



AMERICAN SEAMAN: WARD OF THE ADMIRALTY COURT, BUT SOMETIMES SUBJECT TO ARBITRATION

In *Dahir v Royal Caribbean Cruises Ltd.*¹ a federal district court in the Southern District of Texas recently granted a motion to compel arbitration against an American Jones Act seaman. It found that because the seaman's employment agreement envisaged performance abroad – meaning in international waters between ports at foreign states – arbitration was mandatory.

HFW Houston Partners Jim Brown and Jeanie Goodwin acted for Royal Caribbean Cruises Ltd. (RCCL) in *Dahir*. Arbitration clauses in seamen's employment contracts are difficult to enforce in the United States for many

1. No. 3:16-CV-292, 2017 WL 3287899 (S.D. Tex. Aug. 2, 2017).

“...arbitration is a benefit to employers, maritime and non-maritime alike, when they can reap the savings of consolidating their litigation in one jurisdiction. If your workforce includes Jones Act seamen who are performing their duties in international waters between ports at foreign states or in foreign waters off foreign states, the *Dahir* case provides the blueprint for enforcing arbitration against those seamen.”

reasons, including the statutory prohibition in the Federal Arbitration Act (FAA). But arbitration is a benefit to employers, maritime and non-maritime alike, when they can reap the savings of consolidating their litigation in one jurisdiction. If your workforce includes Jones Act seamen who are performing their duties in international waters between ports at foreign states or in foreign waters off foreign states, the *Dahir* case provides the blueprint for enforcing arbitration against those seamen.

The New York Convention overrides the FAA.

RCCL argued that the New York Convention trumps the FAA's prohibition against enforcement of arbitration clauses in seamen employment contracts.² Although the FAA specifically prohibits enforcement of arbitration clauses in seamen employment contracts, a limited exception exists under the Convention on Recognition and Enforcement of Foreign Arbitral Awards (the New York Convention). That is, when a seaman's contract falls under the New York Convention, the prohibition does not apply and arbitration is mandatory.³

Even where the parties to the contract are both American citizens, if the agreement envisages performance abroad, as seamen's contracts so often do, arbitration is enforceable.

To be enforceable, the arbitration agreement in the seaman's contract must first fall under the New York Convention.

When faced with a seaman's employment contract which calls for arbitration, the court must first consider whether it falls under the New York Convention. Section 202 of the FAA explains when an arbitration agreement falls under the Convention: "An arbitration agreement or arbitral award arising out of a legal relationship, whether contractual or not, which is considered as commercial, including a transaction, contract, or agreement described in section 2 of this title, falls under the Convention."⁴ Therefore before a court can compel arbitration under the Convention Act, the party seeking to enforce the arbitration agreement must first show:

1. The arbitration agreement is in writing

2. The agreement provides for arbitration in the territory of a Convention signatory
3. The agreement arises out of a commercial legal relationship.

If the agreement is between Americans, it must also meet additional requirements.

Section 202 of the FAA introduces an additional requirement when the arbitration agreement is between two citizens of the United States: "An agreement or award arising out of such a relationship which is entirely between citizens of the United States shall be deemed not to fall under the Convention unless that relationship involves property located abroad, envisages performance or enforcement abroad, or has some other reasonable relation with one or more foreign states."⁵ Therefore, in addition to the three requirements set out above, if the arbitration agreement is between two American citizens, the relationship must:

1. Involve property located abroad
2. Envisage performance or enforcement abroad, or

2. 9 USC §§ 1, 2.

3. 9 USC §§ 202, 208.

4. 9 USC § 202.

5. 9 USC § 202.



3. Have some reasonable relation with one or more foreign states.

The roadmap to compelling an American seaman to arbitrate is clear.

To enforce an arbitration clause against a Jones Act seaman, the practitioner must affirmatively check off these requirements:

1. Is the arbitration agreement in writing?
2. Does the agreement provide for arbitration in the territory of a New York Convention signatory?
3. Does the agreement arise out of a commercial legal relationship?
4. If the agreement is between two US citizens, does it involve property located abroad, envisage performance or enforcement abroad, or have some reasonable relation with one or more foreign states?

The *Dahir* court held that planned travel through international waters to a foreign state means that the parties envisaged performance abroad.

RCCL employed Mr. Dahir, an American citizen, as a band leader and guitar player aboard its cruise ship. His contractual employment period included planned sailings to ports on a northern route (including Alaska and British Columbia) and a southern route (including Hawaii, French Polynesia, New Zealand, Australia, Malta Island, Vanuatu, and New Caledonia). The employment agreement between Dahir and RCCL included an arbitration clause requiring arbitration in Florida or Norway.

Mr. Dahir sued RCCL in the US District Court for the Southern District of Texas, Galveston Division, claiming a personal injury sustained while at work on the cruise ship. RCCL moved to compel arbitration.

The parties did not contest the three requirements which made the New York Convention applicable, and the Court easily found that the arbitration agreement was in writing, that the agreement provided for arbitration in

the territory of a New York Convention signatory, and that the agreement arose out of a commercial legal relationship. Instead, the dispute arose regarding whether the relationship between RCCL and Dahir, both citizens of the United States, “envisage[d] performance or enforcement abroad.”⁶

The *Dahir* court relied heavily upon a recent decision by the Eleventh Circuit Court of Appeals on nearly identical facts. In *Alberts v Royal Caribbean Cruises, Limited*⁷ the court analyzed another American seaman’s employment agreement with RCCL. There, Alberts was a musician contracted to sail aboard a RCCL cruise ship amongst various ports on its eastern route (including Florida, the Virgin Islands, St. Martin, and the Bahamas) and its western route (including Florida, Haiti, Jamaica, and Mexico). Alberts’ employment agreement contained an arbitration clause requiring arbitration in Florida or Norway.

In *Alberts*, the first three jurisdictional requirements were also met. The dispute between the parties centered on the fourth requirement. The issue was framed by the district court:

6. 9 USC § 202.

7. 834 F.3rd 1202 (11th Cir. 2016).

The only issue before us is whether Albert's contract "envisages performance... abroad." Alberts argues that the word abroad means "in one or more foreign states" and that because he worked only in international waters, his contract did not envisage performance abroad. Royal Caribbean argues that abroad means anywhere "outside the country," so performance on international waters is performance abroad.⁸

The Alberts court ultimately rejected the definitions put forth by both parties and instead adopted the definition of "in or traveling to or from a foreign state."⁹ The Eleventh Circuit held:

We agree with Alberts that these clauses must be read together, but under our definition of abroad—in or traveling to or from a foreign state — performance abroad does have reasonable relation with a foreign state. The reasonable-relation clause does not compel Alberts's definition of abroad.

Alberts's contract envisaged performance abroad because he worked on a cruise ship that traveled in international waters to foreign ports. Because his contract envisaged performance abroad, the arbitration

clause is enforceable under the Convention.¹⁰

The Galveston court in *Dahir* found this reasoning persuasive. It noted that Dahir signed an employment contract for services he performed upon a ship traveling through international waters to ports at foreign states. He was injured after departing from a foreign state and while traveling through international waters to an ultimate destination at a different foreign state.

The court ultimately held that because the relationship between Dahir and RCCL envisaged performance abroad, the New York Convention compels arbitration.

The *Dahir* court also disposed of the argument that the public policy of protecting seaman is more important than the public policy of enforcing arbitration clauses.

In addressing Dahir's argument that there is a strong public policy in protecting seamen, the court reiterated the public policy favoring the enforcement of arbitration clauses, and noted that it was Dahir's burden to show a "contrary and compelling public interest." The court ultimately found that Dahir did not meet this burden in showing that arbitration is contrary to public policy.

The *Dahir* court also made short shrift of plaintiff's argument that the Jones Act itself prohibits arbitration.

Predictably, Dahir also argued that the Jones Act,¹¹ through the Federal Employers' Liability Act (FELA), prohibits any contract that will enable an employer to exempt itself from liability under the Jones Act. The *Dahir* court pointed out, however, that "[s]ubmitting to arbitration does not constitute a relinquishing of one's rights—instead it merely changes the forum." Indeed, the Fifth Circuit has made clear that arbitration does not force a seaman to forgo the substantive rights afforded by the Jones Act, but merely to submit to their resolution in an arbitral, rather than a judicial forum.¹²

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8. Id. at 1204.

9. Id. at 1205.

10. Id. at 1205 (emphasis added).

11. 46 USC § 30104 (incorporating FELA into the Jones Act); 45 USC § 55.

12. *Terrebonne v. K-Sea Transp. Corp.*, 477 F.3d 271, 278-87 (5th Cir. 2007).

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