brothers Steamship Co.*, 348 U.S. 336, 338-39, 1955 AMC 488, 491 (1955). Under the general maritime law, a vessel owner is liable in damages to a seaman injured as a result of the vessel's unseaworthiness regardless of whether the owner was in any way negligent. *Seas Shipping Co. v. Sieracki*, 328 U.S. 85, 93, 1946 AMC 698, 703 (1946).

Further, as indicated above, the parties agree that Raijin placed the cord on the walkway, that Shevchenko tripped on it at 4:15 a.m., and that Shevchenko sustained serious injuries in the fall. But the parties disagree about whether Carousel breached its warranty of seaworthiness. Carousel contends that Raijin's action was an isolated act of operational negligence by an otherwise qualified independent contractor,[3] and that this isolated act of negligence does not render the *Glacier Explorer* unseaworthy. *See Usner*, 400 U.S. at 499-500, 1971 AMC at 281-

[3] Shevchenko does not deny that Raijin Electrical Engineering Service was otherwise a well-qualified independent contractor. Indeed, Shevchenko does not bring any negligence claim against Carousel.

82. Shevchenko, in contrast, argues that the hazard created by the extension cord was just the kind of transitory unseaworthiness that the Supreme Court recognized in *Mitchell*, 362 U.S. at 540-41, 549-50, 1960 AMC at 1504-05, 1511-12. That disagreement goes to the heart of the case.

Turning to the factual details of the disagreement (see Part I above), Carousel argues that the testimony of the Raijin foreman shows that at the time of Shevchenko's accident the cord had been in place for less than five minutes, too short a time to constitute transitory unseaworthiness.[4] Shevchenko counters that the testimony of his fellow seaman shows that the cord had been in place for several hours, constituting an inarguably unseaworthy condition. As this Court appreciates the governing law, the factual dispute does not matter. Even if the cord had been in place for less than five minutes, it was a condition of transitory unseaworthiness under the analysis required by the Supreme Court's decision in *Usner*, where the Court stated that an injury-causing workplace practice that was not in existence "for a time long enough" to give rise to any duty of care to remedy it is nevertheless an actionable condition of transitory unseaworthiness unless it was an "isolated" or "single and wholly unforeseeable act of negligence." 400 U.S. at 499-500, 1971 AMC at 281, 282.

The Ninth Circuit has long been in accord with *Usner*. *See Rawson v. Calmar Steamship Corp.*, 304 F.2d 202, 205, 1962 AMC 2153, 2157 (9th Cir. 1962) ("[L]ongshoremen as well as seamen [may] create unseaworthy conditions which very soon thereafter can cause injury for which the ship can be held liable. . . . [U]nseaworthiness implies an antecedent condition, although it is quite apparent that the pre-existence of the condition may be very short.").

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[4] Carousel also argues that a condition of transitory unseaworthiness "necessarily involves a congeries of negligent acts." The argument reflects a misunderstanding of the controlling law. It is true that a proponent of transitory unseaworthiness can sometimes establish the existence of a pre-injury condition by pointing to a "congeries" of causal actions, but the cases treated in the two paragraphs below indicate that a "congeries" showing is not required.

The Second Circuit's jurisprudence is generally consistent with *Rawson*. *See Norfleet v. Isthmian Lines, Inc.*, 355 F.2d 359, 363-64, 1966 AMC 80, 86-87 (2d Cir. 1966); *Reid v. Quebec Paper Sales & Transportation Co.*, 340 F.2d 34, 35, 1965 AMC 112, 113-14 (2d Cir. 1965); *Puddu v. Royal Netherlands Steamship Co.*, 303 F.2d 752, 755, 1962 AMC 419, 423-24 (2d Cir. 1962) (Clark, J., dissenting, from denial of en banc rehearing) (stating that "a short-lived [condition] arising only a few minutes [before the accident in suit] is nevertheless [actionable] unseaworth[iness]" and that it "would be purely arbitrary" to insist "that a condition [must] exist for a certain time before it bec[omes] unseaworthy"). The *Puddu* decision is perhaps best known for an insightful test for distinguishing between operational negligence and transitory unseaworthiness propounded by Judge Hays:

> A ship is not unseaworthy because it has glass in a window which might be broken. The injuries of a seaman who negligently breaks such a glass are not the result of unseaworthiness, nor are the injuries of a [fellow] seaman who is cut by the falling glass. But injury incurred in stepping on the broken glass does result from unseaworthiness.

303 F.2d at 757 (en banc) (Hays, J., concurring in the result).

The *Puddu* test has been widely relied upon,[5] and it is of great assistance in resolving the present dispute. Applying the *Puddu* test, Shevchenko would not have had an unseaworthiness claim if he had been directly injured by Raijin's action in placing the extension cord (if, for example, his foot had become tangled in the cord and he was tripped when a Raijin employee pulled it tight). But once Raijin placed the extension cord in a dangerous location and left it there for any perceptible interval of time, the *Glacier Explorer* became transitorily unseaworthy (and remained unseaworthy until the unsafe condition was corrected, just as the *Trawler Racer* was unseaworthy until the fish slime was removed from the rail of the vessel).

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[5] *See, e.g.*, *Radovich v. Cunard Steamship Co.*, 364 F.2d 149, 154, 1966 AMC 2426, 2432 (2d Cir. 1966) (Kaufman, J. dissenting); *Barlas v. United State*s, 279 F. Supp. 2d 201, 215-16, 2003 AMC 2927, 2946 (S.D.N.Y. 2003).

III

With the contentious legal issues decided in Shevchenko's favor, it remains only to resolve the remaining factual issues. Having heard the testimony of all of the witnesses and considered the parties' written submissions, this Court concludes that (1) Shevchenko was not guilty of any contributory negligence; (2) Shevchenko's injuries were proximately caused by the unseaworthy condition of the *Glacier Explorer*; (3) Shevchenko is entitled to $64,174 in damages for his lost earnings and loss of earning capacity; (4) Shevchenko is entitled to $190,000 in damages for his pain and suffering.

IV

In conclusion, Carousel's motion to dismiss Shevchenko's unseaworthiness claim is denied. Shevchenko is entitled to recover a total of $254,174 in damages. A decree addressing prejudgment interest and an appropriate order will be entered accordingly.

Selected Chronology of the Case[*]

Aug. 18, 2010	Plaintiff Taras Shevchenko is injured while working on the *Glacier Explorer*
Nov. 12, 2010	Shevchenko files suit in state court against defendant Carousel Cruise Lines, Inc., seeking damages under the general maritime law for unseaworthiness
May 16, 2011	State court stays the litigation and orders arbitration in Monaco
Feb. 15, 2013	Arbitrator issues decision declining to consider unseaworthiness claim
Mar. 4, 2013	Shevchenko moves in state court to lift the stay of litigation, set aside the arbitration decision, and award damages for unseaworthiness
Apr. 3, 2013	Carousel removes the case to federal district court and moves to enforce the arbitration decision
Oct. 21, 2013	District court declares arbitration award unenforceable and sets unseaworthiness claim for trial
Sept. 10, 2014	District court rules for Shevchenko on the merits and awards damages
Sept. 24, 2014	Carousel files notice of appeal
Mar. 2, 2016	Oral argument in the court of appeals
May 5, 2017	Court of appeals files opinion affirming the district court and enters judgment
May 12, 2017	Carousel files petition for rehearing
Jun. 12, 2017	Court of appeals denies petition for rehearing
Sept. 11, 2017	Carousel files petition for certiorari filed presenting two issues: (1) whether the district court should have enforced the arbitration decision, and (2) whether Shevchenko's injury was caused by transitory unseaworthiness or a single act of negligence.
Dec. 4, 2017	Supreme Court grants Carousel's petition for certiorari

[*] This information is included in the packet for the information of Competition participants. Unlike the preceding pages, it should not be considered part of the APPENDIX TO THE PETITION FOR CERTIORARI filed with the Court.