

**UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA**

Case No. 08-22014-CIV-UNGARO

LILITH ALLEN,
Plaintiff,
v.

ROYAL CARIBBEAN CRUISE, LTD.,
a Liberian corporation,
Defendant.

OMNIBUS ORDER

THIS CAUSE is before the Court upon Plaintiff's Motion for Remand and Supporting Memorandum of Law, filed August 4, 2008 (D.E. 9) (the "First Remand Motion") and Plaintiff's Motion for Remand Based on Defendant's Amended Notice of Removal and Supporting Memorandum of Law, filed September 19, 2008 (D.E. 21) (the "Second Remand Motion"). Defendant filed a response to the First Remand Motion on August 21, 2008 (D.E. 13), to which the Plaintiff replied on September 9, 2008 (D.E. 17). Also before the Court is Defendant's Motion to Dismiss the Complaint for Improper Venue and to Compel Arbitration in the Bahamas or Nicaragua, filed July 17, 2008 (D.E. 2). Plaintiff filed her response to the Motion to Dismiss on August 4, 2008 (D.E. 8), to which the Defendant replied on August 21, 2008 (D.E. 14).¹

THE COURT has considered the Motions and pertinent portions of the record, and is otherwise fully advised of the premises.

BACKGROUND

This action arises out of alleged injuries Plaintiff sustained while employed on Defendant's vessel. Plaintiff alleged that on January 16, 2007 and January 27, 2007, she was

¹ The Court granted Defendant an extension of time to file its response. (See D.E. 12.)

sexually harassed and physically assaulted by a co-worker while carrying out her assigned duties. (Compl. ¶¶ 9-10.) She commenced this action against Defendant on or about July 2, 2008, by filing a complaint in the Circuit Court of the Eleventh Judicial Circuit, in and for Miami-Dade County, Florida, which contained seven counts: (Count I) negligence under the Jones Act, 46 U.S.C. § 688, *et. seq.* (the “Jones Act”); (Count II) unseaworthiness; (Count III) failure to provide prompt, adequate, and complete medical treatment; (Count IV) maintenance and cure; (Count V) unearned wages; (Count VI) intentional infliction of emotional distress; and (Count VII) overtime wages. (D.E. 1, Ex. B.) Counts II-VII arise under general maritime law of the United States.

On July 16, 2008, Defendant filed its Petition for Removal pursuant to the United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards, opened for signature June 10, 1958, 21 U.S.T. 2517, 330 U.N.T.S. 3 (the “Convention”) and its implementing legislation, 9 U.S.C. § 202-208 (2002) (the “Convention Act”). (D.E. 1.) Specifically, Defendant removed the action pursuant to section 205 of the Convention Act, which allows for removal at any time before trial where an action pending in state court relates to an arbitration agreement or award falling under the Convention. *See* 9 U.S.C. § 205. Defendant stated in its Petition for Removal that the state action related to arbitration agreement falling under the Convention, but did not attach a copy of the arbitration agreement.

Immediately following its Petition for Removal, Defendant moved to dismiss and compel arbitration under the Convention. (D.E. 2.) Defendant attached to the motion copies of the Collective Bargaining Agreement (“CBA”) between Defendant and the Seafarers’ Union and the Sign-On Employment Agreement (“SOEA”) executed by the Plaintiff when she commenced her

employment. (*See* D.E. 2, Ex. A and D.)

_____ The SOEA attached to the motion contains the following provision:

I further understand and agree that the Collective Bargaining Agreement between the Company and the Union is incorporated into and made part of this Employment Agreement and that I and the Company are bound by its terms and conditions.

(D.E. 2, Ex. A.) The SOEA also contains Plaintiff's acknowledgment that she received a copy of the CBA").² The CBA, in turn, sets forth procedures for grievance and dispute resolution.

(D.E. 2, Ex. D.) More specifically, Article 26 requires arbitration under the Convention of any and all disputes related to the seafarer's employment where a dispute cannot be resolved by the filing of a grievance with the ship's Human Resources Manager, the Master, or ultimately the Union and the company. (D.E. 2, Ex. D.)

Plaintiff then filed her First Remand Motion, arguing that (i) the suit was not removeable because Plaintiff's complaint contained a "Jones Act claim," and (ii) Defendant's Petition for Removal did not meet the procedural requirements for removal because it did not attach the relevant documents and describe how they bound Plaintiff to arbitration. (First Rem. Mot. at 2-3.)

On August 20, 2008, Defendant filed its Amended Petition of Removal, which did not alter the grounds for removal but, rather, stated more fully the nature of Plaintiff's commercial relationship with Defendant and the terms of the written arbitration agreement between Plaintiff and Defendant. (D.E. 11.) Specifically, Defendant's Amended Petition of Removal stated the

² The SOEA Plaintiff signed contained the following provision: "I acknowledge having received copies of: (1) the Collective Bargaining Agreement referred to above effective on the date of this Employment Agreement; (2) The Employee Handbook." (D.E. 2, Ex. A.)

date Plaintiff began her employment with Defendant, Plaintiff's acknowledgment of the CBA in the SOEA, and recited the CBA's arbitration provision. Defendant also provided copies of the SOEA and CBA as exhibits. (*See* D.E. 11, Ex. A, D.) Plaintiff then filed her Second Remand Motion, which (i) disputed that there was a written agreement to arbitration; (ii) contended that if there was a written agreement to arbitrate, then it was void and unenforceable under the Convention; and (iii) for purposes of preserving the argument for further review, disputed that seamen's employment contracts were "commercial contracts" under the national law of the United States for purposes of the Convention. (Second Rem. Mot. at 5.)³

ANALYSIS

A. Defendant's Petition of Removal Was Not Defective.

On a motion to remand, the removing party bears the burden of showing the existence of federal jurisdiction. *Diaz v. Sheppard*, 85 F.3d 1502, 1505 (11th Cir. 1996). Pursuant to section 203 of the Convention Act, this Court has original jurisdiction to disputes arising under the Convention.⁴ Section 205 of the Convention Act states that the "procedure for removal of causes otherwise provided by law shall apply, except that the ground for removal provided in this section need not appear on the face of the complaint but may be shown in the petition for

³ The Court notes that over fifteen pages of argument in Plaintiff's Second Remand Motion was taken verbatim from Plaintiff's response to Defendant's Motion to Dismiss. (*Compare* Second Remand Mot. at 2-18 *with* Resp. Mot. Dismiss at 4-19.) Therefore, the Court will address and cite to Plaintiff's arguments in the Second Remand Motion, which in turn will resolve many of the issues Plaintiff raised in opposition to the Motion to Dismiss.

⁴ Specifically, 9 U.S.C. § 203 provides: "An action or proceeding falling under the Convention shall be deemed to arise under the laws and treaties of the United States. The district courts of the United States . . . shall have original jurisdiction over such action or proceeding, regardless of the amount in controversy."

removal.”

Defendant’s original Petition for Removal was filed pursuant to section 205 of the Convention Act and stated that “this Notice of Removal has been filed prior to trial and the action pending in State court relates to an arbitration agreement falling under the Convention on the Recognition and Enforcement of Foreign Arbitral Awards.” (Petition ¶ 5.). Plaintiff initially argued, however, that (i) that Defendant did not carry its burden for removal because its first Petition was defective for failure to attach an arbitration agreement, and (ii) that removal is improper because the complaint alleges claims under the Jones Act. (First Rem. Mot. at 3.)

First, pursuant to 28 U.S.C. § 1446(a), a notice of removal need only contain a “short and plain statement of the grounds for removal.” Defendant clearly stated its grounds for removal (*i.e.*, 9 U.S.C. § 205) in its Petition for Removal and while it did not attach the SOEA or the CBA to the Petition, it did attach the SOEA (which expressly incorporated the CBA) and the CBA to its Motion to Dismiss and Compel Arbitration filed the next day. (*See* D.E. 2, Ex. A, D.) Additionally, Defendant provided a copies of the SOEA and CBA as exhibits to its Amended Petition for Removal, filed on August 20, 2008. (*See* D.E. 11, Ex. B.)

The Court is not persuaded that it is without jurisdiction under the Convention Act because Defendant failed to initially provide a copy of the CBA. As the Eleventh Circuit stated, “Section 205 does not require a district court to review the putative arbitration agreement - or investigate the validity of the signatures thereon - before assuming jurisdiction: The language of § 205 strongly suggests that Congress intended *that district courts continue to be able to assess their jurisdiction* from pleadings alone.” *Bautista v. Star Cruises*, 396 F.3d 1289 (11th Cir. 2005) (internal quotations and citation omitted) (emphasis added). Defendant cured any initial

defect by subsequently providing the relevant documents to the Court. *See also Willingham v. Morgan*, 395 U.S. 402, 407-08 (1969) (considering documents the removing party provided in their motion for summary judgment to determine whether they had met their burden of demonstrating that the district court had federal question jurisdiction); *Sheinberg v. Princess Cruise Lines, Ltd.*, 269 F.Supp.2d 1349, 1352 n.3 (S.D. Fla. 2003) (finding that the defendant's corrected notice of removal was timely notwithstanding the 30-day limit to amend under 28 U.S.C. 1446(b) because the case was removed under the Convention Act).

Second, the Court disagrees with Plaintiff's argument that removal is improper under the Convention because her complaint included a Jones Act negligence claim. (First Rem. Mot. at 2.). Plaintiff offers four cases to support the proposition that Jones Act claims cannot be removed under the Convention Act.⁵ Three of the four cases cited are not relevant as they only stand for the general proposition that Jones Act claims may not generally be removed; they do not address removal of Jones Act claims under the Convention Act. *See Lewis v. Lewis & Clark Marine, Inc.*, 31 U.S. 438 (2001) (resolving the tension between the saving the suitors clause in 28 U.S.C. § 1331 and the Limitation of Liability Act); *Fields v. Pool Offshore, Inc.*, 182 F.3d 353 (5th Cir. 1999) (removal of Jones Act claims under diversity and Outer Continental Shelf Lands Act); *Burchett v. Cargill*, 48 F.3d 173 (5th Cir. 1995) (removal of Jones Act claims under diversity jurisdiction).

The fourth case, *Alvarez v. Appollo Ship Chandlers, Inc.*, did involve a motion to remove

⁵ The Court also takes note of the unpublished decision Plaintiff furnished as supplemental authority (D.E. 18). The Court, however, finds this case unpersuasive as it does not involve removal under the Convention Act.

pursuant to the Convention Act but, unlike the case at bar, this motion was made by a third-party defendant against whom an indemnity claim had been made. No. 02-CV-21045, 2002 WL 31933666 (S.D. Fla. May 28, 2002). In *Alvarez*, the plaintiff sued certain defendants under the Jones Act in state court. *Id.* at *1. The defendants then, in turn, brought an indemnity claim against their insurer, and the insurer sought to remove the action under the Convention Act. *Id.* The *Alvarez* court held that because the indemnity claim was not separate and independent of the plaintiff's Jones Act claims, the action was not removable under 28 U.S.C. § 1441(c). *Id.* at *2-*3. The insurer contended generally that section 205 of the Convention Act trumped the non-removable Jones Act claims and, therefore, 28 U.S.C. § 1441(c) did not apply. *Id.* at *1 n.5. The court rejected this argument, holding that removal under section 205 of the Convention Act is "nevertheless governed by the considerations enunciated within §§ 1441-1452."⁶ *Id.* Accordingly, the court held that the Convention did not relieve it of its duty to conduct an analysis under 28 U.S.C. § 1441(c). By contrast, 28 U.S.C. § 1441(c) is not at issue in this case and does not preclude removal as there are no third-party claims. Thus, *Alvarez* does not support the Plaintiff's position because removal here is not improper under 28 U.S.C. 1441(c) and, for reasons stated above, the procedure of removal was not defective.

⁶ The Court further notes that the cases relied upon in *Alvarez* for denying the third-party's attempt to remove the action under section 205 of the Convention Act do not support Plaintiff's argument in this case. First, the case *Transit Casualty Company v. Certain Underwriters at Lloyd's of London* held that the procedure for removal still applies, with limited exception, to cases removed under the Convention Act. 119 F.3d. 619, 624-25 (8th Cir. 1997). Second, the case *In re Ocean Marine Mutual Protection and Indemnity Association*, held that the procedural requirements of section 1446(a) and (b) are generally applicable to cases removed under the Convention Act. 3 F.3d 353, 355-56 (11th Cir. 1993). Neither *Transit Casualty* nor *In re Ocean Marine*, however, involved the question of whether Jones Act claims were removable under the Convention Act.

The Court finds, as other courts have found, that the case may be removed notwithstanding the Jones Act claims. *See, e.g., Acosta v. Norwegian Cruise Line, Ltd.*, 303 F.Supp.2d 1327, 1331 (S.D. Fla. 2003) (holding that a Jones Act claim may be removed under the Convention); *see also Bautista v. Star Cruises & Norwegian Cruise Lines, Ltd.*, 286 F. Supp. 2d 1352, 1366-67 (S.D. Fla. 2003) (removing case involving Jones Act claims); *Varacru v. Royal Carribean Cruises, Ltd.*, No. 07-23040-CV, 2008 WL 649178, *6 (S.D. Fla. Feb. 1, 2008) (same).

B. Removal is Proper Under the Convention Act, and The Court Must Compel Arbitration.

There are four jurisdictional prerequisites for removing a state action under the Convention Act. First, there must be an agreement in writing within the meaning of the Convention; second, the agreement must provide for arbitration in the territory of a signatory of the Convention; third, the agreement must arise out of a legal relationship, whether contractual or not, which is considered commercial; and fourth, there must be a party to the agreement that is not an American citizen, or the commercial relationship must have some reasonable relation with one or more foreign states. *Bautista*, 396 F.3d at 1295 n.7 (citations omitted). The Court must compel arbitration under the Convention unless (i) the four jurisdictional prerequisites are not satisfied, or (ii) one of the Convention's affirmative defenses applies. *Id.* at 1294-95. When deciding a motion to compel arbitration under the Convention, a court conducts "a very limited inquiry." *Id.* at 1294 (citations omitted).

The arguments presented in Plaintiff's Second Remand Motion fail for the same reasons that the Court grants Defendant's Motion to Dismiss and Compel Arbitration – the jurisdictional

prerequisites for the removal under the Convention Act are satisfied, and Plaintiff has not adequately pled an affirmative defense. Looking first at whether the jurisdictional prerequisites are met, only the first and fourth prerequisites are in dispute here. Plaintiff argues that the first prerequisite is not met because she was never given an opportunity to read the SOEA or the CBA, and, therefore, there was no “agreement in writing.” (Second Rem. Mot. at 5-6.) This argument, however, was rejected in *Bautista* and likewise fails here. In *Bautista*, a group of plaintiff-seaman sought to challenge the application of an arbitration clause to their employment contracts claiming, *inter alia*, that they were never specifically notified of the arbitration provision. *Id.* at 1301. The Eleventh Circuit, in rejecting this argument, stated,

Plaintiffs, however, offer no authority indicating that the Convention or the Convention Act impose upon the party seeking arbitration the burden of demonstrating notice or knowledgeable consent. To require such an evidentiary showing in every case would be to make an unfounded inference from the terms of the Convention and would be squarely at odds with a court’s limited jurisdictional inquiry, an inquiry colored by a strong preference for arbitration [W]e find it especially appropriate to abide by the general principal that “[o]ne who has executed a written contract and is ignorant of its contents cannot set up that ignorance to avoid the obligation absent fraud and misrepresentation.”⁷

Id. at 1301 (citing *Vulcan Painters v. MCI Constructors*, 41 F.3d 1457, 1461 (11th Cir. 1995)) (emphasis added). In this case, Plaintiff signed the SOEA and agreed to be bound by the terms and conditions of the CBA.⁸ She recognized that she received a document entitled “Terms and

⁷ For reasons discussed more fully below, the Court finds that there was no fraud or misrepresentation.

⁸ The Court notes that the SOEA was not a long employment contract full of legalese. Instead, it was a single-page document that twice referenced the CBA.

Condition of Employment,” which stated, “Certain employees hired by R.C.C.L., are covered under a Collective Bargaining Agreement. You will be issued a copy of the C.B.A., at sign-on.” Most importantly, Plaintiff acknowledged receipt of the CBA when signing the SOEA. These exact same facts were found to be sufficient to establish an “agreement in writing” in a similar case, *Vacaru v. Royal Caribbean Cruises, Ltd.*, 2008 WL 649178 (S.D. Fla. 2008). Moreover, an agreement in writing to arbitrate exists even where the arbitration language is not stated in the main contract itself but, rather, is contained in a separate contract that is incorporated by reference into the main contract. *See, e.g., U.S. Fidelity & Guar. Co. v. W. Point Contr. Co.*, 837 F.2d 1507 (11th Cir.) (compelling arbitration under a contract that incorporated a subcontract, and the subcontract contained the binding arbitration clause); *Acosta v. Norwegian Cruise Line, LTD*, 303 F. Supp. 2d 1327, 1330 (S.D. Fla. 2003) (finding that a written arbitration agreement existed between the parties where the plaintiff’s employment contract did not expressly include an arbitration agreement, but the contract incorporated by reference a separate agreement that mandated arbitration of disputes). The CBA was expressly incorporated by reference in the SOEA, and Plaintiff agreed to be bound by the terms and conditions of the CBA. (*See* D.E. 2, Ex. A.)

Plaintiff also argues that the fourth jurisdictional prerequisite not is satisfied because seamen’s contracts are not “commercial contracts” within the meaning of the Convention. (Second Remand Motion at 4 n.1). Plaintiff readily admits, however, that the Eleventh Circuit held in *Bautista* that the Convention does indeed apply to seamen’s employment contracts. *See Bautista*, 396 F.3d at 1296-1300. Nonetheless, Plaintiff states she advances the argument expressly for the purposes of “preserving the argument for further review.” The Court finds that

the SOEA is very similar to the employment agreement at issue in *Bautista* - the SOEA is a one-page standard employment agreement stating Plaintiff's position, pay, term of employment, and incorporates by reference a separate document containing an arbitration provision. *See id.* at 1293. Therefore, the Court finds that the SOEA constitutes a commercial agreement within the meaning of the Convention.

Finding that the two disputed jurisdictional prerequisites are satisfied, the Court now turns to Plaintiff's affirmative defenses. The Convention requires courts to enforce an arbitration clause unless the agreement is "null and void, inoperative or incapable of being performed." Convention, art. II(3). The Eleventh Circuit has held that the Convention's limited "null and void" clause must be interpreted to only encompass those situations that can be applied neutrally on an international scale, such as fraud, duress, mistake and waiver. *Bautista*, 396 F.3d at 1302 (citation omitted).

Plaintiff claims that her signature was obtained by fraud and duress. (Second Rem. Mot. at 12-13.) Under Florida law, the elements of fraud are "(1) a false statement concerning a material fact; (2) knowledge by the person making the statement that the representation is false; (3) the intent by the person making the statement [sic] that the representation will induce another to act on it; and (4) reliance on the representation to the injury of the other party." *Lance v. Wade*, 457 So.2d 1008, 1011 (Fla. 1984). Plaintiff contends Defendant made a "false statement" when it represented that it would provide the Plaintiff a copy of the CBA. (Second Rem. Mot. at 13.)⁹ Plaintiff, however, does not offer evidence that she relied on this statement to her

⁹ Plaintiff further alleges that Defendant is engaging in fraud on courts when it presents such arbitration agreements as evidence. (Second Rem. Mot. at 13.) The Court will not

detriment (only that it was false), nor does Plaintiff offer evidence that Defendant made the statement to induce Plaintiff to sign the SOEA. Furthermore, where “there is no evidence that the arbitration clause itself, standing apart from the whole agreement, was induced by fraud, this Court may not consider Plaintiff’s allegations of fraud in the inducement of the contract generally.” *Bautista v. Star Cruises & Norwegian Cruise Lines, Ltd.*, 286 F. Supp. 2d 1352, 1366-67 (S.D. Fla. 2003), *aff’d*, 396 F.3d 1289 (11th Cir. 2005) (internal citation omitted). In sum, Plaintiff fails to adequately allege fraud as an affirmative defense.

Plaintiff also fails to properly plead duress as an affirmative defense under the Convention. While the Court may be sympathetic to Plaintiff’s representation that she signed the SOEA because she had few employment opportunities at home, Plaintiff does not present any evidence that she signed the SOEA involuntarily or against her will. Rather, Plaintiff’s underlying argument is essentially that there was unequal bargaining power between her and the Defendant. This argument was expressly rejected by the Eleventh Circuit and, similarly, fails here. *See Bautista*, 396 F.3d at 1302; *see also Lobo v. Celebrity Cruises, Inc.*, 426 F.Supp.2d 1296, 1309 (S.D. Fla. 2006), *aff’d*, 488 F.3d 891 (11th Cir. 2007).

Finally, Plaintiff asserts that the arbitration agreement is void and unenforceable as contrary to public policy of the United States. (Second Rem. Mot. at 8-12.) Plaintiff appears to argue that because she is entitled to “the benefits and protections of the Jones Act,” the Convention should not be considered. Additionally, Plaintiff argues that enforcing the arbitration

address this allegation as it is not relevant to whether Plaintiff is bound by an arbitration agreement, whether removal under the Convention Act is appropriate in this case, or whether the Court should compel arbitration.

agreement here would be contrary to the public policy underlying the Federal Employers' Liability Act, 45 U.S.C. § 51, *et seq.* ("FELA"). The Court again turns to *Bautista*, where Eleventh Circuit stressed that court must compel arbitration absent a limited number of affirmative defenses, and 'void as against public policy' was not one of them. *Bautista*, 396 F.3d at 1294. The Eleventh Circuit stated that the Convention's "null and void" clause must be narrowly interpreted so that any affirmative defense may be applied neutrally on an international scale. *Id.* at 1302. The 'contrary to public policy of the United States' argument put forth by the Plaintiff could not be applied neutrally on an international scale and, moreover, does not outweigh the policy favoring arbitration.¹⁰ *See id.* at 1295 ("[W]e are mindful that the Convention Act 'generally establishes a strong presumption in favor of arbitration of international disputes.'" (citations omitted). Rather, claims to arbitration are heavily favored and rigorously enforced by courts. *See, e.g., Shearson/Am. Express, Inc. v. McMahon*, 482 U.S. 220, 226 (1987); *Mitsubishi Motors Corp. V. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614, 625 (1985).

The limited inquiry required by this Court is "colored by a strong preference for arbitration." *Bautista*, 396 F.3d at 1301. Based on this strong preference, the satisfaction of all four jurisdictional prerequisites of the Convention, and Plaintiff's failure to properly assert an

¹⁰ The Court further notes that, when presented with the question, courts have consistently found that the policy favoring arbitration under the Convention Act outweighs any policy argument to the contrary. *See, e.g., Bautista*, 396 F.3d 1289 (holding that the seamen exemption under section 1 of the Federal Arbitration Act does not shield crew member's employment contracts from arbitration under the Convention Act); *Acosta*, 303 F.Supp.2d 1327 (holding that FELA does not prohibit a Jones Act claim from arbitration under the Convention); *Lobo*, 426, F.Supp.2d 1296 (denying Plaintiff's argument that a seaman's right to proceed in Federal Court on the Statutory Wage Claim defeats arbitration under the Convention).

affirmative defense under the Convention, the Court finds that Plaintiff agreed to arbitrate her Jones Act claims and that the arbitration clause is not “null and void” under the terms of the Convention. Thus, the Court finds that the removal was proper and that the arbitration clause is enforceable.

Accordingly, it is hereby

ORDERED AND ADJUDGED that Plaintiff’s Motions for Remand (D.E. 9, 21) are DENIED. It is further

ORDERED AND ADJUDGED that Defendant’s Motion to Dismiss and Compel Arbitration (D.E. 2) is GRANTED. Plaintiff is hereby DIRECTED to proceed to arbitrate this dispute as per her employment contract.

DONE AND ORDERED in Chambers at Miami, Florida, this 29th day of September, 2008.



URSULA UNGARO
UNITED STATES DISTRICT JUDGE

copies provided:
counsel of record