TURNER V. COSTA CROCIERE S.P.A.: ELEVENTH CIRCUIT AFFIRMS DISMISSAL UNDER THE *FORUM NON CONVENIENS* DOCTRINE DESPITE UNPRECEDENTED GLOBAL PANDEMIC

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In *Turner v. Costa Crociere S.p.A.*, the United States Court of Appeals for the Eleventh Circuit addressed whether a district court properly dismissed a putative class action claim arising from a COVID-19 outbreak on a cruise ship based on the *forum non conveniens* doctrine.[1] The plaintiff, Paul Turner, ("Turner") sued the defendants—Italian cruise operator Costa Crociere S.p.A. and its American subsidiary Costa Cruise Lines—alleging that their negligence caused a COVID-19 outbreak among the passengers aboard the *Costa Luminosa* transatlantic cruise ship.[2] The United States District Court for the Southern District of Florida dismissed Turner's suit because the defendants had an enforceable forum selection clause that required all claims against the defendants to be litigated in Italy.[3] On appeal, the Eleventh Circuit affirmed the district court's dismissal, and held that (1) the forum selection clause was enforceable, and (2) the district court did not err in its *forum non conveniens* analysis.[4]

On March 5, 2020, Turner loaded aboard the *Costa Luminosa* transatlantic cruise ship operated by the defendants.[5] By purchasing his ticket for the cruise, Turner agreed to the terms of the "General Conditions of Passage Ticket Contract."[6] This contract contained a forum selection clause which stated that "[a]ny claim, controversy, dispute, suit, or matter of any kind whatsoever arising out of, concerned with, or incident to any Cruise or in connection with this Contract shall be instituted only in the courts of Genoa, Italy," and that Italian law would control such proceedings. [7]

On February 29—during the voyage immediately prior to Turner's cruise—the *Costa Luminosa* evacuated a 68-year-old passenger with COVID-19 symptoms who later tested positive and died from the virus.[8] The defendants did not know about the passenger's positive test result until after

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[1] Turner v. Costa Crociere S.p.A., 9 F.4th 1341 (11th Cir. 2021).

[2] *Id.* at 1344.

[3] *Id.*

[4] *Id.* at 1349.

[5] *Id.* at 1344.

[6] *Id.*

[7] *Turner*, 9 F.4th at 1344.

[8] *Id.*

March 8, three days after Turner's cruise began.[9] Yet, the defendants sent an email to Turner and his fellow passengers the night before his cruise was scheduled to depart addressing COVID-19 concerns and promised to make "the most appropriate decisions and take the most adequate measures to ensure 'the highest level of safety for its guests and crewmembers."[10] The defendants claimed the ship was safe; however, Turner alleged that the defendants failed to ensure that the ship had been "sufficiently cleaned after the [previous] COVID-19 positive passenger disembarked."[11] Additionally, Turner alleged that the defendants failed to prevent passengers with COVID-19 symptoms or who had recently travelled to high-risk areas from boarding the ship.[12]

Three days into Turner's cruise, the ship was forced to dock in Puerto Rico to take a couple exhibiting COVID-19 symptoms to the hospital.[13] The other passengers did not learn about the evacuated couple until the ship had already departed from Puerto Rico, nor did the defendants immediately implement any isolation or quarantine procedures.[14] Only after several other passengers subsequently developed COVID-19 symptoms did the captain instruct all travelers on the ship to quarantine.[15] When all the passengers finally disembarked the *Costa Luminosa* on March 19, "thirty-six of the seventy-five passengers tested positive for COVID-19."[16]

After testing positive himself, Turner filed suit against the defendants asserting claims "arising under general maritime law for negligence, negligent misrepresentation, negligent infliction of emotional distress, and intentional infliction of emotional distress, as well as a claim for misleading advertising under Fla. Stat. § 817.41."[17] In response, "the defendants filed a motion to dismiss on *forum non conveniens* grounds, arguing that the forum selection clause required Turner to litigate his claims in Italy."[18] Siding with the defendants, the district court found that "Turner's claims fell within the scope of the forum selection clause; that the forum selection clause was enforceable, did not contravene public policy, and was not fundamentally unfair; and that the *forum non conveniens* factors as modified by the forum selection clause favored dismissal."[19] Turner did not challenge on appeal

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[9] *Id.*
[10] *Id.* (internal quotation marks omitted).
[11] *Id.*
[12] *Id.*
[13] *Turner*, 9 F.4th at 1344.
[14] *Id.*
[15] *Id.* at 1344–45.
[16] *Id.* at 1345.
[17] *Id.*
[18] *Id.*
[19] *Turner,* 9 F.4th at 1345.

whether his claims fell within the forum selection clause's scope, but rather argued that (1) the clause was unenforceable, and (2) "since the forum selection clause does not control, the district court erred by engaging in the modified *forum non conveniens* analysis that applies in the presence of a valid forum selection clause pursuant to *Atlantic Marine Const. Co. v. U.S. Dist. Ct. for W. Dist. of Texas . . . .*"[20]

First, the Eleventh Circuit reviewed de novo the district court's finding that the forum selection clause here was enforceable.[21] Under federal law,[22] "[f]orum selection clauses are presumptively valid and enforceable unless the plaintiff makes a strong showing that enforcement would be unfair or unreasonable under the circumstances."[23] For a plaintiff to show that enforcement would be unfair or unreasonable, he must demonstrate that "(1) the clause was induced by fraud or overreaching; (2) *the plaintiff would be deprived of its day in court because of inconvenience or unfairness*; (3) the chosen law would deprive the plaintiff of a remedy; or (4) *enforcement of the clause would contravene public policy*."[24]

Plaintiffs relying on the second exception to this presumption bear the heavy burden of proving "that trial in the contractual forum will be so gravely difficult and inconvenient that [the plaintiff] will for all practical purposes be deprived of his day in court."[25] Here, Turner argued that enforcing the forum selection clause would be inconvenient and unfair because he and the putative class members would be forced to travel to Italy to litigate their claims, which would "significantly expose (and/or increase) the risk of complicating their [COVID-19] symptoms and/or contracting COVID-19 again, an inconvenience that was unforeseeable due to the unique nature of the COVID-19 pandemic."[26] However, the Eleventh Circuit found Turner's argument unpersuasive because he failed to establish that "he would have to travel to Italy in order to pursue his case."[27] Rather, the court relied on an affidavit from an Italian attorney produced by the defendants, which claimed:

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[20] *Id.* (citing Atl. Marine Const. Co. v. U.S. Dist. Ct. for W. Dist. of Tex., 571 U.S. 49, 60–66 (2013)).

[21] *Id.*

[22] "In this case arising under federal general maritime law, federal law determines the enforceability of the forum selection clause." *Id.*

[23] *Id.* (quoting Rucker v. Oasis Legal Fin., L.L.C., 632 F.3d 1231, 1236 (11th Cir. 2011) (internal quotation marks omitted).

[24] *Id.* (quoting *Rucker*, 632 F.3d at 1236) (emphasis added) (internal quotation marks omitted).

[25] *Turner,* 9 F.4th at 1345 (quoting Bremen v. Zapata Off-Shore Co., 407 U.S. 1, 17–18(1972)).

[26] *Id.* at 1346 (internal quotation marks omitted).

[27] *Id.* (citing Effron v. Sun Line Cruises, Inc., 67 F.3d 7, 11 (2d Cir. 1995)) ("A plaintiff may have his 'day in court' without ever setting foot in a courtroom.").

> Turner would not be required to attend routine proceedings in person and that even for those events that required attendance, he could possibly either arrange for appointment of a special attorney to attend on his behalf or request that the event take place in the United States via international rogatory.[28]

Because Turner did not dispute these assertions, the court narrowly held that Turner did not offer sufficient evidence to meet his heavy burden of proving that "pursuit of his claims in Italy would subject him to fundamental unfairness."[29]

Turner additionally argued that the forum selection clause is unenforceable because it violates public policy by "limit[ing] the [d]efendants' liability for negligently causing personal injury."[30] Specifically, Turner claimed that enforcing the clause would violate 46 U.S.C. § 30509(a)[31] because "[i]t limits the forum for his claims to Italy, . . . Italy has prohibited foreign travel due to COVID-19[,] and medical complications from COVID-19 would make it unfeasible for him to travel there anyway."[32] The court rejected this argument for two reasons. First, the court reiterated that Turner has failed to show how his "travel and medical issues" prevent him from litigating his claims in Italy to "overcome the presumption in favor of forum selection clause enforceability."[33] Second, the Eleventh Circuit 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."[34] Based on this precedent, the court found that enforcing the defendants' forum selection clause would not contravene public policy, and thus affirmed the district court's determination that the clause is enforceable.[35]

The Eleventh Circuit then addressed the second issue of whether the district court abused its discretion by allegedly failing to apply the proper *forum non conveniens* analysis.[36] Generally, dismissal under the *forum non*

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[28] *Id.*
[29] *Id*.
[30] *Id.* at 1347.
[31] 46 U.S.C. § 30509(a) provides that "a vessel transporting passengers . . . between a port in the United States and a port in a foreign country, may not include in a regulation or contract a provision limiting . . . the liability . . . for personal injury . . . ." *Turner,* 9 F.4th at 1347.
[32] *Id.*
[33] *Id.*
[34] *Id.*
[35] *Id.*
[36] *Turner,* 9 F.4th at 1347. To reverse a decision granting a motion to dismiss based on *forum non conveniens*, there must be a "clear abuse of discretion." *Id.*

conveniens doctrine requires the movant to show that "(1) an adequate alternative forum is available, (2) the public and private factors weigh in favor of dismissal, and (3) the plaintiff can reinstate his suit in the alternative forum without undue inconvenience or prejudice."[37] However, when a forum selection clause exists, "the plaintiff bears the burden of establishing that transfer to the forum for which the parties bargained is unwarranted."[38] Additionally, "[a] binding forum-selection clause requires the court to find that the *forum non conveniens* private factors entirely favor the selected forum."[39] Further, the court noted that "a valid forum-selection clause [should be] given controlling weight in all but the most exceptional cases."[40]

Turner argued that the district court abused its discretion by (1) applying the incorrect *forum non conveniens* analysis, and (2) failing to consider the public factor of "unfairness of burdening citizens in an unrelated forum with jury duty."[41] The court first noted that because the forum selection clause is enforceable, the district court's "refus[al] to defer to [Turner's] chosen forum and . . . [determination that] the private interest factors . . . weigh[ed] in favor of the Italian forum. . . . was consistent with—indeed, required by—the modified approach set forth in *Atlantic Marine*."[42] Second, the court explained that district courts are not obligated to consider all public factors when analyzing a *forum non conveniens* dismissal; "they may choose to discuss only those that are *relevant*."[43] Here, the court found that the district court properly considered the following relevant factors:

> The district court carefully considered several public factors including the administrative difficulties associated with the Southern District of Florida's busy docket . . . the interest of the United States in making sure [its] citizens generally have access to an American forum, Italy's interest in adjudicating claims related to its tourism industry, the likely need to apply Italian law based on the Contract's choice-of-law clause, and the fact that key events took place not in Florida but on board the *Costa Luminosa* as it sailed across the Atlantic.[44]

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[37] *Id.* (quoting GDG Acquisitions, LLC v. Gov't of Belize, 749 F.3d 1024, 1028 (11th Cir. 2014)) (internal quotation marks omitted).
[38] *Id.* at 1348 (quoting Atl. Marine Const. Co. v. U.S. Dist. Ct. for W. Dist. of Tex., 571 U.S. 49, 63 (2013)). The court noted that the plaintiff's choice of forum has no bearing on this analysis. *Id.*
[39] *Id.* (quoting *GDG Acquisitions*, 749 F.3d at 1029) (internal quotation marks omitted).
[40] *Turner*, 9 F.4th at 1348 (quoting *Atl. Marine,* 571 U.S. at 63) (alteration in original) (internal quotation marks omitted).
[41] *Id.* (citing Piper Aircraft Co. v. Reyno, 454 U.S. 235, 241 n.6 (1981)).
[42] *Id.*
[43] *Id.* (emphasis in original).
[44] *Id.*

Since the Eleventh Circuit found that the district court's analysis of the relevant public factors was "thorough and persuasive," it concluded that district court did not abuse its discretion in dismissing Turner's claims.[45]

In *Turner*, the Eleventh Circuit affirmed the lower court's dismissal of Turner's claims under the *forum non conveniens* doctrine because the forum selection clause at issue was enforceable, and thus the lower court applied the proper analysis to determine whether to grant dismissal.[46] This case is notable because while the emergence of the COVID-19 pandemic resulted in unforeseen travel difficulties and atypical litigation procedures, the Eleventh Circuit here declined to find that the risks associated with traveling during a global pandemic merited deviation from the heavy burdens of proof involved in challenging a *forum non conveniens* dismissal. However, it is important to note that the court emphasized its holding here on whether enforcing a forum selection clause would be unfair or inconvenient is narrow given the particular circumstances of this case. Here, the court determined that Turner did not offer enough evidence to prove that enforcing the clause would deny him his "day in court" for one basic reason: "he did not establish that he would have to travel to Italy in order to pursue his case."[47]

[45] *Turner*, 9 F.4th at 1348. Furthermore, the court noted that there would be no burden in summoning Italian jurors because Italy has significant interest in this suit. *Id.* at 1349.
[46] *Id.* at 1349.
[47] *Id.* at 1346.