Cruise Passage Contracts
Forum Selection and Choice of Law Provisions:
Will U.S. Litigation Since COSTA CONCORDIA Impact International Uniformity?

Mark R. Houck
Houck Anderson P.A.
Miami, Florida
INTRODUCTION AND ISSUES CONSIDERED

- SUBSTANTIAL UNIFORMITY OF INTERNATIONAL LAW FAVORING FORUM SELECTION AND CHOICE OF LAW PROVISIONS
- CRITERIA FOR JUDICIAL VALIDATION OF FORUM SELECTION AND CHOICE OF LAW PROVISIONS
- CURRENT STATUS OF COSTA CONCORDIA INCIDENT
- PASSAGE CONTRACT TERMS AND CONDITIONS
- ITALIAN AND EUROPEAN UNION LAW
- EXPANSION OF CLAIMS RELATED PROVISIONS IN PASSAGE CONTRACTS BEYOND FORUM AND BROADLY STATED CHOICE OF LAW PROVISION
- PENDING U.S. CASES OF NOTE
EUROPEAN UNION

• EU REGULATION No. 44/2001 – JURISDICTION (FORUM SELECTION CLAUSES)
  • PRESUMPTIVELY ENFORCED, GREAT LATITUDE FOR PARTIES TO SPECIFY FORUM BY CONTRACT

• EU REGULATION No. 593/2008 – CHOICE OF LAW PROVISIONS
  • PRESUMPTIVELY ENFORCED PROVIDES GREAT LATITUDE FOR PARTIES TO CHOOSE APPLICABLE LAW BY CONTRACT
UNITED STATES RECOGNITION OF FORUM SELECTION AND CHOICE OF LAW

UNITED STATES

• BREMEN v. ZAPATA (U.S. SUPREME COURT 1972)
  • PRESUMPTION OF ENFORCEMENT OF FORUM SELECTION CLAUSES IN INTERNATIONAL BUSINESS CONTRACTS

• CARNIVAL v. SHUTE (U.S. SUPREME COURT 1991)
  • PRESUMPTION OF ENFORCEMENT OF FORUM SELECTION CLAUSES IN PASSENGER CONTRACTS

• LIPCON v. UNDERWRITERS AT LLOYDS (11TH CIR. 1970)
  • PRESUMPTION OF ENFORCEMENT EQUALLY APPLICABLE TO CHOICE OF LAW CLAUSES
U.S. SUPREME COURT IN BREMEN

• Recognition that in light of present day commercial realities and expanding international trade parochial concepts requiring litigation only in U.S. Courts must be disregarded.

• Trade and commerce in a world market and international waters cannot occur exclusively on U.S. terms, governed by U.S. laws, and resolved in U.S. courts.
SHUTE POLICIES IN FAVOR OF ENFORCEMENT

• CRUISE LINE LEGITIMATE INTEREST IN LIMITING THE AVAILABLE FORUMS

• CONSERVATION OF JUDICIAL AND PERSONAL RESOURCES BY REQUIRING LITIGATION IN AN AGREED FORUM

• REDUCTION OF COST PASSED ON TO PASSENGERS
While U.S. class actions could align with Shute policy considerations, the U.S. Supreme Court has said...

- The policy at the core of the class action mechanism is to overcome the problem that small recoveries do not provide the incentive for any individual to bring an action.
- Yet, the Supreme Court has also identified the principal purpose of the class action as the efficiency and economy of litigation.
THERE IS CURRENTLY AT LEAST ONE PENDING CLASS ACTION...

• LOBATON v. CARNIVAL, 12-CV-00598 (ND Ill.)
  • FILED AS A CLASS ACTION
  • LOBATON WAS A CREW MEMBER BUT PLEAD GENERALLY, THUS COULD INCLUDE PASSENGERS
  • UNSPECIFIED NUMBER OF PLAINTIFFS
  • CERTIFICATION OF THE CLASS PENDING
CLASS ACTION AS AN ALTERNATIVE

WAIVER PROVISIONS IN PASSAGE CONTRACTS

- CRUISE PASSAGE CONTRACTS HAVE CLASS ACTION WAIVERS
- NO APPELLATE COURT HAS PASSED ON THE ENFORCEABILITY CLASS ACTION WAIVERS IN CRUISE PASSAGE CONTRACTS, BUT...
  - U.S. COURTS HAVE CONSISTENTLY ENFORCED THESE WAIVERS FOUND IN CONJUNCTION WITH ARBITRATION AGREEMENTS BASED ON U.S. PUBLIC POLICY FAVORING ARBITRATION AGREEMENTS (FEDERAL ARBITRATION ACT)
  - STRONG PRESUMPTION IN FAVOR OF ENFORCING FORUM SELECTION CLAUSES MAY SIMILARLY SUPPORT ENFORCEMENT OF CLASS ACTION WAIVERS
EUROPEAN UNION REQUIREMENTS

FORM – EU Regulation No. 44/2001
• FORUM SELECTION CLAUSE MUST BE IN WRITING
• CHOICE OF LAW CLAUSE MUST BE CLEARLY EXPRESSED IN WRITING

SUBSTANCE – EU Regulation No. 593/2008
• “..the law of any country specified by this regulation may be refused only if such application is manifestly incompatible with the public policy of the forum.”
UNITED STATES SHUTE TEST FOR FORUM SELECTION CLAUSES

FORM
• ADEQUATE NOTICE
• REASONABLE OPPORTUNITY TO REJECT

EXAMPLES
• Physical characteristics (bold, set out, repeated references) of the ticket provided adequate notice. CORNA v. AMERICAN HAWAII, 794 F.Supp. 1005 (D. Haw. 1992)
• Simply receiving the passenger contract within the penalty period was insufficient by itself to provide no reasonable opportunity to reject. NORWEGIAN v. CLARK, 867 So.2d 547 (Fla. Dist. Ct. App. 2003)
JUDICIAL REQUIREMENTS OF FORM AND SUBSTANCE

UNITED STATES SHUTE TEST FOR FORUM SELECTION CLAUSES

SUBSTANCE
• FORUM CANNOT BE SELECTED TO DISCOURAGE CLAIMS
• NO FRAUD, OVERREACHING

EXAMPLES
• Greek forum selection clause upheld, need for travel did not discourage claims and no fraud apparent. EFFRON v. SUN LINE CRUISES, 67 F.3d 7 (2nd Cir. 1995)
• French forum selection clause upheld, not sufficiently “remote alien forum” to discourage claims. SEUNG v. REGENT, 393 Fed. Appx. 647 (11th Cir. 2010)
HODES v. SNC ACHILLE LAURO (3RD Cir. 1988)

- Italian flagged ACHILLE LAURO hijacked off the Mediterranean coast of Egypt by Palestinian terrorists
  - Passage contract included a forum selection and choice of law clauses specifying Naples, Italy and Italian law
- “American passengers simply do not carry American public policy on their backs wheresoever they may venture.”
- “We leave it for Italian law and Italian courts to allocate the liabilities of this Italian dispute.”
- “Heavy burden” to invalidate forum selection clause on public policy grounds not satisfied by potential enforcement of limitation provisions
COMPARISON TO OTHER TRAGIC EVENTS

TITANIC

• 14 April 1912
• Atlantic Ocean
• 908 Crew
• 1,316 Passengers
• 1,514 Deaths
COMPARISON TO OTHER TRAGIC EVENTS

EMPRESS OF IRELAND

- 29 May 1914
- St. Lawrence River
- 420 Crew
- 1,057 Passengers
- 1,012 Deaths
COSTA’S CONTRACT TERMS

• “All claims, controversies, disputes, suits and matters of any kind...shall be instituted only in the courts of Genoa, Italy... Italian law shall apply to any such proceedings.”

• GENOA, ITALY SELECTED AS THE FORUM

• CHOICE OF ITALIAN LAW
ITALIAN NAVIGATION CODE: LIMITATION OF LIABILITY

- LIMITATION OF LIABILITY DIFFERS SUBSTANTIALLY
  - Limitation fund no less than 1/5 and no greater than 2/5 sound value of the vessel

- UK LIMITATION OF LIABILITY PER CONVENTION ON LIMITATION OF LIABILITY FOR MARITIME CLAIMS 1996
  - Provides minimum limitation fund based on tonnage
  - Limits claims for PI or death to 3.02 million SDRs plus additional amounts based on tonnage

- U.S. LIMITATION OF LIABILITY PER STATUTE
  - Limited to post accident value of vessel and pending freight
  - PI and death claims may receive additional $420/ton
CONVENTION ON TRAVEL CONTRACTS (CCV), 1970

- Convention provides for approximately €600,000 (converted from 50,000 Germinal Golden Francs)
- Ratified by Italy in its own right in 1979
- Limitation of compensation not available where:
  - “Wrongful act or default committed... with the intention of causing the loss or damage or in a manner implying either a deliberate disregard or inexcusable lack of awareness of the prejudicial consequences which might result from such conduct.”
OTHER CONSIDERATIONS

• ITALIAN NAVIGATION CODE HAS NO PROVISION FOR CAP ON RECOVERABLE DAMAGES IN A PARTICULAR CASE

• SOME COMMENTATORS HAVE OBSERVED A TREND IN ITALIAN COURTS TO IGNORE CCV CAPS AND AWARD EVEN HIGHER DAMAGES
CONTRACTUAL INVOCATION OF INTERNATIONAL LAW

THE COSTA CONTRACT ALSO PROVIDES

- ATHENS CONVENTION ‘74 AND THE ‘76 PROTOCOL
  - Not ratified by Italy or EU though 2002 Protocol to take effect (in Italy) on 31 December 2012 via EU Reg. 392/2009
  - Provides for individual limitation on personal injury or death claims of approximately 46,666 SDRs
  - 2002 Protocol increases limitation to 400,000 SDRs
  - Limitation not available for gross negligence
    - “An act or omission... done with the intent to cause such damage, or recklessly and with knowledge that such damage would probably result.”
THE COSTA CONTRACT ALSO PROVIDES

- CONVENTION ON TRAVEL CONTRACTS (CCV), 1970
  - EU implementing legislation only specifies “reasonable” limits on PI and death claims
  - Convention provides for approximately €600,000 (converted from 50,000 Germinal Golden Francs)
THE COSTA CONTRACT ALSO PROVIDES

- CONVENTION ON LIMITATION OF LIABILITY FOR MARITIME CLAIMS 1976
  - Overall fund limitation based on tiered SDR per ton system
  - Overall limitation fund for PI and death claims approximately $70,000 multiplied by number of passengers the vessel can carry, up to maximum of approximately $38 million
  - Limitation not available for gross negligence
    - “Act or omission committed with the intent to cause such loss, or recklessly with the knowledge that such loss would probably result.”
FINALLY, THE COSTA CONTRACT ALSO PROVIDES:

• CARRIER MAY ENFORCE THE PROVISION PROVIDING THE GREATEST LIMITATION AND IMMUNITY, AND...

• IN THE EVENT THE LAW OF THE FORUM INVALIDATES THE MOST FAVORABLE LIMITATIONS, CARRIER MAY INVOKE THE MOST FAVORABLE REMAINING LIMITATION
SHUTE FAIRNESS TEST IS SATISFIED AS TO BOTH FORM AND SUBSTANCE

• Adequate notice from clearly drafted forum selection clause
• Reasonable opportunity to reject as contract provided concurrent with purchase of ticket
• Litigation in Italy does not discourage claims
• No fraud or overreaching apparent
LIABILITY CAPS NOT SO SEVERE AS TO OFFEND U.S. PUBLIC POLICY

- Courts traditionally will not refuse to dismiss of U.S litigation simply because the designated forum is less favorable
- Italian forum clearly provides more than adequate remedies
  - Substantial limitation fund provided under Italian Navigation Code
  - Possible application of CCV with limits up to €600,000
  - Limitation unavailable in the event of gross negligence
ATTEMPTS TO APPLY U.S. GENERAL MARITIME LAW

• **WARRICK v. CARNIVAL, No. 12-CV-61389 (SD Fl.)**
  - Representations made by cruise line to induce purchase amounted to fraud
  - Reasonable notice not provided by on-line contract
  - Allege grossly negligent or intentional conduct to avoid limitations on damages

• **ABEID-SABA v. CARNIVAL, No. 12-26076 CA 30 (Fl. Cir. Ct.)**
  - Reasonable notice not provided by on-line contract
  - Allege grossly negligent or intentional conduct to avoid limitations on damages

• **LOBATON v. CARNIVAL, 12-CV-00598 (ND Ill.)**
  - Class action though no mention of contractual waiver
  - Allege grossly negligent or intentional conduct to avoid limitations on damages
CONCLUSIONS

U.S. LITIGATION RESULTING FROM COSTA CONCORDIA INCIDENT WILL NOT EFFECT INTERNATIONAL UNIFORMITY

• U.S. LITIGATION SHOULD BE DISMISSED BASED ON PRESUMPTION IN FAVOR OF ENFORCING FORUM SELECTION AND CHOICE OF LAW CLAUSES IN THIS FORM OF INTERNATIONAL COMMERCE

• PURSUANT TO ENFORCEABLE TERMS OF THE COSTA CONTRACT, CLAIMANTS SHOULD HAVE PROVIDED NOTICE OF CLAIM AT THIS POINT AND THE ONE YEAR LIMITATION ON CLAIMS IS FAST APPROACHING

• APPLICATION OF DAMAGE LIMITATION PROVISIONS ARE WITHIN THE PROVINCE ITALIAN COURTS AND SHOULD NOT INFLUENCE U.S. COURT DECISIONS
THANK YOU

FOR FURTHER INFORMATION PLEASE CONTACT:

MARK HOUCK
HOUCK ANDERSON P.A.
mhouck@houckanderson.com

LOOK FOR THIS PRESENTATION AND FOLLOW-ON ARTICLES AT:
WWW.HOUCKANDERSON.COM