UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

MIAMI DIVISION

CASE NO. 10-24089-CIV-JORDAN

KAUSTUBH BADKAR,

Plaintiff

vs.

NCL (BAHAMAS) LTD.,

Defendant

ORDER ON MOTION TO DISMISS AND COMPEL ARBITRATION

For the reasons below, NCL (Bahamas) Ltd.'s motion to dismiss and compel arbitration [D.E. 12] is GRANTED IN PART and DENIED IN PART.

Mr. Badkar, a citizen of India, alleges that in August of 2008 he was injured while working as a seaman on the *Norwegian Pearl*, a vessel owned by NCL (a Florida corporation). Specifically, Mr. Badkar claims that, while "lifting and stacking cases of drinks," he suffered serious injuries, including herniated disks in his neck and back. Based on this alleged accident, Mr. Badkar has brought claims against NCL for negligence under the Jones Act, 46 U.S.C. § 30104 (Count I); unseaworthiness (Count II); failure to provide maintenance and cure (Count III); failure to treat under maritime law (Count IV); and failure to pay wages under the Seaman's Wage Act, 46 U.S.C. § 10313 (Count V).

Mr. Badkar worked aboard the *Norwegian Pearl* pursuant to an employment agreement with NCL. The agreement contains a mandatory arbitration provision that, in relevant part, states as follows:

> Seaman agrees . . . that any and all claims, grievances, and disputes of any kind whatsoever relating to or in any way connected with the Seaman's shipboard employment with [NCL] including, but not limited to, claims such as personal injuries, Jones Act claims, actions for maintenance and cure, unseaworthiness, wages, or otherwise, no matter how described, pleased or styled, and whether asserted against [NCL], Master, Employer, Ship Owner, Vessel, or Vessel Operator, shall be referred to and resolved exclusively by binding arbitration pursuant to the United Nations Convention on Recognition and Enforcement of Foreign Arbitral Awards (New York 1958) ("The Convention"). . . . The arbitration shall be administered by the American Arbitration Association ("AAA") under its International Dispute Resolution

> Procedures.
> . . .
> The place of arbitration shall be the Seaman's country of citizenship, unless arbitration is unavailable under The Convention in that country, in which case, and only in that case, said arbitration shall take place in Nassau, Bahamas. The substantive law to be applied to the arbitration shall be the law of the flag state of the vessel.

Mr. Badkar's employment agreement also expressly provides that the relationship between Mr. Badkar and NCL is "subject to and governed by" a collective bargaining agreement between NCL and the Norwegian Seafarers' Union. The collective bargaining agreement contains a mandatory arbitration provision virtually identical to the one in Mr. Badkar's employment contract.

Based on the arbitration clauses found in these agreements, NCL seeks to compel arbitration of Mr. Badkar's claims in India (Mr. Badkar's country of citizenship) under Bahamian law (the law of the flag state of the *Norwegian Pearl*).

II. ANALYSIS

NCL has moved to compel the arbitration of Mr. Badkar's claims under the Convention on the Recognition and Enforcement of Foreign Arbitral Awards, 9 U.S.C. §§ 201-208, commonly referred to as the New York Convention. "In deciding a motion to compel arbitration under the [New York Convention], a court conducts a very limited inquiry." *Bautista v. Star Cruises*, 396 F.3d 1289, 1294 (11th Cir. 2005). Unless one of the Convention's affirmative defenses applies, a court should compel arbitration under the Convention if the following four jurisdictional prerequisites are satisfied: (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 to a foreign state. *See id.* at 1294-95. Mr. Badkar does not dispute that his employment agreement meets these four jurisdictional conditions. Instead he argues that, pursuant to the Eleventh Circuit's decision in *Thomas v. Carnival Corp*. 573 F.3d 1113 (11th Cir. 2009), Article V(2)(b) of the Convention – permitting courts to refuse recognition of an arbitral award that contravenes public policy – applies as an affirmative defense rendering the arbitration clauses contained in his employment agreement and the collective bargaining agreement unenforceable and void as to all of

his claims.[1]

In *Thomas*, an Eleventh Circuit panel found that the prospective-waiver doctrine, originating from a footnote in *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614 (1985), applied to, and voided, an arbitration provision (very similar to the one here) contained in a seaman's employment contract that mandated the arbitration of any dispute in the Phillippines under Panamanian law. In *Mitsubishi*, the Supreme Court ruled that United States courts should enforce agreements resolving antitrust claims through arbitration when those agreements arose from international, commercial transactions. *See id.* at 624, 629. But in a famous footnote, the Court noted that "in the event the choice-of-forum and choice-of-law clauses operated in tandem as a prospective waiver of a party's right to pursue statutory remedies for antitrust violations, [it] would have little hesitation in condemning the agreement as against public policy." *See Id.* at 637 n.19.[2] Taking into consideration the Court's apparent condemnation of arbitration agreements prospectively waiving a party's statutory remedies, the Eleventh Circuit, in *Thomas*, concluded that the arbitration clause's choice-of-law provision (requiring that the arbitrator apply Panamanian law) effectively waived the plaintiff's rights under the Seaman's Wage Act, 46 U.S.C. § 10313. *See Thomas,* 573 F.3d at 1123. As a result, applying Article V(2)(b) as an affirmative defense to the application of the Convention,[3] the arbitration agreement was found to contravene public policy, and therefore

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[1] Article V(2)(b) of the Convention allows courts to refuse "recognition and enforcement of an arbitral award may . . . if the competent authority in the country where recognition and enforcement is sought finds that . . .[t]he recognition or enforcement of the award would be contrary to the public policy of that country." *See* Convention, Art. V(2)(b).

[2] The Supreme Court has recently acknowledged *Mitsubishi*'s prospective-waiver doctrine. *See 14 Penn Plaza LLC v. Pyett*, 129 S. Ct. 1456, 1474 (2009) ("[A] substantive waiver of federally protected civil rights will not be upheld . . . .") (citing *Mistubishi*, 473 U.S. at 637 & n.19).

[3] Article V(2)(b) of the Convention is actually a defense to the enforcement of an arbitration award, rather than an affirmative defense to the enforcement of an arbitration agreement. *See* Convention, Art. V(2)(b) ("[r]ecognition and enforcement of an arbitral *award* may also be refused . . .") (emphasis added); *Salinas v. Carnival Corp.*, Case No. 10-20910-Civ-Martinez, 2011 WL 1134968, at *2 n. 1 (S.D.Fla. Mar. 28, 2011) ("Technically, Article V(2)(b) is codified as a defense to the enforcement of arbitration rather than as an affirmative defense to the arbitration itself."). The affirmative defenses to the enforcement of arbitration agreements under the Convention are instead found in Article II. *See* Convention, art. II(3) (courts are required to enforce an agreement to

rendered null and void as it related to the plaintiff's Seaman's Wage Act claim. *See id.* at 1124.

NCL argues that *Thomas* is not the applicable law in this dispute, and that this court must follow and apply *Bautista*, an Eleventh Circuit decision pre-dating *Thomas*. If *Bautista* applied to the issues presented here, and there was a direct fundamental conflict between *Bautista* and *Thomas*, then NCL would be correct and I would be obligated to follow *Bautista*. *See United States v. Ohayon*, 483 F.3d 1281, 1289 (11th Cir. 2007) ("When a decision of this Court conflicts with an earlier decision that has not been overturned en banc, we are bound by the earlier decision."); *United States v. Hornaday*, 392 F.3d 1306, 1316 (11th Cir.2004) ("Where there is a conflict between a prior panel decision and those that came before it, we must follow the earlier ones."). But the issues discussed in *Bautista* are not dispositive here, and there is no conflict between the two decisions.

In *Bautista*, a group of seamen brought claims for negligence and unseaworthiness claims under the Jones Act, and for failure to provide maintenance, cure, and unearned wages under the general maritime law. *See Bautista*, 396 F.3d at 1292. The main conclusion reached in *Bautista* was that the arbitration clauses in the seamen's employment contracts met the Convention's jurisdictional requirements, including a ruling that the so-called "seamen exception" to the Federal Arbitration Act, 9 U.S.C. § 1, did not apply to the Convention. *See id.* at 1294-1301. As a subsidiary point, *Bautista* also concluded that the alleged unconscionability of the seamen's arbitration agreements (due to the parties' unequal bargaining power) was not a viable affirmative defense under Article II(3) of the Convention. *See id.* at 1302. Ultimately, because the arbitration agreements met the Convention's jurisdictional requirements and were not "null and void" under Article II(3), the Eleventh Circuit upheld the district court's order compelling arbitration of the seamen's claims.

Thomas concerned a fundamentally distinct and unrelated issue: whether an arbitration

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arbitrate unless the agreement is "null and void, inoperative or incapable of being performed"). Moreover, in *Mitsubishi*, the Supreme Court expressly noted that it could not apply the prospective waiver doctrine because the issue before the it was the enforcement of an arbitration agreement, as opposed to the enforcement of an arbitration award. *See Mitsubishi*, 473 U.S. at 637 (there was no "occasion to speculate" on whether a chof-law provision in arbitration agreement would prospectively waive a party's statutory antitrust remedies because the issue before the Court was whether to "enforce the agreement to arbitrate, not to enforce an award.").

agreement mandating the application of foreign law prospectively waived a seaman's federal *statutory* rights, as seemingly proscribed by *Mitsubishi*, and was therefore violative of public policy and "null and void" under Article V(2)(b). In *Bautista*, there was no discussion of, or even a tangential reference to, the issues addressed in *Thomas*. The conclusion in *Bautista* that an arbitration agreement in a seaman's employment contract meets the jurisdictional requirements of the Convention does not address, much less preclude, the ruling in *Thomas* that such arbitration agreements are invalid to the extent they prospectively waive a seaman's federal statutory remedies through the imposition of foreign law in an arbitral proceeding. The decisions concern the application of different affirmative defenses under the Convention, based on distinct issues of law.

In this case, there is no dispute that the arbitration agreement meet the Convention's jurisdictional requirements; nor does Mr. Badkar argue that Article II(3) – the affirmative defense addressed in *Bautista* – applies here. Accordingly, because there is no conflict between these panel decisions, and because Mr. Badkar argues that the arbitration agreements are invalid due to the imposition of Bahamian law, I examine the enforceability of Mr. Badkar's arbitration agreement with respect to the statutory claims under *Thomas*.[4]

I also agree with Mr. Badkar that the Eleventh Circuit's ruling in *Thomas* applies not only to his Seaman's Wage Act claim, but extends to his Jones Act claims as well. As noted above, the Eleventh Circuit based its decision in *Thomas* on the Supreme Court's apparent proscription of choice-of-law provisions that, through the imposition of foreign law, prospectively waive a

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[4] NCL also argues that *Bautista*, and not *Thomas*, controls because, as in *Bautista*, Mr. Badkar's claims are also subject to a collective bargaining agreement requiring arbitration of all disputes under foreign law. But none of the cases cited by NCL indicate that *Thomas* is inapplicable to arbitration clauses in collective bargaining agreements, nor is there any viable reason for recognizing such a distinction. *See Williams v. NCL Ltd.*, Case No. 10-22046-Civ-Lenard (rejecting an identical argument:"[T]he *Bautista* Court did not focus on the existence of a [collective bargaining agreement] in reaching its conclusion to affirm the district court's grant of defendant's motion to compel. The Court's review of other cases NCL cites in support of this argument reveals that a [collective bargaining agreement] has no discernable effect on the Analysis of Article V's affirmative defenses."). *See also Sivanandi v. NCL (Bahamas) Ltd.,* Case No. 10-20296-Civ-Ungaro, 2010 WL 1875685, at *4 (S.D.Fla. Apr. 15, 2010) (concluding that, under *Thomas*, an arbitration provision in a collective bargaining agreement requiring the application of Bahaman law was null and void as to a seaman's Jones Act claim).

plaintiff's right to pursue federal statutory remedies. *See Thomas*, 573 F.3d at 1121 (quoting *Mitsubishi,* 473 U.S. at 637 n.19). There is no language in *Thomas* that appears to limit the application of the prospective waiver principle exclusively to Seaman Wage Act claims. To the contrary, the language used by the Eleventh Circuit indicates that the arbitration agreement was null and void because it served to "completely bar [the plaintiff] from relying on *any* U.S. statutorily-created causes of action." *See id.* at 1123. There is no reason to limit the prospective waiver principle to one singular maritime statutory cause of action to the exclusion of others, or to distinguish Seaman Wage Act claims from Jones Act claims. *Thomas* was limited to the plaintiff's Seaman Wage Act claim only because that was the only cause of action covered by the subject arbitration agreement (whereas the other claims related to previous employment agreements). *See id.* at 1118-20. Accordingly, I conclude that, under *Thomas*, the arbitration agreement is null and void with respect to Mr. Badkar's claims under the Jones Act (Count I) and the Seaman's Wage Act (Count V).[5]

Nonetheless, I see no reason why *Thomas* would render the arbitration agreement null and void as to Mr. Badkar's non-statutory claims under general maritime law. There is no mention in *Thomas*, or in *Mitsubishi*, of applying the prospective waiver doctrine to non-statutory causes of action. *Thomas* unequivocally focuses on and concerns the prospective waiver of federal statutory remedies. To read *Thomas* as encompassing non-statutory claims would constitute an unfounded expansion and alteration of the Eleventh Circuit's ruling, and would, in turn, have the momentous (and seemingly unintended) consequence of abrogating and rendering void any and all arbitration agreements requiring the application of foreign law to any maritime claims brought by a seaman. Such an implication would directly undermine the strong federal and public policy in favor of international arbitration. *See Picard v. Credit Solutions, Inc.*, 564 F.3d 1249, 1253 (11th Cir. 2009)

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[5] There are several decisions in this district similarly concluding that *Thomas* logically applies to Jones Act claims as well. *See, e.g., Odom v. Celebrity Cruises, Inc.*, Case No. 10-23086–Civ-Jordan, Order on Motion to Compel Arbitration (S.D.Fla. Feb. 23, 2011); *Salinas v. Carnival Corp.*, Case No. 10-20910-Civ-Martinez, 2011 WL 1134968, at *2 n. 1 (S.D.Fla. Mar. 28, 2011); *Cardoso v. Carnival Corp.*, No. 09-23442-Civ-Gold, 2010 WL 996528, at *3 (S.D. Fla. Mar. 16, 2010); *Watt v. NCL (Bahamas) Ltd.*, Case No. 10-20293-Civ-Moreno, 2010 WL 2403107, at *2 (S.D. Fla. June 15, 2010); *Sivanandi v. NCL (Bahamas) Ltd.,* Case No. 10-20296-Civ-Ungaro, 2010 WL 1875685, at *4 (S.D.Fla. Apr. 15, 2010).

(there is a "strong federal policy in favor of arbitration"); *Polimaster Ltd. v. RAE Sys*, 623 F.3d 832, 836 (9th Cir. 2010) ("the public policy in favor of international arbitration is strong"). *See also Rivas v. Carnival Corp*., Case No. 09-23628-Civ-Huck, 2010 WL 2696676, at *1 (S.D.Fla. Mar. 30, 2010) ("The Court is not convinced that the possibility that a generally-crafted arbitration clause might compel application of foreign law which does not recognize a particular form of relief – even when that possibility becomes an actuality – renders the entire clause unenforceable in all respects. Such a result would thwart both the parties' intentions as expressed in the contract and the public policy favoring arbitration. At most, the arbitration clause should not be enforced to the extent it would deprive Plaintiff of his ability to claim Jones Act relief. The arbitration clause is valid, and must be enforced, with respect to Plaintiff's non-statutory claims."); *Odom v. Celebrity Cruises, Inc.*, Case No. 10-23086-Civ-Jordan, Order on Motion to Compel Arbitration (S.D.Fla. Feb. 23, 2011) (compelling arbitration of a seaman's non-statutory causes of action, but finding arbitration clause null and void as to his Jones Act claim).

I realize that bifurcating Mr. Badkar's claims, by permitting him to proceed with his statutory claims in federal court while compelling arbitration of his non-statutory claims, is not the most efficient or convenient outcome for the parties. But I cannot deprive NCL of its contractual right to arbitrate claims that do not fall under the scope of *Thomas*. *See Dean Witter Reynolds Inc. v. Byrd*, 470 U.S. 213, 221 (1985) ("The preeminent concern of Congress in passing the [Arbitration] Act was to enforce private agreements into which parties had entered, and that concern requires that we rigorously enforce agreements to arbitrate, even if the result is 'piecemeal' litigation . . . .").[6] Accordingly, Mr. Badkar may proceed with his Jones Act and Seaman's Wage act claims in this court, but he is required to arbitrate his other claims under the general maritime law.

IV. CONCLUSION

In sum, NCL's motion to dismiss and compel arbitration [D.E. 12] is GRANTED IN PART and

[6] Mr. Badkar incorrectly cites to my previous decision in *Govindaran v. Carnival Corp*., Case No. 09-23386-Civ-Jordan, Order Denying Motion to Dismiss and Compel Arbitration, in support of his argument that *Thomas* applies to both statutory and non-statutory claims. Consistent with my ruling here, in that decision I explicitly noted that "there is an arguable basis for distinguishing between statutory and non-statutory claims under *Thomas*." I did not, however, undertake that analysis because the parties had not raised the argument.

DENIED IN PART. Mr. Badkar may pursue his claims for negligence under the Jones Act (Count I) and for failure to pay wages under the Seaman's Wage Act (Count V) in this court. But he must arbitrate his claims for unseaworthiness (Count II), failure to provide maintenance and cure (Count III), and failure to treat (Count IV). NCL must therefore answer Counts I and V of Mr. Badkar's amended complaint by May 23, 2011. The parties shall file a joint scheduling report by May 30, 2011.

DONE and ORDERED in chambers in Miami, Florida, this 9th day of May, 2011.

Adalberto Jordan
United States District Judge

Copy to: All counsel of record