UNITED STATES DISTRICT COURT

EASTERN DISTRICT OF LOUISIANA

FELICIANO LEJANO and MELINDA LEJANO	*	CIVIL ACTION
VERSUS	*	NO. 00-2990
K.S. BANDAK, ASSURANCEFORENINGEN GARD, and GARD (U.K.) LTD.	*	SECTION "F"

ORDER AND REASONS

Before the Court is the plaintiffs' motion to remand. For the reasons that follow, the motion is DENIED.

Background

On November 7, 1991, Feliciano Lejano, a Philippine citizen and resident, was severely injured in an accident while working as a seaman on board the M/V BANDAK, a Norwegian vessel. At the time of the accident, Lejano was working under the terms of a standard Philippine Overseas Employment Administration(POEA) contract. Because of the injuries he sustained, Lejano and his wife filed a seaman's personal injury lawsuit in Louisiana state court.[1] The

[1] The parties dispute the seriousness of Lejano's medical condition. The plaintiffs assert that Lejano is on the verge of

case comes to this Court by way of removal pursuant to federal question jurisdiction.

Because of the nature of the proceedings leading up to removal, a brief description of the procedural history is necessary. On September 16, 1993, the plaintiffs filed a seaman's personal injury lawsuit in the 24th Judicial District Court, State of Louisiana. Although the trial court initially dismissed the lawsuit on forum non conveniens grounds, the Louisiana 5th Circuit Court of Appeal reversed and remanded the case, finding that the plaintiffs stated a cause of action and that forum non conveniens did not apply. On September 21, 1995, the trial court dismissed the lawsuit, holding that the forum selection clause in Lejano's employment agreement was valid and that the plaintiffs were required to file their lawsuit in the Philippines or Norway. The court of appeals denied a motion for new trial and the Louisiana Supreme Court affirmed the decision on December 12, 1997. However, the Supreme Court allowed the trial court to retain jurisdiction over the case so that the matter could be tried in Louisiana if the plaintiffs could show that pursuit of their claims in the foreign forum was frustrated.

On August 14, 1998, plaintiffs filed a complaint against the

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death and might never get his day in court. The defendants dispute this contention and maintain that the plaintiffs' own expert has estimated Lejano's life expectancy at approximately 22 years from the accident (now about twelve years).

defendants before the Philippine National Labor Relations Commission(NLRC). The Labor Arbiter subsequently dismissed the proceeding, finding that the plaintiffs' claims had prescribed. Because of the dismissal, the plaintiffs went back to the state trial court in December 1998, and sought to re-open the case and set a trial date. On June 17, 1999, the NLRC reversed the decision dismissing the arbitration complaint and remanded the case back to the labor arbiter. As a result, the state trial court did not rule on plaintiffs' motion to re-open until the parties had an opportunity to investigate the status of the Philippines arbitration. However, on April 27, 2000, the Louisiana trial court granted plaintiffs' motion and set a trial date for November 6, 2000. The court of appeals affirmed the decision and the Louisiana Supreme Court has taken the matter under consideration.[2] Then, on October 6, 2000, the defendants removed the case to this Court.[3]

As grounds for removal, the defendants rely on the Convention on the Recognition and Enforcement of Foreign Arbitral Awards, 9 U.S.C. §§ 201-08. Plaintiffs now move to remand the action claiming that the Convention does not apply to this case, and therefore, the Court lacks subject matter jurisdiction.

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[2] These proceedings have been stayed due to defendants' removal.

[3] The plaintiffs have since dismissed their arbitration complaint in the Philippines.

Law and Analysis

Although the plaintiffs challenge removal in this case, the removing defendants have the burden of showing the propriety of this Court's removal jurisdiction. See Jernigan v. Ashland Oil Inc., 989 F.2d 812, 815 (5th Cir.), cert. denied, ___ U.S. ___, 114 S. Ct. 192, 126 L.Ed.2d 150 (1993); Willy v. Coastal Corp., 855 F.2d 1160, 1164 (5th Cir. 1988). In addition, any ambiguities are construed against removal, Butler v. Polk, 592 F.2d 1293, 1296 (5th Cir. 1979), as the removal statute should be strictly construed in favor of remand. York v. Horizon Fed. Sav. and Loan Ass'n, 712 F. Supp. 85, 87 (E.D. La. 1989); see also Shamrock Oil & Gas Corp. v. Sheets, 313 U.S. 100 (1941).

The plaintiffs make several arguments for remand. First, the plaintiffs claim that the Convention does not apply because employment contracts of seamen are specifically excluded from coverage. Second, the plaintiffs urge that even if the Convention somehow applies to this case, the defendants have not satisfied the requirements set out by the Convention. Finally, the plaintiffs contend that the defendants have waived their right to seek arbitration and remove the case to this Court because the removal comes too long after the case was filed.

A. Exclusion of Employment Contracts of Seamen

The plaintiffs assert that the claims in this case arise out of Lejano's employment contract with the defendant and that such

employment contracts are specifically excluded from the Convention's coverage under 9 U.S.C.§ 1.[4] The Court does not agree.

9 U.S.C.§ 202 crafts the coverage of the Convention. Specifically, it provides that:

> An arbitration agreement or arbitral award arising out of a legal relationship, whether contractual or not, which is considered as commercial, including a transaction, contract, or agreement described in section 2 of this title, falls under the Convention.

9 U.S.C.§ 2 further provides that:

> A written provision in any maritime transaction or a contract evidencing a transaction involving commerce to settle by arbitration a controversy thereafter arising out of such contract or transaction, or the refusal to perform the whole or any part thereof, or an agreement in writing to submit to arbitration an existing controversy arising out of such contract, transaction, or refusal, shall be valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract.

9 U.S.C.§ 1, which defines maritime transactions and commerce as set out in § 2, goes on to exclude "contracts of employment of seamen, railroad employees, or any other class of workers engaged

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[4] Title 9 of the United States Code deals with arbitration and is divided into three chapters. The Court is only concerned with the provisions from the first two chapters. Chapter 1 (9 U.S.C.§§ 1-16) addresses domestic arbitration agreements. Chapter 2(9 U.S.C.§§ 201-8) covers foreign arbitration agreements. However, provisions from Chapter 1 apply to Chapter 2 to the extent that the provisions from Chapter 1 are not in conflict with the provisions of Chapter 2 or the Convention. 9 U.S.C.§ 208.

in foreign or interstate commerce."

While §1 of Chapter 1 specifically excludes employment contracts of seamen, § 208 of Chapter 2, which incorporates Chapter 1 into the Convention, only allows an application of Chapter 1 and its sections "to the extent that the chapter is not in conflict with this chapter or the Convention as ratified by the United States." The Court finds that the § 1 exclusion is in conflict with Chapter 2 and the Convention.

Section 202 refers to "a legal relationship ... which is considered as commercial, including a transaction, contract or agreement described in section 2..." § 2 refers to "maritime transaction or a contract evidencing a transaction involving commerce..." It appears that § 202 covers all legal relationships that are commercial, while § 2, defined by § 1, limits transactions involving commerce by excluding from Chapter 1 coverage "contracts of employment of seamen, railroad employees, or any other class of workers engaged in foreign or interstate commerce." Because the Court finds that these two provisions are in conflict, § 1 of Chapter 1 is not applicable to the Convention by virtue of § 208. Furthermore, the Court notes that:

> The goal of the convention, and the principal purpose underlying American adoption and implementation of it, was to encourage the recognition and enforcement of commercial arbitration agreements and international contracts and to unify the standard by which the agreements to arbitrate are observed and arbitral awards are enforced in the signatory

countries.

Scherk v. Alberto-Culver Co., 417 U.S. 506,520 n.15, 94 S.Ct. 2449, 2457, 41 L.Ed.2d 270(1974). Here, the Philippine government has set up a system whereby disputes involving seamen employment contracts are governed by an arbitration tribunal, namely the NLRC. Thus, an application of the § 1 exclusions would thwart the goal of the Convention as stated by the Supreme Court in Scherk. Such a conflict is not permitted by § 208.

B. Convention Prerequisites

The plaintiffs also maintain that the defendants have not met the requirements set out by the Convention, and therefore, the Convention does not apply and the Court lacks subject matter jurisdiction. In order to determine that the Convention applies to an arbitration agreement, the Court must find that the following elements are satisfied: 1) there is an agreement in writing to arbitrate the subject of the dispute; 2) the agreement provides for arbitration in the territory of a signatory of the Convention; 3) the agreement arises out of a commercial legal relationship; and 4)the party to the agreement is not an American citizen or the commercial relationship has some relation with one or more foreign states. 9 U.S.C.§ 201, et seq.

i. Agreement in Writing to Arbitrate

For the Convention to apply, there must be an agreement, in writing, to arbitrate. The Court finds that such an agreement

exists. Not only does Lejano's employment contract contain a agreement in writing to arbitrate, but the plaintiffs' subsequent filing of a complaint before a Labor Arbiter at the NLRC constitutes an agreement in writing to engage in arbitration.

Section I of the Revised Standard Employment Contract provides that "[t]he Philippines Overseas Employment Administration(POEA) shall have original and exclusive jurisdiction over any and all disputes or controversies arising out of or by virtue of this contract." The fact that the POEA, most of whose functions have been transferred to the NLRC, has exclusive jurisdiction over any disputes arising out of the employment contract implies that arbitration is mandatory. The NLRC is an arbitration tribunal which hears labor disputes certified for "compulsory arbitration under Article 263(9) of the Labor Code." Rule IX of the NLRC Rules of Procedure.

The Court also finds that the plaintiffs' filing of a complaint before the NLRC constitutes an agreement in writing to arbitrate. On August 14, 1998, the parties filed a complaint before a Labor Arbiter at the NLRC. Thus, they submitted to the jurisdiction of the arbitration panel. There can be no greater proof of an agreement to arbitrate than the filing of a complaint with an arbitration tribunal. See Piggly Wiggly Operators' Warehouse, Inc. v. Piggly Wiggly Operators' Warehouse Independant

Truck Drivers Union, Local No.1, 611 F.2d 580, 584(5th Cir. 1980).[5]

ii. Arbitration in Territory of Signatory County

As the Court has already stated, the POEA contract mandates that the POEA has exclusive jurisdiction over issues arising out of the employment contract. It is inherent that any arbitration that might occur, would be held in the Philippines. The POEA is indisputably a Philippine agency and the NLRC, which carries out the arbitration requirement of the POEA contracts, is also a branch of the Philippine Department of Labor.

iii. Commercial Legal Relationship

An employment contract constitutes a commercial legal relationship as required by 9 U.S.C.§ 202. See Prograph International, Inc. v. Barhjydt, 928 F.Supp. 983, 988(N.D. Cal. 1996). The only argument that no commercial relationship existed was premised on the seaman employment contract exclusion of § 1. The Court has already found that this exclusion does not apply to the Convention.

iv. Non-American Citizen or Relationship with Foreign State

There is no dispute as to this element. The dispute is entirely between foreign citizens.

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[5] This agreement is beyond the terms of the employment contract and would invoke the application of the Convention regardless of any exceptions urged by the plaintiffs. See Donald Endriss v. Eklof Marine Corp., 1999 AMC 556(S.D.N.Y. 1998)(agreement to arbitrate after accident not part of seaman's employment contract, and therefore, not subject to exclusions of 9 U.S.C.§ 1.)).

C. Waiver

Finally, the plaintiffs assert that the defendants waived their right to seek arbitration because they waited until one month before the trial to remove this case under the Convention. However, plaintiffs seem to ignore § 205 of Chapter 2.

As grounds for removal, defendants rely on the enabling legislation for the enforcement of the Convention. Section 205 provides:

> Where the subject matter of an action or proceeding pending in a State court relates to an arbitration agreement or award falling under the Convention, the defendant or the defendants may, at any time before the trial thereof, remove such action or proceeding to the district court of the United States for the district and division embracing the place where the action or proceeding is pending.

9 U.S.C. § 205. Thus, defendants who removed under the Convention are not limited by the usual thirty day window in which to petition for removal. The plaintiffs assert that a common sense reading of the statute suggests that "at any time before the trial" does not include one month prior to trial on a case that has been litigated since 1993. The Court does not agree and finds that § 205 leaves no room for interpretation. Thus, removal in this case was timely under the Convention.[6]

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[6] See Seaport Shipping Corporation v. West of England Ship Owners Mutual P&I Assoc., No.88-4605, 1998 WL 135179 (E.D.La. Dec. 12, 1998)("Nothing could be plainer that the language of 9 U.S.C. 205, which...provides that in cases involving arbitration agreements, 'the defendants may, at any time before trial thereof,

Congress dictated the removal procedures when it enacted the enabling statute. Looking to § 205, the Court finds that the suit is removable. The claims arise from an arbitration agreement that is valid under the Convention. This is all that § 205 requires for removal. Thus, the defendants have met their burden of persuasion. They have sufficiently demonstrated that removal was proper in this case. The Court, however, reserves the question of whether this action must be stayed pending arbitration.[7]

Accordingly, the plaintiffs' motion to remand is DENIED.

New Orleans, Louisiana, November 3, 2000.

MARTIN L. C. FELDMAN
UNITED STATES DISTRICT JUDGE

remove' to federal court.")).

[7] Defendants have submitted a motion to stay pending arbitration to be heard on November 8, 2000, on the papers. Since the filing of this motion the plaintiffs have dismissed their complaint before the arbitration panel. The Court makes no ruling on the effect of the dismissal on the pending motion to stay.