UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

Case No. 20-24829-CIV-COOKE/O'SULLIVAN

THAMALASSEN SUNGARALINGUM,

Plaintiff,

v.

CARNIVAL CORPORATION and HEINEMANN AMERICAN CRUISE RETAIL, LLC,

Defendants.
_____/

REPORT AND RECOMMENDATION

THIS MATTER comes before the Court on Defendant Heinemann American Cruise Retail, LLC['s] Amended Motion to Compel Arbitration and Dismiss, or Alternatively Stay, this Proceeding (DE# 9, 11/30/20). This matter was referred to the undersigned by the Honorable Marcia G. Cooke, United States District Court Judge. See Endorsed Order of Reference (DE# 19, 12/21/20). Having reviewed the applicable filings and the law, the undersigned respectfully RECOMMENDS that Defendant Heinemann American Cruise Retail, LLC['s] Amended Motion to Compel Arbitration and Dismiss, or Alternatively Stay, this Proceeding (DE# 9, 11/30/20) be **GRANTED and that the matter be DISMISSED** for the reasons stated herein.

PROCEDURAL HISTORY

On October 1, 2020, Thamalassen Sungaralingum (hereinafter "plaintiff") filed a complaint against Carnival Corporation (hereinafter "Carnival") and Heinemann American Cruise Retail, LLC (hereinafter "Heinemann") in the Circuit Court of the

Eleventh Judicial Circuit in and for Miami-Dade County, Florida. See Complaint and Demand for Jury Trial (DE# 4-3, 11/24/20) (hereinafter "Complaint"). The Complaint alleged the following causes of action: Jones Act negligence against Heinemann (Count I); Jones Act negligence against Carnival (Count II); unseaworthiness against Carnival (Count III); failure to provide maintenance and cure against Heinemann (Count IV) and failure to treat against both defendants (Count V).

On November 23, 2020, Heinemann removed the instant action to the United States District Court for the Southern District of Florida pursuant to the Convention on the Recognition and Enforcement of Foreign Arbitral Awards. See Heinemann's Notice of Removal – Convention on the Recognition and Enforcement of Foreign Arbitral Awards (DE# 1, 11/23/20). Federal courts have removal jurisdiction over actions relating to an arbitration agreement falling under that treaty. 9 U.S.C. § 205.

On November 30, 2020, Heinemann filed the instant motion seeking to compel arbitration and dismiss or stay the proceedings during the pendency of the arbitration. See Defendant Heinemann American Cruise Retail, LLC['s] Amended Motion to Compel Arbitration and Dismiss, or Alternatively Stay, this Proceeding (DE# 9, 11/30/20) (hereinafter "Motion"). On December 7, 2020, defendant Carnival joined in the instant motion. See Defendant, Carnival Corporation's Joinder in Defendant Heinemann American Cruise Retail's Amended Motion to Compel Arbitration and Dismiss, or Alternatively Stay Proceeding (DE# 13, 12/7/20).

On January 4, 2021, the plaintiff filed his response in opposition to the instant Motion. See Plaintiff's Response in Opposition to Defendant's Motion to Compel Arbitration (DE# 20, 1/4/21) (hereinafter "Response"). On January 8, 2021, Heinemann

filed exhibits in support of the instant motion. See Defendant, Heinemann American Cruise Retail LLC's, Notice of Filing Exhibits in Support of Defendant's Amended Motion to Compel Arbitration and Dismiss, or Alternatively Stay, this Proceeding (DE# 22, 1/8/21). Both defendants filed replies on January 22, 2021. See Defendant Carnival's Reply Memorandum in Support of the Motion to Compel Arbitration (DE# 32, 1/22/21) (hereinafter "Carnival's Reply"); Defendant Heinemann American Cruise Retail, LLC's Reply in Support of its Motion to Compel Arbitration and Dismiss or Alternatively Stay this Proceeding (DE# 33, 1/22/21) (hereinafter "Heinemann's Reply").

Because Carnival's Reply stated that "[f]or the limited purpose of this case only, Carnival hereby agree[d] to abide by the terms of the Heinemann Agreement," Carnival's Reply at ¶ 4, the undersigned provided the plaintiff with an opportunity to file a sur-reply. See Order (DE# 34, 1/25/21). No sur-reply was filed.

This matter is ripe for adjudication.

BACKGROUND

The plaintiff is a citizen of Mauritius. Complaint at ¶ 2. Heinemann "is a Delaware corporation with its principal place of business in Miami, Florida." Id. at ¶ 4. Carnival "is a Panamanian corporation with its principal place of business in Miami, Florida. Id. at ¶ 3. Carnival owned, operated, managed, maintained and/or controlled the vessel, Fantasy." Id.

The Complaint alleges that the plaintiff was an employee of Heinemann and a borrowed servant of Carnival. Complaint at ¶¶ 9, 11. The Complaint further alleges that "[o]n or about October 2, 2019, Plaintiff was injured while performing his duties as a watch specialist aboard the Fantasy." Id. at 12.

On July 27, 2019, the plaintiff signed an employment contract with Heinemann. See Seafarer's Contract of Employment (DE# 22-1, 1/8/21) (hereinafter "Heinemann Contract"). The Heinemann Contract contained the following arbitration provision:

> 20. Arbitration: Any and all disputes arising out of or in connection with this Agreement, including any question regarding its existence, validity, or termination, or Seafarer's service on the vessel, shall be referred to and finally resolved by arbitration under the American Arbitration Association/International Centre for Dispute Resolution International Rules, which Rules are deemed to be incorporated by reference into this clause[.] The number of arbitrators shall be one[.] The place of arbitration shall be London, England, Panama City, Panama or Manila, Philippines whichever is closer to Seafarer's home country[.] The Seafarer and [Heinemann] must arbitrate in the designated jurisdiction, to the exclusion of all other jurisdictions. The language of the arbitral proceedings shall be English. Each party shall bear its own attorney's fees, but [Heinemann] shall pay for the costs of arbitration as assessed by the AAA. Seafarer agrees to appear for medical examinations by doctors designated by [Heinemann] in specialties relevant to any claims Seafarer asserts, and otherwise the parties agree to waive any and all rights to compel information from each other.

Heinemann Contract at ¶20.

The plaintiff also signed a Seafarer's Agreement with Carnival on July 27, 2019. See Seafarer's Agreement (DE# 22-2, 1/8/21) (hereinafter "Carnival Contract"). The Carnival Contract contained the following arbitration provision:

> 9. Arbitration. 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, no matter how described, pleaded, or styled including but not limited to constitutional, statutory, common law, admiralty, personal injury, intentional tort, contract, equitable claims, claims of injury, medical and lodging benefits claims, inadequacy or improper care claims, or employment disputes, whether accruing prior to, during or after the execution of this Agreement, 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. 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. The number of arbitrators shall be one. The seat of the arbitration and the final hearing shall be either in London, England. Monaco, Panama City, Panama or Manila, Philippines whichever is closer to Seafarer's home country. The Arbitrator shall be either a member of the Bar of the location determined to be the seat of the arbitration proceeding or of the applicable flag-state as determined in paragraph 10 of this Agreement. The Seafarer and CCL must arbitrate in the designated jurisdiction, to the exclusion of all other jurisdictions. The language of the arbitral proceedings shall be English. 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. CCL shall only pay for the administrative costs of arbitration and fees of the arbitrator as assessed by NAM. The Parties agree to the exchange of information as required by NAM's procedures, as amended. At CCL's request, Seafarer agrees to appear at his expense for medical examinations by doctors designated by CCL in specialties relevant to any claims Seafarer asserts. Otherwise the parties agree to waive any and all rights to compel information from each other. The parties agree that there shall be no award of pre-judgment interest or injunctive relief in any arbitration proceeding between the Seafarer and CCL.

Carnival Contract at ¶ 9.

ANALYSIS

The defendants[1] seek an Order compelling arbitration pursuant to the Convention on the Recognition and Enforcement of Foreign Arbitral Awards of June 10, 1958 (hereinafter "Convention"). Motion at 1.

The plaintiff argues that the instant action should be remanded to state court because the arbitration provisions in the Heinemann Contract and the Carnival Contract are unenforceable. Response at 1. Specifically, the plaintiff argues that the arbitration

[1] The instant Motion was filed by Heinemann. In light of Carnival's joinder, the undersigned will refer to the moving parties collectively as "defendants."

provisions in each contract contradict each other making compliance with both arbitration provisions impossible. Id. at 2-3. The plaintiff notes that the two arbitration provisions call for different governing rules and arbitration locations. Id. at 3. The plaintiff further argues that the case should be remanded to state court because the Court lacks subject matter jurisdiction. Lastly, the plaintiff argues that because he has asserted causes of action under the Jones Act, the removal of the instant case to federal court was improper. Id. at 4.

The undersigned will address the plaintiff's subject matter jurisdiction argument first.

1. Subject Matter Jurisdiction

The plaintiff argues that this Court lacks subject matter jurisdiction, and as such, this case should be remanded to state court. See Motion at 4 (stating that "[b]ecause the arbitration provisions are unenforceable, and there are no other grounds for federal jurisdiction, this Honorable Court should remand the case back to state court.").[2]

"A case covered by the Convention confers federal subject matter jurisdiction upon a district court because such a case is 'deemed to arise under the laws and treaties of the United States.'" Bautista v. Star Cruises, 396 F.3d 1289, 1294 (11th Cir. 2005) (quoting 9 U.S.C. § 203). Ultimately, the question of whether the Court has subject matter jurisdiction in the instant case rests on whether there exists an enforceable arbitration agreement under the Convention. See Haasbroek v. Princess Cruise Lines, Ltd., 286 F. Supp. 3d 1352, 1357 (S.D. Fla. 2017) (noting that "[s]ubject

[2] Although the plaintiff argues in his response that the case should be remanded, the plaintiff has not filed a motion for remand.

matter jurisdiction . . . [was] ultimately dependent on the applicability of the [a]rbitration [c]lause . . . . If the arbitration clause . . . [was] applicable to all of the claims at issue . . . then the Court ha[d] subject matter jurisdiction to compel arbitration of all of those claims pursuant to the Convention and the Convention Act . . . . If, on the other hand, the arbitration clause . . . [was] not applicable to some or all of the claims at issue, then the Court [did] not have subject matter jurisdiction of those claims and those claims must be remanded."); see also Pineda v. Oceania Cruises, Inc., 283 F. Supp. 3d 1307, 1310 (S.D. Fla. 2017) (stating that "[b]ecause the Court ultimately finds . . . that [the plaintiff]'s claims against [the defendants], as set forth in her complaint, do not relate to an arbitration agreement . . . falling under the Convention, it finds subject-matter jurisdiction lacking and removal, therefore, to have been improper.") (internal quotation marks omitted).

For the reasons discussed below, the undersigned finds that there are enforceable arbitration agreements between the plaintiff and each defendant under the Convention. Accordingly, the Court has subject matter jurisdiction over the instant action.

2. Removability of Jones Act Cases

The plaintiff also argues that because he has asserted causes of action under the Jones Act, the instant case should not have been removed to federal court. Response at 4 (stating that "this case should be remanded because Jones Act claims cannot be removed as a matter of law").

Claims brought under the Jones Act are generally not removable to federal court. See Lewis v. Lewis & Clark Marine, Inc., 531 U.S. 438, 455 (2001) (noting that "in this

case respondent raised a Jones Act claim, which is not subject to removal to federal court even in the event of diversity of the parties."); Trifonov v. MSC Mediterranean Shipping Co. SA, 590 F. App'x 842, 844 (11th Cir. 2014) ("accept[ing] that Jones Act claims are not generally subject to removal").

Nonetheless, an action asserting a claim under the Jones Act may be removed to federal court where there is an enforceable arbitration agreement under the Convention. In Trifonov, the Eleventh Circuit noted that "[a]lthough [the Eleventh Circuit] ha[d] not addressed the removal issue expressly, [the] Court ha[d] routinely compelled arbitration of Jones Act claims that had been removed under 9 U.S.C. § 205 when they relate to an arbitration agreement under the Convention." 590 F. App'x at 845.

The plaintiff notes that "the Southern District of Florida remanded an identical Jones Act cruise line case back to state court on grounds that 1) the arbitral agreement was void as against public policy pursuant to Thomas v. Carnival, 573 F.3d 1113 (11th Cir. 2009) and also that 2) that Jones Act claims brought in State Court were non-removable." Response at 5-6 (citing Sivanandi v. NCL (Bahamas) Ltd., Case No. 10-20296, 2010 U.S. Dist. LEXIS 54859 (S.D. Fla. 2010)).

On the issue of the removability of Jones Act claims, Sivanandi is not helpful to the plaintiff. In Sivanandi, the plaintiff argued that "his Jones Act claim [could not] be removed as a matter of law, relying on the 2006 and 2008 amendments to the Jones Act." 2010 U.S. Dist. LEXIS 54859 at *6. This Court rejected the argument, stating: "As this Court has held several times since the recent amendments of the Jones Act, removal of the Jones Act negligence claims to enforce arbitration agreements is proper pursuant to the Convention." Id. at 6-7 (citing Allen v. Royal Caribbean Cruise, Ltd.,

2008 U.S. Dist. LEXIS 103783, 2008 WL 5095412 (S.D. Fla. Sept. 30, 2008), aff'd 353 Fed. Appx. 360 (11th Cir. Nov. 23, 2009)).

Relatedly, the plaintiff argues that Jones Act claims cannot be removed because where there is a conflict between a treaty and a federal statute, the more recent legal pronouncement (the Jones Act) controls:

> If a treaty and statute are inconsistent, "the one last in date will control the other." Whitney v. Robertson, 124 U.S. 190, 194 (1888). See also Ribas y Hijo v. U.S., 194 U.S. 315, 324 (1904) citing Cherokee Tobacco, 78 U.S. 616 (1870) (when there are inconsistencies "between an act of Congress and a treaty, each being equally the supreme law of the land, the one last in date must prevail"). See also Empresa Cubana del Tobacco v. Culbro Corp., 399 F. 3d 462, 481 (2d Cir. 2005) (legislative acts trump treaty made international law when those acts are passed subsequent to ratification of the treaty). Indeed, the "one last in date" need not be new legislation. If Congress amends an existing statute, that will defeat the "chronological foundation" of a pre-existing treaty. See Egle v. Egle, 715 F. 2d 999, 1013 (5th Cir. 1983).
>
> While 9 U.S.C. § 205 of the Convention has never been amended, the Jones Act has been amended a number of times, in 2006 and 2008. Therefore, the Jones Act provisions expressly prohibiting removal and selection of venue prevail as a matter of law over any claim that the convention should apply in this matter, since as illustrated above the Jones Act was last in date – due to its Amendments.

Response at 6.

A similar argument was considered and rejected by the Eleventh Circuit. Lindo v. NCL (Bahamas), Ltd., 652 F.3d 1257, 1286-87 (11th Cir. 2011). In Lindo, the plaintiff argued that "a 2008 Amendment to the Jones Act, which deleted its venue provision, mean[t] Congress ha[d] rendered [the plaintiff]'s Jones Act claim inarbitrable." Id. at 1286. The Eleventh Circuit noted that the 2008 amendment was only meant to clarify existing law: "Congress made it clear that no substantive change was being effected by the 2008 Amendment . . . ." Id. at 1286-87.

The Eleventh Circuit concluded that:

> [t]he repeal of the Jones Act's venue provision hardly warrant[ed] the inference that Congress sought to overturn the numerous cases requiring arbitration of Jones Act claims where the Convention applies. . . . If Congress had intended to render international arbitration clauses unenforceable in Jones Act cases, it could have explicitly done so. Instead, the legislative history of the 2008 Amendment reveals that no such sweeping change was intended at all.

Id. at 1287.

Given the analysis in Lindo, the plaintiff's argument that the Jones Act controls over the Convention because the Jones Act was more recently amended is not persuasive. Moreover, the plaintiff's argument is inconsistent with the Eleventh Circuit's observation that courts "routinely compel[ ] arbitration of Jones Act claims that had been removed under 9 U.S.C. § 205 when they relate to an arbitration agreement under the Convention." Trifonov, 590 F. App'x at 845; see also Isanto v. Royal Caribbean Cruises, Ltd., No. 20-CV-23715, 2020 WL 6262981, at *8 (S.D. Fla. Oct. 23, 2020) (rejecting argument that "Jones Act 'controls over' the Convention" as "inconsistent with Eleventh Circuit case law that expressly approves of removing Jones Act claims under the Convention"); Sivanandi v. NCL (Bah.) Ltd., 2010 U.S. Dist. LEXIS 54859, *6 (rejecting argument that "a Jones Act claim cannot be removed as a matter of law" due to the "the 2006 and 2008 amendments to the Jones Act. As this Court has held several times since the recent amendments of the Jones Act, removal of the Jones Act negligence claims to enforce arbitration agreements is proper pursuant to the Convention.").

In sum, Jones Act claims are removable to federal court provided there is an enforceable arbitration agreement under the Convention.

3. The Convention

The Convention "'is a multi-lateral treaty that requires courts of a nation state to give effect to private agreements to arbitrate and to enforce arbitration awards made in other contracting states.'" Gonsalvez v. Celebrity Cruises, Inc., 935 F. Supp. 2d 1325, 1329 (S.D. Fla.) aff'd, 750 F.3d 1195 (11th Cir. 2013) (quoting Thomas v. Carnival Corp., 573 F.3d 1113, 1116 (11th Cir. 2009)). "The United States, as a signatory to the Convention, enforces this treaty through Chapter 2 of the [Federal Arbitration Act (FAA)], which incorporates the terms of the Convention." Id. Chapter 2 of the FAA, 9 U.S.C. §§ 202-208, is referred to as the Convention Act.

"The Convention and Chapter 2 of the FAA exclusively govern[ ] arbitration between a citizen of the United States and citizens of a foreign country." Gonsalvez, 935 F. Supp. 2d at 1329 (quoting Costa v. Celebrity Cruises, Inc., 768 F. Supp. 2d 1237, 1240 (S.D. Fla. 2011), aff'd, 470 Fed. App'x 726 (11th Cir. 2012); 9 U.S.C. § 207.

"To implement the Convention, Chapter 2 of the FAA provides two causes of action in federal court for a party seeking to enforce arbitration agreements covered by the Convention: (1) an action to compel arbitration in accord with the terms of the agreement, 9 U.S.C. § 206, and (2) at a later stage, an action to confirm an arbitral award made pursuant to an arbitration agreement, 9 U.S.C. § 207." Lindo, 652 F.3d at 1263.

The Convention recognizes distinct defenses for the two stages of enforcement. Lindo, 652 F.3d at 1263. Article II of the Convention provides defenses at the initial arbitration enforcement stage. Id. (citing Bautista, 396 F.3d at 1301). Article V of the Convention provides defenses that are directed at courts considering whether to

recognize and enforce an arbitral award at the award enforcement stage. Id. "Only certain defenses can be raised at each stage of enforcement, and the available defenses differ between the arbitration-enforcement stage and the award-enforcement stage." Escobar v. Celebration Cruise Operator, Inc., 805 F.3d 1279, 1286 (11th Cir. 2015)

There is a strong presumption in favor of arbitration. Lindo, 652 F.3d at 1275 (noting that "under the Convention and Supreme Court and Circuit precedent, there is a strong presumption in favor of freely-negotiated contractual choice-of-law and forum-selection provisions, and this presumption applies with special force in the field of international commerce."). "In deciding a motion to compel arbitration under the Convention Act, a court conducts 'a very limited inquiry.'" Bautista, 396 F.3d at 1294 (citing Francisco v. Stolt Achievement MT, 293 F.3d 270, 273 (5th Cir. 2002)). "A district court must order arbitration unless (1) the four jurisdictional prerequisites are not met . . . or (2) one of the Convention's affirmative defenses applies." Id. at 1294-95 (internal citations omitted). The four jurisdictional prerequisites and the available affirmative defenses are discussed below.

The Convention places the burden of establishing the four jurisdictional prerequisites on the party seeking to compel the arbitration. Czarina, L.L.C. v. W.F. Poe Syndicate, 358 F.3d 1286, 1293 at n.3 (11th Cir. 2004). "[T]he party opposing arbitration . . . has the burden to prove that an affirmative defense applies . . . ." Shamsi v. Levin, No. 17-80372-CIV, 2017 WL 7803807, at *3 (S.D. Fla. Oct. 27, 2017).

a. Jurisdictional Prerequisites

A court ruling on a motion to enforce an arbitration agreement must ensure that four jurisdictional prerequisites are present:

> (1) there is an agreement in writing within the meaning of the Convention; (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, which is considered commercial; and (4) a party to the agreement is not an American citizen, or that the commercial relationship has some reasonable relation with one or more foreign states.

Bautista, 396 F.3d at 1294 n.7.

The defendants argue that all four jurisdictional prerequisites are met:

> Here, a written Arbitration Provision exists which falls within the scope of the Convention's reach because it is included in a commercial contract engaging the Plaintiff as a seafarer that is not entirely between citizens of the United States since the Plaintiff is a citizen of Mauritius. Furthermore, the Arbitration Provision provides for the arbitration to be held in London, which is the city closest to Plaintiff's residence out of the four options for place of arbitration provided in the Arbitration Provision.

Motion at 7-8. The defendants further note that "Plaintiff's entire case arises out of and relates to the Employment Contract." Id. at 8. The plaintiff does not contest any of the jurisdictional prerequisites in his Response.

The undersigned has reviewed the Complaint and both contracts and is satisfied that all four jurisdictional prerequisites are met in the instant case.

The first jurisdictional prerequisite is met because the defendants have produced two written agreements, the Heinemann Contract and the Carnival Contract. Each written agreement is signed by the plaintiff and the respective defendant and contains

an arbitration provision. See Heinemann Contract at ¶ 20; Carnival Contract at ¶ 9.[3]

The second jurisdictional prerequisite is met because the arbitration would take place in London, England under the Heinemann Contract and in Monaco under the Carnival Contract. See discussion, infra. The United Kingdom and Monaco are signatories to the Convention. See http://www.newyorkconvention.org/countries.

The third jurisdictional prerequisite is met because the Heinemann Contract and the Carnival Contract arise from a commercial relationship between the plaintiff and each defendant in which the plaintiff provided services as a watch specialist onboard the Fantasy.

Lastly, the fourth jurisdictional prerequisite is met because one of the parties, the plaintiff, is not a United States citizen.[4]

In sum, all four jurisdictional prerequisites are met.

b. Affirmative Defenses

As noted above, where all four jurisdictional prerequisites are present, a court ruling on a motion to enforce an arbitration agreement must compel arbitration unless an affirmative defense recognized under the Convention applies. Bautista, 396 F.3d at 1294-95.

The "two stages of enforcement are known as (1) the arbitration-enforcement stage and (2) the award-enforcement stage." Escobar, 805 F.3d at 1286. At the

[3] Article II(2) provides that "[t]he term 'agreement in writing' shall include an arbitral clause in a contract or an arbitration agreement, signed by the parties or contained in an exchange of letters or telegrams." Convention at Article II.

[4] For purposes of the Convention Act, "a corporation is a citizen of the United States if it is incorporated or has its principal place of business in the United States." 9 U.S.C. § 202. Here, both defendants have their principal place of business in Miami, Florida. Complaint at ¶¶ 3-4. Moreover, Heinemann is a Delaware corporation. Id. at ¶ 4.

arbitration-enforcement stage, "the only affirmative defense to arbitration is a defense that demonstrates the arbitration agreement is 'null and void, inoperative or incapable of being performed.'" Escobar, 805 F.3d at 1286 (quoting Convention at Article II(3)). "[A]n arbitration agreement is 'null and void' under Article II(3) of the Convention only where it is obtained through those limited situations, 'such as fraud, mistake, duress, and waiver,' constituting 'standard breach-of-contract defenses' that 'can be applied neutrally on an international scale.'" Lindo, 652 F.3d at 1276 (quoting Bautista, 396 F.3d at 1302). "These traditional breach-of-contract claims do not include public-policy or unconscionability arguments." Escobar, 805 F.3d at 1288.

i. Incapability of Performance

In the instant case, the plaintiff argues that "the arbitration provisions between Defendants HEINEMANN and CARNIVAL contradict each other, rendering the arbitration provisions incapable of being performed." Response at 3. The plaintiff notes that the defendants' respective arbitration provisions are governed by different rules. Id. The Heinemann Contract is governed by the American Arbitration Association/ International Centre for Dispute Resolution International Rules, whereas the Carnival Contract is governed by the "National Arbitration and Mediation (NAM) under its Comprehensive Dispute Resolution Rules and Procedures as adapted for Seafarer/ Crew-Member Employment Arbitrations." Heinemann Contract at ¶ 20; Carnival Contract at ¶ 9.

The plaintiff also notes that the arbitration provisions call for different arbitration locations. Both arbitration provisions list several locations and state that the arbitration must take place in whichever location is closest to the plaintiff's home country. See

Heinemann Contract at ¶ 20; Carnival Contract at ¶ 9. Under the Heinemann Contract, London, England is the location closest to the plaintiff's home country. Motion at 8. Under the Carnival Contract, Monaco is the location closest to the plaintiff's home country. Response at 3.

As previously noted, in its reply, Carnival "agree[d] to abide by the terms of the Heinemann Agreement," for this case only. Carnival's Reply at ¶ 4. Given Carnival's new position, the undersigned provided the plaintiff with an opportunity to file a sur-reply to address this change in circumstance. The plaintiff did not take up that opportunity to address why Carnival's change in position would not cure the asserted contradictions between the two arbitration provisions. "As the party opposing arbitration, Plaintiff has the burden to prove that an affirmative defense applies." Estibeiro v. Carnival Corp., No. 12-22713-CIV, 2012 WL 4718978, at *2 (S.D. Fla. Oct. 3, 2012).

Heinemann argues that the defense raised by the plaintiff "does not qualify as one of [the] recognized affirmative defenses." Heinemann's Reply at 4. However, incapability of performance is one of the recognized affirmative defenses under Article II. See Escobar, 805 F.3d at 1286 (stating that "[u]nder Article II, the only affirmative defense to arbitration is a defense that demonstrates the arbitration agreement is "null and void, inoperative or incapable of being performed."). Whether the two arbitration provisions are actually incapable of being performed is a separate matter.

Heineman also argues that, in actuality, the two arbitration provisions can be performed:

> Plaintiff provides no legal basis for [the] premise that the arbitration provisions nullify each other. Plaintiff's sole basis is the inconvenience for Plaintiff to arbitrate against two parties in two different locations under different rules. This is not impossible. Plaintiff freely decided to contract

> with two parties with each contract containing an arbitration provision with different location and applicable rules to conduct arbitration. Plaintiff decided to prosecute both Defendants in one action.

Reply at 5.

The Court does not need to decide whether both arbitration provisions can be performed. In light of Carnival's agreement to abide by the terms of the Heinemann Contract, Carnival's Reply at ¶ 4, the contradictions between the two arbitration provisions identified by the plaintiff in his Response have vanished. As such, there is no longer a factual basis to support the plaintiff's impossibility of performance defense.

ii. Meaningful Relief

The plaintiff also argues that because "Defendant's arbitral provision requires that Panamanian law govern" it "deprives Plaintiff of any hope of meaningful relief – defeating the remedial purposes of the Jones Act and the general maritime law." Response at 7 (citing Paladino v. Avnet Computer Technologies, Inc., 134 F. 3d 1054 (11th Cir. 1998)).

The plaintiff's reliance on Paladino is misplaced. Paladino involved an appeal from an order denying a motion to compel arbitration in an action involving claims under Title VII and Florida law. Paladino, 134 F.3d at 1055. Importantly, Paladino did not involve a motion to compel arbitration under the Convention. "Chapter 1 of the FAA governs domestic arbitration, and provides a broad array of defenses to the enforcement of arbitration agreements in the cases that it governs. . . . However, the broad defenses applicable in the context of domestic arbitration are not generally available in cases governed by the . . . Convention." Suazo v. NCL (Bahamas), Ltd., 822 F.3d 543, 547 (11th Cir. 2016). Thus, the plaintiff in Paladino had more (and different) defenses available to her than those defenses available under the Convention.

As noted above, the Court's inquiry on a motion to compel arbitration under the Convention is very limited. Bautista, 396 F.3d at 1294. The defenses available at the arbitration-enforcement stage are different from the defenses available at the award-enforcement stage. Escobar, 805 F.3d at 1286. "[A]t the arbitration-enforcement stage, it is generally premature to make findings about how arbitrators will conduct the arbitral process, whether a claim will be heard, or whether the foreign-law remedies will be adequate or inadequate." Lindo, 652 F.3d at 1279.

In Escobar, the arbitration agreement at issue was governed by Bahamian law. 805 F.3d at 1283. The plaintiff "argued [that] this foreign choice-of-law clause violate[d] public policy because it prospectively waived his right to pursue statutory remedies under American law." Id. The Eleventh Circuit refused to consider the merits of the plaintiff's argument, noting that:

> a challenge based on public policy cannot be made at the [arbitration enforcement] stage of the proceedings in which the district court is considering whether to compel the parties to arbitrate, which is the stage at which [the plaintiff]'s case finds itself. At this present arbitration-enforcement stage of a Convention case, the only affirmative defense that a reviewing court can consider is a defense that demonstrates the arbitration agreement is null and void, inoperative, or incapable of performance, under Article II of the . . . Convention.

Id. at 1288.

Similarly here, the plaintiff may not raise any public policy arguments at this stage in the proceeding and is limited to only those affirmative defenses available under Article II. No Article II defenses apply to the instant case.

4. Whether to Dismiss or Stay the Instant Action

The defendants ask that the instant action be dismissed, or alternatively, that the matter be stayed pending arbitration. Motion at 9-10. The defendants note that "where all of the claims involved in an action are arbitrable, a court may dismiss the action instead of staying it." Id. at 9. The defendants further state that the instant action should be dismissed as premature because "Heinemann's arbitration demand makes arbitration a condition precedent to Plaintiff's right to maintain an action on the Arbitration Provision." Id.

In German Int'l Sch. of Fort Lauderdale, LLC v. Certain Underwriters at Lloyd's, London, this Court noted that "where all issues presented in the lawsuit are arbitrable and the plaintiff has not requested a stay, the Eleventh Circuit and this Court have found that a dismissal of the lawsuit is a proper remedy." No. CV 19-60741-CIV, 2019 WL 2107260, at *3 (S.D. Fla. May 14, 2019) (citing Caley v. Gulfstream Aerospace Corp., 428 F.3d 1359, 1379 (11th Cir. 2005)).

In Singh v. Carnival Corp., this Court observed that the dismissal of an action might be preferable to a stay:

> To stay the action assumes, however, that one of the parties will be unhappy with the results of arbitration. In fact, both parties might be satisfied with the outcome of arbitration and choose not to proceed to a later cause of action to confirm the award or contest its enforcement. At this point, Plaintiff has provided no reason for the Court to believe that there is no way that arbitration of his dispute will be productive. Therefore, the Court dismisses this action. Once arbitration is complete, either party may file a new complaint seeking for the Court to confirm the award in accordance with the provisions of the FAA and the Convention.

No. 13-20414-CIV, 2013 WL 12139415, at *7 (S.D. Fla. Mar. 26, 2013), aff'd, 550 F. App'x 683 (11th Cir. 2013).

Here, all of the plaintiff's claims are subject to arbitration and the plaintiff does not address the defendant's request for dismissal or, alternatively, a stay. Moreover, as noted in Singh, the parties may ultimately decide there is no need for further proceedings in this Court. Accordingly, the undersigned respectfully RECOMMENDS that the case be DISMISSED.

RECOMMENDATION

In sum and for the reasons stated herein, the undersigned finds that all four jurisdictional prerequisites are present in this case and that there are no affirmative defenses which would preclude an arbitration under the Convention.

Based on the foregoing, the undersigned respectfully RECOMMENDS that Defendant Heinemann American Cruise Retail, LLC['s] Amended Motion to Compel Arbitration and Dismiss, or Alternatively Stay, this Proceeding (DE# 9, 11/30/20) be **GRANTED and that the matter be DISMISSED**.

The parties will have fourteen (14) days from the date of receipt of this Report and Recommendation within which to serve and file written objections, if any, with the Honorable Marcia G. Cooke, United States District Court Judge. Failure to file objections timely shall bar the parties from a de novo determination by the District Judge of an issue covered in the Report and shall bar the parties from attacking on appeal unobjected-to factual and legal conclusions contained in the Report except upon grounds of plain error if necessary in the interest of justice. See 28 U.S.C § 636(b)(1); Harrigan v. Metro Dade Police Dep't Station #4, 977 F.3d 1185, 1191-1192 (11th Cir. 2020); Thomas v. Arn, 474 U.S. 140, 149 (1985); Henley v. Johnson, 885 F.2d 790, 794

(11th Cir. 1989); 11th Cir. R. 3-1 (2016).

RESPECTFULLY SUBMITTED at the United States Courthouse, Miami, Florida this **18th** day of February, 2021.

JOHN J. O'SULLIVAN
CHIEF UNITED STATES MAGISTRATE JUDGE