UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

CASE NO.: 11-11427-A

CAMILO COSTA,
BERNARD FERNANDES, and
MENINO D'ACOSTA
Petitioners/Appellants

vs.

CELEBRITY CRUISES, INC.

Appeal from the United Status District Court for the Sourthern District of Florida, Docket # 1:10-cv-24229-UU

APPELLANTS' INITIAL BRIEF

CARLOS FELIPE LLINÁS NEGRET
LIPCON, MARGULIES, ALSINA & WINKLEMAN, P.A.
Attorneys for Appellants/Plaintiffs
2 South Biscayne Tower, Suite 1776
Miami, Florida 33131
Telephone: (305) 373 – 3016
Facsimile: (305) 373 – 620

STATEMENT REGARDING ORAL ARGUMENT

Appellants respectfully request oral argument. The outcome of this case will have a substantial impact on the applicability Chapter 1 of the FAA to Motions to Vacate Arbitration Awards in Federal District Courts, and thus implicates important policy considerations. As such, Appellants believe oral argument will be of assistance in presenting this case to the Court.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page

STATEMENT OF JURISDICTION

Appellants action sought to vacate an arbitration award pursuant to Chapter 1 of the Federal Arbitration Act, 9 U.S.C. §10, and the Convention on the Recognition and Enforcement of Arbitral Awards, 21 U.S.T. 2517 (the "Convention"), and its implementing legislation, 9 U.S.C. §202-208 (hereinafter "Convention Act"). Thus, the court below had jurisdiction by virtue of 28 U.S.C. §1331.

STATEMENT OF THE ISSUES

1. In arbitrations taking place in the United States, under United States Law, and involving at least one party who is a citizen of a foreign country; does Article V(1)(e) of the Convention allow a United States District Court to apply domestic United States arbitral law (such as Chapter 1 of the FAA and the Florida International Arbitration Act) to a motion to set aside or vacate an arbitral award?

2. Whether the district court erred in ruling that the grounds for vacating the arbitration award contained in Chapter 1 of the Federal Arbitration Act were strictly inapplicable.

STATEMENT OF THE CASE

Plaintiffs' are citizens of India who worked as stateroom attendants (seafarers) for Defendant Celebrity Cruises Inc.'s (Celebrity). [R.E. Tab 2, ¶3]. The terms of Plaintiff's employment are governed by a Collective Bargaining Agreement (the CBA) entered into between Celebrity and an international labor union (the Union). [R.E. Tab 2, ¶13].

Both the CBA and the employment contracts established the seafarers compensation from two sources: base pay and gratuities. Since basic pay consisted of only $50.00 per month,[1] the majority of the Seafarers' wages

[1] This averages to one-dollar and 67 cents ($1.67) per day.

were gratuities from passengers. Under the gratuity payment scheme, set forth in the CBA, Celebrity was required to recommend to its passengers that they pay gratuities in accordance with an incorporated pay scale in the CBA. [R.E. Tab 2, ¶14]. Pursuant to the pay scale, the seafarers were entitled to receive gratutities amounting to $3.50 per passenger per day. [R.E. Tab 2, ¶14, ft. 2].

Despite these provisions, Celebrity breached the terms of the seafarers' employment contract and the CBA by requiring the Seafarers to share their earned gratuities with *assistant* cabin stewards (a newly created position in the ships) and the chief housekeeper (the Seafarers' supervisors) at the rates of $1.20 and $0.50 per day, respectively. [R.E. Tab 2, ¶17].

Accordingly, on October 21, 2009, seafarers Camilo Costa and Bernard Fernandes submitted a demand for arbitration under the terms of the CBA to Celebrity and the Union, and, on December 9, 2009, seafarer Menino D'Acosta did the same. On December 29, 2009, the Union formally demanded arbitration on behalf of all three Plaintiffs. [R.E. Tab 2, ¶6].

Celebrity and the Union appointed Stanley H. Sergent as arbitrator (the Arbitrator). On May 28th, 2010, Celebrity moved to dismiss the demand for arbitration on the grounds that the Seafarer's claims were non-arbitral on grounds that the seafarer's did not submit grievances to the company and the

union under the CBA within 30 days (allegedly a pre-condition to arbitration). On July 27, 2010, a one (1) day arbitration hearing was held in Miami, Florida at the offices of counsel for Celebrity in Miami, Florida. On August 28, 2010, the Arbitrator granted Celebrity's motion, holding that the Seafarers' claims were non-arbitral for failure to exhaust the grievance procedure under the CBA. [R.E. Tab 2, ¶10].

On November 29, 2010, the Seafarers filed the lawsuit below seeking to vacate the arbitrator's decision. In the Amended Complaint, the Seafarers sought to vacate the arbitrator's decision pursuant to the Federal Arbitration Act, 9 U.S.C. §10 (Chapter 1 of the FAA), and pursuant to the Convention and Enforcement of Foreign Arbitral Awards (the Convention) and its implementing legislation, 9 U.S.C. §§201-08 (Chapter 2 of the Federal Arbitration Act). [R.E. Tab 2].

The crux of the Seafarer's defenses under Chapter 1 of the FAA were as follows: (1) vacatur was appropriate under Chapter 1 of the FAA §10 (a)(3) because the arbitrator refused to hear evidence pertinent and material to the controversy; (2) vacatur was appropriate under Chapter 1 of the FAA §10 (a)(4) because the arbitrator exceeded his powers, or so imperfectly executed them that a mutual, final and definite award upon the subject matter submitted was not made. The Seafarer's also raised defenses pursuant

to the Florida International Arbitration Act (FIAA) and the Convention and its implementing legislation, 9 U.S.C. §§201-08 (Chapter 2 of the FAA). [R.E. Tab 2, ¶10].

On February 17, 2011, Celebrity filed a Motion to Dismiss the Seafarers' Amended Complaint. [R.E. Tab 3].

On February 26, 2011, the Court below dismissed the Seafarer's Amended Complaint to vacate the arbitrator's decision, holding in part:

> The Court discusses Celebrity's Motion beginning with the arguments against the applicability of the FAA and the Florida Act.
>
> The Convention and Chapter 2 of the FAA exclusively governs arbitration between a citizen of the United States and citizens of a foreign country. *See 9 U.S.C.* §207; *Indus. Risk Ins. V. M.A.N. Gutehoffnungshutte GmbH*, 141 F. 3d 1434, 1439-41 (11th Cir. 1998). Here, Plaintiffs are citizens of India and, thus, the Convention and Chapter 2 of the FAA apply. Accordingly, Celebrity is correct that the only potential grounds for vacating the arbitration award in this case are the seven defenses to enforcement of enumerated in the Convention. *Indus. Risk Ins.*, 141 F. 3d at 1445-46. And any additional grounds for vacating an arbitration award as may be contained in Chapter 1 of the FAA or the FIAA are strictly inapplicable.[Ft. 3] Although this may not be the rule in other circuits, it is the rule in the Eleventh Circuit. *See, i.e., id.* ("In short, the Convention's enumerations of defenses is exclusive."). For this reason, the Court will dismiss with prejudice Plaintiffs' claimed defenses under Chapter 1 of the FAA or the FIAA.

Id. [R.E. Tab 4].

The Seafarers thus file the instant appeal, seeking to reverse the lower Court's ruling, holding that the grounds for vacating the arbitrator's decision

contained in Chapter 1 of the Federal Arbitration Act (9 U.S.C. §10(a)(3) and (4)) were strictly inapplicable.

SUMMARY OF ARGUMENT

In arbitrations taking place in the United States, under United States Law, and involving at least one party who is a citizen of a foreign country; Article V(1)(e) of the Convention allows a United States District Court to apply domestic United States arbitral law (such as Chapter 1 of the FAA and the Florida International Arbitration Act) to a motion to set aside or vacate an arbitral award.

The district court below erred in ruling that the grounds for vacating the arbitration award contained in Chapter 1 of the Federal Arbitration Act were strictly inapplicable.

STANDARD OF REVIEW

The Eleventh Circuit reviews a district court's order on a motion to vacate or confirm an arbitration award for clear error with respect to factual findings and *de novo* with respect to the district court's legal conclusions. *Escobio v. Salomon Smith Barney, Inc.*, 164 Fed. Appx. 881 (11th Cir. 2006). *See also Money Purchase Plan & Trust v. ADM Investor Servs., Inc.*, 146 F. 3d 1309, 1311 (11th Cir. 1998). *See also Wackenhut Corp. v. Amalgamated Local 515*, 126 F. 3d 29, 31 (2d Cir. 1997) ("We review a

district court decision upholding or vacating an arbitration award de novo on questions of law and for clearly erroneous findings of fact."); *Barnes v. Logan*, 122 F. 3d 820, 821 (9th Cir. 1997) ("Appellate courts review the confirmation or vacation of an arbitration award like any other district court decision … accepting findings of fact that are not "clearly erroneous' but deciding questions of law de novo.").

ARGUMENT

I. CHAPTER 1 OF THE FEDERAL ARBITRATION ACT, AND THE GROUNDS LISTED THEREUNDER TO VACATE THE ARBITRATOR'S AWARD (9 U.S.C. §10(a)(3) (4)) WERE APPLICABLE. IF THE CONVENTION APPLIES, THEN CHAPTER 1 APPLIES. THE TRIAL COURT TRIAL ERRED IN HOLDING OTHERWISE.

A. The Seafarers moved to vacate the arbitrator's decision both pursuant to Chapter 1 of the FAA, 9 U.S.C. §10(a)(3) and (4), and the Convention on Enforcement of Foreign Arbitral Awards (the Convention). Contrary to the Honorable Court's ruling below, even in situations in which the remedies for vacatur under the Convention apply - as is the Seafarer's case – the Convention allows Courts to apply domestic arbitral laws, in this case Chapter 1 of the FAA, to a motion to set aside or vacate an arbitral award. In fact, pursuant to *Article V(1)(e)* of the Convention, a Court in the United States is authorized to apply United States procedural arbitral law, i.e. the domestic FAA (Chapter 1), to non-domestic convention awards rendered in the United States.

The Convention on Enforcement of Foreign Arbitral Awards (the Convention), by its terms applies to all arbitrations in the United States where at least one of the parties is a non-citizen of the United States. *See*,

i.e., Industrial Risk Insurers v. M.A.N. Gutenhoffnungshutte GmbH, 141 F. 3d 1434 (1998). *See also Ledee v. Cermiche Ragno,* 684 F. 2d 184, 186-87 (1st Cir. 1982), *Yusuf Ahmed Alghanim & Sons, W.L.L v. Toys "R" US, Inc.*, 126 F. 3d 15, 18-19 (2d Cir. 1997).

Here, since the seafarers are citizens of India (non-citizens of the United States), the Convention applies.

By virtue of the fact that the Seafarers were non-U.S. citizens and that the Convention applies, the district court held that the Convention (Chapter 2 of the FAA) provided the grounds for vacatur. That portion of the district court's order was proper. However, the district court erred in holding that because the Convention applied, the Seafarers could not rely on the grounds set forth in Chapter 1 of the FAA.

In fact, by holding that the Convention applied, the District Court below also ruled that all of the enumerated grounds for vacatur under the Convention applied. One of such enumerated grounds is the Convention's Article V(1)(e). As succinctly addressed below, Article V(1)(e) of the Convention specifically authorizes district courts to vacate arbitral award pursuant to Chapter 1 of the FAA, including §§10(a)(3) and (4).

Under Article V(1)(e) of the Convention, a Court may refuse to recognize an arbitral award if: "The award has not yet become binding on

the parties, or **has been set aside or suspended by a competent authority in which, or under the law of which, that award was made."** Courts have interpreted the language of Article V(1)(e) of the Convention to allow a court in the country under whose law the arbitration was conducted to apply domestic arbitral law, in this case Chapter 1 of the FAA, to a motion to set aside or vacate the arbitral award. *See Yusuf Ahmed Alghanim & Sons v. Toys "R" Us, Inc.*, 126 F. 3d 15 (2d Cir. 1997):

> **We read Article V(1)(e) of the Convention to allow a Court in the country under whose law the arbitration was conducted to apply domestic arbitral law, in this case the FAA, to a motion to set aside or vacate that arbitral award.** The district court in *Spector v. Torenberg*, 852 F. Supp. 201 (S.D.N.Y. 1994), reached the same conclusion as we do now, reasoning that, **because the Convention allows the district court to refuse the enforce an award that has been vacated by a competent authority in the country where the award was rendered, the court may apply FAA standards to a motion to vacate a nondomestic award rendered in the United States** …From the plain language and history of the Convention, it is thus apparent that a party may seek to vacate or set aside an award in the state in which, or under the law of which, the award is rendered. **Moreover, the language and history of the Convention make it clear that such a motion is to be governed by domestic law of the rendering state, despite the fact that the award is nondomestic within the meaning of the convention** […]. *Id.*, at 23 (emphasis added).

See also Ario v. Underwriting Members of Syndicate 53 at Lloyds for 1998 Year of Account, 618 F. 3d 291 – 292 (3d Cir. 2010) (emphasis added):

> 1. In the absence of clear intent to the contrary, the FAA's vacatur standards apply to a Convention award rendered and enforced in

the United States. Under the Convention, a district court's role is limited – it must confirm the award unless one of the grounds for refusal specified in the Convention applies to the underlying award. Article V of the Convention sets forth grounds for refusal […]We have recognized, however, that there is "more flexibility…when the arbitration site and the site of the confirmation proceeding were within the same jurisdiction … In this case the Convention award was rendered in the United States. Therefore, we must decide whether to adopt the first portion of the *Yusuf* decision and its articulation of the available grounds for vacating a Convention award rendered in the United States. The *Yusuf* Court held that, "under Article V(1)(e) [of the Convention], the Courts of the United States are authorized to apply United States procedural arbitral law, i.e., the [domestic] FAA, to nondomestic [Convention] awards rendered in the United States. *See also* Convention Art. V(1)(e) ("Recognition and enforcement of award may be refused … [if the award] has been set aside or suspended by a competent authority of the country in which, or under the law of which, that award was made.") […]. **We agree with this interpretation and now adopt it. This reasoning is also consistent with 9 U.S.C. §208, also part of the Convention's implementing statute, in which Congress explicitly provided for the application of the domestic FAA to the extent that it did not conflict with the Convention.** *See* 9 U.S.C. §208 ("Chapter 1 [of the FAA] applies to actions and proceedings brought under this chapter to the extent that this chapter is not in conflict with this chapter or the Convention as ratified by the United States."). **When both the arbitration and enforcement of an award falling under the Convention occur in the United States, there is no conflict between the Convention and the domestic FAA because article V(1)(e) of the Convention incorporates the domestic FAA and allows awards to be "set aside or suspended by a competent authority of the country … in which the award was made."** Here, because arbitration took place in Philadelphia, and the enforcement of the action was also brought in Philadelphia, we may apply United States law, including the domestic FAA and its vacatur standards.

Id., at 292. *See also Gulf Petro Trading Company, Inc.*, 512 F. 3d 742, 747 (5th Cir. 2008):

> We have characterized the country "in which, or under the [arbitration] law of which," an award was made as having *primary* jurisdiction over the award […]. The Convention does not restrict the grounds on which primary-jurisdiction courts may annul an award, thereby leaving to a primary jurisdiction's local law the decision whether to set aside the award. Such courts are free to set aside or modify an award in accordance with [the country's] domestic arbitral law and its full panoply of express and implied grounds for relief.

The Court below ruled that the Convention – along with all of its defenses - provided the exclusive grounds for vacatur. By implication, therefore, Article (V)(1)(e) of the Convention – one of the Convention's enumerated defenses- also applies. Pursuant to *Yusuf* (2nd Cir), *Ario* (3d Cir), and *Gulf Petro Trading* (5th Cir), Article (V)(1)(e) of the Convention allows a Court in the country under whose law the arbitration was conducted to apply domestic arbitral law – in this case Chapter 1 of the FAA, §§10(a)(3) and (4), to a motion to set aside or vacate an arbitral award.

Further, when both the arbitration and enforcement of a decision falling under the Convention occurs in the United States (as was the case here), there is no conflict between the Convention and the domestic FAA (Chapter 1), because Article (V)(1)(e) of the Convention incorporates the

domestic FAA and allows awards to be "set aside or suspended by a competent authority of the country … in which the award was made."

Here, because the arbitration award took place in Miami, Florida and the vacatur of the action was also brought in Miami, Florida; the district court below should have applied United States law, including the domestic FAA (Chapter 1) and its vacatur standards.[2]

B. In *Industrial Risk*, this Honorable Court did not specifically decide or rule on the issue of whether Article V(1)(e) allows a United States District Court to consider grounds for vacatur under domestic United States arbitral law (i.e. Chapter 1 of the FAA and the Florida International Arbitration Act). However, *Industrial Risk* did hold that the seven enumerated defenses against enforcement of an arbitral award in Article V of the Convention applied to a non-domestic arbitration in the United States, under U.S. law, involving a foreign party. By implication, therefore, *Industrial Risk* held that Article (V)(1)(e) – one of the seven enumerated defenses - also applies to non-domestic arbitrations in the United States, under U.S. law, involving a foreign party. As illustrated in *Yusuf*, *Ario*, and *Gulf Petro Trading*, this Honorable Court should therefore join the Third, Sixth and Fifth Circuits, in holding that Article (V)(1)(e) allows district courts to apply Chapter 1 of the FAA.

In the Order dismissing the Seafarer's Amended Complaint with prejudice [R.E. Tab 4], the district court, *citing Industrial Risk Insurers v. M.A.N. Guttenhoffnungshutte GmbH*, 141 F. 3d 1434, 1446 (11th Cir. 1998), held in part, that the "rule in the Eleventh Circuit" is "that the only potential

[2] Because the Florida International Arbitration Act is also domestic U.S. law, for the same reasons Article V(1)(e) of the Convention allows this Honorable Court to apply its vacatur standards.

grounds for vacating the arbitration award in this case are the seven defenses to enforcement enumerated in the Convention." On that basis the Court held that the "grounds for vacating an arbitration award as may be contained in Chapter 1 of the FAA or the FIAA are strictly inapplicable." The district court's interpretation of *Industrial Risk Insurers*, was nevertheless, incorrect.

Rather than undermining their position, *Industrial Risk* supports the Seafarers' position. In *Industrial Risk* the Court succinctly held that where an arbitration involves parties domiciled outside of the enforcing jurisdiction, the party challenging the arbitration award must assert one of the seven defenses against enforcement of the award enumerated in Article V of the Convention. *Id.*, at 1441. The Court then goes on to list the seven defenses under Article V – including the language of Article V(1)(e): "the award has yet to become binding on the parties, or **has been set aside or suspended by a competent authority of the country in which, or under the law of which, the award was made."** *Id.*, at 1441, ft. 8. As such, the *Industrial Risk* Court specifically recognized the applicability of Article V(1)(e) as a ground for vacatur – the same as the Courts in *Yusuf*, *Ario*, and *Gulf Petro Trading*. Unlike these four Circuit Courts, however, the Eleventh Circuit in *Industrial Risk* 1) ***did not*** analyze the language of Article V(1)(e), and 2) ***did not*** determine whether under Article V(1)(e), the Convention

allows the application of arbitral domestic law – such as Chapter 1 of the FAA.

Therefore, contrary to the district court's ruling below; the holding in *Industrial Risk* does not contradict the holdings by this Honorable Court's sister Circuits in *Yusuf, Ario*, and *Gulf Petro Trading*. Rather, these cases complement each other. Reading both sets of cases together it is clear that Article V(1)(e) should have applied in the district court's determination of whether to vacate the arbitral decision. *Yusuf, Ario*, and *Gulf Petro Trading* explain that pursuant to Article V(1)(e) of the Convention, district courts may apply domestic United States law, including the domestic FAA (Chapter 1) and its vacatur standards. This Honorable Court should join the Third, Sixth and Fifth Circuits and hold the same.

To hold otherwise, would mean to hold that Article V(1)(e) – one of the Convention's enumerated defenses – does not apply.

CONCLUSION

In arbitrations taking place in the United States, under United States Law, and involving at least one party who is a citizen of a foreign country; Article V(1)(e) of the Convention allows a United States District Court to apply domestic United States arbitral law (such as Chapter 1 of the FAA and

the Florida International Arbitration Act) to a motion to set aside or vacate an arbitral award.

The district court thus erred in ruling that the grounds for vacating the arbitration award contained in Chapter 1 of the Federal Arbitration Act were strictly inapplicable.

CERTIFICATE OF COMPLIANCE WITH RULE 32(A)(7)

I certify that this brief complies with the type-volume limitation set forth in FRAP 32(a)(7)(B). This brief contains a word count of 4,214 words.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY, that a true and correct copy of the foregoing was furnished by electronic mail and U.S. Mail this 10th day of June, 2011 to: Scott Ponce, Esquire, of Holland & Knight LLP, 701 Brickell Avenue, Suite 3000 Miami, Florida 33131.

LIPCON, MARGULIES,
ALSINA & WINKLEMAN, P.A.
Attorney for Plaintiff
One Biscayne Tower, Suite 1776
2 South Biscayne Boulevard
Miami, Florida 33131
Telephone: (305) 373-3016
Facsimile: (305) 373-6204
cllinas@lipcon.com

By: s/ *Carlos Felipe Llinás Negret*
CARLOS FELIPE LLINÁS NEGRET
FLA. BAR. NO. 73545