

Homeward Bound – Judge Orders Filipino Seamen or Their Survivors to Arbitrate Miami Explosion Claims Back Home. The case of *Rizalyn Bautista, et al, v. Star Cruises and Norwegian Cruise Line, Ltd., No. 03-21642(S.D. Fla. Oct. 14, 2003)(Seitz, J.)*

On October 14, 2003 a Miami Federal Judge rocked the Plaintiff's bar in the Cruise Capital of the World by rejecting a bid by Filipino seamen injured or killed in the SS Norway boiler blast to have their claims heard in the United States judicial system. Instead, the Honorable Patricia A. Seitz ruled the employment contracts negotiated between their government and Norwegian, Carnival and other South Florida-based cruise lines would be enforced thus sending the cases to the Philippines for resolution by arbitration. Until this definitive ruling, judges in the Southern District of Florida had ruled that such claims could be heard in the United States court system. This view began to change in late 2002 and earlier in 2003, when Southern District Judges Paul Huck and James Lawrence King ruled in favor of the cruise lines on similar facts. See *Adolfo v. Carnival Corp.* No. 02-23572 (S.D. Fla. Mar. 17, 2003)(Huck, J.) and *Amon v. Norwegian Cruise Lines, Ltd.* No. 02-21025 (S.D. Fla. Sept. 26, 2002) and *Santos v. Carnival Corp.* No. 03-20914 (S.D. Fla. Sept. 16, 2003)(King, J.). These cases were all settled before appeal so it is not possible to know how the 11th Circuit would rule. The 11th U.S. Circuit Court of Appeals will now have to decide whether to affirm or reverse Judge Seitz's decision unless the Bautista case (and the nine related and consolidated cases are also settled before appeal.

The instant cases arose in late May 2003, when, while at the dock in Miami, the venerable cruise ship NORWAY experienced an unexpected, heart and metal rending explosion. As a result 6 lives were lost and 4 others badly burned by super heated steam escaping from the steam boilers of the 41 year old ship. A blast, from as yet to be determined origins, ripped through the casings of the ship's boilers. In the days which followed the incident, the global regime in which the cruise industry operates would be brought under the microscope of instant experts who, only moments earlier, were mere land-based journalists.

The reportage which followed highlighted the ethnocentric way those who depend on the sea for their livelihoods are viewed by mostly U.S. based media organizations.

The legendary ship itself was routinely referred to as "foreign registered" as if Norway were some strange, remote even primitive isle. While it is true that the world's oceans are the last vestige of the earth's surface which remain to some extent ungoverned, one would have thought that Norway would have been given more consideration.

Initially, the United States wasted no time asserting jurisdiction since the NORWAY was literally at the dock and fully within the jurisdiction of the United States of America at the time of the accident. Quite properly, the National Transportation Safety Board was immediately dispatched to the scene to investigate. The NTSB investigation seemed particularly appropriate in as much as the vast majority of the 2100 passengers disembarking in Miami were almost certainly United States citizens.

Meanwhile the press routinely, frequently and ominously referred to the boilers as "French made" thus giving the French no more credit than Norway in the matter.

Perhaps it was the horrific prospect of being engulfed in steam which captured the popular imagination and interest in the incident. The steam, we read, had expanded some 1,700 times from a liquid to a gaslike state. The intense heat of the gas was reported to have reached some 900 to 100 degrees.

So, while the focus might have been rightly on what *caused the explosion*, for example, (metal fatigue, unseen corrosion, a part failure or human error) the media seemed to more interested in the cruise industry's employment practices. Ironically, the media may have

unintentionally laid the groundwork for what was to come in Court but with an unintended consequence as the Court cases which followed focused on exactly what the media seemed so enamored of, namely, the employment practices which led to the hiring of the deceased and injured seamen.

The nationalities of those lost and injured were Filipino with one exception, a Jamaican. Thus the media focused on the plight of the world's poor and reported exploitation of the world's poor and the possible implication of the cruise industry.

Within a week of the incident, ten lawsuits had been filed in separate actions, with one lawyer trumpeting in the press his client's demand for a "billion dollars" in damages.

The Complaints alleged negligence and unseaworthiness under the Jones Act, 46 U.S.C. Section 688 and failure to provide maintenance, cure and unearned wages under the general maritime law of the United States. All of the cases were originally filed in the Florida State Court system and removed to the United States District Court, Southern District of Florida and consolidated before the Honorable Patricia A. Seitz.

Plaintiffs' actions were met by defendants Motion to Compel Arbitration bringing immediately into question the enforceability of the written arbitration agreements between the Defendant Cruise Line and the Plaintiff seamen. Defendants maintained that the arbitration agreements were subject to the Convention on the Recognition and Enforcement of Foreign Arbitral Awards ("the Convention"). Both the United States and the Philippines are signatories to the Convention with the United States implementing it in 1970 through the enactment of 9 U.S.C. Section 201-298 (collectively, "the Convention Act").

Each plaintiff signed an employment contract with the defendant cruise line which contracts were "verified and approved" by the Philippine Overseas Employment Administration ("POEA"). The Contracts were almost uniform varying only respect to salary levels, position attained, etc. All of the Contracts referred to Department Order No. 4 and Memorandum Circular No. 9 promulgated by the Department of Labor and Employment of the Philippines.

In her Order of dismissal the Court noted that Department Order No. 4 incorporated by reference the Standard Terms and Conditions Governing the Employment of Filipino seamen ("the Standard Terms"). Section 29 of the Standard Terms requires arbitration "[I]n cases of claims and disputes arising from [the seaman's] employment".

Proof was adduced that the seamen had each signed the Standard Terms and that the meaning of the Standard Terms had been explained to them and had even attended an "Orientation Seminar" which reviewed the Standard Terms.

Federal Arbitration Act Exclusion of Seamen Contracts Does Not Apply to the Convention Act

Plaintiffs argued with the support of an amicus brief filed by the Academy of Florida Trial Lawyers that the Motion to Compel Arbitration had to be denied because seaman employment contracts are exempted from the coverage of the Convention Act. But Judge Seitz deferred to and followed *Francisco v. Stolt Achievement MT*, 293 F. 3rd 270 (5th Cir.), cert. Neneied, 537 U.S. 1030 (2002) the only United States Circuit court decision on the question. In *Francisco v. Stolt Achievement MT* the Fifth Circuit held that neither the Convention nor its implementing legislation recognize an exception for seamen employment contracts.

The Arbitration Agreements Between Plaintiffs and Defendant Fall Within the Scope of the Convention Act and Require Arbitration

Judge Seitz found that the “United States Supreme Court has expressed a liberal federal policy favoring the enforcement of arbitration provisions” citing *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.* 473 U.S. 614, 625 (1985). She further found that there is a strong presumption in favor of arbitration which “applies with special force in the field of international commerce.”

There Was An Agreement In Writing Whereby the Parties Agreed to Arbitrate the Dispute

Judge Seitz acknowledged that the Convention requires “an agreement in writing between the parties to arbitrate the dispute in question” and she specifically found that the POEA-approved employment contract (which each Plaintiff signed) qualified as such an agreement. She made this finding even though the one-page employment contract did not contain an arbitration clause. By her reasoning the fact section 29 of the Standard Terms contained an arbitration clause was enough because the Standard Terms were expressly referred to and incorporated by reference in Department Order No. 4 and Memorandum Circular No. 9.

Judge Seitz noted that it would be for the arbitrator to decide whether the Plaintiffs had been coerced into signing the arbitration agreement, whether they had been adequate notice of the arbitration provision, whether the plaintiffs themselves were covered by the collective bargaining agreement, or whether Plaintiff’s employment contracts were negotiated on a “take it or leave it” basis”. Judge Seitz noted that the “*employment contracts, with the incorporated Standard Terms, were in the form and language that their own government required to protect its citizens*”.

In short, Judge Seitz found that the Plaintiffs lacked a factual basis for claiming that the Defendants took advantage of them in negotiating the language and terms of the contract because the contract had been expressly approved and signed off on by the POEA. She then noted that it is against Philippine law to hire a Filipino seaman except through the POEA. This being said she indirectly acknowledged the application of the Act of State doctrine when she stated “...it is not the role of this Court to second –guess such [Philippine government] actions”. It might be fairly said that not only is it not the role of the Court, the Court is expressly precluded from inquiring into the validity of official acts of the Philippine government by the Act of State Doctrine. See *Fogade v. ENB Revocable Trust*, 263 F. 3d 1274 (11th Cir. 2001)

The Agreements to Arbitrate Arise Out of International – not Domestic - based Commercial Relationships and Therefore Would Not Be Exempt from the Federal Arbitration Act

It is well established that “contracts evidencing a transaction involving interstate commerce” fall within the Federal Arbitration Act (the FAA”). It is also clear that as a general rule contracts of employment are such contracts. But the FAA also expressly exempts certain contracts of employment including those involving transportation workers (including seaman). Against this backdrop, the Plaintiffs argued that the Seamen’s contracts were expressly exempted from the FAA and therefore the Plaintiffs should not be required to arbitrate.

Judge Seitz found, notwithstanding this exemption, that exemption only applied in the domestic context because other legislation to govern disputes between seamen and their employers had been passed to govern domestic employment contracts for seaman. Plaintiff’s argument that Judge Seitz should extend the exemption from the FAA to the international context was not accepted. .

The Arbitration Agreements Are Not Null and Void, Inoperative Or Incapable of Being Performed

In making this argument, Plaintiffs took language right out of Article II, Section 3 of the Convention which provides that disputes arising under the arbitration agreements should be referred to arbitration unless the agreements are “null and void, inoperative or incapable of being performed”. But, Judge Seitz reasoned, there was no clear indication from the Philippine government that it intended to implement the alleged phase out of POEA as argued by Plaintiffs and therefore the Agreement was not null and void..

Plaintiffs also argued that the claims were not subject to arbitration because they sounded in tort. But the only case cited by Plaintiffs – Tolosa v. National Labor Relations Commission, et al, G.R. No. 149578, Apr. 10, 2003 - concerned injuries to the Plaintiff caused by *third parties* namely the co-workers of the injured seaman. The instant case, Judge Seitz reasoned, concerned alleged torts arising as between the Plaintiff and the Plaintiffs’ employers. Given the contractual relationship between the two parties the tort claim exemption did not apply. In fact the Tolosa Court, - the Philippine Supreme Court – specifically noted that the widow’s claim did not arise from an employer-employee relationship.

Removal of the Cases To Federal Court was Proper Under 9 U.S.C. Section 205

As a final point, Judge Seitz noted that the removal under 9 USC Section 205 of the FAA was appropriate because the proceeding did relate to “an arbitration agreement or award falling under the Convention”. She found that it did not matter that Jones Act cases could not be removed based on federal question jurisdiction under 28 U.S.C 1331 because the Filipino seamen cases were removed under the Convention Act which is construed broadly in favor of removal.

Conclusion

First one, then two and now three Federal Judges in the Southern District of Florida agree that foreign seaman do not automatically have a right to bring their personal injury complaints in United States Courts when there is an employment contract which incorporates an arbitration clause even if the incorporation in the employment contract is merely by reference.