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# Arbitrating Seamen's Personal Injury Claims

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An injured seaman typically enjoys a trial by jury despite admiralty's more traditional 'bench' trial. However, arbitration of a seaman's injury claim is in a whole different boat. While arbitration to resolve domestic and international commercial maritime disputes is quite common in New York with the Society of Maritime Arbitrators, Inc. (SMA), seamen's injury claims are rarely arbitrated.[1]

The seaman's right "to bring a civil action at law, with the right of trial by jury, against the employer" was codified in the Jones Act. 46 U.S.C. §30104. Pursuant to the Jones Act, a seaman may demand a jury trial despite Rule 38(e) of the Federal Rules of Civil Procedure ("Admiralty and Maritime Claims"), which specifically states that "these rules do not create a right to a jury trial on issues in a claim that is an admiralty or maritime claim under Rule 9(h)." The Jones Act was enacted by Congress in 1920 in response to several U.S. Supreme Court cases which had precluded seamen from recovering against their employers for negligence of the master or owner of the vessel.

## Seaman Status

The scope of who qualifies as a 'seaman' has been expanded over the years. The test for 'seaman' status was articulated by the U.S. Supreme Court in *Chandris v. Latsis*, 515 U.S. 347 (1995). What is required is "an employment-related connection to a vessel in navigation," and the worker must contribute either to the function of the vessel (or an identifiable group of vessels) or the accomplishment of its mission that is substantial in both its duration and its nature. Thus, under this test, anyone from the ship's captain, mate, steward, engineer, or deckhand, qualifies as a seaman, even a photographer or hairdresser aboard a cruise ship.[2]

A seaman's employment contract, especially for those employed aboard a cruise ship, often contains a clause requiring arbitration to resolve disputes arising out of or related to employment. The Federal Arbitration Act (FAA) and case law interpreting it create a strong federal policy in favor of arbitration.[3] Section 2 of the FAA states that an agreement to arbitrate "shall be valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract." 9 U.S.C. §2. Indeed, according to the U.S. Court of Appeals for the Second Circuit, the FAA reflects a legislative recognition of "the desirability of

arbitration as an alternative to the complications of litigation."[4] However, maritime personal injury attorneys frown upon arbitration because of its binding nature, i.e., being stuck with the arbitrator's ruling with no right to appeal, and no jury.

An arbitration clause contained in a seaman's pre-employment contract is barred by Section 1 of the FAA, 9 U.S.C. §1. Section 2 of the FAA specifically enforces arbitration agreements contained in 'maritime transactions' or 'commerce.' But, Section 1 limits the nature of "maritime transactions" that are subject to arbitration and specifically carves out an exemption for "contracts of employment of seamen, railroad employees, or any other class of workers engaged in foreign or interstate commerce."

In *Circuit City Stores v. Adams*, 532 U.S. 105, 121 (2001), the Supreme Court explained that, at the time of the FAA's enactment, Congress had already enacted various statutes governing the resolution of seaman disputes. Thus, the court concluded that "it is reasonable to assume that Congress excluded 'seaman' and 'railroad employees' from the FAA for the simple reason that it did not wish to unsettle established or developing statutory dispute resolution schemes covering specific workers."

## Clever Arguments

To sidestep the strict rule against arbitration clauses in an employment contract, some parties have reached agreements to arbitrate after an injury occurs. This was accepted by the Second Circuit in 2010 in *Harrington v. Atlantic Sounding Co.*, which involved a post-injury agreement to arbitrate signed by a seaman in return for cash advances against his claim.[5] The Harrington court concluded that a post-accident arbitration agreement is enforceable because it is not a "contract of employment" between the parties and thus not captured by the FAA's 'seamen's exemption.'

Prior to *Harrington*, at least two other courts in New York determined that a seaman's agreement to arbitrate an injury claim after the injury occurs in exchange for certain consideration, was not barred by the Federal Arbitration Act.[6]

Many other courts are following suit and enforcing arbitration agreements in a seaman's post-injury contract by distinguishing 'post-injury' contracts from contracts of employment. Typically, the quid pro quo for agreeing to post-accident arbitration is the employer or vessel owner's advancement of certain payments to the seamen such as wages.

In the U.S. Court of Appeals for the Fifth Circuit, one vessel owner argued that a seaman employed solely upon a stationary oil rig in the Gulf of Mexico was required to arbitrate his injury claim pursuant to the terms of the employment contract, because he was not engaged in "interstate commerce," as set forth in the FAA. The Fifth Circuit did not take the bait. The court held that every seaman's employment contract is exempt from arbitration, regardless of whether or not the seaman is engaged in interstate commerce.[7]

Another exception to the FAA's exemption for seamen employment contracts are international agreements entered into between a foreign seaman and a foreign employer or shipowner. Such personal injury arbitrations are enforceable pursuant to the United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards (Convention).[8] While the Second Circuit has not weighed in on this subject, the Southern District of New York aired its opinion in

an injury case involving a Romanian citizen employed aboard a cruise line as a steward.[9] The foreign seaman's agreement to arbitrate was contained in the employment contract but, because it was international in scope and thus governed by the Convention (not the FAA), it was enforceable.[10]

Recently, in *Rutledge v. NCL (Bahamas)*, a female photographer employed aboard a foreign-flag cruise ship challenged a pre-employment arbitration clause with respect to certain of her claims. The Southern District of Florida held that the foreign seaman's claims for negligence, unseaworthiness and failure to pay maintenance and cure fell squarely within the vessel owner's arbitration provision and compelled arbitration of same. Due to the international scope of the contract, it was not governed by the FAA's seaman's arbitration exemption. However, the seaman had also asserted separate claims against her employer for sexual harassment and sexual assault.

Referring to the wording of the arbitration clause at issue, the court determined that nothing about sexual harassment or sexual assault allegations 'relate to,' 'arise out of' or were 'connected with' her duties aboard ship. As a result, the court concluded that claims stemming from sexual harassment and sexual assault did not sufficiently relate to employment as a ship's photographer and would exist even if plaintiff were not an employee, such as a guest aboard the ship.[11] Thus, the court extracted these claims from those that were arbitrable.

To further challenge arbitration, seamen have attempted to invoke their age-old status as "wards of the admiralty." This was the issue presented in *Schreiber v. KC Transp. Corp.*, 9 N.Y.3d 331 (N.Y. 2007). The "ward of the admiralty" doctrine was adopted in 1823 by Justice Joseph Story in *Harden v. Gordon*, 11 F. Cas. 480, 485 (D. Me. 1823). Interestingly, today's seamen may not warrant this antiquated protection. As one court noted, seamen today are as "intelligent and responsible as most others." *Schreiber* at 340.

The court in *Schreiber* acknowledged that the "ward of the admiralty" doctrine has shown signs of erosion, and determined that such status does not outweigh the policy favoring arbitration. The seaman claimed that the burden should shift to the vessel owner/employer to establish the enforceability of the arbitration clause. The argument was that an arbitration agreement is invalid unless it is shown to be fair to the seaman and untainted by deception or duress by the vessel owner. Nonetheless, the Schreiber court concluded that the burden does not shift by virtue of 'ward of the court' status but, rather, the burden always remains on the party challenging the enforceability of an arbitration agreement to show grounds for its revocation. Id.

Due to the transient nature of the occupation, a seaman's employment contract often calls for jurisdiction or arbitration overseas, thus making it difficult for U.S.-based admiralty attorneys to represent a foreign seaman locally under such parameters. Accordingly, while arbitration clauses may be disfavored among the maritime personal injury bar, undoubtedly a clause requiring arbitration in the United States would be preferable to one that requires arbitration, for example, in the Philippines (home of a majority of merchant seamen).

## Conclusion

Arbitration of commercial maritime disputes is a seaworthy forum particularly before a tribunal of marine experts such as the SMA. However, personal injury arbitrations called for in a seaman's pre-employment contract are still barred by the FAA. As demonstrated herein, some vessel owners are creating arbitration opportunities by advancing new arguments to avoid

statutory preclusions and to replace antiquated notions with current realities.

**Endnotes:**

1. Members of the SMA are required to have commercial shipping backgrounds and expertise. The SMA will also arbitrate marine-related personal injury claims. See, e.g., *Great Elephant Corp. v. CPC Corp*. No. 4197, 2012 WL 6968924 (S.M.A.A.S.) (Dec. 14, 2012); *APM Terminals N. Am. v. Horizon Lines*, No. 4169, 2012 WL 1143462 (S.M.A.A.S.) (Feb. 28, 2012).

2. *Maharamas v. American Export Isbrandtsen Lines*, 475 F.2d 165 (2d Cir. 1973).

3. The Federal Arbitration Act (FAA) was enacted in 1925 and codified in 1947 as Chapter 1 of Title 9 of the U.S. Code. Pub. L. No. 80-392, 61 Stat. 669 (1947) (codified as 9 U.S.C. §§1-16).

4. *Genesco v. T. Kakiuchi & Co.*, 815 F.2d 840, 844 (2d Cir. 1987).

5. *Harrington v. Atlantic Sounding Co*., 602 F.3d 113, 122 (2d Cir. 2010).

6. *Barbieri v. K-Sea Transp. Corp*., 566 F.Supp.2d 187, 194, 2008 A.M.C. 2176, 2185 (E.D.N.Y. 2008); *Schreiber v. KC Transp. Corp.*, 9 N.Y.3d 331 (N.Y. 2007),

7. *Brown v. Nabors Offshore Corp*., 339 F.3d 391 (5th Cir. 2003).

8. The Convention which addressed international arbitration agreements, was signed in 1958 and codified in 1970 as Chapter 2 of Title 9 of the U.S. Code. Pub. L. No. 91-368, 84 Stat. 692 (1970) (codified as 9 U.S.C. §§201-208).

9. *Dumitru v. Princess Cruise Lines*, 732 F.Supp.2d 328 (S.D.N.Y. 2010).

10. Id. at * 346; see also *Bautista v. Star Cruises*, 396 F.3d 1289 (11th Cir. 2005) (arbitration provision contained in employment contract of Filipino crew member aboard cruise ship was governed by the Convention and thus not shielded by exception contained in FAA).

11. *Rutledge v. NCL (Bahamas)*, #14-23682 dated Feb. 3, 2015 (S.D.Fla. 2015). See also *Doe v. Princess Cruise Lines*, 657 F.3d 1204 (11th Cir. 2011) (holding that plaintiff's claims against the cruise lines—stemming from rape of plaintiff, a bar server, were not subject to arbitration).

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