Forum Selection Clauses and Cruise Ship Contracts

On August 19, 2021, the U.S. Court of Appeals for the Eleventh Circuit issued its latest decision on foreign forum selection clauses in cruise ship contracts. The case was *Turner v. Costa Crociere S.P.A.* The plaintiff was an American cruise ship passenger, Paul Turner, who brought a class action in federal district court in Florida alleging that the cruise line's "negligence contributed to an outbreak of COVID-19 aboard the Costa Luminosa during his transatlantic voyage beginning on March 5, 2020."

The cruise line moved to dismiss the case on the basis of a forum selection clause in the ticket mandating that all disputes be resolved by a court in Genoa, Italy. The contract also contained a choice-of-law clause selecting Italian law. By way of background, it is important to note that (1) the parent company for the cruise line was headquartered in Italy, (2) its operating subsidiary was headquartered in Florida, (3) the cruise was to begin in Fort Lauderdale, Florida, and (4) the cruise was to terminate in the Canary Islands.

The Eleventh Circuit never reached the merits of the plaintiffs' claims. Instead, it sided with the cruise line, enforced the Italian forum selection clause, and dismissed the case on the basis of *forum non conveniens*. A critique of the Eleventh Circuit's reasoning in *Turner* is set forth below.

Years ago, the U.S. Congress enacted a law imposing limits on the ability of cruise lines to dictate terms to their passengers. 46 U.S.C. § 30509 provides in relevant part:

The owner . . . of a vessel transporting passengers . . . between a port in the United States and a port in a foreign country, may not include in a . . . contract a provision limiting . . . the liability of the owner . . . for personal injury or death caused by the negligence or fault of the owner or the owner's employees or agents . . . . A provision described in paragraph (1) is void.

Boiled down to its essence, the statute provides that any provision in a cruise ship contract that caps the damages in a personal injury case is void. If the cruise ship were to write an express provision into its passenger contracts capping the

damages recoverable by plaintiffs such as Paul Turner at $500,000, that provision would be void as contrary to U.S. public policy.

The cruise lines are sharp enough, however, to know not to write express limitations directly into their contracts. Instead, they have sought to achieve the same end via a choice-of-law clause. The contract in *Turner* had a choice-of-law clause selecting Italian law. Italy is a party to an international treaty known as the Athens Convention. The Athens Convention, which is part of Italian law, caps the liability of cruise lines at roughly $568,000 in personal injury cases. If a U.S. court were to give effect to the Italian choice-of-law clause and apply Italian law on these facts, therefore, it would be required to apply the liability cap set forth in the Athens Convention. It seems highly unlikely that any U.S. court would enforce an Italian choice-of-law clause on these facts given the language in Section 30509.

Enter the forum selection clause. If the forum selection clause is enforced, then the case must be brought before an Italian court. An Italian court is likely to enforce an Italian choice-of-law clause and apply the Athens Convention. If the Athens Convention is applied, the plaintiff's damages will be capped at roughly $568,000. To enforce the Italian forum selection clause, therefore, is to take the first step down a path that will ultimately result in the imposition of liability caps in contravention of Section 30509. The question at hand, therefore, is whether the Eleventh Circuit was correct to enforce the forum selection clause knowing that this would be the result.

While the court clearly believed that it reached the right outcome, its analysis leaves much to be desired. In support of its decision, the court offered the following reasoning:

[B]oth we and the Supreme Court have directly rejected the proposition that a routine cruise ship forum selection clause is a limitation on liability that contravenes § 30509(a), even when it points to a forum that is inconvenient for the plaintiff. Shute, 499 U.S. at 596–97 ("[R]espondents cite no authority for their contention that Congress' intent in enacting § [30509(a)] was to avoid having a plaintiff travel to a distant forum in order to litigate. The legislative history of § [30509(a)] suggests instead that this provision was enacted in response to passenger-ticket conditions purporting to limit the shipowner's liability for negligence or to remove the issue of liability from the scrutiny of any court by

means of a clause providing that 'the question of liability and the measure of damages shall be determined by arbitration.' There was no prohibition of a forum-selection clause.")

The problem with this argument is that there was no evidence in *Shute*—none—suggesting that the enforcement of the forum selection clause in that case would lead to the imposition of a formal liability cap. Indeed, the very next sentence in the passage from *Shute* quoted above states that "[b]ecause the clause before us . . . *does not purport to limit petitioner's liability for negligence*, it does not violate [Section 30509]." This language suggests that if enforcement of a forum selection clause *would* operate to limit the cruise line's liability for negligence, it would not be enforceable. The Eleventh Circuit's decision makes no mention of this language.

The *Turner* court also cites to a prior Eleventh Circuit decision, *Estate of Myhra v. Royal Caribbean Cruises*, for the proposition that "46 U.S.C. § 30509(a) does not bar a ship owner from including a forum selection clause in a passage contract, even if the chosen forum might apply substantive law that would impose a limitation on liability." I explain the many, many problems with the Eleventh Circuit's decision in *Myhra* here. At a minimum, however, the *Myhra* decision is inconsistent with the Supreme Court's admonition in *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc* that "in the event the choice-of-forum and choice-of-law clauses operated in tandem as a prospective waiver of a party's right to pursue statutory remedies . . . we would have little hesitation in condemning the agreement as against public policy." There is no serious question that the cruise line is here attempting to use an Italian choice-of-law clause and an Italian forum selection clause "in tandem" to deprive the plaintiffs in *Turner* of their statutory right to be free of a damages cap. This attempt would seem to be foreclosed by the language in *Mitsubishi*. The Eleventh Circuit does not, however, cite *Mitsubishi* in its decision.

At the end of the day, the question before the Eleventh Circuit in *Turner* was whether a cruise company may deprive a U.S. passenger of rights guaranteed by a federal statute by writing an Italian choice-of-law clause and an Italian forum selection clause into a contract of adhesion. The Eleventh Circuit concluded the answer is yes. I have my doubts.