PASSENGER AND CREW CLAIM ARBITRATIONS

BY: David J. Horr
HORR, NOVAK & SKIPP, P.A.[1]
Two Datran Center, Suite 1700
9130 South Dadeland Boulevard
Miami, FL 33156
Telephone: (305) 670-2525
Facsimile: (305) 672-2526

Maritime Law Association Fall Meeting
Miami, FL, October 19, 2018

[1] Mr. Horr wishes to acknowledge and thank Justin Henning and Kevin Warger (both J.D. candidates at the University of Miami School of Law) for their contributions and assistance with the development of this paper.

I. INTRODUCTION

Federal Arbitration Act 9 U.S.C. §§ 1 and 2 (2012): Arbitration agreements for any maritime transaction are valid, irrevocable, and enforceable.

The Seafarer's Employment Agreement (SEA) and any Collective Bargaining Agreement (CBA) pertinent to the Seafarer's shipboard employment are the usual focal documents. It is in either or both of these documents (as applicable) that the seafarer and the employer/shipowner express their agreement to arbitration as a means of dispute resolution as an alternative to litigation. The SEA and CBA are foundational documents in the arbitration of seafarer claims context.

Similarly, in the context of passenger claims the passage contract will contain any pertinent agreement between the passenger and the carrier/ship operator to arbitrate, as opposed to litigate specific disputes.

Specific issues regarding enforcement of agreements to arbitrate are discussed in greater detail in § VIII of this paper.

II. VENUE OR FORUM SELECTION

Frequently, the place of arbitration will either be specified in the SEA or CBA or a range of potential sites for arbitration will be identified in either document.

Determination of the place for arbitration or forum will generally be a matter of interpreting the agreement of the parties in the SEA or CBA. Where disputes arise, determination of the issue will be a matter for decision by the arbitrator, once appointed.

Certain legal principles may be pertinent to this determination. The United States Supreme Court has determined that in admiralty cases, federal law governs the enforceability of forum selection clauses. *Lejano v. Bandak*, 705 So.2d 158, 166 (La. S. Ct. 1997), *citing Carnival Cruise Lines, Inc. v. Shute*, 499 U.S. 585, 111 S. Ct. 1522 (1991). Forum selection clauses are unenforceable "only when the remedies available in the chosen forum are so inadequate that enforcement would be fundamentally unfair." *Calix-Chacon v. Global Int'l Marine, Inc*., 493 F.3d 507, 515 (5th Cir. 2007) (citing *Shute*, 499 U.S. at 595). The forum selection clause must be enforced absent a clear, strong showing that enforcement would be unreasonable under the circumstances, unjust or that the clause is invalid for reason of fraud or overreaching. *M/S Bremen v. Zapata Off-Shore Co., 407 U.S. 1, 10, 92 S. Ct. 1907 (1972)*.

An assessment of the reasonableness of the designated forum must take into account the unique risks facing ship-owners and an appreciation of the need to designate a particular forum in which to address claims as the ships sail around the globe. *Orozco v. Trinity Ship Mgmt, Inc.*, 2000 U.S. Dist. LEXIS 4666 at *6-7 (E.D. La. 2000). "Ocean-going vessels travel through many jurisdictions, and could become subject to the laws of a particular jurisdiction solely upon the fortuitous event of an accident." *Marine Chance Shipping, Ltd. v. Sebastian*, 143 F.3d 216, 220

(5th Cir. 1998). Agreeing in advance on forum and choice of law eliminates uncertainty. *Id.* Forum selection clauses are generally a reasonable vehicle to reduce exposure to lawsuits in forums around the world, while eliminating any confusion as to where and under which law actions may proceed. *Marine Chance Shipping*, 143 F.3d at 221.

Arguments seeking to avoid enforcement of the parties' agreed upon forum selection clause, alleging disparity in bargaining power because the crew member's employment was purportedly conditioned on an agreement offered on a "take-it-or-leave-it" basis have generally not been successful. Unequal bargaining power does not invalidate a forum selection clause. Disparity of bargaining power was addressed by the United States Supreme Court in *Shute*, where the Court stated that "unequal bargaining power between the parties does not make a forum selection clause unenforceable." 499 U.S. at 593; *see also Estibeiro v. Carnival Corp*., 2012 U.S. Dist. LEXIS 143058, 2012 WL 4718978, * 5(S.D. Fla. Oct. 3, 2012) ("…if this assertion was sufficient for procedural unconscionability, many agreements between corporations and individuals would be subject to the defense and the application would clearly be overbroad."); *Lathan v. Carnival Corp*., 2009 WL 6340059, at *2 (S.D. Fla. April 9, 2009) (finding that the plaintiff's allegations of being forced to sign an agreement under a "take it or leave it" situation does not invalidate the parties' agreement); *Saturna v. Bickley Constr. Co*., 252 Ga.App. 140, 555 S.E.2d 825, 827 (2001) (ruling that the lack of sophistication or economic disadvantage of one attacking a forum selection clause will not amount to unconscionability).

Courts recognize that the crewmember's signature on the employment agreement manifests assent to the agreement and binds him to it. *See Bautista v. Star Cruises*, 396 F.3d 1289, 1301 (11th Cir. 2005). ("…[W]e find it especially appropriate to abide by the general principle that one who has executed a written contract and is ignorant of its contents cannot set up that ignorance to avoid the obligation absent fraud and misrepresentation").

III. CHOICE OF LAW

Provisions specifying Choice of Law or the substantive law to be applied to resolve disputes between the crewmember and his employer or the shipowner are also frequently included in the SEA or CBA.

Disputes regarding interpretation of choice of law provisions and the ultimate decision on the law to be applied to the dispute will also be for decision by the arbitrator, once appointed.

Arguments that a forum selection/ choice-of-law clause is substantively unconscionable because it forces a crewmember to waive statutory rights and remedies have limited prospects for success. This was precisely the argument asserted (and rejected) by the Eleventh Circuit in *Lipcon v. Underwriters at Lloyd's, London*, 148 F.3d 1285 (11th Cir. 1998). *Lipcon* involved an agreement containing both choice-of-law and forum selection clauses which called for a dispute to be heard in a foreign forum under foreign law. The plaintiffs asserted U.S. statutory claims and essentially argued that the choice of law clause, acting in tandem with the forum-selection clause, violated U.S. public policy and should not be enforced. 148 F.3d at 1288–89, 1298–99. Even though the plaintiffs asserted U.S. statutory securities claims, the Eleventh Circuit enforced the choice-of-law clause where English law provided less favorable remedies than the U.S. Securities Acts. *Id.* at 1297–98.

The Eleventh Circuit concluded that choice-of-law clauses are unenforceable "only when the remedies available in the chosen forum are so inadequate that enforcement would be fundamentally unfair." Id. at 1297. The Eleventh Circuit acknowledged that "the United States securities laws would provide [the American plaintiffs] with a greater variety of defendants and a greater chance of success due to lighter scienter and causation requirements." *Id.* (quotation marks omitted). Nonetheless, the Eleventh Circuit held that the choice-of-law and forum-selection clauses were enforceable and ordered the matter to be heard in English courts under English law, since "we will declare unenforceable choice clauses only when the remedies available in the chosen forum are so inadequate that enforcement would be fundamentally unfair." *Id.*

. . .

In the instance of a SEA or CBA specifying forum and substantive law choices, the burden is on the crewmember to establish that the agreed upon forum and governing law is unreasonable under the circumstances or fundamentally unfair.

. . .

In *Alvarado Castro v. Pulmantur Ship Management Ltd.*, No. 14-021552 (Fla. 11th Cir. Ct. March 1, 2016), the Court analyzed an Employment Agreement and granted the defendant's motion to dismiss based on enforcement of the forum selection clause designating Malta as the proper situs for all disputes arising from the Agreement, finding that "…Malta has an interest in regulating its ships and ship-owners and Malta has an established system recognizing and enforcing seaman's rights." *Castro v. Pullmantur, S.A.*, 220 So. 3d 531, 534 (Fla. 3d DCA 2017).

IV. CHOOSING THE ARBITRATOR(S)

Frequently, the SEA or CBA will either specify a method for arbitrator selection or designate an entity responsible for administration of the arbitration proceeding (e.g. International Center for Dispute Resolution ("ICDR") or National Arbitration and Mediation ("NAM")). In the instance of a specified method of selection, selection should be followed per the agreement of the parties communicated in the SEA or CBA.

a. Pertinent Federal law on arbitrator appointment.

Appointment of Arbitrators – 9 U.S.C. § 5 (2000): controls the selection of arbitrators. If there is a provision in an agreement that determines how arbitrators are selected, then that is followed. If there is no such provision, either or both parties can apply to the court for designation or appointment of an arbitrator.

b. ICDR Administered Arbitration

Article 6, ICDR IDRP ARB R Art. 6 (en) (2010): Governs the appointment of Arbitrators. The parties may agree upon any procedure for selecting arbitrators with or without

the assistance of the Administrator. After 45 days, if no procedure has been agreed upon, the Administrator will appoint an Arbitrator in the following manner:

Article 6(3), ICDR IDRP ARB R Art. 6 (en) (2010): If within 45 days after the commencement of the arbitration, all of the parties have not mutually agreed on a procedure for appointing the arbitrator(s) or have not mutually agreed on the designation of the arbitrator(s), the administrator shall, at the written request of any party, appoint the arbitrator(s) and designate the presiding arbitrator. If all of the parties have mutually agreed upon a procedure for appointing the arbitrator(s), but all appointments have not been made within the time limits provided in that procedure, the administrator shall, at the written request of any party, perform all functions provided for in that procedure that remain to be performed.

c. NAM Administered Arbitration

NAM Rule 22 provides that in a claim for $10,000 or less the Administrator shall appoint the Arbitrator. In claims exceeding that, NAM shall forward parties lists containing at least three names; and each party may strike one name from the list and number the remaining names in the order of their preference, and return it to NAM within 15 days of receipt.

V. MAINTENANCE AND CURE OBLIGATIONS

The specifics of the maintenance and cure entitlements for a given Seafarer Claimant will be impacted by the terms of the SEA and any pertinent CBA. Choice of law provisions in the SEA/CBA will also have potential implications for determining the nature and extent of maintenance and cure entitlement. Also, depending on the circumstance, the terms and provisions in the Maritime Labor Convention (MLC) may also come into play.

VI. DISCOVERY

ICDR 21 provides that parties shall exchange all documents upon which each intends to rely on a schedule set by the tribunal. The tribunal may, upon application, require a party to make available to another party documents in that party's possession not otherwise available to the party seeking the documents, that are reasonably believed to exist and to be relevant and material to the outcome of the case. Requests for documents shall contain a description of specific documents or classes of documents, along with an explanation of their relevance and materiality to the outcome of the case.

NAM 28 provides that the Arbitrator(s) may require witnesses in a party's employ or control to testify under oath if requested to do so by the other party. The Arbitrator(s) may limit testimony or exclude witnesses or evidence that the Arbitrator(s) considers immaterial or unduly repetitive.

a. Depositions

While 9 USCS 7 provides that arbitrators may compel deposition and production of documents of any person, some courts have held that the tribunal may compel deposition of

parties. *Integrity Ins. Co. v. Am. Centennial Ins. Co.*, 95 Civ. 1010 (SAS), 1995 U.S. Dist. LEXIS 6085 (S.D.N.Y. May 3, 1995); Others have found that the arbitrators do not have the power to compel non-parties. *Nat'l Broadcasting Company v. Bear Sterns and Co., Inc.*, 165 F.3d 184, 187 (2d. Cir. 1999); *In re Meridian Bulk Carriers, LTD*, No. 03-2011, 2003 U.S. Dist. LEXIS 24203 (E.D. La. July 16, 2003).

The Meridian Court followed the reasoning in Integrity, which allowed the production of documents, but not deposition, of non-parties.

ICDR 21: Depositions, interrogatories, and requests to admit as developed for use in U.S. court procedures generally are not appropriate procedures for obtaining information in an arbitration under these Rules.

b. Requests to Produce; Interrogatories.

There is a circuit split on whether arbitrators can order discovery under Fed.R.Civ.P. 27. A party might, under unusual circumstances, petition the district court to compel pre-arbitration discovery upon a showing of special need or hardship. At a minimum, a party must demonstrate that the information it seeks is otherwise unavailable. Deiulemar Compagnia di Navigazione S.P.A. v. M/V Allegra (4th Cir. 1999).

The Meridian Court (E.D. La.) followed the reasoning in Integrity (S.D.N.Y.), which allowed the production of documents of non-parties.

ICDR 21: Depositions, interrogatories, and requests to admit as developed for use in U.S. court procedures generally are not appropriate procedures for obtaining information in an arbitration under these Rules.

c. Subpoena Powers

NAM 28: The Arbitrator(s) may issue subpoenas for the attendance of witnesses or the production of documents and the parties agree to abide by such.

The discovery provisions of the Federal Arbitration Act, 9 U.S.C.S. § 7, do not authorize an arbitrator to subpoena third parties. However, a party might, under unusual circumstances, petition the district court to compel pre-arbitration discovery upon a showing of special need or hardship. At a minimum, a party must demonstrate that the information it seeks is otherwise unavailable. Deiulemar Compagnia di Navigazione S.P.A. v. M/V Allegra (4th Cir. 1999).

The *Meridian* Court followed the reasoning in *Integrity*, which allowed arbitrators to subpoena the production of documents, but not deposition, of non-parties, and they could subpoena parties.

VII. ARBITRATION PROCEEDING

ICDR 20 discusses the Proceedings of Arbitration. The tribunal may conduct the arbitration in whatever manner it considers appropriate so long as there is equity and each party has the right to be heard and has opportunity to present its case.

The tribunal may The tribunal may decide preliminary issues, bifurcate proceedings, direct the order of proof, exclude cumulative or irrelevant testimony or other evidence, and direct the parties to focus their presentations on issues whose resolution could dispose of all or part of the case. At any time during the proceedings, the tribunal may order the parties to produce documents, exhibits, or other evidence it deems necessary or appropriate. The tribunal determines the admissibility, relevance, and weight of the evidence.

NAM 28 provides that Arbitrations are binding upon the parties. Parties have an opportunity to present their case in a manner similar to a non-jury trial in the public court system. The Arbitrator(s) will conduct the Arbitration hearing in the manner set forth in these rules. However, an Arbitrator has the discretion to vary these procedures if it is reasonable and appropriate to do so. The Arbitrator(s) will rule upon the admissibility of evidence and will be guided by the Federal Rules of Evidence. However, strict conformity to the Federal Rules of Evidence is not required. The Arbitrator(s) will consider evidence that the Arbitrator(s) deems relevant and material to the dispute and will accord such weight to the evidence as the Arbitrator(s) deems appropriate.

VIII. ENFORCEABILITY

A) FOR THE AGREEMENT TO ARBITRATE

Federal law strongly favors agreements to arbitrate and courts rigorously enforce them. *See, e.g., Shearson/American Express, Inc. v. McMahon*, 482 U.S. 220, 226, 107 S. Ct. 2332 (1987); *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc*., 473 U.S. 614, 625, 105 S. Ct. 3346 (1985); *Moses H. Cone Memorial Hosp. v. Mercury Constr. Corp*., 460 U.S. 1, 103 S. Ct. 927 (1983); *see Lindo v. NCL (Bahamas), Ltd*., 652 F.3d 1257, 1275 (11th Cir. 2011). As a matter of law, any doubts concerning the scope of arbitral issues should be resolved in favor of arbitration. *Moses H. Cone Memorial Hosp*., 460 U.S. at 24. This is especially true in agreements affecting interstate and foreign commerce. *Mitsubishi*, 473 U.S. at 629; *Lindo*, 652 F.3d at 1275. Arbitration agreements are governed by the Federal Arbitration Act, 9 U.S.C. § 1, *et. seq*. ("The Act") and the Convention, codified at 9 U.S.C. § 201, *et. seq*.

The Act, specifically 9 U.S.C. §§ 3, 4, and 9, provides this Court with the general authority to order compulsory arbitration. The Convention also requires courts to enforce any written agreement which provides arbitration as the mechanism to resolve international commercial disputes. A party opposing a motion to compel arbitration has the affirmative duty to show cause why the court should not compel arbitration. *Sims v. Clarendon Nat'l Ins. Co*., 336 F. Supp. 2d 1311, 1314 (S.D. Fla. 2004) (citations omitted).

In practice, the enforceability of arbitration clauses in international commercial agreements is dependent in large part on an analysis similar to that of the forum selection clause cases. In *Scherk v. The Alberto-Culver Co*., 417 U.S. 506, 94 S. Ct. 2449 (1974) and in *Mitsubishi*, 473 U.S. 614, the U.S. Supreme Court enforced arbitration clauses and relied substantially on *M/S Bremen v. Zapata Off-Shore Co*., 407 U.S. 1, 92 S. Ct. 1907 (1972), a pure forum selection clause case. The court in *Scherk* noted, "an agreement to arbitrate before a specified tribunal is, in effect, a specialized forum selection clause that posits not only the situs of the suit but also the procedure to be used in resolving the dispute." *Scherk*, 417 U.S. at 519.

Under 9 U.S.C. § 206, "[a] court having jurisdiction under this chapter may direct that arbitration be held in accordance with the agreement at any place therein provided for, whether that place is within or without the United States." When deciding "to compel arbitration under the Convention Act, a court conducts 'a very limited inquiry.'" *Bautista v. Star Cruises*, 396 F.3d 1289, 1294 (11th Cir. 2005) (citation omitted). Binding precedent dictates that unless there is an affirmative defense that prevents the application of the Convention Act, the Court must compel the parties to arbitrate if the following jurisdictional prerequisites are met:

(1) There is an agreement in writing to arbitrate the dispute;
(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, that is considered commercial; and
(4) One party to the agreement is not a United States citizen, or the commercial relationship at issue has some reasonable relation with a foreign state.

Bautista, 396 F.3d at 1294; *Allen v. Royal Caribbean Cruises, Ltd*., 2008 U.S. Dist. LEXIS 103783, *12-13 (S.D. Fla. 2008), *aff'd*, 353 F. App'x 360 (11th Cir. 2009).

B) EXCEPTIONS TO ENFORCEMENT OF AN AGREEMENT TO ARBITRATE.

A line of cases have developed where Plaintiff crewmembers sue entities who are not "direct" parties to the SEA or CBA and seek to evade enforcement of arbitration clauses. Efforts to enforce the arbitration clauses nonetheless featured arguments that the defendant parties in these cases constitute "third party beneficiaries" to the SEA or CBA arbitration provisions and they should be enforced.

A recent decision from the Eleventh Circuit impacts these cases. Outokumpu Stainless USA, LLC v. Converteam SAS (11th Cir. 2018): This Circuit decision that held a third party beneficiary of a contract cannot enforce arbitration unless it is a signatory to the contract.

Outokumpu Stainless was a steel producer and manufacturer who entered into contracts with Fives. *Id.* at *3-5. When an issue arose with non-signatory, sub-contractor, GE Energy, Outokumpu filed suit in District Court, and GE moved to dismiss and compel arbitration. *Id.* at *6-8. The District Court granted GE Energy's motion to compel arbitration; however, the Eleventh Circuit overruled because it found that under the Convention, to compel arbitration, the

agreement must be signed by the parties before the Court, and further, a third-party beneficiary cannot compel arbitration because they are not a signatory to the agreement. *Id.* at *18-20.

C. ARBITRATION AWARDS

Arbitration awards are generally not subject to appeal. The district court, however, may vacate or refuse to recognize an award if:

a) The award was procured by corruption, fraud, or undue means;
b) There was evident partiality or corruption in the arbitrators;
c) The arbitrators were guilty of misconduct in refusing to postpone the hearing, or in refusing to hear evidence pertinent and material to the controversy, or any other misbehavior that prejudiced a party; or
d) The arbitrators exceeded their powers, or no final and definite award was made.

9 U.S.C.10.

Agreements to arbitrate are governed by the Convention on the Recognition and Enforcement of Foreign Arbitral Awards, popularly known as the "New York Convention." The United States acceded to the Convention, codified at 9 U.S.C. §§ 201-28. "Because arbitration is an alternative to litigation, judicial review of arbitration decisions is 'among the narrowest known to the law.'" *Bamberger Rosenheim Ltd. v. OA Development, Inc*., 862 F.3d 1284, 1286 (11th Cir. 2017) (*quoting AIG Baker Sterling Heights, LLC. v. Am. Multicinema, Inc*., 508 F.3d 995, 1001 (11th Cir. 2007)). Foreign arbitral awards are vulnerable to attack only on the grounds expressed in the articles of the Convention, particularly Article V. Article V states that an arbitral award "may . . . be refused . . . [if] [t]he recognition or enforcement of the arbitral award would be contrary to the public policy" of the country where recognition and enforcement is sought. 21 U.S.T. 2517, Art. V(2)(b). The party defending against the enforcement of an arbitral award bears the burden of proof. *Lindo v. NCL (Bahamas) Ltd*., 652 F.3d 1257, 1263 (11th Cir. 2011).

"'[T]he Convention's public policy defense should be construed narrowly' and applies where enforcement [of] the award 'would violate the forum state's most basic notions of morality and justice .'" *Costa v. Celebrity Cruises, Inc.,* 768 F. Supp. 2d 1237, 1241 (S.D. Fla. 2011)(*quoting Parsons & Whittemore Overseas Co., Inc. v. Societe Generale de L 'Industrie du Papier*, 508 F.2d 969, 974 (2d Cir. 1974)). "'Erroneous legal reasoning or misapplication of the law is generally not a violation of public policy within the meaning of the . . .Convention ." Id. (*quoting Karaha Bodas Co., LLC v. Perusahaan Pertambangan Minyak Dan Gas Bumi Negara*, 364 F.3d 274, 306 (5th Cir. 2004)).

1. *Cvoro v. Carnival Corp.,* 2018 U.S. Dist. LEXIS 57836 (S.D. Fla 2018).

In this case, the Plaintiff requested the Court to vacate an arbitral award as void and against public policy because the arbitrator applied Panamanian law. In so doing, the Plaintiff contended the arbitrator precluded her from asserting a Jones Act claim against her employer for vicarious liability of a treating physician who was allegedly negligent in his treatment of Plaintiff thereby causing her injury.

Judge Moreno declined to vacate the arbitral award. The Court found that while there were distinctions between the specific remedies Plaintiff might enjoy under the Jones Act as opposed to Panamanian law, the Panamanian law did afford Plaintiff remedies that she either elected not to pursue, or failed to prove entitlement.

Judge Moreno's opinion surveyed the case law from the Eleventh Circuit on the arbitration enforcement issues culminating in the Court's decision in *Lindo v. NCL (Bahamas) Ltd*. 652 F.3d 1257, 1263 (11th Cir. 2011). The district court considered the *Lindo* case in assessing whether Plaintiff carried her burden under Article V of the Convention to prove enforcement of the arbitral award would be "contrary to public policy."

Judge Moreno identified three American public policies in play:

1. A strong Federal policy favoring arbitration which "applies with special force in the field of international commerce" *Asignacion v. Rickmers Genoa Schiffahrtsgesellschaft MBH& CIE, GF*. 783 F.3d 1010, 1017 (5th Cir. 2015).

2. An "explicit public policy that is well defined and dominant" with respect to seaman who have long been termed as "wards of admiralty".

3. The Supreme Court rejected the notion that all disputes must be resolved under American laws even where foreign law provides a lesser remedy. In *Asignacion*, the Fifth Circuit addressed the choice of law to a seafarer's claim and stated that "even with regard to foreign seaman, United States public policy does not necessarily disfavor lessor or different remedies of foreign law". *Asignacion* 783 F.3d 1017.

Seafarer Cvoro's argued to invoke the American policy favoring Seafarers and the recognized Jones Act claim of vicarious liability for the negligence of the shoreside physician. While doing so, Judge Moreno recognized in the context of a public policy defense to an arbitral award, the United States Supreme Court instructs courts to consider the source of the policy to determine whether a statutorily protected right actually exists, in this case, the Jones Act. The Court stated: "the Supreme Court in *Scherk* recognized the distinction as to whether Federal case law implied the right of action at issue or whether the legislation itself establishes a special right." *Scherk* 417 U.S. 513-14.

Judge Moreno determined that the Jones Act does not explicitly provide for vicarious liability as that claim was asserted by Cvoro. Instead, the Plaintiff's theory of vicarious liability for the negligence of the shoreside physician stemmed from the judicial application of the Jones Act and not from express language of the statute. On this basis. the Court did not find that Plaintiff's claim was one that constituted a well-defined and explicit U.S. public policy.

Even if the Plaintiff's theory of vicarious liability did constitute a deeply rooted U.S. public policy, the Court continued its analysis noting it would need to find the arbitrator's decision violated that policy. The Court then examined whether the arbitrator's decision to apply Panamanian law violated U.S. public policy. Here, Judge Moreno considered the opinions of the Eleventh Circuit in *Lindo* and *Lipcon* to determine that the proper standard was to declare

unenforceable choice of law clauses only when the remedies available in a chosen forum are so inadequate that enforcement would be fundamentally unfair. On this basis, Judge Moreno reasoned that the Plaintiff's mere inability to arbitrate a Jones Act claim did not in and of itself mean the award is unenforceable as against public policy. The question, rather, was what claims could Cvoro assert under Panamanian law and were those remedies under Panamanian law "so inadequate that enforcement would be fundamentally unfair".

At this point of the opinion, Judge Moreno examined what claims were presented to the Arbitrator and how he decided them. The Court then deduced the issue to be whether the distinctions between Panamanian and US law required the Court to vacate the arbitral award and concluded they did not. The Court stated "even where the designated foreign law differs from U.S. Law by a subtle distinction in remedy or calculation of damages, there is no violation of public policy. Specifically the Court stated "here, the record does not show that Cvoro attempted to pursue these remedies under Panamanian law. By her own admission she claims she did not because to do so would have been futile. Given these potential avenues for recovery under Panamanian law, and Cvoro's failure to employ them, the Court cannot say these remedies were so inadequate as to render the proceeding and its result unfair."

The Court specifically observed that Plaintiff's argument that pursuing a remedy under Panamanian law would have been futile was not persuasive. The Court found "her statement about futility, without more, is insufficient to establish the arbitration proceeding was so inadequate that enforcement would be fundamentally unfair."

The Court concluded that its ruling to deny the Plaintiff's request to vacate the arbitral award "is in line with the goals of the Convention, as the Court is charged with applying the defenses only in very narrow circumstances."

IX. COMPELLING ARBITRATION IN PASSENGER CASES

9 U.S.C §§ 3, 4, and 9: allow U.S. District Courts to order arbitration.

9 U.S.C § 201-208: The Convention "generally establishes a strong presumption in favor of arbitration of international commercial disputes." *Bautista v. Star Cruises*, 396 F.3d 1289, 1292 (11th Cir. 2005) (*quoting Indus. Risk Insurers v. M.A.N. Gutehoffnungshutte GmbH,* 141 F.3d 1434, 1440 (11th Cir. 1998)). Section 205 permits removal before the start of trial. *Id.* at 1292. A Court must first determine whether the parties agreed to arbitrate that dispute. *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth*, 473 U.S. 614, 626 (1985).

Bautista v. Star Cruises, 396 F.3d 1289, 1294 (11th Cir. 2005) provides four jurisdictional prerequisites for compelling arbitration:

1) There is an agreement in writing to arbitrate the dispute;

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, that is considered commercial; and

4) One party to the agreement is not a United States citizen, or the commercial relationship.

A court must order arbitration unless these four prerequisites are not met; or one of the affirmative defenses of the Convention apply. *Id.* Similarly, an agreement to arbitrate is not enforceable if it is "null and void, inoperative or incapable of being performed." *Javier v. Carnival Corp.*, 2010 US Dist. LEXIS 95637 (S.D. Cal. 2010) (citing *Bautista*, 396 F.3d at 1302). Further, a plaintiff has the duty to show why a court should not or cannot compel arbitration. *Sims v. Clarendon Nat. Ins. Co.*, 336 F. Supp. 2d 1311, 1314 (S.D. Fla. 2004).

An agreement to arbitrate is invalid if it violates public policy. *Javier*, 2010 US Dist. LEXIS 95637 at *9. One way an arbitration agreement violates public policy is if the choice-of-law provisions force the plaintiff to waive statutory rights. *Id.* In *Javier*, the court found that arbitrating plaintiff's claims under Panamanian law would not violate public policy. *Id.* at *27. The key reasoning is that plaintiff is still able to return from foreign arbitration with some award. *Id*.

A passenger is bound by the contractual terms of their ticket regardless of whether they read them. *Strauss v. Norwegian Caribbean Lines*, 613 F. Supp. 5, 8 (E.D. Pa. 1984). The ticket language must be reasonably communicated and give adequate caution. *Marek v. Marpan Two, Inc.*, 817 F.2d 245, 246 (3d Cir. 1987); *Nash v. Kloster Cruise A/S*, 901 F. 3d 1565 (11th Cir. 1990). The relevant inquiry is not whether the passenger actually read his or her ticket, but rather, whether the passenger had the opportunity to read the ticket. *Barkin v. Norwegian Caribbean Lines*, 1988 A.M.C. 645, 650 (D. Mass. 1987).

Reinhardt v. RCCL, 2013 U.S. Dist. LEXIS 201442 (S.D. Fla. 2013): Plaintiff, a cruise line passenger, allegedly sustained injuries as a passenger aboard cruise ship. Defendant reimbursed Plaintiff for medical expenses incurred in a foreign port and in California. Defendant refused to pay some debts. Plaintiff filed a claim seeking damages for injuries in connection with the shipboard incident. Defendant moved to dismiss and compel arbitration under the arbitration clause in the ticket contract. Here, the Judge compelled arbitration based on the *Bautista* prerequisites.