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Eleventh Circuit Troubled By Choice of Law Not Choice of Arbitration In Thomas v. Carnival

Paul Friedland (White & Case LLP) · Wednesday, August 26th, 2009 · White & Case

A recent decision by the Eleventh Circuit Court of Appeals has attracted attention within the arbitration community as it puts into question the enforceability in the United States of international arbitration agreements where foreign (non-US) law is the governing substantive law. The Eleventh Circuit also mistakenly references Article V of the New York Convention in its discussion of arbitration agreements, which are governed by Article II.

Though it addresses enforcement of an arbitration agreement, the Eleventh Circuit decision may be seen as about choice of law more than about arbitration.

The contract at issue in Thomas v. Carnival Corporation, No. 08-10613 (11th Cir., July 1, 2009), was a Seafarer's Agreement (between Thomas, a seaman, and Carnival, a cruise line) which contained an arbitration clause that provided for arbitration in the Philippines and a choice of law clause that provided that Panamanian law would govern the Agreement and all disputes arising out of it. The choice of law clause specified that Panamanian law would apply notwithstanding the availability of claims under the laws of any other jurisdiction.

The Eleventh Circuit found that it was against public policy for the Seafarer's Agreement to forfeit the rights of a seaman injured during his employment to pursue against the cruise line remedies available under the Seaman's Wage Act and that the choice of foreign law and a foreign forum "operated in tandem" to do just that. The problem for the Eleventh Circuit was that the choice of Panamanian law excluded remedies provided to injured seaman in the Seaman's Wage Act. The issue was, therefore, the contract's choice of law clause more than the choice of forum. Even had the contract provided a US court as the forum for resolving disputes, the choice of law clause by itself would likely still have been stricken as counter to public policy.

Thomas is the latest example of the potential for harmful spillover into international arbitration of rulings by US courts designed for a different context, namely, consumer or employment disputes. The Eleventh Circuit understandably sought to protect a seaman by preserving the seaman's US statutory remedies. Yet, because the Federal Arbitration Act and precedent required the Eleventh Circuit to treat seaman employment contracts as commercial contracts, the Thomas ruling becomes a potential precedent for international commercial disputes of any kind. Citing Thomas, parties may seek to escape otherwise valid arbitration agreements simply by declaring their intention to bring a claim based on a US statute.

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