UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

CASE NO.: 04-22132-CIV-GOLD/TURNOFF

INACIO EUFEMIO LOBO

Plaintiff,

v.

CELEBRITY CRUISES, INC.,

Defendant.
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CLOSED CIVIL CASE

ORDER AFFIRMING REPORT AND RECOMMENDATION AND DISMISSING CASE WITH PREJUDICE

THIS MATTER comes before the Court on the "Plaintiff's Objection to Magistrate's Recommendation and Report on Defendant's Motion to Dismiss Second Amended Complaint" [D.E. 57]. The Defendant filed a response essentially arguing that the objections, with the exception of its "Introduction" and the last sentence of its "Conclusion" were verbatim reproductions of Plaintiff's Response to Celebrity's Motion to Dismiss the Second Amended Complaint [D.E. # 45]. I held oral argument on Plaintiff's objections on Wednesday, March 22, 2006.

Upon reviewing the matter, I find no factual disputes and conclude that the Magistrate Judge's legal conclusions are correct. Accordingly, I adopt the Report and Recommendations [D.E. # 56] in its entirety and hereby dismiss the Second Amended Complaint [D.E. # 38] with prejudice in that any further amendment to the Second Amended Complaint would be futile and the legal issues addressed are ripe for resolution on appeal

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by the Eleventh Circuit Court of Appeals. I hereby briefly add to the Magistrate Judge's well-reasoned Report and Recommendation.

The Plaintiff's employment agreement [Exhibit B to the Second Amended Complaint] is a commercial legal relationship under the Convention Act, regardless of the FAA seamen exemption. Under that agreement, grievances and disputes arising on the vessel or in connection with the agreement "... which cannot be resolved onboard or between the parties shall be referred to the arbitration as elsewhere provided herein." [Exhibit B, Article 26, page 12]. The place of arbitration shall be either the country of the seaman's citizenship or Miami, Florida. *Id.*

Under such circumstances, the Eleventh Circuit has determined that the seamen employment contract exemption to the Federal Arbitration Act does not remove from the Convention Act's scope a subset of commercial employment agreements such as Plaintiff's signed contract. *Bautista v. Star Cruises*, 396 F.3d 1289, 1298 (11th Cir. 2005). This Court must order arbitration if four conditions 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 to the Convention, (3) the agreement to arbitrate arises out of a commercial legal relationship, and (4) there is a party to the agreement who is not an American citizen. *Id.* at 396 F.3d 1289, 1294 n. 7.

Here, the Magistrate Judge correctly concluded that the allegations answered each of these questions affirmatively. Thus, the Court must send this matter to arbitration unless one of the permissible defenses applies-i.e, that the agreement is null and void, inoperative or incapable of being performed. While Plaintiff has raised allegations about disparity in

bargaining position, the Eleventh Circuit, in *Bautisa*, has rejected such arguments when the Plaintiff does not explain how this makes for a defense under the Convention. *Id.* at 1301.

The only other argument that requires further comment is Plaintiff's contention that the arbitration clause does not defeat an individual seaman's right to proceed in Federal Court on the Statutory Wage Claim provided for in Title 46, U.S.C. §1033. In essence, Plaintiff argues that his claims brought under 46 U.S.C. §§ 10313(f) and (g) are exempt from the Convention on the Recognition and Enforcement of Foreign Arbitral Awards ("the Convention"), and its implementing legislation, 9 U.S.C. §§ 202-208 9 ("the Convention Act"). Plaintiff bases his position on*U.S. Bulk Carriers, Inc. v. Arguelles,* 400 U.S. 351, 375 (1971). There, the Supreme Court held that claims for unpaid wages and penalty wages under § 10313 cannot be forced into arbitration, and that a seaman may assert such claims in federal court regardless of whether the seaman's employment contract contains an arbitration provision.

The difficulty with the *Arguelles* decision as being despositive of this case is that the Court did not address, or even mention, the Convention and Convention Act, because what was at issue in *Arguelles* was the duty to follow the collective bargaining grievance procedures under § 301 of the Labor Management Relations Act. The United States implemented the Convention in 1970 through the enactment of the Convention Act, while *Arguelles* was argued before the circuit court on January 12, 1968– at least two years before the Convention was implemented. Accordingly, the Supreme Court did not, in *Arguelles*, address the underlying policy and goals of the Convention, especially in the context of enforcing arbitration provisions contained in international seamens' employment

contracts.

Specifically, at the core of the Supreme Court's decision in *Arguelles*, was its conclusion that:

> Enforcement by or against labor unions was the main burden of s 301, though standing by individual employees to secure declarations of their legal rights under the collective agreement was recognized. Since the emphasis was on suits by unions against unions, little attention was given to the assertion of claims by individual employees and none whatsoever concerning the impact of s 301 on the special protective procedures governing the collection of wages of maritime workers. We can find no suggestion in the legislative history of the Labor Management Relations Act of 1947 that grievance procedures and arbitration procedures were to take the place of the old shipping commissioners or to assume part or all of the roles served by the federal courts protective of the rights of seaman since 1790.
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> *Aguelles,* 400 U.S. at 355-56.

In contrast, subsequent to *Arguelles*, the United States Supreme Court, in *Scherk v. Alberto-Culver Co.,* 417 U.S. 506, 520 n.15 (1974), recognized the importance of the Convention by stating:

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

The Eleventh Circuit has cited to *Sherk* in *Bautista, id.,* 396 F.3d at 1299-1300, in support of the proposition that to read industry-specific exceptions into the broad language of the Convention Act would be to hinder the Convention's purpose. Based on this broad language of the Convention Act, the Eleventh Circuit held that " ... in the context of the

framework of title 9 and the purposes of the Convention, we find no justification for removing from the Convention Act's a subset of commercial employment agreements. The crewmembers' arbitration provisions constitute commercial legal relationships within the meaning of the Convention Act." *Id.* at 1300.

It is the advent of the Convention and the Convention Act, together with its broad policies, which distinguishes this case from *Arguelles*. In *Arguelles*, the Court's recognition of the parochial desire to protect seamen lead it to trump the underlying policy of the LMRA. Given the Supreme Court's later position in *Sherk*, this case is not governed by *Arguelles* because the underlying policies at issue between the LMRA and the Convention and Convention Act are diametrically different. As noted in *Bautista*, the Eleventh Circuit, relying on *Sherk*, already has recognized that the same policies do **not** apply with regard to foreign seamen governed under the Convention and Convention Act, because: "[i]n pursuing effective, unified arbitration standards, the Convention's framers understood that the benefits of the treaty would be undermined if domestic courts were to inject their 'parochial' values into the regime." *Id.* at 1300. Accordingly, Plaintiff's claim cannot be carved out from the Convention. In that regard, I concur with the Magistrate Judge, that a contrary holding " ... would go against the reading proscribed in *Bautista*, because it would be reading into the Convention Act an insular (parochial) attitude of the courts to protect seamen." Report and Recommendation, page 10. Given that the Plaintiff gets to arbitrate in Miami, Florida, namely within the same jurisdiction of the Southern District of Florida, such a result is neither unfair nor onerous. This is not a situation where the contract at issue required

arbitration in an untenable forum.[1]

These conclusions are supported by the Fifth Circuit's decision in *Lim v. Offshore Specialty Fabricators, Inc.*, 404 F.3d 898 (5th Cir. 2005). Although the *Lim* case dealt with a different federal statute, the Federal Labor Standards Act, the case is nonetheless persuasive in the context of federal wage statutes.

In the *Lim* case, a Filipino seaman sued his employer, a Louisiana corporation that owned the foreign-flagged vessel on which he worked, alleging overtime violations under the Fair Labor Standards Act (FLSA). The employer moved to dismiss, claiming that the standard terms of the seaman's employment contract required arbitration of the claim in the Philippines, and that the Convention on the Recognition and Enforcement of Foreign Arbitral Awards required enforcement of the arbitration clause. The district court denied the dismissal, holding that the arbitration clause violated Louisiana law, which signaled a strong public policy against a forum selection clause in an employment contract and rendered the clause enforceable. 404 F.3d at 901. The district court did not address two other grounds raised by the plaintiffs whereby it was asserted that the arbitration clause was unenforceable. These grounds were, first, that arbitration has never been required in seamen's wage litigation, and, second, that the arbitration clause was invalid under the terms of the Convention, because plaintiffs' FLSA claims were rooted in United States law and cannot be resolved through foreign arbitration.

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[1] Admittedly, this matter is one of first impression. Neither side has cited cases which directly address whether the central holding in *Arguelles* is now distinguishable in light of the Convention and Convention Act. This Court can only look to the Eleventh Circuit's opinion in *Bautista* for guidance.

The Fifth Circuit vacated the district court's order. In reversing, it only addressed two of plaintiffs' issues and held "... (1) the Convention and the Supremacy Clause require enforcement of the arbitration clause, and (2) there is no exception to that requirement based on any one of the three advanced by plaintiffs, including Louisiana's anti-forum-selection clause statute." *Id.* at 902. It rejected plaintiffs' argument that arbitration has never been required in seamen's wage litigation, and that clauses requiring such arbitration are invalid. *Id.* Applying these principles, although, admittedly, reached in another context, it does not appear that the Convention Act intended to exempt the Statutory Wage Claim Act from its coverage notwithstanding the Supreme Court's decision in *Arguelles*. Rather, I conclude that the Convention, the Convention Act and the Supremacy Clause require enforcement of the arbitration clause at issue in this case. I would leave for another day what would happen if arbitration was required in a manner or context which resulted in an unconscionable hardship for the seaman. In any event, I conclude that such is not the result here.

WHEREFORE it is **ORDERED** that the Report and Recommendation of the Magistrate Judge [D.E. # 56] is hereby **ADOPTED** and Plaintiff's Second Amended Complaint [D.E. 38] is hereby **DISMISSED WITH PREJUDICE**.

ORDERED this 27 day of March, 2006.

Alan S. Gold
United States District Judge

Copies furnished to: [via telefax from chambers]

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