Eleventh Circuit Reverses Prior View and Holds That Forum and Choice of Law Clauses Cannot Be Invalidated Pre-Arbitration Despite the Loss of the Right To Pursue a Federal Claim: New Interpretion of Challenge Mechanism in the New York Convention Offered

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An important area within international dispute resolution is the extent to which courts will override parties' choice of law and forum in the name of public policy. See generally the discussion of choice of law/choice of forum and their impact on enforceability in our e-book, *International Practice: Topics and Trends*).

The Eleventh Circuit has now weighed in on a specific and timely example of this issue, on which we have posted on several times (e.g., here and here): Whether a plaintiff can avoid a choice of law/choice of forum agreement it made could be avoided on grounds of being contrary to public policy when the plaintiff is or might be deprived of the right to assert and prosecute a claim under U.S. federal law. The decision was filed in *Lindo v. NCL (Bahamas), Ltd.*, No. 10-10367 (11th Cir. 2011), and consists of a 67-page majority decision writtten by Judge Hull and a 22-page dissent by written by Judge Barkett.

In an earlier decision, the Elevent Circuit, in *Thomas v. Carnival Corp.*, 573 F.3d 1113 (11th Cir. 2009), held that an arbitration clause that precluded a seafarer's claims under the federal Seaman's Wage Act was contrary to public policy and hence was not enforceable. Lower courts in the Eleveth Circuit have concluded that no different result should be reached with respect to a plaintiff's Jones Act claims. It is a Jones Act claim that is at issue in *Lindo.*

We have observed that the Eleventh Circuit rule seemed inconsistent with law in the Second Circuit. See *Transunion v. PepsiCo, Inc.*, 811 F.2d 127 (2d Cir. 1987) (in which the author was counsel), holding that forum non conveniens dismissal of claims in favor of non-U.S. jurisdictions was not precluded even if the plaintiff would lose the ability to assert a federal claims as a result. The Eleventh Circuit now agrees and affirms the enforcement of choice of law/choice of forum clauses even over a public policy objection. It does not directly take on or reject the public policy exception but reaches the same result as if it did.

The plaintiff in Lindo had an employment contract with NCL and worked on the M/S Norwegian Dawn. After an injury, the plaintiff sued. The employment contract contained a forum clause (the Seaman's country of citizenship, here Nicaragua) and a choice of law clause designating the law of the flag state of the vessel (Bahamian). The plaintiff did not want Bahamian negligence law but U.S. statutory law under the Jones Act.

The Eleventh Circuit decision undertakes an extensive analysis of every U.S. Supreme Court decision since *M/S Bremen v. Zapata Off-Shore Co.*, 407 U.S. 1 (1972), as well as the pertinent Eleventh Circuit authority. The Court of Appeals interpreted the New York Convention's rules to challenge jurisdiction as essentially dividing challenges into two points in time: prior to arbitration, where the only rule to avoid arbitration is a null and void rule that, for example, no agreement to arbitrate was made; and after arbitration, where a party could challenge an arbitral ruling on one of the enumerated grounds. The majority found that there was no public policy objection available pre-arbitration and refused to follow its earlier decision in *Thomas*, finding several respects in which Thomas conflicted with Supreme Court and Eleventh Circuit jurisprudence.

The Court of Appeals affirmed the District Court's dismissal of the plaintiff's claims in favor the agree-upon arbitration remedy.