UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

CASE NO. 21-22301-CIV-ALTONAGA/Torres

JOHN DOE,

Plaintiff,

v.

CARNIVAL CORPORATION,

Defendant.
______________________________/

ORDER

THIS CAUSE came before the Court on Defendant, Carnival Corporation's Motion to Compel Arbitration and Dismiss [ECF No. 19], accompanied by supporting exhibits [ECF Nos. 19-1, 19-2, 19-3], filed on August 18, 2021. Plaintiff, John Doe, filed a Response [ECF No. 24], to which Defendant filed a Reply [ECF No. 25]. The Court has carefully considered the parties' written submissions, the record, and applicable law. For the following reasons, the Motion is granted in part and denied in part, and the action is stayed pending arbitration of the parties' dispute.

Background. The relevant facts are set forth in Defendant's Motion and are undisputed by Plaintiff. (*See generally* Mot.; Resp.). Briefly, Plaintiff, a United States citizen, began working for Defendant, a Panamanian corporation, in 2000, and for the next 17 years completed at least one contract with Defendant. (*See* Mot. 1). Plaintiff executed his last contract on June 23, 2018 (the "Seafarer's Agreement" or "Agreement") for work to be performed on the *Carnival Magic* (the "Vessel"). (*See id.*; *see also id.*, Ex. 2, Seafarer's Agreement [ECF No. 19-2]). Four days after executing the Agreement, Plaintiff was medically disembarked from the Vessel. (*See* Mot.

2). He returned to work on September 2, 2018, but on November 25, 2018 was again medically disembarked. (*See id.*). He has not worked for Defendant since. (*See id.*).

Plaintiff lodges several claims[1] against Defendant, arising from incidents occurring in June 2018, October 2018, and May 2019. (*See generally* Compl.). Defendant filed its Motion to Compel Arbitration and Dismiss, relying on an arbitration clause contained in the Seafarer's Agreement.[2] (*See generally* Mot.).

Standards. The Convention on the Recognition and Enforcement of Foreign Arbitral Awards (the "New York Convention" or "Convention"), codified at Chapter 2 of the Federal Arbitration Act ("FAA"), *see* 9 U.S.C. §§ 201–08, requires signatory States, such as the United States, "to give effect to private international arbitration agreements and to recognize and enforce arbitral awards made in other contracting states." *Lindo v. NCL (Bahamas), Ltd.*, 652 F.3d 1257, 1261 (11th Cir. 2011) (citation omitted). The Convention provides that "[a] court having jurisdiction under [Chapter 2] may direct that arbitration be held in accordance with the agreement at any place therein provided for, whether that place is within or without the United States." 9 U.S.C. § 206 (alterations added).

[1] Plaintiff asserts discrimination claims under federal and Florida statutes (Counts I–III); and claims of negligence under the Jones Act (Count IV), unseaworthiness (Count V), and failure to provide maintenance and cure (Count VI). (*See generally* Compl. [ECF No. 1]).

[2] The clause states:

> Except for a wage dispute governed by [Plaintiff]'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. . . .

(Seafarer's Agreement ¶ 9 (alterations added)).

Courts determining whether to compel arbitration under the Convention should conduct a "very limited inquiry." *Bautista v. Star Cruises*, 396 F.3d 1289, 1294 (11th Cir. 2005) (quotation marks and citation omitted). "[T]he first task of a court asked to compel arbitration of a dispute is to determine whether the parties agreed to arbitrate that dispute." *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614, 626 (1985) (alteration added). If so, a court must grant a motion to compel arbitration "so long as (1) the four jurisdictional prerequisites are met and (2) no available affirmative defense under the Convention applies." *Suazo v. NCL (Bahamas), Ltd.*, 822 F.3d 543, 546 (11th Cir. 2016) (quotation marks and citations omitted).

The four jurisdictional prerequisites are

> (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 [] the commercial relationship has some reasonable relation with one or more foreign states.

Bautista, 396 F.3d at 1294 n.7 (alteration added; citation omitted). "[T]he only affirmative defense to arbitration is a defense that demonstrates the arbitration agreement is 'null and void, inoperative or incapable of performance.'" *Escobar v. Celebration Cruise Operator, Inc.*, 805 F.3d 1279, 1288 (alteration added; footnote call number and citations omitted).

"The party opposing a motion to compel arbitration . . . has the affirmative duty of coming forward by way of affidavit or allegation of fact to show cause why the court should not compel arbitration." *Sims v. Clarendon Nat'l Ins. Co.*, 336 F. Supp. 2d 1311, 1314 (S.D. Fla. 2004) (alteration added; citation omitted). Further, "any doubts concerning the scope of arbitrable issues should be resolved in favor arbitration, whether the problem at hand is the construction of the contract language itself or an allegation of waiver, delay, or a like defense to arbitrability." *Moses*

H. Cone Mem'l Hosp. v. Mercury Constr. Corp., 460 U.S. 1, 24–25 (1983) (footnote call number omitted).

With these principles in mind, and through the lens of the Convention's "strong presumption in favor of arbitration of international commercial disputes[,]" the Court considers the parties' arguments. *Bautista*, 396 F.3d at 1295 (alteration added; citation omitted).

Discussion. Plaintiff does not dispute whether the parties agreed to arbitrate. (*See generally* Resp.). Instead, he raises three jurisdictional issues and no affirmative defenses, arguing (1) the "in writing" requirement is not satisfied (Resp. 14–17); (2) seamen's disputes are not arbitrable under the Convention[3] (*see id.* 2–11); and (3) the parties' relationship bears "no reasonable relation with foreign states" (*id.* 12; *see id.* 12–14). The first argument, although tenuous, at least merits discussion; the latter two are, quite exasperatingly, contradicted by binding Eleventh Circuit precedent.[4] The Court addresses each in turn.

---

[3] Plaintiff initially couches this argument as an affirmative defense, asserting with barebones legal conclusions that the arbitration clause is "null and void, inoperative, incapable of being performed, invalid, revocable, and unenforceable against seamen." (Resp. 1). He later contends that "seamen's contractual disputes are not a subject matter capable of settlement by arbitration." (*Id.* 4). The essence of Plaintiff's arguments concerns the Convention's applicability and not whether the arbitration agreement is null and void, inoperative, or incapable of being performed, which are the only affirmative defenses available. *See Escobar*, 805 F.3d at 1288 (citations omitted). The Court thus construes Plaintiff's arguments as jurisdictional. *See Bautista*, 396 F.3d at 1295 (construing argument that seamen's disputes are not arbitrable as a jurisdictional question of "whether the arbitration agreement arises out of a commercial legal relationship").

[4] The Court admonishes Plaintiff's Counsel of her ethical duties under the Florida Rules of Professional Conduct:

> A lawyer shall not bring or defend a proceeding, or assert or controvert an issue therein, unless there is a basis in law and fact for doing so that is not frivolous, which includes a good faith argument for an extension, modification, or reversal of existing law.

Rules Regulating the Fla. Bar r. 4-3.1 (Fla. Bar 2021). As a member of the Bar of this Court, and pursuant to Local Rule 11.1(c) of the U.S. District Court for the Southern District of Florida, Counsel is obligated to abide by this mandate, and her arguments contrary to binding precedent flagrantly disregard her ethical and professional obligations. Counsel is warned; she must do better.

Agreement in writing. The Convention requires each Contracting State to recognize an "agreement in writing[,]" which the Convention defines as "an arbitral clause in a contract or an arbitration agreement, signed by the parties or contained in an exchange of letters or telegrams." *Bautista*, 396 F.3d at 1300 (alteration added; quotation marks omitted; quoting Convention, art. II(1), (2); other citation omitted). Plaintiff insists that the October 2018 incidents are not covered by an agreement in writing, precluding arbitration of the claims arising from that period. Plaintiff asserts that the parties do not have a written agreement covering the time-period at issue: September 2, 2018 through November 25, 2018, because the contract auto-terminated after Plaintiff was medically disembarked, and when Plaintiff returned to work, the parties failed to execute a new written agreement. (*See* Resp. 14–16).

According to Defendant, "Plaintiff mistakenly conflates a 'terminated agreement' with there being 'no written agreement.'" (Reply 7 (quotation marks and citation omitted)). Defendant explains "[t]he [p]arties expressly agreed that the arbitration provision would remain in force after termination"; "there is an actual written agreement"; and Plaintiff's interpretation "gives no effect to Paragraph []3.K[], Paragraph []14[], or the broad language of the arbitration provision itself in Paragraph []9[]." (Reply 7, 8 (alterations added)). Defendant has the better position.

The auto-termination clause in Paragraph 2 of the Agreement states:

> This Agreement shall automatically terminate without notice immediately upon Seafarer's unscheduled disembarkation of the assigned vessel if Seafarer disembarks the vessel for any reason, including but not limited to unscheduled personal leave, illness or injury, for more than one full voyage.

(Seafarer's Agreement ¶ 2). The Agreement continues:

> In the event Seafarer returns to work after this Agreement has automatically terminated pursuant to paragraph 2, then Seafarer's return to active duty shall be deemed to be the commencement of a new and separate Seafarer's Agreement under the same terms and conditions set forth herein and said terms will be in force and effect until such time as a new Seafarer's Agreement is executed.

(*Id.* ¶ 3.K.). The Agreement also provides that "[t]he parties' agreement to arbitrate shall survive the termination of the Seafarer's Agreement[.]" (*Id.* ¶ 14 (alterations added)). It is undisputed that (1) the Agreement terminated upon Plaintiff's medical disembarkation, pursuant to Paragraph 2 (*see* Mot. 3; Resp. 14), and (2) a new Seafarer's Agreement was never executed pursuant to Paragraph 3.K (*see* Resp. 14; Reply 7).

Defendant contends the Eleventh Circuit's decisions in *Montero v. Carnival Corp.*, 523 F. App'x 623 (11th Cir. 2013), and *Martinez v. Carnival Corp.*, 744 F.3d 1240 (11th Cir. 2014), controvert Plaintiff's position and require arbitration of Plaintiff's claims. (*See* Reply 7–9). The *Montero* plaintiff was medically disembarked subject to the same auto-termination clause present here. *See* 523 F. App'x at 625–626. Despite the parties' agreement not including a survival clause (as the Agreement does here) the court held the broad language of the arbitration clause made clear that "the parties contemplated some circumstances in which the arbitration clause would survive termination of the agreement." *Id.* at 627; *see also Martinez*, 744 F.3d at 1245–46 (same).

Yet, Plaintiff's situation differs from *Montero* and *Martinez* in two ways. First, the *Montero* and *Martinez* plaintiffs couched their arguments in terms of whether the parties had an agreement to arbitrate,[5] while Plaintiff attacks the "in writing" jurisdictional requirement. Second, Plaintiff returned to the ship, implicating Clause 3.K of the Agreement, which forms the crux of

[5] In fact, the plaintiff-appellant in *Montero* did "not phrase his arguments in terms of the Convention's jurisdictional prerequisites or affirmative defenses," so the court "[took] his argument to be that one or more of the affirmative defenses applie[d] because the arbitration clause ceased to be effective when the agreement terminated[.]" 523 F. App'x at 626 (alterations added; citation omitted). In *Martinez*, the question before the reviewing court was whether the district court erred in "refusing to determine whether the [a]greement had terminated because the question of termination ha[d] remained in dispute and the 'clear and unmistakable' language of the contract indicate[d] that the parties intended for just such a dispute to be decided by arbitration and not the court." 744 F.3d at 1246 (alterations added; citation and footnote call number omitted).

Plaintiff's argument that the Agreement was not in writing. (*See* Resp. 14–15). Notwithstanding these differences, Plaintiff's argument fails.

It bears emphasizing that Plaintiff does not dispute whether the parties have a binding agreement to arbitrate arising from Paragraph 3.K. (*See generally id.*; *see also* Compl. ¶ 49 (stating "Plaintiff's last contract with [Defendant] ended on November 25, 2018") (alteration added)). Plaintiff hangs his hat on the words "new and separate Seafarer's Agreement[,]" arguing that "a new Seafarer's Agreement was never executed[,]" and, as such "[t]here is no written instrument pertaining to Plaintiff's employment from September 2, 2018 until November 25, 2018." (Resp. 15–16 (alterations added; quotation marks, citation, and emphasis omitted).

The black-and-white text of the Seafarer's Agreement forecloses that position. Plaintiff certainly agreed in writing to the arbitration clause contained in Paragraph 9 (*see* Seafarer's Agreement ¶ 9), and further agreed — *also in writing* — that the arbitration clause should be given effect in the event of his return to work on the Vessel (*see id.* ¶ 3.K). Stated in terms of the Agreement's language, Plaintiff agreed, in a signed writing, that "[i]n the event [Plaintiff] return[s] to active duty" he would arbitrate "any and all disputes[] arising out of or in connection with this Agreement or Seafarer's service on the vessel[.]" (*Id.* ¶¶ 3.K, 9 (alterations added)). The "in writing" jurisdictional prerequisite is thus satisfied. *Cf. Czarina, L.L.C. v. W.F. Poe Syndicate*, 358 F.3d 1286, 1293 (11th Cir. 2004) (holding the agreement-in-writing requirement was not satisfied by an unsigned, unexecuted "sample wording" arbitration agreement).

Commercial Relationship. Plaintiff also argues the Court may not compel arbitration because the FAA's seamen's exemption, which warns "nothing herein contained shall apply to contracts of employment of seamen[,]" 9 U.S.C. § 1 (alteration added), applies to the New York Convention (*see* Resp. 2–11). Plaintiff's position is plainly foreclosed by controlling law.

The FAA is comprised of three Chapters. *See* 9 U.S.C. §§ 1–307. Chapter 2, which contains the New York Convention, provides that "Chapter 1 applies to actions and proceedings brought under this chapter to the extent that [Chapter 1] is not in conflict with this chapter or the Convention[,]" *id.* § 208 (alterations added); *see also Bautista*, 396 F.3d at 1297 ("Rather than put the Convention . . . on equal footing with the FAA in the field of foreign arbitration, Congress gave the treaty-implementing statutes primacy in their fields, with FAA provisions applying only where they did not conflict" (alteration added; citations omitted)). Nevertheless, "the provisions of Article II contemplate the use of domestic doctrines to fill gaps in the Convention." *GE Energy Power Conversion France SAS, Corp. v. Outokumpu Stainless USA, LLC*, 140 S. Ct. 1637, 1645 (2020).

In *Bautista*, the Eleventh Circuit addressed the interplay of the seamen's exemption and the Convention. *See* 396 F.3d at 1299–1300. The *Bautista* plaintiff "assert[ed] that the United States national law definition of 'commercial' resides in section 1 of the FAA," which includes the seamen's exemption, but the court held "the exemption's application outside [Chapter 1] is restricted by the second and third chapters of title 9." 396 F.3d at 1296 (alterations added). Because the Convention "covers commercial legal relationships without exception[,]" the court reasoned it "conflicts with section 1, an FAA provision that exempts certain employment agreements that — but for the exemption — would be commercial legal relationships." 396 F.3d at 1299 (alteration added). Thus, the seamen's exemption did not apply to the Convention. *Id.* at 1300.

Plaintiff's argument to the contrary is premised on *GE Energy Power*, which held that non-signatories to an arbitration agreement may raise equitable estoppel doctrines to enforce arbitration under the Convention, because the Convention is silent about the issue and thus equitable estoppel

principles "do not conflict" with the Convention. 140 S. Ct. at 1645. By some fantastical reasoning, Plaintiff argues *GE Energy Power* abrogates *Bautista*. (*See* Resp. 2–6). It plainly does not. *See generally GE Energy Power*, 140 S. Ct. 1637.

Indeed, *Bautista* held the seamen's exemption conflicts with the Convention, which covers all commercial relationships, rendering the exemption inapplicable, *see* 396 F.3d at 1299–1300; while *GE Energy Power* held equitable estoppel doctrines, which are "matter[s] not covered[,]" do not conflict with the Convention and thus could be employed by non-signatory litigants, 140 S. Ct. at 1645 (alterations added; citation omitted). The Court will not consider Plaintiff's arguments contrary to *Bautista*. *See* 396 F.3d at 1299–300. The seamen's exemption is inapplicable. *See id.*

Reasonable Relation with Foreign States. Plaintiff further argues the Convention does not apply to the parties' relationship because the parties are both U.S. citizens and "the relationship between [the parties] has no reasonable relation with foreign states" and "had nothing to do with property located abroad or performance abroad." (Resp. 12 (alteration added)). Plaintiff again ignores controlling precedent.

In *Alberts v. Royal Caribbean Cruises, Ltd.*, 834 F.3d 1202, 1204 (11th Cir. 2016), the Eleventh Circuit held that "performance abroad" "includes a seaman's work traveling to or from a foreign country." *Id.* Thus, a seaman's "contract envisaged performance abroad because he worked on a cruise ship that traveled in international waters to foreign ports." *Id.* at 1205. Defendant cites this case; offers evidence that a minimum of 71.5 percent and a maximum 88 percent of Plaintiff's performance was abroad[6]; and, utilizing an estimate of 75–85 percent, argues

[6] Defendant explains:

> [T]he ship never spent an entire day in the United States territory during [the time periods it was stationed in Puerto Rico and St. Thomas.] The schedule shows the [Vessel] was in those ports for an approximate total of 40 hours every two-week period, which amounts to

that percentage satisfies the jurisdictional prerequisite, citing several district court cases in support. (*See* Mot. 6–7 (collecting cases); *id.*, Decl. John Mitchell, Ex. 3A [ECF No. 19-3] 5–13).[7]

Plaintiff entirely ignores this evidence and authority and responds by citing Texas and California county court cases for the proposition that "[t]here is no nexus to foreign states, any more than there is for airline personnel employed on international flights. Yet, airline crew are not compelled to arbitrate their employment disputes under the Convention." (Reply 13 (alteration added; citations omitted)). *Alberts* forecloses Plaintiff's position. *See* 834 F.3d at 1204. Plaintiff's arguments to the contrary are quite remarkable.

Conclusion. Because Defendant has satisfied the four jurisdictional prerequisites to the Convention, and Plaintiff raises no applicable affirmative defense, Defendant's Motion must be granted. *See Suazo*, 822 F.3d at 546. But dismissal, as Defendant requests, is not appropriate. The correct procedure is to stay the case. *See Bender v. A.G. Edwards & Sons, Inc.*, 971 F.2d 698, 699 (11th Cir. 1992) ("Upon finding that a claim is subject to an arbitration agreement, the court should order that the action be stayed pending arbitration." (citing 9 U.S.C. § 3)).

Accordingly, it is

ORDERED AND ADJUDGED as follows:

1. Defendant, Carnival Corporation's Motion to Compel Arbitration and Dismiss **[ECF No. 19]** is **GRANTED in part** and **DENIED in part**.

> the [V]essel being abroad 88% of the time (296/336 = .8809). Thus, 75–85% is a fair estimate.

(Mot. 6 n.3 (alterations added)). Plaintiff does not dispute that the Vessel began its journey in a U.S. port and cruised to ports in the Dominican Republic and Grand Turk, both of which are foreign ports. (*See* Resp. 13). Plaintiff likewise offers no evidence to rebut the declaration offered by Defendant that Plaintiff's work was at minimum 71.5 percent abroad and maximum 88 percent abroad. (*See generally id.*).

[7] The Court uses the pagination generated by the electronic CM/ECF database, which appears in the headers of all court filings.

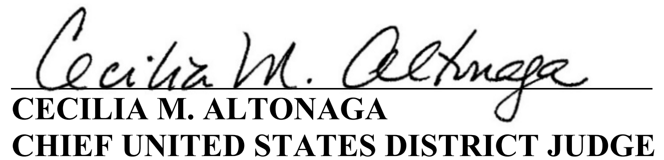
2. The Motion with respect to compelling arbitration is **GRANTED**.

3. The Motion with respect to dismissal is **DENIED**.

4. The case is **STAYED** pending arbitration of the parties' dispute.

5. The Clerk is directed to administratively **CLOSE** this case, and all pending motions are **DENIED as moot**.

DONE AND ORDERED in Miami, Florida, this 18th day of October, 2021.



CECILIA M. ALTONAGA
CHIEF UNITED STATES DISTRICT JUDGE

cc: counsel of record