UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

CASE NO. 12-61322-CIV-DIMITROULEAS

GEOVANY QUIROZ,

Plaintiff,

vs.

MSC MEDITERRANEAN SHIPPING COMPANY, S.A., MSC CRUISES (USA) INC. and MSC CROCIERE, S.A.,

Defendants.
_____/

ORDER GRANTING DEFENDANTS' MOTION TO COMPEL ARBITRATION

THIS CAUSE is before the Court upon Defendants MSC Mediterranean Shipping Company, S.A., MSC Cruises (USA) Inc., and MSC Crociere, S.A.'s Motion to Compel Arbitration [DE 11], filed herein on August 3, 2012. The Court has carefully considered the Motion, Plaintiff Geovany Quiroz's Response [DE 19], Defendants' Reply [DE 21], and is otherwise fully advised in the premises.

I. BACKGROUND

Plaintiff, a crewmember and citizen of Honduras, filed a four-count Complaint alleging he suffered personal injury while working aboard the *MSC Poesia* ("*Poesia*"), a cruise ship flagged in Panama. Plaintiff alleges that, on or about December 4, 2010, Plaintiff suffered a traumatic injury to his right arm, while employed in the capacity of First Pastryman on board the *Poesia*. Plaintiff injured his right arm while mixing batter. The cake mixer paddle caught his right forearm and caused a dual radius and ulna fracture. His Complaint asserts claims for Jones

Act[1] negligence, unseaworthiness, failure to provide maintenance and cure, and failure to treat. Shortly after Plaintiff commenced this action, Defendants filed the instant Motion to Compel Arbitration, which Plaintiff opposes.

Prior to boarding the *Poesia*, on December 20, 2009, Plaintiff signed an Enrollment Contract in which he agreed that while working aboard the *Poesia* he had reviewed and was bound by the terms and conditions set forth in a Collective Bargaining Agreement ("CBA"). See [DE's 11-1, 11-2, 11-3]. Among other things, the CBA covers any and all claims made by a Seafarer against the operator of the vessel (which Plaintiff alleges all Defendants to be), and requires that Plaintiff arbitrate any and all claims or disputes (including specifically the claims raised herein) in Panama City, Panama. The CBA in force at the time Plaintiff signed his employment contract was for the entire calendar year 2009. See [DE 11-2]. The CBA was renewed on January 1, 2010, with an identical agreement that included the identical arbitration provision. See [DE 11-3]. The CBA was in force on the date Plaintiff claims he was injured on December 4, 2010. The two CBA agreements contain identical arbitration provisions. Article 31 of the CBA is entitled "Grievances and Disputes" and states as follows:

> Grievances and disputes which remain unresolved after a sixty (60) day period, must be referred to arbitration to the exclusion of any other legal or court proceeding as set forth in this Agreement. It is further agreed that any and all claim from a Seafarer against the Company whether asserted against MSC, the Master, Employer, Vessel or Vessel Operator, including Jones Act claims, claims for damages for personal injury, wrongful death, negligence, unseaworthiness, failure to provide prompt proper and adequate medical care, or maintenance and cure whether based in tort or contract or under the laws of any nation or jurisdiction shall be arbitrated in accordance with the terms and conditions in this Agreement. The Seafarer and Union acknowledge that they knowingly and voluntarily waive any right they have to a jury trial. The arbitration referred to in

[1] See 46 U.S.C. § 30104.

> this Article is exclusive and mandatory ….
> If the grievance or dispute involved the Seafarer as a party, the following procedure shall apply. For Filipino Seafarers the arbitration shall be in accordance with the rules of the standard POEA contract of employment.
> For all other Seafarers, any grievance or dispute, with the exception of a wage dispute which is governed by the MSC Wage Grievance Policy and Procedure (including mandatory arbitration procedures found therein) shall be referred to and finally resolved by arbitration under the American Arbitration Association/International Centre for Dispute Resolution International Rules, 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 Panama City. The Seafarer and MSC must arbitrate in the designated jurisdiction, to the exclusion of all other jurisdictions. The language of the arbitral proceedings shall be English. The law of the vessel's flag state shall govern any such dispute. Each party shall bear its own attorney's fees, but MSC shall pay for the costs of arbitration as assessed by the AAA. Seafarer agrees to appear for medical examinations by doctors designated by MSC 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.

See [DE's 11-1, 11-2, 11-3]. (DE's 11-1, 11-2, 11-3 collectively referred to as the "employment contract"). Accordingly, Defendants argue that pursuant to the employment contract, Plaintiff must arbitrate his claims. Under the terms of the employment contract, such arbitration would be held in Panama City and would be decided under Panamanian law (because the *Poesia* is flagged in Panama).

In response, Plaintiff contends that his claims are not subject to arbitration because the agreement to arbitrate is invalid and unenforceable for a variety of reasons. First, he argues that the express agreement to arbitrate was not validly formed. He argues that "MSC has a system in place in which it is impossible for seaman to review and examine the terms and conditions of MSC's arbitration agreements before signing them," and that he was required to sign quickly and without an opportunity to properly review the arbitration agreement or seek advice of counsel concerning its terms. See [DE 19] at pp. 3-9; [DE 19-6] ("Quiroz Aff.") at ¶¶ 7–9. According to

Plaintiff, this system employed by MSC violates the Seamen's Articles of Agreement Convention, the Maritime Labor Convention, and Panamanian law, rendering the arbitration clause invalid and/or unenforceable. Second, Plaintiff contends that the arbitration provision is void because Panamanian law, if applied to his claims, would deprive him of all meaningful relief. He asserts that he would not be able to pursue his Jones Act cause of action in arbitration, as Panama does not recognize such a claim or a reasonable equivalent. Further, Plaintiff states that the Panamanian statute of limitations is one year in negligence actions, and that Panama limits maximum recovery to $50,000 per maritime incident, does not provide a strict liability claim for unseaworthiness, and does not provide for punitive damages for failure to provide maintenance and cure. Third, Plaintiff argues that the arbitration agreement is void as against public policy, relying on the Eleventh Circuit's opinion in Thomas v. Carnival Corp., 573 F.3d 1113, 1123 (11th Cir. 2009).

II. DISCUSSION

This Court is empowered to compel arbitration under the Federal Arbitration Act and the Convention on Recognition and Enforcement of Foreign Arbitral Awards, 9 U.S.C. § 202 (the "Convention"). There is a strong federal policy favoring the enforcement of arbitration provisions. See Mitsubishi Motors Corp. v. Soler Chrysler–Plymouth, Inc., 473 U.S. 614, 626 (1985). "[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 (international arbitration agreements), even assuming that a contrary result would be forthcoming in a domestic context." Id. at 629. Under the Convention, this Court engages in a "very limited inquiry' " when deciding

motions to compel arbitration. See Bautista v. Star Cruises, 396 F.3d 1289, 1294 (11th Cir. 2005). In determining whether to order arbitration, the district court conducts a "limited jurisdictional inquiry," which is "colored by a strong preference for arbitration." Id. at 1301.

Initially, a court must consider whether four jurisdictional prerequisites are met. Id. at 1294. The four jurisdictional prerequisites are (1) there is an agreement in writing within the meaning of the Convention; (2) the agreement provides for arbitration in the territory of a signatory of the Convention; (3) the agreement arises out of a legal relationship, whether contractual or not, which is considered commercial, and (4) a party to the agreement is not an American citizen, or that the commercial relationship has some reasonable relation with one or more foreign states. Id. at 1294 n. 7.

Here, the Court finds that the arbitration agreement in this case meets the four Bautista jurisdictional prerequisites. First, there is a written agreement to arbitrate this dispute. See [DE's 11-1, 11-2, 11-3]. The CBA specifically states that disputes and grievances involving Jones Act claims, claims for damages for personal injury, negligence, unseaworthiness, failure to provide prompt proper and adequate medical care, or maintenance and cure whether based in tort or contract shall be subject to arbitration. See [DE's 11-2, 11-3]. Plaintiff argues that the express agreement to arbitrate was not validly formed. He states in his affidavit that "MSC has a system in place in which it is impossible for seaman to review and examine the terms and conditions of MSC's arbitration agreements before signing them," and that he was required to sign quickly and without an opportunity to properly review the arbitration agreement or seek advice of counsel concerning its terms. See [DE 19] at pp. 3-9; [DE 19-6] ("Quiroz Aff.") at ¶¶ 7–9. According to Plaintiff, this system employed by MSC violates the Seamen's Articles of Agreement

Convention, the Maritime Labor Convention, and Panamanian law, rendering the arbitration clause invalid and/or unenforceable. The Court finds Plaintiff's argument unpersuasive. "[I]t is immaterial whether this contention is treated as a challenge to a jurisdictional prerequisite or as an affirmative defense. In either case, the result is the same; this argument is insufficient to avoid arbitration." Lujan v. Carnival Corp., 2012 WL 1104253, * 3 (S.D. Fla. Apr. 02, 2012). See Henriquez v. NCL (Bahamas), Ltd., 440 F. App'x 714, 716 (11th Cir. 2011) (rejecting seaman's argument that arbitration agreement was invalid because if he did not sign the agreement, he would not have been allowed to stay on the ship to work); Bautista, 396 F.3d at 1302 (fact that prospective crewmembers were "put in a difficult 'take it or leave it' situation when presented with the terms of employment" does not render arbitration agreement unenforceable).

As to the second prerequisite, Panama is a signatory to the Convention. See, e.g., Lujan v. Carnival Corp., 2012 WL 1104253, * 3 (S.D. Fla. Apr. 02, 2012). Third, the agreement to arbitrate arises from a commercial legal relationship. See Bautista, 396 F.3d at 1300 (employment contracts are commercial legal relationships under the Convention). Fourth, a party to the agreement is not a U.S. citizen; Plaintiff is a citizen of Honduras.

Where, as here, the four prerequisites are met, the district court must compel arbitration unless an available affirmative defense under the Convention applies. Estibeiro v. Carnival Corp., 2012 WL 4718978, *2 (S.D. Fla. Oct. 03, 2012); Lujan, 2012 WL 1104253, at* 2; Alcalde v. Carnival Cruise Lines, 2011 WL 2883287, at *2 (S.D. Fla. Jul.19, 2011)).

> At the arbitration enforcement stage, these are limited to claims that the agreement is "null and void, inoperative, or incapable of being performed." Bautista, 396 F.3d at 1301–02. An arbitration agreement is "null and void" within the meaning of the Convention "only where it is obtained through those limited situations, such as fraud, mistake, duress, and waiver, constituting standard breach-of-contract

> defenses that can be applied neutrally on an international scale." Lindo v. NCL (Bahamas), Ltd., 652 F.3d 1257, 1276 (11th Cir. 2011) (citations omitted). Arguments that the arbitration agreement is "contrary to public policy" may only be raised after arbitration, at the arbitral award enforcement stage; such defenses are not available initially. Id. at 1280 (public policy defense has no application "where [defendant] seeks to enforce arbitration at the outset of the dispute").

Lujan, 2012 WL 1104253, at* 2.

Here, Plaintiff makes two arguments in the nature of an affirmative defense. Plaintiff contends that the arbitration provision is void because Panamanian law, if applied to his claims, would deprive him of all meaningful relief. He asserts that he would not be able to pursue his Jones Act cause of action in arbitration, as Panama does not recognize such a claim or a reasonable equivalent. Plaintiff avers that the Panamanian statute of limitations is one year in negligence actions, and that Panama limits maximum recovery to $50,000 per maritime incident, does provide a strict liability claim for unseaworthiness, and does not provide for punitive damages for failure to provide maintenance and cure. Plaintiff also argues that the arbitration agreement is void as against public policy, relying on the Eleventh Circuit's opinion in Thomas v. Carnival Corp., 573 F.3d 1113, 1123 (11th Cir. 2009).

The Court agrees with Judge Scola's assessment of these arguments as articulated in Lujan: "These arguments go hand-in-hand and really only raise a single affirmative defense. Both essentially ask the Court to declare the arbitration provision unenforceable on public policy grounds because Panama law, if applied to [Plaintiff's] claims, will defeat meaningful recovery and deprive [Plaintiff] of available remedies under United States law." Lujan, 2012 WL 1104253, at *4.

However, these public policy arguments are not viable at the arbitration enforcement

stage. See id.; Lindo, 652 F.3d at 1280-82 (holding that a public policy defense cannot be raised at the initial arbitration enforcement stage). Moreover, the Court agrees with the recent district court opinions from the Southern District of Florida, as well as two recent unpublished Eleventh Circuit panel decisions, that Lindo is the governing law in this Circuit and that Thomas is dead-letter. See Estibeiro, 2012 WL 4718978, at * 3-4; Downer v. Royal Caribbean Cruises, Ltd., 2012 WL 1966288, *2 (S.D. Fla. May 31, 2012); Lujan, 2012 WL 1104253, at *4; Centeno v. NCL (Bahamas) Ltd., 2012 WL 1014691, *3-4 (S.D. Fla. Mar. 23, 2012); Lazarus v. Princess Cruise Lines, Ltd., 2011 WL 6070294, *2-3 (S.D. Fla. Dec. 06, 2011); Hodgson v. Royal Caribbean Cruises, Ltd., 2011 WL 5005307, *2 (S.D. Fla. Oct. 19, 2011); Kote v. Princess Cruise Lines, Ltd., 2011 WL 4434858, *3 (S.D. Fla. Sept. 23, 2011); Maxwell v. NCL (Bahamas), Ltd., 2011 WL 4928737, at *1 (11th Cir. 2011); Henriquez, 440 F. App'x at 716.

Based upon the foregoing, the Court concludes that arbitration must be compelled in this case. The four jurisdictional prerequisites of Bautista are satisfied, and Plaintiff's defenses are not viable at this stage in the proceedings. Any public policy arguments Plaintiff may have must be asserted during the arbitral award enforcement stage.

III. CONCLUSION

Accordingly, it is **ORDERED and ADJUDGED** as follows:

1. Defendants' Motion to Compel Arbitration [DE 11] is **GRANTED**;

2. All remaining pending motions are **DENIED** as moot;

3. The Clerk is directed to **CLOSE** this case.

DONE AND ORDERED in Chambers at Fort Lauderdale, Broward County, Florida this 17th day of October, 2012.

WILLIAM P. DIMITROULEAS
United States District Judge

Copies furnished to:
Counsel of record