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Forum Shopping on the High Seas:
The Presumptive Enforceability of Forum Selection Clauses
in Cruise Line Passenger Ticket Contracts

“Forum shopping” to an admiralty and maritime attorney does not necessarily carry the same negative connotation that it does to other attorneys. To an admiralty attorney, forum shopping or a forum selection clause is often the starting point of any prospective litigation against a cruise line. A lawyer who fails to understand forum selection clauses in maritime and nonmaritime contracts, and, further, fails to scrutinize the fine print of a passenger ticket contract, practices at their own peril.

Most cruise passenger tickets are contracts that contain these forum selection clauses in which the cruise line has unilaterally determined where a claim arising from the subject cruise may be pursued. Additionally, recent amendments to Carnival Corporation (“Carnival”) and Norwegian Cruise Line’s (NCL) ticket contracts determine not only the place of the claim, but also which court it can be brought. Specifically, Carnival and NCL’s passenger ticket contracts dictate that a claim can only be brought in the United States District Court for the Southern District of Florida.¹

On January 3, 2008, the validity of this new forum selection clause contained in Carnival’s passenger ticket contract was upheld by the Third District Court of Appeal in *Leslie v. Carnival Corp.*, So.2d , 33 FLW D105 (Fla. 3d DCA 2008). In upholding this clause, *Leslie* follows the United States Supreme Court’s precedent that forum selection clauses in maritime contracts are presumptively enforceable. *Leslie* highlights the importance of understanding forum selection clauses in cruise line passenger ticket contracts, and this article is intended to set forth the basics of this binding precedent and to offer advice on ways to avoid such clauses.

A Change in View

Traditionally, forum selection clauses in contracts were not favored by American courts because they were considered contrary to public policy or that their effect was to oust the jurisdiction of the court. This view abruptly changed in *M/S Bremen v. Zapata Off-Shore Co.*, 407 U.S. 1, 92 S.Ct. 1907, 32 L. Ed. 2d 513 (1972). In *Bremen*, a Houston-based American company, Zapata, contracted with a German corporation, Unterweser, to tow a drilling rig from Louisiana to the Mediterranean Sea. The contract contained a forum selection clause designating London as the appropriate forum for any dispute arising from the contract. A severe storm damaged the rig while it was in international waters, and Zapata instructed Unterweser to tow it to Tampa, Florida, the nearest port of refuge. Zapata then filed suit in admiralty in U.S. District Court in Tampa against Unterweser and The Bremen, Unterweser’s deep sea tug, for breach of contract and negligent towing. The District Court declined to enforce the forum selection clause, and the Circuit Court affirmed.

The Supreme Court reversed, noting that the forum selection clause at issue was a “freely negotiated private international agreement, unaffected by fraud, undue influence, or overweening bargaining power,” and held that “the forum clause should control absent a strong showing that it be set aside.” *Bremen* at 15, 92 S.Ct. at 1916. The Court also stated that such clauses in commercial maritime contracts are “prima facie valid and should be enforced unless enforcement is shown by the resisting party to be unreasonable under the circumstances.” *Id.* at 10, 92 S. Ct. at 1913. However, the Supreme Court announced an important exception to the prima facie validity of choice of forum agreements, that they will not be enforced if doing so would violate “a strong public policy of the forum, whether declared by statute or judicial decision.” *Id.* at 15, 92 S.Ct. at 1916.

Next, in *Carnival Cruise Lines, Inc. v. Shute*, 499 U.S. 585, 111 S. Ct. 1522, 113 L. Ed. 2d 622 (1991), the Court expanded its holding in *Bremen* to include maritime contracts involving consumers. In *Shute*, a married couple bought cruise tickets from a travel agent in their home state of Washington. After paying for the cruise, they received their tickets. On the backs of the

tickets, in fine print, was a forum selection clause designating Florida as the appropriate venue for any disputes. Carnival had its principal place of business in Florida. The wife slipped and fell while the vessel was in international waters off the coast of Mexico. She and her husband sued Carnival in Washington.

Relying on *Bremen*, the Supreme Court held that the forum selection clause was enforceable despite the fact that the tickets were nonrefundable and the forum selection clause was not the product of bargaining. *See id.* at 595, 111 S.Ct. at 1528. The Court reasoned that the cruise line had an interest in "limiting the fora in which it could be potentially subject to suit." *Id.* at 593, 111 S.Ct. at 1527. Because cruise ships typically carry passengers from many different states and countries, an accident could subject the cruise line to litigation in multiple locales. *See id.* Also, enforcing the forum selection clause would avoid confusion about the proper venue. *See id.* at 593-94, 111 S.Ct. at 1527. The parties would know in advance where to file suit. *See id.* This would conserve judicial resources. *See id.* at 593-94, 111 S.Ct. at 1527. Finally, passengers benefit from forum selection clauses in the form of lower ticket prices. *See id.*

These oft-cited Supreme Court cases form the backbone of the analysis of forum selection clauses in cruise line passenger ticket contracts, as further evidenced by the Third DCA's opinion in *Leslie*.

Leslie

In *Leslie*, the Third DCA consolidated the claims of two Florida resident passengers ("the passengers") who wanted to use Florida state courts, rather than Florida federal courts to resolve their personal injury claims against Carnival. The contracts issued by Carnival to these fare paying passengers prior to embarking on their cruises, directed that passenger lawsuits arising out of the cruise be filed exclusively in the United States District Court for the Southern District of Florida. The plaintiffs admitted these clauses were reasonably communicated to them as required by federal maritime law. Since no diversity existed between the parties, the only federal court jurisdiction was through the original jurisdiction of federal courts over admiralty and maritime claims contained in the U.S. Constitution. Due to the one-year statute of limitations which was also present in their ticket contracts,² the passengers filed identical actions in both the Southern District and Florida Circuit Court.

The passengers' primary argument was that because the federal court lacked diversity jurisdiction over the matter, Carnival's forum selection clause stripped them of their right to a jury trial which is historically unavailable to litigants in court sittings in admiralty. Jury trials to admiralty litigants, however, are supposed to be available through the Federal Judiciary Act of 1789 and 28 U.S.C. §1333(1). This argument was quickly disposed of only because Carnival stated in its answer brief that it had no intention of opposing the passenger's request for a jury trial.

The Third DCA followed what it called the well settled federal maritime precedent of *Bremen* and *Shute* in upholding Carnival's forum selection clause. The court was persuaded by the reasoning in *Shute* because "if a contractual provision requiring one of Carnival's Washington State passengers to travel to Florida to litigate her shipboard personal injury claim is valid, then, *a fortiori*, it is not contractually unreasonable for Carnival [Florida residents] to travel from the Miami-Dade County Circuit Court to the United States District Court for the Southern District of Florida to present their personal injury claims against Carnival in this case." *Leslie* at 6.

Inherent in the passenger's argument was that Carnival unlawfully "federalized" its passenger personal injury actions because the clause effectively dictates not only the location where a passenger may sue, but also contractually constrains the "subject matter jurisdiction" of the available courts within that jurisdiction because all Florida resident passengers and passengers whose claims are worth less than \$75,000 (the federal diversity jurisdictional minimum) must initiate suits against Carnival on the admiralty side of District Court, and, at the same time, all other U.S. citizens (for whom diversity does exist) may file on the law side of that court. The Third DCA found this argument unavailing, but nonetheless conceded, "[a]lthough our participation in maritime personal injury claims might be lessened by the adoption of clauses of this type, we doubt we will be silenced completely as [the passengers] and their counsel so eloquently urge. Nor do we harbor jurisdictional or sovereign concern. Rather, we concur with the sentiment expressed in *Bremen* that "[it] reflects something of a provincial attitude regarding the fairness of other

tribunals" to suggest, ... that plaintiffs who might become contractually obligated to appear before and litigate their cases before the fine judges of the United States District Court for the Southern District of Florida somehow will be shortchanged." *Leslie at 13*.

Invalidating the Forum Selection Clause

The Third DCA's opinion in *Leslie* shows the powerful effect of these provisions in passenger ticket contracts. Nonetheless, forum-selection clauses contained in passage contracts are subject to judicial scrutiny for both reasonable communicativeness and for fundamental fairness and, thus, there remain avenues around such clauses.

When a valid forum selection clause exists, the burden of invalidating such clause lies with the party opposing enforcement of the agreed upon venue. *In re Ricoh Corp.*, 870 F.2d 570, 573 (11th Cir. 1989). Although forum selection clauses in admiralty cases are presumptively valid and enforceable, courts will not enforce clauses that are unreasonable under the circumstances. *Webster v. Royal Caribbean Cruises, Ltd.*, 124 F. Supp. 2d 1317, 1321 (S.D. Fla. 2001). To avoid a forum selection clause based on unreasonableness consider whether: (1) fraud or overreaching induced the clause; (2) the inconvenience or unfairness of the chosen forum would deprive plaintiff of his day in court; (3) whether the plaintiff would be deprived of a remedy due to the unfairness of the chosen law; or (4) enforcing such provision contravenes strong public policy. See *Lipcon v. Underwriters at Lloyd's London*, 148 F.3d 1285, 1292 (11th Cir. 1998), *cert. denied*, 525 U.S. 1093, 119 S. Ct. 851, 142 L. Ed. 2d 704 (1999).

In sum, forum shopping is an integral part of the Law of the Sea. Admiralty and maritime attorneys initiate litigation by first looking to forum selection clauses provisions contained in the passenger ticket contract. Understanding these clauses is an integral part of any litigation against the cruise lines. Failure to properly navigate the sea of law which dictates the enforceability of these clauses may cause an attorney to drift into improper and forbidden forums from which there may be no return.

¹ The tickets provide language selecting the United States District Court for the Southern District of Florida for all such claims over which that court would have jurisdiction and state court in Miami-Dade County for such other claims not meeting the jurisdictional requirements of federal court.

² According to 46 U.S.C. §30508, shipowners are allowed to limit the three-year statute of limitations available in admiralty matters to one year.