

UNITED STATES DISTRICT COURT FOR THE
SOUTHERN DISTRICT OF FLORIDA
Miami Division

Case Number: 10-20293-CIV-MORENO

JOHN D. WATT,

Plaintiff,

vs.

NCL (BAHAMAS) LTD d/b/a/ NCL,

Defendant.

ORDER DENYING MOTION TO COMPEL AND GRANTING MOTION TO REMAND

THIS CAUSE came before the Court upon the Defendant's motion to compel arbitration and to dismiss and the Plaintiff's motion to remand the action to state court.

THE COURT has considered the motions and the pertinent portions of the record, and is otherwise fully advised in the premises.

Background

This action stems from injuries the Plaintiff alleges to have suffered while working aboard one of the Defendant's cruise ships. The Plaintiff brought claims in the Miami-Dade County Circuit court for Jones Act negligence, unseaworthiness, and failure to provide maintenance and cure. The Defendant removed the action to this Court under 9 U.S.C. § 205, the removal provision of the Convention on the Recognition and Enforcement of Foreign Arbitral Awards (the "Convention Act"), based on the following arbitration clause contained in the Plaintiff's employment agreement with the Defendant:

Seaman agrees ... that any and all claims ... including, but not limited to claims such as personal injuries, Jones Act claims, actions for maintenance and cure,

unseaworthiness ... shall be referred to and resolved exclusively by binding arbitration pursuant to [the Convention Act] The place of the arbitration shall be the Seaman's country of citizenship The substantive law to be applied to the arbitration shall be the law of the flag state of the vessel.

The Plaintiff's country of citizenship is Jamaica and the flag state of the ship is the Bahamas.

The agreement thus requires the arbitration to occur in Jamaica and mandates that Bahamian law be applied.

The Defendant moved to compel arbitration and to dismiss the Plaintiff's claims, arguing that they must be resolved by arbitration. The Plaintiff moved to remand, arguing that (1) Jones Act claims cannot be removed as a matter of law because the Act gives the Plaintiff the right to choose the forum and (2) the arbitration provision at issue is void as against public policy because it requires the application of Bahamian law and thus precludes the Plaintiff from recovering under his U.S. statutorily-created causes of action.

Discussion

The Court must first determine whether this action was properly removed. While the Plaintiff is correct that Jones Act claims are not generally removable, the Eleventh Circuit has found them to be removable where a valid arbitration agreement under the Convention Act exists. *See Allen v. Royal Caribbean Cruises, Ltd.*, 353 Fed. Appx. 360, 361 (11th Cir. 2009) (affirming the District Court's finding that a Jones Act claim is removable under the Convention Act).

The Court must next determine whether removal was proper under the Convention Act itself. The Convention Act's removal provision provides, "[w]here 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...." 9 U.S.C. § 205. There are four jurisdictional requirements that must be satisfied for removed cases under § 205: (1) the existence of a written agreement to arbitrate; (2) the agreement provides for arbitration in the territory of a signatory to the Convention; (3) the agreement arises out of a commercial relationship; and (4) one party to the agreement is not a U.S. citizen or the commercial relationship is reasonably related to a foreign state. *Thomas v. Carnival Corporation*, 573 F.3d 1113, 1117 (11th Cir. 2009). There is no dispute that these prerequisites have been satisfied. The Plaintiff argues only that the arbitration provision is void as against public policy because its enforcement would constitute a waiver of his rights to pursue U.S. statutorily-authorized remedies (*i.e.*, his Jones Act claim).

Judge Ungaro recently addressed the same challenge to the same arbitration agreement in *Sivkumar Sivanandi v. NCL (Bahamas) Ltd., d/b/a NCL*, Case No. 10-20296-CIV-UNGARO. Relying on the Eleventh Circuit's decision in *Thomas v. Carnival Corporation*, 573 F.3d at 1117, Judge Ungaro found that, because the arbitration agreement required the application of only Bahamian law, it precluded the plaintiff from recovering on his Jones Act claim and was thus void as against public policy.

In *Thomas*, the arbitration agreement required that the arbitration occur in the Philippines and that Panamanian law apply. 573 F.3d at 1123. The plaintiff argued that, if Panamanian law applied, he would be precluded from bringing his U.S. statutory Seaman's Wage act claim. *Id.* The Eleventh Circuit noted,

There is no dispute that the IMAGINATION's flag of convenience is Panamanian nor that Thomas's Seaman's Wage Act claim is a U.S. statutory remedy. Thus, under the terms of the Arbitration Clause, Thomas must arbitrate in the Philippines (choice-of-forum) under the law of Panama (choice-of-law). As the arbitrator is bound to effectuate the intent of the parties irrespective of any public policy considerations,

these arbitration requirements have “operated in tandem” to completely bar Thomas from relying on any U.S. statutorily-created causes of action.

Id. (Emphasis added.) The court accordingly found the arbitration agreement unenforceable. *Id.* at 1124. Although the *Thomas* decision involved the prospective waiver of a different U.S. statutory claim (Seaman’s Wage Act) from the one at issue here (Jones Act), Judge Ungaro, pointing out that the defendant failed to offer any reason why the right to bring a Seaman’s Wage Act claim should be afforded any more protection than the right to bring a Jones Act claim, found no meaningful distinction. Judge Ungaro also cited a recent opinion written by Judge Gold in *Cardoso v. Carnival Corporation*, 2010 WL 996528, No. 09-23442-CIV-GOLD (S.D. Fla. Mar. 16, 2010). Addressing the same argument, Judge Gold found,

While Defendant is correct insofar as the Eleventh Circuit’s narrow holding in *Thomas* applied only to claims asserted pursuant to the Seaman’s Wage Act, a holistic reading of *Thomas* indicates that the Eleventh Circuit’s reasoning applies with equal force to claims brought pursuant to the Jones Act. Specifically, I note that the Eleventh Circuit did not focus on the unique nature of the Seaman’s Wage Act in reaching its conclusion that foreign choice-of-law and arbitration clauses can-if enforced in tandem-constitute a prospective waiver of statutory rights in violation of public policy. Rather, the Eleventh Circuit focused on the fact that the clauses would have ‘operated in tandem’ to completely bar Thomas from relying on *any* U.S. statutorily-created causes of action.

Both Judge Ungaro and Judge Gold found that the arbitration agreements could not be enforced to require the plaintiffs to submit their claims to a tribunal that precluded them from maintaining their Jones Act claims. This Court agrees and finds that the instant arbitration agreement is void because, in requiring the application of only Bahamian law to an arbitration in Jamaica, it precludes the Plaintiff from relying on his U.S. statutorily-created Jones Act claim.

Because the arbitration agreement is unenforceable, removal pursuant to the Convention Act-

the sole basis for removal-was not proper. The Court accordingly finds that remand is warranted.

It is therefore

ADJUDGED that:

(1) The motion to compel arbitration and to dismiss is DENIED as the Court finds the arbitration agreement void as against public policy.

(2) This case is REMANDED to the Circuit Court for the Eleventh Judicial Circuit in and for Miami-Dade County, Florida. The Clerk of the Court is hereby directed to take all necessary steps and procedures to effect the expeditious remand of the above-styled action.

DONE AND ORDERED in Chambers at Miami, Florida, this 15 day of June, 2010.



FEDERICO A. MORENO
UNITED STATES DISTRICT JUDGE

Copies provided to:

Counsel of Record