UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA
CASE NO. 24-24894-CV-WILLIAMS

DEAN WILSON,

Plaintiff,

v.

CARNIVAL CORPORATION,

Defendant.
_____/

OMNIBUS ORDER

THIS MATTER is before the Court on Defendant's Motion to Compel Arbitration and Stay (DE 5) ("***Motion to Compel Arbitration***") and Plaintiff's Motion for Remand to State Court (DE 13) ("***Motion to Remand***"). The Motions are fully briefed and ripe for review.[1] For the reasons set forth below, the Motion to Compel Arbitration (DE 5) is **GRANTED IN PART AND DENIED IN PART**, and the Motion to Remand is **DENIED**.[2]

[1] Plaintiff filed a Response to the Motion to Compel Arbitration (DE 13), and Defendant filed a Reply (DE 16). Defendant filed a Response to the Motion to Remand (DE 16), and Plaintiff filed a Reply (DE 19).

[2] Before the Court is also Defendant's Motion to Stay Discovery (DE 28) ("***Motion to Stay***"), which requests a stay of discovery during the pendency of Defendant's Motion to Compel Arbitration. (DE 28 at 1.) Plaintiff responded (DE 29), and Defendant replied (DE 30). Because the Court is resolving Defendant's Motion to Compel Arbitration, the Motion to Stay is **DENIED AS MOOT**.

Finally, on June 5, 2025, Plaintiff filed a Motion for Leave to Supplement (DE 31), requesting the Court to consider certain information contained within arbitration rules not at issue in this case. Defendant responded (DE 32), and Plaintiff replied (DE 33). Because the Court finds this information irrelevant to its analysis, Plaintiff's Motion for Leave to Supplement (DE 31) is **DENIED**.

I. BACKGROUND

According to the Complaint (DE 1-2 at 5–18), this case stems from an injury Plaintiff Dean Wilson ("***Plaintiff***" or "***Mr. Wilson***"), a Nicaraguan citizen, suffered while working for Defendant Carnival Corporation ("***Defendant***" or "***Carnival***") as a galley assistant on board the cruise ship *M/V Carnival Vista* ("***Vessel***"). (DE 1-2 ¶ 8.) On March 11, 2022, Mr. Wilson was using the restroom while on duty, when he slipped, fell, and injured his back and left hand. (*Id.*) Over the next few months, Mr. Wilson sought medical care for those injuries, but his conditions persisted. (*Id.* ¶¶ 11-22.)

The employment agreement Mr. Wilson executed with Carnival (DE 1-1) ("***Agreement***") specifies that Mr. Wilson was to earn about $2/hour for a 70-hour workweek. (DE 1-1 at 2–4.) The Agreement also includes an arbitration provision with the following relevant language:

> Except for a wage dispute governed by CCL's Wage Grievance Policy and Procedure, any and all disputes, arising out of or in connection with this Agreement or Seafarer's service on the vessel . . . . shall be resolved by final and binding arbitration on an individual basis. In addition, Seafarer agrees to arbitrate on an individual basis any and all disputes regarding the existence, validity, termination or enforceability of any term or provision in this Agreement, including but not limited to this provision to arbitrate [("***Delegation Clause***")]. All Arbitration between the parties shall be referred to and finally administered and resolved by National Arbitration and Mediation [("***NAM***")] under its Comprehensive Dispute Resolution Rules and Procedures as adapted for Seafarer/Crew-Member Employment Arbitrations and fee schedule (which may be amended from time to time) in effect at the time of initiating a proceeding with NAM, which Rules, as amended, are deemed to be incorporated by reference to this Agreement. . . . Each party shall bear its own attorney's fees and costs associated with maintaining an action in arbitration, including, but not limited to, travel, lodging, expert(s) and court reporter(s) fees and costs, regardless of any rules or laws to the contrary. **Seafarer and CCL agree to each pay one-half (1/2) of the fees required to initiate arbitration under the terms of this Agreement. The arbitration shall not commence until both parties pay their portion of the required fee.** [("***Initial Fee-splitting Provisions***")] Once arbitration is commenced, CCL shall pay for the [sic] all other reasonable administrative costs of arbitration and fees of the arbitrator as assessed by NAM.

(*Id.* ¶ 9 ("***Arbitration Provision***").) In accordance with the Arbitration Provision, on April 12, 2024, Plaintiff filed a four-count Statement of Claim with NAM, seeking damages related to his fall and injuries. (DE 13-1; DE 13-2.) A few days later, NAM sent Plaintiff an invoice for $1,500, representing his half of the filing fee to initiate arbitration proceedings. (DE 13-4.)

On April 24, 2024, Plaintiff's counsel communicated with a NAM representative and Carnival over email that Plaintiff had not been able to work due to his injuries, had no savings, and was unable to afford the $1,500 filing fee. (DE 13-20 at 9–10.) He requested that NAM either wave or defer this portion of the filing fee or that Carnival pay the fee and seek it as a set off from any recovery. (*Id.*) On May 6, 2024, NAM responded by simply reiterating that the Agreement requires Plaintiff to pay half of the filing fee and that NAM "is unable to administrate this matter" until all filing fees are paid. (DE 13-20 at 6.) On June 7, 2024, Carnival communicated to Plaintiff and NAM their position that if Plaintiff "intends to bring a claim against Carnival, he must . . . pay his portion of the arbitration filing fee." (DE 13-15; DE 13-16.)

On August 22, 2024, Plaintiff's counsel reasserted to NAM and Defendant that Plaintiff "remains unable to pay $1,500" and requested that NAM direct Carnival to effectuate substitute payment under NAM Comprehensive Dispute Resolution Rules and Procedures Rule ("***NAM Rule***") 19(C), (DE 13-20 at 1), which allows NAM to "direct the other party . . . to effectuate substitute payment to allow the Arbitration to proceed" if "a party fails or refuses to provide any deposit as directed by NAM." (DE 13-10 at 11.) If not, Plaintiff's counsel represented, Plaintiff "will have no choice but to abandon the arbitration as it is impossible for him to pay the $1,500 filing fee." (13-20 at 2.)

NAM then contacted Carnival by letter. NAM did not direct Carnival to pay Plaintiff's portion of the filing fee, but asked Carnival to notify them, by September 6, 2024, whether, given Plaintiff's counsel's August 22, 2024 email and pursuant to NAM Rule 19(C), "Carnival will be paying [Plaintiff's] portion of the filing fee." (DE 13-21.) NAM also "advised that if [Plaintiff's] filing fee is not paid . . . [the] arbitration will not be considered commenced, and NAM will not proceed with the administration of [the] arbitration." (*Id.*)

Carnival responded on September 5, 2024 by reiterating its refusal to pay Plaintiff's portion of the filing fee, arguing that Plaintiff must honor his contractual obligation under the Agreement; that Plaintiff's counsel has the responsibility to advance Plaintiff's filing fee under his contingency fee contract with Plaintiff; and that NAM Rule 19(C) applies only to deposits required after arbitration commences. (DE 13-22.)

As the months went by, NAM sent several updated invoices to Plaintiff, each time adding interest to the initial $1,500 fee. (*See* DE 13-4; DE 13-17; DE 13-18; DE 13-19.) By September 11, 2024, when NAM sent its final invoice, Plaintiff owed $1,590 in fees to commence arbitration. (DE 13-23.) After not receiving that payment, on September 13, 2024, NAM sent a letter to both Parties informing them that "[t]o date, NAM has not received the complete filing fee required to proceed with the above matter. . . . In light of the foregoing, please be advised that NAM has administratively closed this file." (DE 13-24.)

On November 12, 2024, Plaintiff filed a complaint in Florida's Eleventh Judicial Circuit, alleging four claims against Carnival: 1) Jones Act Negligence (Count I); 2) Unseaworthiness (Count II); 3) Maintenance and Cure Claim (Count III); and 4) Failure to Provide Prompt, Proper and Adequate Medical Care (Count IV). (DE 1-2 at 9–16.) On

December 13, 2024, Carnival removed the case to federal court under the Convention on the Recognition and Enforcement of Foreign Arbitral Awards (the "***New York Convention***" or "***Convention***"), codified at 9 U.S.C. §§ 201–208. (DE 1 at 1); *see also* 9 U.S.C. § 205 ("Where the subject matter of an action or proceeding pending in a State court relates to an arbitration agreement or award falling under the Convention, the defendant or the defendants may, at any time before the trial thereof, remove such action or proceeding to the district court of the United States for the district and division embracing the place where the action or proceeding is pending."). A week later, Carnival moved the Court to compel arbitration and for a stay of the case pending the arbitration, pursuant to the Arbitration Provisions in the Parties' Agreement. (DE 5 at 6.)

Plaintiff responded, arguing principally that Defendant's refusal to advance Plaintiff's portion of the filing fee either constituted a waiver of their right to arbitration or meant that the arbitration '"had been had in accordance with terms of the agreement' under 9 U.S.C. § 3," so needed no longer proceed, given Plaintiff's inability to pay. (DE 13 at 7–11 (quoting *Tillman v. Tillman*, 825 F.3d 1069, 1074 (9th Cir. 2016).)

In support of Plaintiff's inability to pay, Plaintiff included several items of evidence. First, Plaintiff referenced the Agreement, showing that Plaintiff earned $2/hour during his time of employment by Carnival. (DE 13 at 1, 7.) Second, Plaintiff attached invoices from NAM specifying the $1,590 filing fee. (DE 13-4; DE 13-17; DE 13-18; DE 13-19; DE 13-23.) Third, Plaintiff included a sworn declaration by Plaintiff from January 12, 2025 attesting (a) to his inability to work since his injury, (b) that at the time of NAM's first invoice he had $33.50 in his bank account, (c) that as of the declaration, he had $31.00 in his bank account, (d) that he has "no assets, no savings and no credit," and (e) to his

unsuccessful efforts to borrow the money for the filing fee. (DE 13-7 at 1–3.). Finally, Plaintiff included a screenshot of Plaintiff's Nicaraguan bank account, which appears to show a $33.50 balance. (*Id.* at 4.) Plaintiff requested the Court to remand the case back to state court, arguing that the Court's sole basis for jurisdiction, 9 U.S.C. § 205, would no longer apply if arbitration is not compelled. (DE 13 at 14.)[3]

In addition to disagreeing with Plaintiff on the merits of these issues, Defendant argued that the Delegation Provision, which delegates to the arbitrator "any and all disputes regarding the existence, validity, termination or enforceability of any term or provision in this Agreement, including but not limited to this provision to arbitrate," requires the Court to grant the motion, at least, for the "the arbitrator to decide all gateway questions of arbitrability in this case." (DE 13 at 3 (citations omitted).)

After reviewing the Parties' briefing on the motions, the Court requested supplemental briefing to explain "(1) whether application of the effective vindication doctrine to the initial fee-splitting provision[s] in the Parties' Arbitration [Provision] (DE 5-1 ¶ 9) renders the Arbitration [Provision] 'incapable of being performed' by Plaintiff within the meaning of Article II(3) of the New York Convention, and, (2) if so, whether the initial fee-splitting provision[s are] severable from the remainder of the Arbitration [Provision]." (DE 20.) In his supplemental response, Plaintiff argues that the Initial Fee-splitting Provisions render the Arbitration Provision "incapable of being performed" given Plaintiff's financial circumstances and that the provisions are not severable from the Arbitration

[3] "In assessing this Motion, the Court may consider the attached exhibits." *Tejon v. Zeus Networks, LLC*, 725 F. Supp. 3d 1351, 1354 n.1 (S.D. Fla. 2024) (citing *MarketSource, Inc. v. Fernandez*, No. 21-cv-23217, 2022 WL 18464969, at * 3 (S.D. Fla. Sept. 27, 2022) ("[On a motion to compel arbitration, like on a Rule 12(b)(1) motion, the Court may consider factual matters outside the pleadings.").

Provision. (DE 25 at 7.) Meanwhile, Carnival contends that the effective vindication doctrine is not a defense at the arbitration-enforcement stage, and even if it is, Plaintiff has not made a sufficient showing of inability to pay. (DE 24 at 3, 8–11.) Carnival also insists that the Initial Fee-splitting Provisions would be severable from the Parties' Agreement if unenforceable, pointing to the Agreement's severability provision. (*Id.* at 13.)

II. LEGAL STANDARD

In 1970, the United States acceded to the New York Convention, which was subsequently implemented by Chapter 2 of the Federal Arbitration Act ("**FAA**"), 9 U.S.C. § 201 *et seq. Lindo v. NCL (Bahamas)*, *Ltd.*, 652 F.3d 1257, 1262 (11th Cir. 2011). "The Convention requires contracting states, such as the United States [and Nicaragua, where Plaintiff is a citizen], to recognize written arbitration agreements concerning subject matter capable of settlement by arbitration[.]" *Id.* (citing New York Convention, art. II(1)); *see also* 9 U.S.C. § 201 (requiring that federal courts enforce the New York Convention). As the Supreme Court has stated, "[t]he goal of the Convention, and the principal purpose underlying American adoption and implementation of it, was to encourage the recognition and enforcement of commercial 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." *Id.* (quoting *Scherk v. Alberto-Culver Co.,* 417 U.S. 506, 520 n. 15 (1974)). One of the ways the New York Convention integrates with domestic arbitration law is through its residual clause, which specifies that "Chapter 1 [of the FAA] applies" to proceedings under the New York Convention "to the extent that chapter is not in conflict with" the Convention. 9 U.S.C. § 208. In other words, "[t]he FAA

applies residually to supplement the provisions of the Convention Act" where "they d[o] not conflict." *Bautista v. Star Cruises*, 396 F.3d 1289, 1297 (11th Cir. 2005)

The Convention creates two causes of action in federal court for a party seeking to enforce an arbitration agreement: "(1) an action to compel arbitration in accord with the terms of the agreement, . . . and (2) at a later stage, an action to confirm an arbitral award made pursuant to an arbitration agreement[.]" *Escobar v. Celebration Cruise Operator, Inc.*, 805 F.3d 1279, 1286 (11th Cir. 2015) (citing 9 U.S.C. §§ 206, 207). These causes of action correlate with the two stages of arbitration enforcement—the "initial arbitration-enforcement stage" and "the award-enforcement stage." *Id.* (citing *Lindo*, 652 F.3d at 1281). Here, at the initial arbitration-enforcement stage, Article II of the Convention applies, and "prescribes a limited set of defenses that may be considered," including that the Arbitration Provision is "null and void, inoperative or incapable of being performed." *Suazo v. NCL (Bahamas), Ltd.*, 822 F.3d 543, 546 (11th Cir. 2016) (quoting New York Convention, art. II(3)).

"In deciding a motion to compel arbitration under the Convention Act, a court conducts a "very limited inquiry." *Bautista*, 396 F.3d at 1295 (citations omitted). The Court must grant a motion to compel arbitration under the Convention "so long as (1) the four jurisdictional prerequisites are met and (2) no available affirmative defense under the Convention applies." *Suazo*, 822 F.3d at 546 (quoting *Lindo*, 652 F.3d at 1276). An arbitration falls within the jurisdiction of the Convention, in turn, when (1) "the agreement is 'in writing within the meaning of the Convention"; (2) "the agreement provides for arbitration in the territory of a signatory of the [New York] Convention"; (3) "the agreement arises out of a" commercial legal relationship, and (4) "a party to the agreement is not an

American citizen or the commercial relationship has some reasonable relation with one or more foreign states." *Id.* (quoting *Bautista*, 396 F.3d at 1294 n.7) (alterations omitted).

III. DISCUSSION

Before addressing the impact of the Initial Fee-splitting Provisions on arbitrability, the Court will address Defendant's argument that this is a "gateway issue," which the Parties delegated to the arbitrator through the Delegation Clause. (DE 16 at 3.)

A. *The Delegation Clause is unenforceable.*

A "delegation provision is an agreement to arbitrate threshold issues concerning the arbitration agreement." *Rent-A-Center, West, Inc. v. Jackson*, 561 U.S. 63, 69 (2010). The United States Supreme Court has "recognized that parties can agree to arbitrate gateway questions of arbitrability, such as whether the parties have agreed to arbitrate or whether their agreement covers a particular controversy." *Id.* 69–70 (internal quotations omitted). This is "simply an additional, antecedent agreement the party seeking arbitration asks the federal court to enforce, and the FAA operates on this additional arbitration agreement just as it does on any other." *Id.* at 70.

When a party challenges an arbitration agreement as a whole, not the delegation provision specifically, a federal court must "treat [the delegation provision] as valid . . ., and must enforce it . . ., leaving any challenge to the validity of the [a]greement as a whole for the arbitrator." *Id.* at 72. However, "the federal court must consider the challenge" when a party challenges the validity of a "delegation provision specifically." *Id.* at 71–72; *see also Parm v. Nat'l Bank of Ca., N.A.*, 835 F.3d 1331, 1334–35 (11th Cir. 2016) ("Delegation clauses are severable from the underlying agreement to arbitrate. . . . Because the loan agreement contains a delegation clause, our review is limited, at least

initially, to [plaintiff's] direct challenges to that clause. . . . Only if we determine that the delegation clause is itself invalid or unenforceable may we review the enforceability of the arbitration agreement as a whole.") (citing *Rent-A-Center*, 561 U.S. at 70–73). "Challenging a delegation agreement is a matter of substance, not form. A party specifically challenges the validity or enforceability of a delegation agreement if, and only if, the substantive nature of the party's challenge meaningfully goes to the parties' precise agreement to delegate threshold arbitrability issues." *Attix v. Carrington Mortg. Servs., LLC*, 35 F.4th 1284, 1304 (11th Cir. 2022).

Plaintiff does not dispute the existence of the Delegation Clause, or that the clause's scope would cover the question of the validity of the Arbitration Provision. (DE 1-1 ¶ 9 ("In addition, Seafarer agrees to arbitrate on an individual basis any and all disputes regarding the existence, validity, termination or enforceability of any term or provision in this Agreement, including but not limited to this provision to arbitrate.").) But Plaintiff argues that arbitration is unavailable to him, even to decide gateway issues of arbitrability, because he is incapable of paying his portion of the initial filing fee required by NAM to commence any arbitration proceedings. (DE 19 at 3.)

Indeed, despite Plaintiff informing all parties of his indigency, NAM has refused to waive Plaintiff's initial filing fee and Carnival has refused to advance it. (DE 13-11 at 1–3 (NAM refusing to waive the filing fee); DE 13-15 (Carnival letter to Plaintiff stating their refusal to advance Plaintiff's portion of the filing fee); DE 13-16 (same).) And NAM has steadfastly maintained that "[t]he arbitration shall not commence until both parties pay their portion of the required fee." (DE 13-6 at 1); *see also* (DE 13-11 ("NAM is unable to administer this matter until all filing fees are received"); DE 13-12 at 1 ("Please note that

until payment is received, NAM is unable to administrate this matter."); DE 13-21 ("Please be advised that if the Claimant's filing fee is not paid by either Claimant or Carnival, the referenced arbitration will not be considered commenced, and NAM will not proceed with the administration of this arbitration."); DE 13-24 (administratively closing file after not receiving the filing fee).) A challenge to the availability of an arbitration forum, such as when an arbitration agreement requires a specific tribal arbitral forum that does not exist, is a challenge to a delegation clause as well as the underlying arbitration agreement. *Parm,* 835 F.3d at 1335, 1338 ("Neither party disputes that the [tribal arbitral] forum is unavailable, and as such, we agree with the district court that we cannot enforce the delegation clause or the underlying arbitration agreement."). Plaintiff's contention that he cannot access the arbitrator even to resolve gateway issues such as financial inaccessibility or waiver is similarly a challenge to the Delegation Clause in substance.[4] Therefore, the Court will proceed with the limited arbitrability inquiry required under the Convention.

[4] Separately, Plaintiff argues that Carnival has waived its right to arbitration and that arbitration has "been had" within the meaning of 9 U.S.C. §3. (DE 13 at 7–11.) As these are "disputes over the . . . enforceability of" the Arbitration Provision as a whole, they come within the Parties' broad Delegation Clause and are properly delegated to the arbitrator to resolve. *See Lamonaco v. Experian Info. Sols., Inc.*, 2025 WL 1831283, --F.4th--, at *4–5 (11th Cir. July 3, 2025) (holding waiver was an issue for the arbitrator because the parties' delegation provision expressly stated so and the plaintiff did not challenge the delegation provision). *Lamonaco* does not require that Plaintiff's effective vindication doctrine challenge be delegated to the arbitrator, as it is "a successful challenge to the delegation provision[.]" *Id.* (quoting *Coinbase, Inc. v. Suski*, 602 U.S. 143, 152 (2024)).

B. *The effective vindication doctrine invalidates the Initial Fee-splitting Provisions.*

The Parties do not dispute that the four jurisdictional prerequisites are met: 1) the Arbitration Provision is contained within the Parties' signed, written Agreement; 2) the Arbitration Provision provides for arbitration in either Panama or the Philippines, both signatories of the Convention; 3) the Agreement containing the Arbitration Provision arises out of an employer-employee commercial legal relationship; and 4) Plaintiff is a Nicaraguan citizen. The Parties dispute only whether any "available affirmative defense under the Convention applies." *Suazo,* 822 F.3d at 546. In particular, the Court will address Plaintiff's argument that the effective vindication doctrine acts as an affirmative defense to arbitration in this case.[5]

[5] Plaintiff additionally argues that the Arbitration Provision is "null and void" within the meaning of the New York Convention, because "Congress has expressly forbidden the enforcement of arbitration clauses in seamen's employment contracts, such as the one at bar[.]" (DE 13 at 13.) Plaintiff reasons that 9 U.S.C. § 1 of the FAA—which exempts "contracts of employment of seamen" from FAA coverage—excludes those contracts from the definition of a "commercial legal relationship" under the Convention. (DE 13 at 13.) However, the Eleventh Circuit has squarely rejected this interpretation, concluding that "the FAA exemption for seamen's employment contracts [does not apply] to arbitration agreements covered by the Convention[.]" *Bautista*, 396 F.3d at 1295–1298. Contrary to Plaintiff's argument, nothing about the United States Supreme Court's mention that "the [New York] Convention requires courts to rely on domestic law to fill [its] gaps" changes *Bautista's* relevance. *GE Energy Power Conv. France SAS, Corp. v. Outokumpu Stainless USA, LLC*, 590 U.S. 432, 441 (2020) (holding that domestic equitable estoppel doctrines apply to New York Convention cases, as they do under the FAA); *see* (DE 13 at 13 (arguing *GE Energy* calls *Bautista* into doubt).) The *Bautista* court *did* draw on domestic law, synthesizing the New York Convention with the "closely related" FAA and Inter-American Act codified together within title 9. *Bautista*, 396 F.3d at 1296–1300. The court concluded that "[a] conflict exists between the FAA seamen exemption, which is narrow and specific, and the language of the Convention and the Convention Act, which is broad and generic." *Id.* at 1299. Therefore, Plaintiff's argument is unpersuasive.

1. Cost-based effective vindication as an Article II defense

The United States Supreme Court first introduced the notion that "large arbitration costs could preclude a litigant . . . from effectively vindicating [their] rights in the arbitral forum" in *Green Tree Fin. Corp.-Alabama v. Randolph*. 531 U.S. 79, 90 (2000) (also noting the "party resisting arbitration bears the burden of proving" arbitration would be prohibitively expensive). Thirteen years later, the Supreme Court confirmed "the existence of a[cost-based] 'effective vindication' exception" to mandated arbitration, applicable when "filing and administrative fees attached to arbitration . . . are so high as to make access to the forum impracticable." *Am. Exp. Co. v. Italian Colors Rest.*, 570 U.S. 228, 235–36 (2013) (quoting *Green Tree Fin.*, 531 U.S. at 90); *see also Smith v. Int'l Bus. Machs. Corp.*, No. 22-11928, 2023 WL 3244583, at *6 (11th Cir. May 4, 2023) (describing the effective vindication doctrine as "cover[ing] agreements 'forbidding the assertion of certain federal statutory rights' or, perhaps, imposing fees for arbitration 'so high as to make access to the forum impracticable'") (quoting *Italian Colors Rest.*, 570 U.S. at 236); *Anders v. Hometown Mortg. Servs., Inc.*, 346 F.3d 1024, 1028 (11th Cir. 2003) ("It may be that an agreement to arbitrate is unenforceable if the cost of arbitration precludes the effective vindication of statutory rights in arbitration.") (citing *Green Tree*, 531 U.S. at 90).

In a pair of cases, the Eleventh Circuit analyzed the cost-based effective vindication exception in the context of the New York Convention. First, in *Escobar v. Celebration Cruise Operator, Inc.*, the indigent plaintiff employee argued that a provision of his arbitration agreement with defendant cruise-line Celebration—which required Celebration to pay the initial filing fee but the parties to split the remainder of the costs—was prohibitively expensive, making the arbitral forum effectively unavailable. 805 F.3d

1279, 1282, 1291 (11th Cir. 2015). Plaintiff argued this rendered the arbitration agreement "null and void" under Article II of the Convention. *Id.* at 1291. Though the court noted that no case had yet applied the cost-based effective vindication doctrine to a New York Convention case, the court went on to engage in a substantive analysis of the argument's merits. First, the court explained that "a party invoking the effective-vindication doctrine because the cost of arbitration is prohibitively expensive must present evidence of two things: (1) 'the amount of the fees he is likely to incur;' and (2) 'his inability to pay those fees.'" *Id.* (quoting *Musnick v. King Motor Co. of Ft. Lauderdale*, 325 F.3d 1255, 1259 (11th Cir. 2003)). For a few reasons, the court concluded that it was "premature" for the plaintiff to make the claim. *Id.* at 1292. First, the cost-splitting clause required Celebration to pay the initial cost of arbitration. *Id.* Additionally, the clause was reasonably read to require Celebration to advance the full, as yet unknown cost of arbitration. *Id.* "In sum, based on the clause language and his own filings, [the plaintiff] ha[d] wholly failed to establish that he would be denied access to the forum." *Id.*

Then, in *Suazo*, the court analyzed a cost-based effective vindication challenge to an arbitration agreement, which, through incorporation of the plaintiff employee's union's collective bargaining agreement, provided that the employer would pay all costs of arbitration if the employee used union representation. 822 F.3d at 548–49. The agreement was silent on who bears the costs of arbitration if the plaintiff rejected union representation, as happened in the case, and the defendant employer took the position that plaintiff was required to pay half the costs. *Id.* In opposing the defendant's motion to compel arbitration, the plaintiff submitted an affidavit, claiming to be "from a poor rural community," to "not have any money to pay for an arbitration, much less for an arbitrator's

salary," and to "not have the means to pay for thousands of dollars to an arbitrator" because "[t]o do so would mean to deprive [his] family of support." *Id.* at 549–50.

Like *Escobar*, the *Suazo* court concluded that the plaintiff's effective vindication challenge failed on the merits, so it "need not resolve" the question of "whether a cost-based effective vindication defense can be raised under the 'incapable of being performed' clause of Article II." *Id.* at 554. The court found the plaintiff's evidentiary support fell short, because he "submitted no evidence concerning the amount of the fees he is likely to incur" apart from some belated evidence outside the record suggesting he may be required to pay up to $3,750 in fees over the course of arbitration. *Id.* at 554–55. Additionally, the "conclusory statements" in his affidavit did "not establish that [the plaintiff" could not afford to pay even $3,750." *Id.* at 555. Finally, the court found that the plaintiff's opportunity to use union representation—giving "him the ability to arbitrate for free"—rendered his effective vindication defense unmeritorious. *Id.* at 555.

The Court sees no reason why a cost-based effective vindication challenge would be unavailable to a plaintiff under Convention Article II, as it fits neatly within the article's "incapable for being performed" phrase of the null and void clause. New York Convention Art II(3). The scope of that clause encompasses "standard breach-of-contract defenses. . . .—such as fraud, mistake, duress, and waiver—that can be applied neutrally on an international scale." *Bautista*, 396 F.3d at 1302 (quoting *DiMercurio v. Sphere Drake Ins. PLC*, 202 F.3d 71, 80 (1st Cir. 2000)). Like these standard defenses, and unlike the unconscionability defense rejected in *Bautista*, Plaintiff's effective vindication defense does not depend on notions of fairness that vary by country. 396 F.3d at 1302 ("It is doubtful that there exists a precise, universal definition of the unequal bargaining power

defense that may be applied effectively across the range of countries that are parties to the Convention, and absent any indication to the contrary, we decline to formulate one."). Indeed, effective vindication is akin to impossibility or impracticability of performance defenses. *See Fla. Laundry Servs, Inc. v. Sage Condo. Ass'n, Inc.*, 1903 So. 3d 68, 68 (Fla. Dist. Ct. App. 2016) ("'Where after a contract is made, a party's performance is made impracticable without his fault by the occurrence of an event the non-occurrence of which was a basic assumption on which the contract was made, his duty to render that performance is discharged, unless the language or the circumstances indicate the contrary[.]' Florida law has embraced this defense, calling it a 'cousin' of the defense of impossibility . . . and explicitly recognizing that 'the doctrine is not limited to strict impossibility, but includes 'impracticability due to unreasonable expense.'") (first quoting Restatement (Second) of Contracts § 261 (A.L.I. 1981); then quoting *Ferguson v. Ferguson*, 54 So. 3d 553, 556 (Fla. Dist. Ct. App. 2016); and then quoting *Hopfenspirger v. West*, 949 So. 2d 1050, 1054 (Fla. Dist. Ct. App. 2006)). Additionally, it is sensible to characterize cost-based effective vindication challenges as an Article II defense, applicable in the initial arbitration-enforcement stage, rather than an Article V defense invoked in the award-enforcement stage, because a claimant who is barred from initiating arbitration proceedings cannot hope to reach the second stage.

Given that the Court finds that a cost-based effective vindication defense is encompassed within the null and void clause, the Court will assess the merits of Plaintiff's challenge.

2. Plaintiff's inability to pay his portion of the initial filing fee

To invalidate the Initial Fee-splitting Provisions, Plaintiff has the burden to "present evidence of two things: (1) 'the amount of the fees he is likely to incur;' and (2) 'his inability to pay those fees'. . . . Speculative fear of high fees is insufficient." *Suazo*, 822 F.3d at 554 (quoting *Escobar*, 805 F.3d at 1291).

Mr. Wilson has easily satisfied the first element. He has provided the Court with five invoices from NAM detailing the fee Mr. Wilson must pay to initiate arbitration. (DE 13-4; DE 13-17; DE 13-18; DE 13-19; DE 13-23.) As of September 11, 2024, a few days before NAM closed the arbitration file, that fee stood at $1,590. (DE 13-23.) Mr. Wilson's showing does not rely on speculation about future costs and how the arbitrator will divide them. The filing fee is a certain amount, NAM and Carnival have both refused to relieve Mr. Wilson of the obligation, and NAM will not commence arbitration until the fee is paid. So, in order to even get his foot in the arbitral door, Mr. Wilson must pay $1,590.[6]

Mr. Wilson's circumstances present a stark contrast with those of the plaintiffs in *Escobar* and *Suazo*. Here, the initial fee amount is certain and entirely precludes Mr. Wilson from commencing arbitration, while in those cases, the costs were uncertain and backloaded, allowing the plaintiffs access to the arbitral forum and preventing the courts from confidently assessing ability to pay. In *Escobar*, "the arbitration agreement at issue required "the employer to 'pay the initial cost of arbitration[,]'" so the plaintiff "had not 'shown that he is likely to incur any costs *due prior to the arbitrator's decision*.'" *Suazo*,

[6] Defendant leans heavily on this fact while arguing that "arbitration will not be administered or 'considered commenced' until [Mr. Wilson] pay[s] his portion of the initial fee." (DE 16 at 8; see also *id.* n.5 (quoting the many communications from NAM refusing to commence arbitration until all initial filing fees are paid).)

822 F.3d at 554 (quoting *Escobar*, 805 F.3d at 1291). Moreover, the *Escobar* court read the arbitration agreement to require the defendant to advance all the costs of arbitration, alleviating any possibility that the plaintiff would be financially precluded from seeing his claims through. *Escobar*, 805 F.3d at 1292. Meanwhile, in *Suazo*, the plaintiff "submitted no evidence concerning the amount of the fees he is likely to incur. . . . His counsel simply opined that arbitration costs could exceed $20,000, but he cited no evidence in support of that claim." *Id.* (internal quotations omitted).

Mr. Wilson has also proven his inability to pay the $1,590 fee, particularly in the absence of any argument or evidence from Carnival to the contrary. He filed a sworn affidavit, attesting to his financial circumstances and inability to pay in far more specific and comprehensive terms than either the plaintiff in *Escobar* or *Suazo*. (DE 13-7.) Mr. Wilson was earning $2.08 per hour (~$140/week) while working for Carnival and has been unable to work since being sent home on medical leave in 2022 due to his ongoing injury. (*Id.* ¶¶ 4–6, 12); *see also* (DE 1-1 at 2–4 (providing Mr. Wilson's compensation structure).) He has "no assets, no savings and no credit" apart from the $33.50 in his bank account, and he has unsuccessfully attempted to borrow money for the fee from friends, family, and corporate lenders. (*Id.* ¶¶ 7–8.) Mr. Wilson receives no monthly income, save what he borrows from his friends to survive. (*Id.* ¶¶ 11–15.) Mr. Wilson produced a screenshot of his bank account, supporting his claim that he had only $33.50 in his account as of the time he was first invoiced by NAM. (DE 13-7 at 2, 4.)

This strong evidentiary showing also mandates a different result than in *Escobar* and *Suazo*. In *Escobar*, the plaintiff had not included a bank statement with his affidavit. *Escobar*, 805 F.3d at 1283. But even then, the court took no issue with the plaintiff's

evidence of indigency, just his support for his arbitration cost estimate. *Id.* at 1292. And In *Suazo*, the plaintiff submitted only an affidavit containing the conclusory statements that he "lives in a poor community where it is not easy to find work," that he "does not have money to pay for an arbitration, much less for an arbitrator's salary," and that "he does not have the means to pay for thousands of dollars to an arbitrator." 822 F.3d at 555 (alterations accepted). Moreover, the plaintiff's option to arbitrate with union representation for free meant his poverty did not create a complete barrier to arbitration. *Id.*

In short, the Initial Fee-splitting Provisions, NAM's fee structure, and Mr. Wilson's financial circumstances combine to create "filing and administrative fees attached to arbitration that are so high as to make access to the forum [impossible]." *Italian Colors Rest.*, 570 U.S. at 236; *see also Bolivar v. Global Diagnostic Labs LLC*, No. 23-cv-1130, 2023 WL 7496161, at *4 (M.D. Fla. Oct. 26, 2023) (recommending severing provisions of arbitration agreement requiring parties to share arbitration costs equally and advance those costs, because plaintiffs had shown through cost estimations and sworn declarations that "the payment of arbitration costs up front would preclude their ability to vindicate their rights through arbitration."), *aff'd & adopted*, 2023 WL 7495569 (Nov. 13, 2023).

Defendant does not dispute any of Mr. Wilson's factual claims. Instead, Defendant contends that Mr. Wilson should have asked NAM to rule on his effective vindication argument under the Delegation Clause. (DE 24 at 6.) But this ignores NAM's repeated refusal to initiate any type of proceeding until the initial filing fee is paid. Defendant also suggests that Plaintiff's counsel should advance the $1,590 for his client under their

contingency fee arrangement. (DE 5 at 3; DE 24 at 10.) Though Defendant shies away from articulating the implications of its argument, Defendant is essentially saying that an indigent Plaintiff should be forced to choose between filing a speculative breach of contract suit against his attorney and forgoing his claims in this case. The Court will not analyze that as a true choice. And in any event, as a non-party to the engagement contract between Mr. Wilson and his attorney, Defendant cannot invoke the contract. *See Omega v. Deutsche Bank Trust Co. Ams.*, 920 F. Supp. 2d 1298, 1300 (S.D. Fla. 2013) (holding that as a non-party, loan servicer could not invoke jury trial waiver provision of plaintiff's contract with mortgage provider). Therefore, in this case, Plaintiff has shown that his financial circumstances and the Initial Fee-splitting Provisions render the Arbitration Provision incapable of being performed, and are thus unenforceable. Next, the Court will address whether the Initial Fee-splitting Provisions are severable from the remainder of the Arbitration Provision.

C. *The Initial-Fee Splitting Provision is severable from the Arbitration Provision.*

The Parties disagree on whether the Initial-Fee Splitting Provision is severable. Plaintiff maintains that severing the provision "would leave the remainder of the arbitration agreement meaningless." (DE 25 at 7.) Defendant points to Paragraph 20 of the Parties' Agreement—a severability clause—to conclude that "the Court should be permitted to sever any provisions that the Court deems unenforceable[.]" (DE 24 at 12.) The Agreement's severability clause provides: "If any provision, term, or condition of this Agreement is invalid or unenforceable for any reasons, it shall be deemed severed from this Agreement and the remaining provisions, terms, and conditions of this Agreement shall not be affected thereby and shall remain in full force and effect." (DE 1-1 ¶ 20.)

"When an arbitration agreement contains invalid terms but the overarching contract has a severability clause, the [Court must] turn to [the governing law] to determine whether the contract's severability clause may be used to remove the offending terms in the arbitration agreement." *Bodine v. Cook's Pest Control Inc.*, 830 F.3d 1320, 1325 (11th Cir. 2016).[7] If the "severability clause is enforceable under the relevant [forum] law, then 'any invalid provisions in the arbitration agreement are severable, and the underlying claims are to be arbitrated.'" *Id.* (quoting *Anders*, 346 F.3d at 1032 (alterations accepted). The Agreement's "governing law" provision requires that, except for specified Carnival vessels not at issue here, "the laws of the flag state of the vessel on which [the employee] is assigned at the time the cause of action accrues" should be applied. (DE 1-1 ¶ 10.) It is unclear here which jurisdiction's law should be applied, as neither Party informed the Court of the Vessel's flag state. And while the Agreement appears to list Malta, Panama, and Bahamas under its "Flag State Competent Authority" section, (DE 1-1 at 11), Plaintiff analyzes the issue under Florida law. (DE 25 at 8 (citing *Frankenmuth Mut. Ins. Co. v. Escambia Cnty., Fla.*, 289 F.3d 723, 728–29 (11th Cir. 2002) (applying Florida law). But as Defendant argues, no "matter whether the Court applies, Panamanian, Florida, or federal maritime law at this stage," the Initial Fee-Splitting Provisions are severable. (DE

[7] *Bodine* analyzes a domestic arbitration agreement under the FAA, not an international arbitration agreement governed by the New York Convention. *Id.* at 1323. However, as previously discussed, *supra* p. 7, the FAA "applies residually to supplement the provisions of the" New York Convention "where they d[o] not conflict." *Bautista*, 396 F.3d at 1297 (citing 9 U.S.C. § 208). Given that the New York Convention is silent on severability issues, the Court will analyze severability under the FAA framework. *See Wior v. BellSouth Corp.*, No. 15-cv-02375, 2016 WL 11528970, at *6 (N.D. Ga. June 29, 2016) (using FAA principles to analyze severability in a New York Convention case, after noting that "the New York Convention's limitation on defenses is consistent with FAA standards generally").

24 at 12 (citing a Panamanian civil code provision "recognizing relative nullity of imperfect contracts").) Indeed, "[s]everability clauses are recognized and enforceable under Florida law" as well. *Pilato v. Edge Investors, L.P.*, 609 F. Supp. 2d 1301, 1309 (S.D. Fla. 2009).

"Here, the fact that the contract itself contains a severability provision demonstrates that the parties intended for the contract to be severable." *Frankenmuth*, 289 F.3d 791–92 (under Florida law, [w]hether a contract is entire or divisible depends upon the intentions of the party"). Further, the Initial-Fee Splitting Provision neither goes "to the essence of the [Arbitration Provision]" nor does removing it render the Agreement meaningless. *Id.; see Hudson v. P.I.P., Inc.*, No. 18-cv-61877, 2020 WL 5647009, at *3–4 (S.D. Fla. March 13, 2020) (finding fees and costs clause of arbitration agreement severable, despite the absence of a severability clause, because that clause is "ancillary to[] the arbitration provision's main purpose of designating the forum for resolving disputes within its scope"), *aff'd & adopted*, 2020 WL 5647051 (Apr. 2, 2020); *Krstic v. Princess Cruise Lines, Ltd. (Corp)*, 706 F. Supp. 2d 1271, 1280 (S.D. Fla. 2010) (finding severance of unenforceable choice-of-law provision appropriate due to the "severance provision in the arbitration agreement [and] the general federal policy in favor of enforcing arbitration agreements") (internal quotation omitted); *Dockeray v. Carnival Corp.*, 724 F. Supp. 2d 1216, 1226 (S.D. Fla. 2010) (relying on the "clearly written and stand-alone severability clause" to sever choice-of-law provision in arbitration agreement). The Court's removal of the Initial-Fee Splitting Provisions leaves intact the remaining arbitration obligations and a coherent structure for assigning costs. *See Bolivar*, 2023 WL 7496161, at *4 (finding unenforceable fees and costs provisions in arbitration agreement were severable); *Hudson*, 2020 WL 5647009, at *4 (same). Therefore, the Court severs the

Initial Fee-Splitting Provisions, leaving the relevant portion of the Arbitration Provision as follows:

> Each party shall bear its own attorney's fees and costs associated with maintaining an action in arbitration, including, but not limited to, travel, lodging, expert(s) and court reporter(s) fees and costs, regardless of any rules or laws to the contrary. [SEVERED PROVISIONS]**.** CCL shall pay for the [sic] all other reasonable administrative costs of arbitration and fees of the arbitrator as assessed by NAM.

IV. CONCLUSION

For the reasons set forth above, it is **ORDERED AND ADJUDGED** as follows:

1. Carnival's Motion to Compel Arbitration (DE 5) is **GRANTED IN PART AND DENIED IN PART**. Plaintiff's claims are hereby compelled to arbitration pursuant to the Arbitration Provision of the Agreement (DE 1-1 ¶¶ 9, 9.A.), as modified by this Order. Specifically, the Initial Fee-splitting Provisions are **SEVERED** from the Arbitration Provision as described above, and Defendant Carnival shall pay for all reasonable administrative costs of arbitration and fees of the arbitrator as assessed by NAM, including initial filing fees.[8]
2. Plaintiff's Motion to Remand (DE 13) is **DENIED**.
3. Defendant's Motion to Stay Discovery (DE 28) is **DENIED AS MOOT**.
4. Plaintiff's Motion for Leave to Supplement (DE 31) is **DENIED**.

[8] Pursuant to NAM Rule 19(D), (DE 13-10 at 11), NAM may ultimately "award the total cost of the Arbitration to one party or apportion[] such costs between the parties," meaning that NAM has the authority to set off the initial filing fee from any judgment against Defendant.

5. This case is **STAYED** and **ADMINISTRATIVELY CLOSED** pending the completion of the arbitration proceedings. All hearings, trial, and deadlines are **CANCELED**. All other pending motions are **DENIED AS MOOT**.

6. On or before **October 22, 2025**, and every **ninety (90) days** thereafter, the Parties shall file a joint status report regarding the status of the arbitration proceedings. Further, the Parties shall file a joint status report within **fourteen (14) days** of completing arbitration, discussing the result of the arbitration and how this case should proceed.

DONE AND ORDERED in Chambers in Miami, Florida, on this 24th day of July, 2025.

KATHLEEN M. WILLIAMS
UNITED STATES DISTRICT JUDGE