Nos. 15-1170, 15-1217

IN THE UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

JAMES HAYES *ET AL.*,

Plaintiffs/Appellants/Cross-Appellees,

v.

DELBERT SERVICES CORPORATION,

Defendant/Appellee/Cross-Appellant.

Appeal from the United States District Court for the Eastern District of Virginia
Civil No. 3:14-cv-00258-JAG

PETITION FOR REHEARING EN BANC OF APPELLEE/CROSS-APPELLANT

Clifford M. Sloan
Joseph L. Barloon
Michael A. McIntosh
SKADDEN, ARPS, SLATE,
MEAGHER & FLOM LLP
1440 New York Ave. NW
Washington, DC 20005
(202) 371-7000
cliff.sloan@skadden.com
joseph.barloon@skadden.com
michael.mcintosh@skadden.com

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Statutes

Other Authorities

INTRODUCTION AND RULE 35(b) STATEMENT

On February 2, 2016, the panel issued a decision in this case reversing the district court's order enforcing the arbitration provision in the contract between Plaintiffs and Defendant Delbert Services Corporation ("Delbert"). Delbert now requests that the Court rehear this appeal en banc to ensure conformity with precedent of the U.S. Supreme Court and this Court and to preclude the wholesale invalidation of arbitration agreements that include a foreign choice-of-law clause.

En banc consideration is necessary because the panel opinion conflicts with the Supreme Court's decision in *Vimar Siguros y Reaseguros, S.A. v. M/V Sky Reefer*, 515 U.S. 528 (1995), and its progeny, as well as this Court's decision in *Aggarao v. MOL Ship Mgmt. Co., Ltd.*, 675 F.3d 355 (4th Cir. 2012). These decisions make clear that inclusion of a foreign choice-of-law provision in an arbitration agreement does not automatically invalidate the agreement on the ground that it constitutes a prospective waiver of federal statutory rights. Rather, in the ordinary course, courts must, in the first instance, defer to an arbitrator to resolve questions surrounding the application of foreign law.

But the panel opinion never addressed the import of these decisions. Rather, the panel opinion relied on three decisions from other circuits construing arbitration agreements far different from the agreement here. In doing so, the panel opinion overstepped the limited role of the judiciary at the pre-arbitration

juncture, in direct violation of the principles set forth in *Vimar* and *Aggarao*. The panel opinion's premature interpretation of the arbitration agreement—concluding, before an arbitrator even considers it, that the arbitration provision prohibits application of federal law—also runs headlong into long-standing Supreme Court precedent directing courts to resolve all doubts in favor of arbitration. The panel decision also is premised on a hostility to Native American law that conflicts with Supreme Court precedent, congressional enactments, and a due regard and respect for tribal law. And the panel opinion's misapprehension of settled precedent will have far-reaching consequences, compelling the invalidation of scores of arbitration agreements providing for the application of foreign law and thereby destabilizing American interests in the global economic system.

To correct the panel opinion's disregard of binding precedent and to avoid the attendant harm to the nation's international commercial relationships, this Court should grant this Petition and rehear this appeal en banc.

ARGUMENT

I. THE PANEL OPINION CONFLICTS WITH DECISIONS OF THE SUPREME COURT AND THIS COURT.

In holding that the parties' arbitration agreement prohibits Plaintiffs from asserting federal rights, the panel opinion disregarded binding precedent in two fundamental ways. First, it overlooked that the arbitrator, not a court, is the proper authority to construe choice-of-law clauses in the first instance. Second, the panel

opinion ignored the mandate to resolve any ambiguities in an arbitration agreement in favor of arbitration.

A. Mere Inclusion of a Foreign Choice-of-Law Provision Does Not Violate the Prospective Waiver Doctrine.

The panel opinion concluded that the arbitration agreement is invalid because it "waives a potential claimant's federal rights through the guise of a choice of law clause." Slip Op. at 19. Yet the agreement's choice-of-law clause is routine. It states that "[t]he arbitrator will apply the laws of the Cheyenne River Sioux Tribal Nation and the terms of this Agreement," JA 156, just as many arbitration agreements provide for the applicability of foreign law. By construing this language as a "choice of no law clause," slip op. at 21, the panel decision contravened precedent of the Supreme Court and this Court.

The Supreme Court reaffirmed just this Term that the Federal Arbitration Act ("FAA") "allows parties to an arbitration contract considerable latitude to choose what law governs some or all of its provisions," observing also that, "[i]n principle, [the parties] might choose to have portions of their contract governed by the law of Tibet" or the "law of pre-revolutionary Russia." *DIRECTV, Inc. v. Imburgia*, 136 S. Ct. 463, 468 (2015).[1] To be sure, the Supreme Court has recognized limits to that discretion, including that an agreement is unenforceable

[1] Unless otherwise noted, all internal quotation marks and citations are omitted.

when it provides for the "prospective waiver of a party's *right to pursue* statutory remedies," such as where the agreement "forbid[s] the assertion of certain statutory rights." *Am. Express Co. v. Italian Colors Rest.*, 133 S. Ct. 2304, 2310 (2013).

In contrast to the panel opinion's holding that the inclusion of a foreign choice-of-law provision in the arbitration agreement rendered it unenforceable under this "prospective waiver" doctrine, the Supreme Court made clear in *Vimar* that the doctrine is not triggered where, as here, it has not been definitively established that a plaintiff will be precluded from asserting federal statutory rights or from receiving comparable adequate protections. The parties in *Vimar* disputed the enforceability of an arbitration agreement calling for the application of Japanese law. 515 U.S. at 531. The plaintiff argued that the arbitration clause was invalid because there was "no guarantee foreign arbitrators will apply [the federal Carriage of Goods by Sea Act]" and thus the plaintiff would be prohibited from asserting its federal statutory rights. *Id.* at 539.

The Supreme Court flatly rejected the plaintiff's arguments against arbitration as "premature," regardless of the merits of the plaintiff's position. *Id.* at 540. The Court explained that, "[a]t this interlocutory stage it is not established what law the arbitrators will apply to [plaintiff's] claims or that [plaintiff] will receive diminished protection as a result," and noted that "[t]he arbitrators may conclude that COGSA applies of its own force or that Japanese law does not

apply." *Id.* The Court then observed that a reviewing court would have the chance to evaluate the plaintiff's argument at the award-enforcement stage, after the arbitrator's decision has been issued. *Id.* Cautioning courts not to engage in "mere speculation" about what law the foreign arbitrators might apply, the Supreme Court concluded that lower courts were obligated to "reserve judgment on the choice-of-law question, as it must be decided in the first instance by the arbitrator." *Id.* at 541; *see also, e.g.*, *PacifiCare Health Sys., Inc. v. Book*, 538 U.S. 401, 406–07 (2003) (applying *Vimar* and enforcing arbitration agreement where Court did not "know how the arbitrator will construe" the remedial provisions that plaintiffs claimed invalidated the agreement).

This Court faithfully has followed the dictates of *Vimar*, including its admonition against prematurely resolving the ramifications of a foreign choice-of-law provision. In *Aggarao*, the plaintiff argued that the foreign choice-of-law provision in an arbitration clause violated the prospective waiver doctrine because "the arbitrator would apply the law of the Philippines to the exclusion of otherwise applicable American law, thereby denying his right to pursue his federal statutory claims." 675 F.3d at 371. Applying *Vimar*, this Court found the plaintiff's challenge premature, concluding that the plaintiff was not "entitled to interpose his public policy defense, on the basis of the prospective waiver . . . doctrine[,] until the second stage of the arbitration-related court proceedings—the award-

enforcement stage." *Id.* at 373. The Court also noted that it would be speculative to determine, before the arbitration had taken place, that the plaintiff would not be able to pursue his federal statutory claims or receive comparable protections, notwithstanding the Philippine choice-of-law provision. *See id.* at 373 n.16 ("It is possible that the Philippine arbitrator(s) will apply United States law with respect to the Jones Act and Seaman's Wage Act claims, or that [plaintiff] will be able to effectively vindicate the substance of those claims under Philippine law and obtain an adequate remedy.").

Straightforward application of the holdings in *Vimar* and *Aggarao* compels the conclusion that the panel opinion conflicts with settled precedent. As was the case with the arbitration agreements in *Vimar* and *Aggarao*, the agreement here includes a choice-of-law clause simply providing for the application of foreign law. *See* JA 156 ("The arbitrator will apply the laws of the Cheyenne River Sioux Tribal Nation and the terms of this Agreement."). The panel opinion interpreted this as a "choice of no law clause," slip op. at 21, that operated as a prospective waiver of Plaintiffs' federal statutory rights, *id.* at 19. But *Vimar* and *Aggarao* rejected just this sort of reasoning, holding that a court may not refuse to enforce an arbitration agreement on the ground that a foreign choice-of-law clause, without more, will prohibit a plaintiff from asserting federal rights. An arbitrator in this case might apply federal law to Plaintiffs' claims. Or the arbitrator might apply

tribal law that is consistent with federal law. Or the arbitrator might take a different course. Regardless, "[w]hatever the merits" of the panel opinion's prediction that Plaintiffs will not be able to vindicate their federal rights at arbitration, the conclusion "is premature" and anchored in "mere speculation." *See Vimar*, 515 U.S. at 540–41. Plaintiffs are "not entitled to interpose" their objection based on the prospective waiver doctrine until "the award-enforcement stage." *Aggarao*, 675 F.3d at 373.[2]

Particularly given that the panel opinion did not meaningfully discuss *Vimar* or even cite *Aggarao*, en banc review is warranted to resolve the clear conflict with binding precedent. The panel opinion also conflicts with the decisions of other circuits, which have held that it is for the arbitrator to construe contractual

[2] To be sure, some arbitration agreements include unambiguous waivers of specific, enumerated rights guaranteed by federal statutes such that the agreements (or portions thereof) can be invalidated before the award-enforcement stage. *See* slip op. at 21 (collecting cases). But these cases involve agreements featuring much more than a simple provision that foreign law applies or that federal law does not apply. Rather, the agreements expressly identify rights protected within federal statutes and disclaim their applicability. *See Kristian v. Comcast Corp.*, 446 F.3d 25, 47–48 (1st Cir. 2006) (invalidating provision where federal antitrust law mandated a treble damages remedy but agreement prohibited award of treble damages); *Hadnot v. Bay, Ltd.*, 344 F.3d 474, 478 n.14 (5th Cir. 2003) (noting that Title VII provides for statutory punitive damages and striking down agreement's ban on punitive and exemplary damages); *Graham Oil Co. v. ARCO Prods. Co.*, 43 F.3d 1244, 1248 (9th Cir. 1994) (invalidating agreement that prohibited recovery of exemplary damages and attorneys' fees, which Petroleum Marketing Practices Act authorized; and that imposed a 90-day or six-month limitations period, when Act provided a one-year statute of limitations).

language purportedly limiting the assertion of statutory rights in the first instance, and en banc review is warranted for that reason as well. *See, e.g.*, *Quilloin v. Tenet HealthSystem Phila., Inc.*, 673 F.3d 221, 231 (3d Cir. 2012) (concluding that district court "erred in determining that it could not compel arbitration before resolving the issue" whether arbitration agreement prohibited an award of attorneys' fees as authorized by federal statutes); *Carbajal v. H&R Block Tax Servs., Inc.*, 372 F.3d 903, 906–07 (7th Cir. 2004) (rejecting argument that arbitration clause was unenforceable on ground that it prohibited remedies available under federal statute because the "arbitrator rather than the court determines the validity of these ancillary provisions").

B. The Panel Opinion Violates the Strong Federal Policy in Favor of Arbitration.

To bolster its conclusion that the arbitration agreement prohibits Plaintiffs from asserting federal statutory rights, the panel opinion, in direct conflict with Supreme Court precedent, relied on a strained interpretation of the agreement. The Supreme Court has emphasized that § 2 of the FAA "reflect[s] both a liberal federal policy favoring arbitration and the fundamental principle that arbitration is a matter of contract," such that "courts must place arbitration agreements on an equal footing with other contracts and enforce them according to their terms." *AT&T Mobility LLC v. Concepcion*, 563 U.S. 333, 339 (2011). "[Q]uestions of arbitrability must be addressed with a healthy regard for the federal policy favoring

arbitration." *Gilmer v. Interstate/Johnson Lane Corp.*, 500 U.S. 20, 26 (1991). Critically, the Supreme Court has held that "any doubts concerning the scope of arbitrable issues should be resolved in favor of arbitration." *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614, 626 (1985).

The Supreme Court has invoked these principles in applying *Vimar* to reject arguments based on the prospective waiver doctrine. *See Book*, 538 U.S. at 406–07. In *Book*, the plaintiffs argued that the prospective waiver doctrine barred enforcement of four arbitration agreements where the agreements prohibited an award of punitive damages, but the federal statute under which the plaintiffs asserted claims (RICO) authorized treble damages. *Id.* at 403. The Supreme Court rejected the argument that the agreements' provisions—which expressly barred the award of "punitive damages" or "exemplary damages"—triggered the prospective waiver doctrine. *Id.* at 405. The Court first found that, "[i]n light of [its] case law's treatment of statutory treble damages, and given the uncertainty surrounding the parties' intent with respect to the contractual term 'punitive,' the application of the disputed language to [plaintiffs'] RICO claims is, to say the least, in doubt." *Id.* at 406. It then stressed that "*Vimar* instructs that we should not, on the basis of 'mere speculation' that an arbitrator might interpret these ambiguous agreements in a manner that casts their enforceability into doubt, take upon ourselves the authority to decide the antecedent question of how the ambiguity is to be

resolved." *Id.* at 406–07. "In short," the Supreme Court concluded, "since we do not know how the arbitrator will construe the remedial limitations, the questions whether they render the parties' agreements unenforceable and whether it is for courts or arbitrators to decide enforceability in the first instance are unusually abstract" and "the proper course is to compel arbitration." *Id.* at 407.

But while the Supreme Court has commanded that all doubts be resolved *in favor* of arbitration, the panel opinion resolved all doubts *against* arbitration, failing to adhere to the strong federal policy in favor of arbitration. In addition to the agreement's choice-of-law clause, the panel opinion relied on a second provision—which is not part of the choice-of-law clause—to support its decision that the agreement was invalid as a prospective waiver of federal rights. That provision first gives Plaintiffs the option to have their arbitrations conducted "within thirty miles" of their residence and then notes that "this accommodation for you shall not be construed in any way . . . to allow for the application of any law other than the law of the Cheyenne River Sioux Tribe of Indians to this Agreement." JA 155. The panel opinion interpreted this clause to "confirm[]" that federal law may not be applied at arbitration. Slip Op. at 20. But had the panel opinion properly "resolved" "any doubts concerning the scope of arbitrable issues . . . in favor of arbitration," *Mitsubishi Motors*, 473 U.S. at 626, it surely would have concluded, at this preliminary stage, that the provision is not

necessarily an express prohibition on the assertion of federal statutory rights. *See, e.g.*, *Book*, 538 U.S. at 406–07 (instructing courts to refrain from deciding "how the ambiguity is to be resolved" "on the basis of 'mere speculation" that a clause could be interpreted "in a manner that casts [its] enforceability into doubt"). To the contrary, the provision states simply that a willingness to conduct arbitration away from tribal land does not change the choice-of-law provision. This clause does not state that application of federal law is prohibited in all instances, as the panel opinion seemed to conclude.[3]

Other provisions of the agreement, which could be read to leave open the possibility that federal law might apply in an arbitral proceeding, underscore the panel opinion's selective reading of the agreement and its resolution of any doubts against arbitration. For instance, the agreement defines the "Dispute" subject to arbitration as "any claim based upon," among other things, "federal or state

---

[3] The panel opinion appeared to anchor much of its reasoning in a contractual clause wholly outside of the arbitration agreement, a provision that provided that "no United States state or federal law applies to this Agreement," JA 154. Slip op. at 6–7, 22. But, as the panel opinion itself conceded, *id.* at 11, 21–22, an arbitration agreement can be invalidated only on the basis of a challenge "specifically *to the validity of the agreement to arbitrate*," *Rent-A-Ctr., West, Inc. v. Jackson*, 561 U.S. 63, 70 (2010) (emphasis added). In other words, "a party's challenge to another provision of the contract, or to the contract as a whole, does not prevent a court from enforcing a specific agreement to arbitrate." *Id.* Thus any language outside the arbitration agreement has no bearing on its validity. And, in any event, predicting at this stage how the arbitrator will interpret this part of the loan agreement also is speculative.

constitution, statute, ordinance, regulation, or common law." JA 155. The agreement, moreover, includes a seemingly broad remedial provision, authorizing the arbitrator to "award all remedies available by statute, at law, or in equity to the prevailing party." *Id.* As the Supreme Court instructed in *Book*, then, since a court does not "know how the arbitrator will construe the remedial limitations, the questions whether they render the parties' agreement[] unenforceable and whether it is for the courts or arbitrators to decide enforceability in the first instance are unusually abstract" and "the proper course is to compel arbitration." 538 U.S. at 407.[4]

At bottom, the panel opinion's holding that the arbitration agreement is a "choice of no law clause," slip op. at 21, expresses outright hostility toward the adequacy of tribal law. But this logic, too, runs headlong into Supreme Court

[4] Notably, district courts construing the identical arbitration agreement at issue here have complied with the Supreme Court's holdings and refused to invalidate the agreement. *See, e.g.*, *Yaroma v. CashCall, Inc.*, Civil No: 15-08-GFVT, 2015 WL 5475258, at *6 (E.D. Ky. Sept. 16, 2015) ("[W]here, as here, the parties have agreed to arbitrate the entire dispute, the specific choice of what substantive law to apply is more appropriately a question for the arbitrator. . . ."); *Kemph v. Reddam*, No. 13 CV 6785, 2015 WL 1510797, at *5 (N.D. Ill. Mar. 27, 2015) ("Although the arbitration agreements provide that 'the arbitrator will apply the laws of the Cheyenne River Sioux Tribal Nation,' the arbitrator, once chosen, would have the authority to determine whether that choice-of-law provision is valid. This is particularly true because . . . the loan agreements explicitly provide that the arbitrator can decide 'any issue concerning the validity, enforceability, or scope of . . . the Arbitration agreement,' which includes the enforceability of the choice-of-law clause.").

precedent, as well as congressional enactments. The Supreme Court has explained that "[t]ribal courts have repeatedly been recognized as appropriate forums for the exclusive adjudication of disputes affecting important personal and property interests of both Indians and non-Indians" and that "[n]onjudicial tribal institutions have also been recognized as competent law-applying bodies." *Santa Clara Pueblo v. Martinez*, 436 U.S. 49, 65–66 (1978); *see also Vimar*, 515 U.S. at 539 (cautioning against "insular distrust of the ability of foreign arbitrators to apply the law"). And Congress, for its part, has declared that "Congress and the Federal courts have repeatedly recognized tribal justice systems as the appropriate forums for the adjudication of disputes affecting personal and property rights." 25 U.S.C. § 3601(6).

As is especially relevant here, the Cheyenne River Sioux Tribal Nation has a legal system capable of adjudicating the disputes at issue in this case. *See, e.g.*, *Williams v. CashCall, Inc.*, 92 F. Supp. 3d 847, 854 (E.D. Wis. 2015) (referring to "substantive Tribal law on contract disputes, including contract cases in the Tribe's courts, and the Tribe's Commercial Code, Rules of Civil Procedure, Constitution and By-Laws, and Law & Code"); South Dakota Tribal Court Handbook 18–20 (2006), *available at* http://ujs.sd.gov/media/docs/-IndianLaw%20Handbook.pdf (noting that the Cheyenne River Sioux Tribe Rules of Civil Procedure "closely parallel the Federal Rules of Civil Procedure"; that relief available under Tribal

law includes "money damages, declaratory relief, injunctive relief, extraordinary writs, and execution"; and that the Tribe has adopted South Dakota's version of Article 9 of the Uniform Commercial Code).[5]

II. THE PANEL OPINION WILL HAVE FAR-REACHING RAMIFICATIONS FOR INTERNATIONAL COMMERCE.

If allowed to stand, the panel decision will lead to the invalidation of countless arbitration agreements with foreign choice-of-law clauses on the ground that explicitly providing for the application of foreign law violates the prospective waiver doctrine. There is no principled basis for distinguishing the arbitration agreement in this case from routine foreign choice-of-law clauses in standard international commercial agreements. Application of the panel decision's holding to other cases thus will have a substantial and deleterious effect on the participation of American businesses in the global economy, and will create incentives for businesses to try to ensure that their arbitration agreements are not subject to litigation in this Circuit.

As the Supreme Court noted two decades ago, "[t]he expansion of American business and industry will hardly be encouraged . . . if, notwithstanding solemn

[5] Although the panel opinion devotes much attention to Plaintiffs' allegations that the "arbitration agreement is unenforceable because it sets up a hollow arbitral mechanism," slip op. at 11–16, the decision ultimately makes clear that the panel "need not consider" and does not rely on that argument because its holding rests solely on application of the prospective waiver doctrine, *id.* at 15–16.

contracts, we insist on a parochial concept that all disputes must be resolved under our laws and in our courts." *Vimar*, 515 U.S. at 538; *see also Mitsubishi*, 473 U.S. at 629 ("[C]oncerns of international comity, respect for the capacities of foreign and transnational tribunals, and sensitivity to the need of the international commercial system for predictability in the resolution of disputes require that we enforce the parties' agreement. . . ."). This principle applies with particular force when confronting choice-of-law clauses in arbitration agreements, given that "[a] contractual provision specifying in advance the forum in which disputes shall be litigated and the law to be applied is . . . an almost indispensable precondition to achievement of the orderliness and predictability essential to any international business transaction." *Id.* at 631. "A parochial refusal by the courts of one country to enforce an international arbitration agreement" would "damage the fabric of international commerce and trade, and imperil the willingness and ability of businessmen to enter into international commercial agreements." *Id.*

En banc consideration of this appeal thus is warranted to vindicate the considered views of the Supreme Court and Congress and to safeguard the nation's access to foreign commercial markets.

CONCLUSION

For the foregoing reasons, this Court should grant the Petition.

Dated: February 16, 2016

Respectfully submitted,

/s/ Clifford M. Sloan

Clifford M. Sloan
Joseph L. Barloon
Michael A. McIntosh
SKADDEN, ARPS, SLATE,
MEAGHER & FLOM LLP
1440 New York Ave. NW
Washington, DC 20005
(202) 371-7000
cliff.sloan@skadden.com
joseph.barloon@skadden.com
michael.mcintosh@skadden.com

CERTIFICATE OF SERVICE

I certify that on February 16, 2016 I electronically filed the foregoing Petition with the Clerk of the Court for the U.S. Court of Appeals for the Fourth Circuit using the CM/ECF system, which will send notification of such filing to counsel for all parties.

/s/ Clifford M. Sloan
Clifford M. Sloan
1440 New York Ave. NW
Washington, DC 20005
(202) 371-7000
cliff.sloan@skadden.com