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Post-Injury Arbitration Agreements Leaving Seamen High and Dry

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POST-INJURY ARBITRATION AGREEMENTS LEAVING SEAMEN HIGH AND DRY

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Table of Contents

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I. INTRODUCTION

Imagine that you are working aboard a ship as an engineer and one of your tasks is to lift a 122-pound piece of steel. While lifting the steel you sustain an injury to your lower back, neck, and hands. After you are injured, the captain of your vessel takes you ashore and sends you back to your home state of Louisiana. Following the injury, you experience persistent difficulty obtaining the basic quasi-contractual rights of maintenance and cure from your employer. As part of the maintenance and cure, the company is obligated to cover your lodging, utilities, and meals, as well as pay cure for your medical expenses. Now imagine that your employer gives you $20 per day to "cover" maintenance. Not only are you injured and cannot work, but now you are not able to support yourself or your family. Your new reality is that you are barely able to live, and you cannot work because of the injuries that you sustained. In addition, your employer has been notified by your medical team that you have sustained what they consider to be "career-ending" injuries. Your employer then decides to take advantage of the situation and, instead of trying to settle the claim with you or go through the court system, they ask you to sign an arbitration agreement. As you read the document, contemplating whether you should sign it, you wonder what all the legal jargon in the document means and if your rights could be violated by signing the agreement. You hesitantly sign the document, blissfully unaware that the arbitration agreement that you just signed waived your right to a trial by jury afforded to you by the Jones Act. Thus, you have agreed to enter into a binding agreement with an arbitrator.[2] While this is an extreme example in which the employer refused to pay maintenance and cure; it is representative of a real issue that injured seamen face. Courts throughout the country have dealt with fact patterns very similar to the one described above.

This comment explores the rickety plank that seafarers are forced to walk when navigating the arbitration process. First, this comment will explore the Federal Arbitration Act and how it pertains to seamen and other employees engaged in interstate commerce. Second, this comment will discuss why seamen are traditionally protected as wards of the court, and how the Federal Employment Liability Act (hereinafter "FELA") applies to a seaman. Additionally, this section will also discuss the interplay between the protections afforded to seamen by the Jones Act and the arbitration process. Next, this comment will examine the differences between post- and pre-injury arbitration agreements through various examples of precedent and address the door that was left open regarding post-injury arbitration agreements. Finally, this comment will discuss the pros and cons of signing an arbitration agreement and explain why asking a seaman to sign an arbitration agreement for maintenance and cure is a violation of the FAA.

A. FEDERAL ARBITRATION AGREEMENTS ("FAA")

An arbitration agreement is a form of alternative dispute resolution in which two or more parties agree to submit their dispute to a third party, institution, or panel, which will listen to the conflicting positions of the parties and then make a binding decision.[3] The Federal Arbitration Act (hereinafter "FAA"), which was adopted in 1925, transfers an otherwise judicial dispute to a private forum where the applicable law is or should be, applied and an award is issued for those

[2] *Arbitrator*, BLACK'S LAW DICTIONARY (11th ed. 2019) (arbitrator, *n*. 1. A neutral person who resolves disputes between parties, especially by means of formal arbitration).

[3] Brief of Arbitration Scholar Imre Stephen Szalai as Amicus Curiae in Support of Respondents at 7-8, Badgerow v. Walters, 142 S. Ct. 1310 (2022) (No. 20-1143).

involved to resolve the underlying dispute.[4] Before the enactment of the FAA in 1925, employment disputes were generally considered to be local issues not involving interstate commerce.[5] However, transportation workers who cross state lines were considered to be involved in interstate commerce and were therefore subject to Congressional regulation.[6] Specifically, section 1 of the FAA contains an exemption for interstate commerce workers noting that: "Nothing herein contained shall apply to contracts for employment of seamen, railroad employees or any other class of workers engaged in foreign or interstate commerce."[7] When there is a Motion to Compel Arbitration, courts apply the three factors set forth in *Mitsubishi Motors Corp v. Soler Chrysler- Plymouth*[8]:

(1) Whether a valid agreement to arbitrate exists between the parties;

(2) If the dispute in question falls within the scope of the arbitration contract;

(3) In the event that the two questions above are answered in the affirmative, the court must then consider whether there is any federal statute or policy that renders the arbitration contract non-arbitrable.[9]

Additionally, to determine the scope of the arbitration agreement, courts must examine the language of the contract to determine if it is too broad or too narrow.[10] If the language is determined to be "too broad," the court should compel the arbitration agreement and the action should stay while the arbitrator decides if the dispute falls within the stated clause.[11] However, if the language of the agreement is narrow, courts should not order arbitration unless the claims are clearly covered under the agreement.[12] It is important to note that arbitration is encouraged and when there is a valid formation of an arbitration agreement, federal courts are required to compel arbitration.[13] A popular tactic used by shipowners and employers is to offer the employee more than just "maintenance" and "cure" by including a percentage of lost wages to deceive the seaman into presenting their claim to an arbitrator and waiving their right to a jury trial.[14]

B. WHY DOES CONGRESS PROTECT MARITIME SEAMEN?

There is a longstanding judicial tradition of affording seamen heightened protection as wards of admiralty.[15] Under 28 U.S.C. § 1333, "district courts shall have original jurisdiction, exclusive of the courts of the States, of (1) Any civil case of admiralty or maritime jurisdiction, saving to suitors in all cases all other remedies to which they are otherwise entitled. (2) Any prize brought into the United States and all proceedings for the condemnation of property taken as a

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[4] *See id*.
[5] *Id.* at 30.
[6] *Id*.
[7] *Id*.
[8] Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, 473 U.S. 614 (1985).
[9] Joshua Sins, *Arbitration: A Seamans Dilemma Not All Perils are of the Sea*, 17 Loy. Mar. L.J. 239, 241-42 (2018).
[10] Hill v. Hornbeck Offshore Service Inc., 799 F. Supp. 2d 658, 662-63 (E.D. La. 2011).
[11] *Id*. at 663.
[12] *Id*.
[13] *Id*. at 661.
[14] Sins, *supra* note 9, at 259.
[15] Schreiber v. K-Sea Transp. Corp., 30 A.D.3d 101, 107 (App. Div. 1st Dept. 2006).

prize."[16] However, federal courts do not have exclusive jurisdiction over maritime claims and a state court can entertain certain maritime claims.[17] Typically claims involving *in rem* (against an inanimate object) remedies against vessels or cargo are subject to the exclusive jurisdiction of the federal courts.[18] On the other hand, state courts have concurrent jurisdiction over admiralty claims when a state court is competent to grant relief, which in most instances is *in personam* jurisdiction (against a specific party).[19] Therefore, *in personam* claims may be heard in state court and are usually predicated on a party's contacts with the particular forum.[20]

To determine whether a federal court has admiralty subject matter jurisdiction over a particular claim, U.S. courts apply a two-part test requiring a party to satisfy conditions of both (1) a maritime location and (2) a connection with maritime activity.[21] As to why seamen are given protected status, the court explains:

> A seaman is emphatically the ward of admiralty and though not technically incapable of entering into a valid contract, they are treated in the same manner as courts of equity are accustomed to treat young heirs . . . if there is any undue inequality in the terms, any disproportion in the bargain, and sacrifice of right on one side, which are compensated extraordinary benefit on the other, the judicial interpretation of the transaction is that the bargain is unjust and unreasonable, that advantage has been taken of the situation of the weaker party, and that pro tanto the bargain out to be set aside as inequitable.[22]

Seamen enjoy the liberal application of the law because of the dangerous nature and hardships traditionally faced in their jobs.[23] As stated by Judge Biggs in *Jones v. Waterman Steamship Corp.*, "the relationship of the shipowner to the seaman is more closely analogous to that of father and child, than that of an employee and employer."[24] Therefore, a seaman who falls ill or who is injured while in the service of the vessel and subject to the call of duty is entitled to maintenance and cure without regard to fault under traditional maritime remedies.[25] Thus, as long as the court recognizes that a seaman is a ward of the court, a seaman should have the opportunity

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[16] 28 U.S.C. §1333 (1948).
[17] Noe S. Hamra & Zachary R. Cain, *The Gateway to Federal Court: Admiralty Jurisdiction and Limitation of Liability*, *Publications*, BLANKROME (Dec. 2021), https://www.blankrome.com/publications/gateway-federal-court-admiralty-jurisdiction-and-limitation-liability.
[18] *Id.*
[19] *Id.*
[20] *Id*.
[21] *Id.*
[22] *Schreiber*, 30 A.D.3d at 109-10.
[23] John Townsend Cooper, *Jones Act Seamen: Wards of the Admiralty Courts*, JHCOOPER: BLOG, https://jhcooper.com/info/jones-act-seamen-wards-of-the-admiralty-courts/ (last visited Mar. 16, 2023).
[24] *Id.*
[25] *Id.*

to have legal counsel and be apprised of their legal rights to comprehend the importance or gravity of the decision to arbitrate.[26]

C. JONES ACT: GIVING SEAMEN A LIFE RAFT

Before enacting the FAA, Congress already advanced legislation that addressed the protection of seamen specifically, the Jones Act.[27] Congress ultimately decided to exclude the FAA's application to contracts of employment of seamen, railroad employees, or any other class of workers engaged in foreign or interstate commerce to refrain from overwriting the Jones Act.[28] Under the Jones Act, Congress created unique protections for seamen, providing solely a negligence remedy *in personam* against the employer.[29] Only the general maritime law remedies of "maintenance" and "cure" [30] and "unseaworthiness" may be joined with a Jones Act claim to allow an action to recover "maintenance" and "cure."[31] Thus, an injured seaman who sustained the injury in the scope of employment, or a personal representative in the event of death, has the right to either proceed in admiralty or to bring a civil action for negligence with a trial by jury, against the employer.[32] However, to be able to bring a claim under the Jones Act, one must qualify as a seaman.[33]

The Supreme Court established several requirements for seaman status including (1) whether an employee's duty must contribute to the function of the vessel or the accomplishment of its mission and (2) whether the employee has a sufficient connection to a vessel in navigation or to a fleet or vessel under common ownership.[34] Federal courts have generally declined to enforce arbitration agreements in cases brought pursuant to the Jones Act on the grounds that the relevant arbitration provision was contained in the governing contract of employment and thus subject to the exclusion under the FAA.[35] However, the question left unanswered, until recently, is: If the arbitration agreement was not signed until after the accident occurred, would this change the outcome of applying the FAA to the arbitration agreement, even if the claim is being brought pursuant to the Jones Act?

D. FEDERAL EMPLOYER LIABILITY ACT ("FELA")

Federal Employer Liability Act (hereinafter "FELA") is a federal act that has direct relevance to the Jones Act because seamen personal injury lawsuits under Jones Act are to be

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[26] Sins, *supra* note 9, at 264.
[27] *Id*.
[28] *Id.*
[29] *Id.*
[30] Maintenance and Cure. Explaining that "Maintenance" is the seaman's day-to-day living expenses and "Cure" is the seaman's medical cost. *Maintenance and Cure*, Cornell Law School Legal Information Institute, https://www.law.cornell.edu/wex/maintenance_and_cure.
[31] *Schreiber*, 30 A.D.3d 101 at 107-08.
[32] 46 U.S.C. § 30104 (1915).
[33] *Schreiber*, A.D.3d 101 at 105. (Specifically tailoring the research to only United States citizens seamen.)
[34] Chandris Inc v. Latsis, 515 U.S. 347 (1995). (The second element is a durational aspect. Thus, rejecting the snapshot approach, considering the employee's employment history with the particular employer).
[35] 9 U.S.C. § 1 (1947).

considered with the same advocacy and standards that apply to railroad workers under the FELA.[36] FELA exempts railroad employees from state worker's compensation statutes, which would normally bar an injured employee from suing his railroad employer.[37] FELA provides a legal basis for injured railway employees to recover monetary damages for injuries sustained due to the negligence either in whole or in part of a railroad carrier, its agents, servants, or other employees."[38] Sections 5 and 6 under FELA are implicated in cases involving arbitration agreements.[39] These sections give injured employees the choice of commencing a lawsuit in federal or local state court.[40]

Under section 5 of FELA, "any contract, rule, regulation, or device whatsoever, the purpose or intent of which shall be to enable any common carrier to exempt itself from any liability created by this chapter, shall to that extent be void."[41] Section 6 of FELA gives the right for a plaintiff to bring an action in state court.[42] It protects a covered employee's right to file suit against an employer in federal and state forums.[43] It ensures the right to bring a suit in any eligible forum, but it does not ensure the existence of a particular type of forum.[44] FELA and its judicial decisions are incorporated into the Jones Act.[45] Under FELA, a railroad worker not covered under state law may recover damages from his employer for injuries caused by negligence.[46] Similarly, under the Jones Act, a seaman may recover damages from his employer in similar situations.[47] Congress enacted the Jones Act to grant seamen the same right of action made available to railway workers by the FELA.[48] Therefore, Jones Act litigation necessarily involves interpreting FELA in the context of a maritime claim.[49] FELA cases of limited liability for negligent employment have been distinguished in Jones Act litigation on the basis that "the obligation of a shipowner to his seamen is substantially greater than that of an ordinary employer to his employees."[50] Conversely, this distinction has been used to limit the applicability of the Jones Act precedent to FELA litigation.[51]

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[36] Editors, *The FELA and the Jones Act: From Negligence to Assault and Battery to False Arrest and Imprisonment*, 30 U. CHI. L. REV. 555, 556 (1963).
[37] *Id.*
[38] *Id.* at 555.
[39] 45 U.S.C. § 55 (1908).
[40] *Id.*
[41] Harrington v. Alt. Sounding Co., Inc., 602 F.3d 113, 119-120 (2nd Cir. 2010); *see* 45 U.S.C. § 55 (1908).
[42] *Id*. at 120; *see* 45 U.S.C. § 56 (1908).
[43] *Harrington*, 602 F.3d at 119.
[44] *Id*. at 134.
[45] *Id.* at 119.
[46] 30 U. CHI. L. REV. 555, 555 (1963).
[47] *Id.* at 556.
[48] *Id*. at 557.
[49] *Id.*
[50] *Id*. at 560.
[51] 30 U. CHI. L. REV. 555, 560 (1963).

II. ANALYSIS

A. PRE- INJURY ARBITRATION AGREEMENTS

A pre-injury arbitration agreement is an agreement in which an employee signs a mandatory arbitration agreement before starting work as part of the employment contract.[52] Prior jurisprudence has evidenced a distinction between arbitration agreements signed as part of the employment agreement and those which are signed after the seaman is injured.[53] Courts apply state contract law in resolving any issues arising from contract formation.[54] Thus, courts focus on whether the seaman's employment depended on whether he or she signed the arbitration agreement in order to work on the vessel, or if the agreement was only presented to the seaman after an injury was sustained.[55] To determine if the arbitration agreement is part of the employment contract, courts look to (a) when the arbitration clause or contract was agreed to; (b) was the arbitration agreement attached to the component part of the employment contract; and (c) was contracted for employment contingent on whether the arbitration agreement was signed. [56] The Fifth and Second Circuits have addressed the issue of employers including arbitration agreements as part of a seaman's employment contract and have used the above factors to determine the validity of the arbitration agreement. [57]

The Fifth Circuit addressed and answered the question of whether an employee's status as a seaman excluded him from coverage under the FAA in *Buckley v. Nabors Drilling USA, Inc*.[58] This case involved a plaintiff Jones Act seaman who was working for the defendant.[59] Defendant adopted the Nabors Dispute Resolution Program that required all of the defendant's employees to enter into a binding arbitration proceeding for any personal injury occurring in the workplace or in the course and scope of the employment.[60] Plaintiff, however, did not sign the agreement and still proceeded to work for the defendant.[61] Defendant did not ask the plaintiff to sign the agreement or tell the plaintiff that he was required to do so.[62] While working for the defendant aboard the RANGER V, the plaintiff sustained injuries to his lower back, right leg, and shoulder.[63] Plaintiff then initiated a suit against the defendant for both negligence and unseaworthiness of the RANGER V.[64] The defendant then countered with a motion to compel arbitration.[65]

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[52] ROBERT FORCE & MARTIN J. JONES, THE LAW OF SEAMEN, § 1:39 ARBITRATION CLAUSES (5th ed. 2021)
[53] *Id.*
[54] Hill v. Hornbeck Offshore Services, Inc., 799 F. Supp. 2d 658, 661 (E.D. La. 2011).
[55] *Id*.
[56] Sins, *supra* note 9, at 243.
[57] *See* Buckley v. Nabors Drilling USA, Inc., 190 F. Supp. 2d 958 (S.D. Tex. 2002); *See* Brown v. Nabors Offshore Corp., 339 F.3d 391 (5th Cir. 2003).
[58] *Buckley*, 190 F.Supp.2d 958 at 965-66.
[59] *Id.* at 959.
[60] *Id*.
[61] *Id.* at 965
[62] *Id.*
[63] *Buckley,* 190 F. Supp. 2d 958 at 959.
[64] *Id.*
[65] *Id.* at 959-60.

The Fifth Circuit applied the three established factors from *Mitsubishi* to determine the enforceability of the unsigned arbitration agreement, determining only the issue of whether a valid agreement to arbitrate existed after recognizing the prohibition to seamen in the FAA.[66] The court held that when a signed arbitration agreement is included in a contract or as a provision in the transaction it is deemed to be valid and enforceable, except if there exists a controversy of law or equity under the FAA.[67] However, an issue arose because the plaintiff's status as a seaman could make the agreement unenforceable under the FAA since seamen are specifically excluded from its purview.[68]

Therefore, the main issue for the court was to determine whether the plaintiff's status as a seaman excluded him from coverage under the FAA.[69] Defendant, relying on *Circuit City*, argued that the plaintiff was not the type of seaman contemplated under the FAA exemption clause, attempting to distinguish between seamen who are directly involved in the movement of goods and those who are just everyday workers.[70] The court pointedly rejected this "'misguided application,' reasoning that section 1 of the FAA exempts all seaman since all seamen are directly involved in the transportation of goods in interstate commerce."[71]

The court recognized that the FELA and the Jones Act were established prior to the FAA and therefore, it did not define what a seaman was when it excluded them from the FAA because they were already defined under the Jones Act.[72] The Fifth Circuit panel made an effort to shine a light on the arduous efforts put forth in drafting the Jones Act, the FELA, and the FAA by explaining why employees involved in interstate commerce are exempt and the conflicts arising from the overlapping of the three acts. [73] The court denied Nabors's Motion to Compel Arbitration, concluding that the arbitration agreement was not valid under the FAA because of Buckley's status as a Jones Act seaman.[74] It set the precedent that Jones Act seaman could not have arbitration clauses within their contracts of employment because "the Jones Act is the highest standard for seamen, therefore exempt under the FAA."[75]

The Fifth Circuit further outlined the protections for seamen and railroad workers under the FAA in *Brown v. Nabors Offshore Corp*., applying the *Buckley* standard.[76] *Brown* addressed the issue of whether the plaintiff's action against his defendant employer was within the exclusion of the FAA, which exempts from its application contracts of employment of seamen.[77] Plaintiff

[66] *Id.* at 960.
[67] *Id.*
[68] 9 U.S.C. §1(1947).
[69] *Id*.
[70] *Buckley*, 190 F.Supp.2d 958 at 960-61.
[71] *Id.* at 961-62.
[72] *Id.* at 962.
[73] *Id.* at 962-63.
[74] *Id.* at 965-66.
[75] *Buckley*, 190 F. Supp. 2d 958 at 961-62.
[76] *Nabors Offshore Corp*., 339 F.3d 391.
[77] *Id.* at 392.

was employed as a roustabout[78] for the defendant aboard the DOLPHIN-110, a jack-up rig located in the Gulf of Mexico off the coast of Louisiana.[79] After already starting employment, the defendant sent the plaintiff a letter notifying him of the adoption of the Nabors Dispute Resolution Program which required, among other things, that all disputes are to be resolved through arbitration.[80] The NDRP document provided that "in the event that an employee failed to return the acknowledgment form, continued employment after the date [he or she] received the enclosed document will constitute [his or her] acceptance of the program."[81] The plaintiff did not return the signed acknowledgment form and continued to work.[82]

Roughly five months after the letter was sent to the employees, the plaintiff slipped and fell on a piece of waste packaging while stepping off the staircase, suffering injuries to his lower back.[83] The plaintiff then filed suit against the defendant in federal district court under the Jones Act and General Maritime Law, seeking damages based on negligence, unseaworthiness, and maintenance and cure.[84] The defendant filed a motion to compel arbitration and to stay or dismiss the defendant's suit based on the NDRP.[85] The plaintiff asserted that, as a seaman, the unsigned arbitration agreement did not apply to him; the defendant countered that the plaintiff was not a seaman involved in the transportation of commerce.[86] The District Court concluded that the plaintiff was a seaman, and therefore the arbitration clause that the defendant sought to compel was outside the scope of the FAA.[87]

On appeal, the defendant argued that the plaintiff could not be a seaman because he was not engaged in the transportation of goods in foreign or interstate commerce as a general laborer.[88] The court rejected this argument averring that "any other class of workers engaged in commerce" is a residual phrase of seamen, stating that there was "no paradox between the Congressional decision to exempt the workers over whom the commerce power was most apparent."[89] The court then used the defendant's argument against them by stating that under section 1 of the FAA, all seamen and railroad workers are directly involved in the transportation of goods in commerce.[90]

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[78] R A roustabout is an unskilled or semiskilled laborer especially in an oil field or refinery. *Roustabout*, MERRIAM-Webster, http://www.merriam-webster.com/dictionary/roustabout (last visited Mar. 17, 2023).
[79] *Nabors Offshore Corp*., 339 F.3d 391 at 392.
[80] *Id.*
[81] *Id.*
[82] *Id.*
[83] *Id.*
[84] *Nabors Offshore Corp*., 339 F.3d 391 at 392.
[85] *Id.*
[86] *Id*.
[87] *Id*.
[88] *Id.* at 393.
[89] *Nabors Offshore Corp*., 339 F.3d 391 at 394.
[90] *Id.* (referencing *Circuit City*, which held that as a "seaman" section 1 of the FAA would still exclude his employment contract from the application of the FAA, even if he was not engaged in commerce).

The court held that because the plaintiff was a seaman, he was expressly excluded from coverage under the FAA without having to establish that he was engaged in interstate commerce.[91]

B. POST-INJURY ARBITRATION AGREEMENTS

Post-injury arbitration agreements are typically more complex than pre-injury agreements. Courts have held that courts were obligated to enforce a post-injury arbitration agreement subject to a hearing on the validity of the agreement.[92] Under post-injury arbitration agreements, courts look to whether the agreement was a written agreement between an injured seaman and his employer, and whether the claim related to his or her injuries will be dealt with in an arbitration forum, rather than a court.[93] Thus, it is the understanding that a seaman signed the arbitration agreement *after* an injury has occurred, not before.[94]

The Second Circuit in *Harrington v. Alt. Sounding Co.*[95] addressed the issue of whether asking a plaintiff to sign an arbitration agreement was a violation of his rights under the FELA and the Jones Act, as well as the difference between post and pre-injury agreements.[96] In *Harrington*, the plaintiff filed an action in the United States District Court for the Eastern District of New York against the defendants pursuant to the Jones Act, seeking recovery for injuries sustained while he was employed as a seaman.[97] The plaintiff was receiving maintenance payments of twenty dollars and medical expenses per day from Weeks Marine.[98] During this time, he was given a prescription painkiller as a result of a herniated disc in his back which would require surgery.[99] The plaintiff testified to "drinking upwards of half-gallon of vodka every two or three days."[100] Defendants sent an arbitration agreement to the plaintiff for review, offering to pay 60% of the gross wages that he would have earned as an advanced settlement "until he was declared fit for duty or October 10, 2005, whichever occurred first."[101]

The arbitration agreement stated that Weeks was obligated to pay maintenance and cure; however, it also stated that "Weeks was not currently responsible or liable for any other damages under General Maritime Law, the Jones Act, or any other applicable law."[102] Nonetheless, Weeks arranged voluntary advances against settlement of any claim that could arise out of the personal injury claims that were made, contingent on the plaintiff's agreement to arbitrate his claim under FAA rules.[103] The agreement further stated that the money given would be credited against any further arbitration award.[104] The plaintiff underwent surgery and was released the next day.[105]

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[91] *Id*.
[92] § 1:39 ARBITRATION CLAUSES, *supra* note 50.
[93] *Id*.
[94] *Id*.
[95] *Harrington*, 602 F.3d 113 at 115.
[96] *Id.*
[97] *Id.*
[98] *Id.*
[99] *Id*.
[100] *Harrington*, 602 F.3d 113 at 115-16.
[101] *Id*. 116.
[102] *Id.*
[103] *Id.*
[104] *Id.*
[105] *Id.*

While still taking painkillers and being in "tough shape" only five days after his surgery, he brought the agreement to get notarized.[106] The notary asked him if he understood the terms of the agreement, to which he stated that he did.[107] Once the agreed date was reached for his return and he was still unable to work, the parties drafted an addendum to the original arbitration agreement extending its terms.[108]

On January 27, 2006, the defendant terminated the plaintiff's employment, leading to the current suit.[109] The defendant sought to compel arbitration pursuant to the arbitration agreement signed between the parties.[110] The plaintiff argued that the arbitration agreement was unenforceable due to intoxication and mental incapacity.[111]

In 2007, the district court found in favor of the plaintiff and denied Week's Motion to Compel Arbitration on the grounds that the arbitration agreement was "unconscionable under New Jersey law" (the state of the defendant's principal place of business) and satisfied the "sliding scale of unconscionability and therefore was not able to be enforced."[112] The district court looked at state law and inferred that the circumstances that surrounded the signing of the arbitration agreement would eliminate the prospect of liability under the claim that the arbitration agreement violated his rights under the FELA and the Jones Act.[113] The court considered the fact that the plaintiff signed the arbitration agreement within days of his surgery and increased his alcohol consumption, in addition to the fact that there was no attorney present.[114] However, the court of appeals disagreed, stating that only coercion would make the agreement void.[115] New Jersey courts have not found procedural unconscionability to be the sole basis to invalidate a contract.[116] Under New Jersey law, Weeks would have had to have done something so outrageous to "shock the conscience of the court."[117] The Appellate court stated this element was not present because the plaintiff's rights were not lost.[118]

The plaintiff then argued that both section 5 and section 6 of the FELA made the agreement unenforceable[119] because entering into the arbitration agreement deprived the seaman of his right to bring an action before a jury in state or federal court.[120] The majority inferred that the FAA overrides the FELA and the Jones Act,[121] and stated that "the FAA acts as a counter-weight to the

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[106] *Harrington*, 602 F.3d 113 at 117.
[107] *Id.*
[108] *Id.*
[109] *Id.*
[110] *Id.*
[111] *Harrington*, 602 F.3d 113 at117-118.
[112] *Id.* at 118.
[113] *Id.*
[114] *Id.*
[115] *Id.* at 124.
[116] *Harrington*, 602 F.3d 113 at125.
[117] *Id.*
[118] *Id.*
[119] *Harrington*, 602 F.3d 113 at 120. Both FELA section 5 and 6 were previously discussed, please refer to the FELA section for background information.
[120] *Id.*
[121] § 1:39 ARBITRATION CLAUSES, *supra* note 50.

preferred position that Congress purported to give to railroad workers under FELA and to seamen under the Jones Act."[122] The majority held that the burden of proving the invalidity of an arbitration agreement was on the party challenging it, the seaman.[123] The court refused to draw the analogy between the arbitration agreement to a seaman's release where the party relying on the release has the burden of proving its validity.[124] The court reasoned that a person gives up their rights when signing a release, whereas the arbitration agreement was an agreement to predetermine the forum where those rights would be adjudicated.[125] The majority, while depending on state law, additionally pointed out that the plaintiff entered into the contract after his injury.[126] His employment was not contingent on whether he signed the arbitration agreement and therefore was enforceable by law, thus making the distinction between the timing of the signing of the contract.[127] Lastly, the court dismissed the plaintiff's argument that the high arbitration fees would rob him of his ability to pursue his claim because Weeks agreed to take full responsibility for and cost of retaining the plaintiff's counsel and fees for the arbitration.[128]

The New York state appellate court addressed the issue of whether enforcing an arbitration agreement interferes with the FELA and the Jones Act again in *Schreiber v. K-Sea Trans. Corp..*[129] The petitioner was employed by K-Sea Transportation Corp. and K-Sea Transportation LLC as an engineer and qualified as a seaman aboard the TASMAN SEA.[130] The deck plate that the petitioner was standing on flipped up causing him to fall through the deck and sustain injuries to his lower extremities.[131] Pursuant to a collective bargaining agreement, the respondent paid the petitioner $15 per day in maintenance in addition to his medical expenses.[132] The company offered to pay an average of two-thirds of his net wages as an advance against settlement if the petitioner would agree to participate in an arbitration program and not pursue legal claims through the court.[133] The petitioner agreed to submit all claims arising under the doctrine of unseaworthiness, the Jones Act, or any other applicable law to arbitration.[134] The letter, in bold, stated: "[he] [was] not obligated to sign the agreement and that [he] will continue to receive $15 as maintenance and medical cure at the Company's expense until [he] [was] fit for duty, whether [he] signed the agreement or not."[135] The petitioner signed the arbitration agreement under the expectation of recovering from his injuries at some point; however, he was unable to return to work.[136] After the petitioner's condition did not improve, he brought suit asserting a cause of action for a violation of the Jones Act against K-Sea Transportation Corp. and claims for unseaworthiness, as well as for

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[122] *Id.*
[123] *Harrington*, 602 F.3d 113 at 124.
[124] § 1:39 ARBITRATION CLAUSES, *supra* note 50.
[125] *Harrington*, 602 F.3d 113 at 124.
[126] *Id.*
[127] *Id.*
[128] *Id.* at 126.
[129] Schreiber v. K-Sea Trans. Corp., 879 N.E.2d 733, 735-736 (N.Y. 2007).
[130] *Id.* at 735.
[131] Schreiber v. K-Sea Transp. Corp., 30 A.D.3d 101, 102 (App. Div. 1st Dept. 2006).
[132] *Schreiber*, 879 N.E.2d 733 at 735.
[133] *Id.*
[134] *Id.*
[135] *Id.*
[136] *Id.*

maintenance and cure against both respondents.[137] K-Sea filed a motion to enforce the arbitration agreement and sent $750, which was the petitioner's share of the arbitration fee.[138] After this happened, AAA sent a letter to the parties informing them that they owed $10,000, for which K-Sea claimed that the petitioner was liable.[139]

In response to the letter, the petitioner filed a motion to stay arbitration with the Supreme Court of New York, which was granted.[140] However, the Supreme Court of New York eventually denied the petitioner's claim that he was exempt from arbitration due to the protections that he, as a seaman, is afforded under the Jones Act.[141] The Supreme Court of New York also held that the petitioner's contract to arbitrate his claims from the injuries that he sustained was not contingent on his employment with K-Sea, and therefore the agreement was not deemed to be a part of his employment contract (which would have been a violation of FAA).[142] The court, looking at the FELA provision, determined that the petitioner, by signing the arbitration agreement, preserved his rights.[143] He was not hindered from pursuing his claim because a recovery opportunity still existed—arbitration.[144] Therefore, the agreement did not violate the Jones Act or the FELA.[145] While the court tiptoed around the issue of the AAA filing fee and remanded the case to determine the issue of coercion, it inferred that the petitioner would need to establish proof of coercion by way of not being informed of the excessive cost of arbitration.[146] The court specifically stated that "anyone reading this statement in context would infer that the fee was likely to be around $750 or less," implying that it was understandable that the petitioner might not have fully understood the extent to the charges associated with the arbitration.[147] The state court in *Schreiber* set a precedent by determining that an arbitration agreement does not deprive a seaman of their ability to recover damages from injuries sustained.[148] Additionally, an inference can be made from the court's decision that there is an understanding that a seaman has the freedom to enter into the post-injury arbitration agreement (if it is not dependent on their employment), and by doing so the seaman willingly waives the right to a trial by jury.[149]

The United States District Court of the Eastern District of Louisiana addressed the issue of whether an arbitration agreement should be upheld by applying the factors from the *Mitsubishi* case in *Hill v. Hornbeck*.[150] In *Hill*, the plaintiff signed arbitration agreements after he suffered injuries on June 13, 2008, and in May 2009 while on the vessel.[151] On May 26, 2009, the plaintiff signed an incentive agreement after the first injury, and after the second injury, he entered into two

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[137] *Schreiber,* 879 N.E.2d 733 at 735.
[138] *Id.*
[139] *Id.*
[140] *Id.*
[141] *Id.* at 737.
[142] *Schreiber,* 879 N.E.2d 733 at 737.
[143] *Id*.
[144] *Id.*
[145] *Schreiber*, 879 N.E.2d at 737.
[146] *Id.*
[147] *Id.*
[148] *Id.* at 737. *See* Sins, *supra* note 9, at 254.
[149] *Id.* at 734, 739. *See* Sins, *supra* note 9, at 254.
[150] *Hill v. Hornbeck*, 799 F. Supp. 2d 658, 660 (E.D. La. 2011).
[151] *Id.*

additional agreements.[152] Regardless of the agreements, the plaintiff brought a negligence and unseaworthiness claim against his employer under the Jones Act and General Maritime Law.[153] The defendant's employer responded by filing a motion to compel arbitration.[154] The plaintiff argued that the motion should be denied because the defendant failed to comply with the deadline set for all motions.[155] The defendant asserted that the motion is not subject to a deadline because it does not contend that the court is without jurisdiction or that the venue is improper.[156] The court held that the motion to compel arbitration was timely considering the public policy favoring arbitration without more from the plaintiff.[157]

The court then considered the three questions set out previously in *Mitsubishi Motor Corp*.[158] The first question addressed was whether there was a valid agreement to arbitrate between the parties.[159] The plaintiff contended that enforcement of the arbitration agreement is unconscionable.[160] "Where a party h[as] no power to negotiate a contract, state law permits courts to strike an unconscionable arbitration clause if it is found to be unduly burdensome or extremely harsh."[161] Here, "there is no evidence that the defendant desired to deceive or mislead by including the arbitration agreement with financial matters or by burying it in the contract itself, as alleged by the plaintiff." [162] On the second page of each of the contracts, "the arbitration agreements are set off as separate and distinctive clauses with bolded and italicized headings."[163] The court stated that "whether [the plaintiff] understood the terminology is simply irrelevant."[164] As a principle of contract law, "[t]he law does not compel people to read or inform themselves of the contents of an instrument which they may choose to sign, but it holds them to the consequences in the same manner and to the same extent as though they had exercised those rights."[165] By signing the contracts, the plaintiff signified that he had reviewed this agreement and the plan in their entirety, thus he had an opportunity to obtain the advice of counsel prior to executing this agreement, and he fully understood all provisions of this agreement and the Plan.[166]

Next, the court asked the second question of whether the dispute in question fell within the scope of the agreement.[167] The plaintiff contended that his claims fall outside of the agreement's scope because it fails to mention either the Jones Act or unseaworthiness claims nor does it contain the terms "injury" or "accident."[168] The court reasoned that "the language of the agreement makes

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[152] *Id.*
[153] *Id.*
[154] *Id.*
[155] *Hill*, 799 F. Supp. 2d at 660.
[156] *Id.*
[157] *Id.* at 660-61.
[158] *Id.*
[159] Id at 661
[160] *Hill*, 799 F. Supp. 2d at 662.
[161] *Id.*
[162] *Id.*
[163] *Id.*
[164] *Id.*
[165] *Hill*, 799 F. Supp. 2d at 662.
[166] *Id.* at 662
[167] *Id.* at 662-63.
[168] *Id.* at 663.

the inclusion of such specific terms unnecessary."[169] "While the words "injury" or "accident" are not specifically used, the agreement explains that its broad scope covers tort claims which, often arise out of injuries or accidents."[170] "There is no unique policy reason not to compel arbitration of claims merely because they concern personal injury."[171] Thus, it found that any contract that has been established in writing is essentially binding and courts will apply state contract law arising from the contract formation.[172] Because the claims presented here arise out of injuries alleged to have occurred during the plaintiff's employment, the question of whether the claims are covered is debatable and the issue should be accordingly submitted to arbitration for the arbitrator to decide.[173]

Finally, the court addressed the third question of whether the claims are rendered non-arbitrable by federal statute or policy.[174] The plaintiff asserted that it is against public policy to require his claims under the Jones Act and General Maritime Law to be arbitrated.[175] The court emphatically stated that the Fifth Circuit has found no unique public policy ground "to exempt seamen from the binding effect of pre-dispute contracts. . .to arbitrate Jones Act or general maritime law claims against his employer."[176]

The plaintiff's last argument was that he had equity in the company since he was a "part owner" and therefore the arbitration agreement should be void as part of his employment contract.[177] The court explained that an arbitration agreement is not required to be included in an actual employment contract to be considered part of it, but it must modify the seaman's employment.[178] For example, in *In re Deepwater Horizon*,[179] the court found that an arbitration agreement is unenforceable when consent was required as a condition to being considered for employment.[180] However, the plaintiff's decision to accept or reject the agreement had no bearing on his continued employment.[181] While he had a financial stake in the company's performance, his status as an at-will employee and the nature of his work remained unaltered.[182]

Additionally, the United States District Court of the Eastern District of New York addressed the issue of whether the plaintiff's post-injury arbitration agreement constitutes a seaman's employment contract within the meaning of section 1 of the FAA, in *Barbieri v. K-Sea Transportation Corporation.* The plaintiff, a seaman under the Jones Act, was employed by K-Sea

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[169] *Id.*
[170] *Hill*, 799 F. Supp. 2d at 663.
[171] *Id.*
[172] *Id.* at 661.
[173] *Id.* at 663-664.
[174] *Id.* at 664.
[175] *Hill*, 799 F. Supp. 2d at 664.
[176] *Id.*
[177] *Id.*
[178] *Id.*
[179] In re Oil Spill by the Oil Rig "Deepwater Horizon" in the Gulf of Mexico, 2010 WL 4365478, at *1 (E.D. La. 2010).
[180] *Id.* at *4.
[181] *Hill*, 799 F. Supp. 2d at 664.
[182] *Id.*

as the captain of its petroleum barge DBL-31.[183] While working on the deck, he sustained injuries to his lower back and other parts of his body because of the alleged negligence of the defendant and the unsafe and unseaworthy conditions of the vessel.[184] Upon his release from the hospital, K-Sea began paying the plaintiff $15 per day for maintenance pursuant to the collective bargaining agreement between K-Sea and the plaintiff's union, Local 333 United Marine Division, which covered the employee's obligation to pay maintenance.[185] While still recovering, the plaintiff received a call from the claims manager for K-Sea asking him to sign an agreement to arbitrate all claims arising from his injuries.[186] K-Sea stated that it would pay the plaintiff his average two-thirds net weekly wage in addition to the $15 per day as an advance against his settlement until he has been declared fit for duty or reached maximum medical improvement.[187] The agreement also provided that any filing fees, up to $750.00, and deposits for compensation of the arbitration would be advanced by K-Sea subject to allocation.[188] K-Sea argued that it kept its end of the bargain by sending the plaintiff a biweekly check amounting to $838.[189] Even after he reached his maximum medical improvement on July 1, 2004, K-Sea continued to pay the plaintiff for almost an additional year later.[190] The plaintiff did not return to work once the payments stopped and he was determined to have reached his "maximum medical improvement" because he claimed to be "totally disabled."[191] Therefore, he filed suit seeking additional damages from K-Sea.[192] As seen in *Schreiber*, K-Sea filed a motion to compel arbitration and grant parallel relief staying the ligation pending the outcome of the arbitration.[193]

The court first addressed the issue of whether the plaintiff's claims were arbitrable under federal law.[194] The plaintiff argued that the claims were not arbitrable under the FAA because he is a Jones Act seaman, despite having already signed the agreement.[195] The judge agreed that the FAA had intended to preclude matters involving contracts of employment for seamen from arbitration agreements. The plaintiff then argued that because the Claims Arbitration Agreement he signed amounted to no more than a contractual modification of the seaman's employment contract, the court must decline to enforce the agreement and bar the arbitration agreement of his personal injury claims.[196]

The plaintiff additionally claimed that the court should hold the Claims Arbitration Agreement void as contrary to the letter and intent of the Jones Act.[197] The court held that the

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[183] Barbieri v. K-Sea Trans., 2006 WL 3751215, at *1 (E.D. N.Y. 2006).
[184] *Id.*
[185] *Id.*
[186] *Id.*
[187] *Id.*
[188] *Barbieri*, 2006 WL 3751215, at *2.
[189] *Id*.
[190] *Id.*
[191] *Id.*
[192] *Id.*
[193] *Barbieri*, 2006 WL 3751215, at *2.
[194] *Id.* at *4.
[195] *Id.*
[196] *Id.* at *5.
[197] *Id.*

Jones Act does not limit the remedies to the judicial forum[198] and additionally noted that the Jones Act contains no expression of intent to limit the pursuit of its remedies but states that an injured seaman *may at his election* maintain an action for damages at law, with the right to trial by jury.[199] Further, the trial court stated that the FAA, being created shortly after the Jones Act, can be viewed as affording a plaintiff an alternative forum in which to pursue his claims under the Jones Act.[200] Additionally, the court stated that by agreeing to arbitrate a statutory claim, a party does not forgo the statutory right afforded by the Jones Act.[201] The court rejected the plaintiff's argument and reasoned that arbitration agreements are neither precluded by the language of the Jones Act itself nor in conflict with the policy considerations the Jones Act was intended to advance.[202]

Additionally, the plaintiff urged the court to interpret this clause liberally to apply to an arbitration agreement that amounts to nothing more than a contractual modification of an employment contract with that statute's ambit.[203] The court rejected this argument for two reasons. First, given the Congressional intent manifested in the FAA, courts were reluctant to afford a more expansive meaning of what is an exclusionary clause.[204] Second, the court searched diligently for cases in which post-injury ad hoc claims arbitration agreement constitutes a seaman's employment contract within the meaning of FAA.[205] The plaintiff's evidence conflicted with itself, presenting two different conclusions..[206] The court held that the claims arbitration agreement was considered to be a "transaction evidencing one involving commerce within the meaning of section 2 of the FAA."[207]

Next, the court addressed the enforceability of the Claim's Arbitration Agreement. The court stated that general state contract law could provide relief[208] if the plaintiff could prove (1) fraud, (2) undue influence, (3) overwhelming bargaining power, (4) that enforcement would be unreasonable and unjust, or (5) that proceeding in the contractual forum would be gravely difficult.[209] The trial judge followed a similar approach as in *Schreiber*[210] in requiring a separate hearing for issues of undue influence when forming the contract.[211] The judge noted that the plaintiff had sufficiently alerted the court that he was contesting the validity of the claims arbitration agreement he signed and also provided the court with the factual basis underlying his opposition.[212] The judge cited several examples, such as the plaintiff not being represented by legal counsel or by his union when the agent contacted him, which could lead to an unfair advantage for

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[198] *Barbieri*, 2006 WL 3751215. at *6.
[199] *Id*. at *6.
[200] *Id.*
[201] *Id.*
[202] *Id.*
[203] *Barbieri,* 2006 WL 3751215 at *7.
[204] *Id.*
[205] *Id.*
[206] *Id.*
[207] *Id*. at *8.
[208] *Barbieri,* 2006 WL 3751215 at *8.
[209] *Id.*
[210] *Schreiber v. K-Sea Transp. Corp.*, 879 N.E.2d 733 (2007).
[211] *Barbieri*, 2006 WL 3751215, at *9.
[212] *Id.*

the employer and thus could allude to undue influence.[213] However, the court remanded the claim to determine the issue of undue influence.[214] The court explained that the FAA allows seaman the freedom to opt out of an arbitration agreement, absent coercion.[215] If coercion is present, the agreement can be deemed invalid [216]

III. ARGUMENT

A. ARBITRATION IS NOT A BETTER ALTERNATIVE TO A COURTROOM PROCEEDING

Vessel owners and operators should be upfront and honest with their employees and advise them that they are not obligated to sign the arbitration agreement. They should further explain that by signing the agreement they are agreeing to not bring their claim in a courtroom. If the arbitration agreement is found to be valid, it is enforceable under federal policy. However, arbitration is not a better alternative to allowing the court to decide the outcome of the claim because arbitration puts employees at a disadvantage to the employer. Furthermore, allowing employers to use arbitration agreements to settle claims for maintenance and cure violates the FAA.

The main arguments for arbitration are that arbitration is cost-effective and more efficient than using the court system.[217] However, the cons heavily outweigh the pros in arbitration due to the disadvantageous conditions inherent in arbitration agreements. Mandatory arbitration agreements emerged in non-union employment and were written by employers to benefit themselves.[218] Judge Harry T. Edwards stated, "Mandatory arbitration agreements in an individual employee's contract are presented on a take-it-or-leave-it basis."[219] Therefore, employers are free to structure arbitration in ways that disadvantage employees.[220] Some arbitration agreements also require employers to split the cost of the arbitration with the employee, as depicted in several of the cases discussed above. Judges have ruled in favor of requiring employees with inadequate means to share the fees of a private arbitrator hinders the claimant from having an opportunity to have their disputes heard because they are having to shell out money that they do not currently possess.[221] Therefore, these procedures do not provide more procedural protections compared to those available in court.

There are confining issues regarding the procedural aspect of arbitration agreements such as the privacy aspect, the shortened statute of limitations, the discovery limitations, and the lack of an appeals process. Employers choose arbitration agreements because arbitration agreements

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213 *Id.*
214 *Id.*
215 *Barbieri*, 2006 WL 3751215, at *9
216 *Id.*
217 Michael L. Russell, *Employment Arbitration Agreements: The Case for Ethical Standards for Dispute Resolution System Designers*, 21 PEPP. DISP. RESOL. L.J. 173, 192 (2021).
218 *Id.* at 177.
219 *Id.* at 177-78.
220 *Id.* at 178.
221 *Id.* at 179.

are generally held in strict confidence.[222] Enforcing the arbitration agreements could help conceal the employer's wrongdoing, and therefore most of the employees have no way of knowing that claims similar to theirs have been brought previously.[223] Second, enforcing arbitration agreements creates a glaring difference in the time in which an injured employee must bring a claim under the statute of limitations.[224] In the absence of an arbitration clause, an employee may have several years to file a claim, depending on the state, but with an arbitration clause, an employer may require the claim to be submitted within a week or days from the alleged injury.[225] This heightened timeline makes it more challenging for vulnerable, weaker parties to prove their claims.

Third, the scope of discovery is narrowed to cut the cost of the discovery process.[226] However, these limits give an advantage to the employer who drafted the arbitration agreement and, when abused, can hinder the injured employee's ability to prove their claim.[227] Therefore, the employee is not able to collect evidence to prove his or her case in court.[228] Had the employee not signed an arbitration agreement, he or she would have had broad procedural rights and protections to help litigate their claim.[229] Fourth, and most importantly, the appeal process is the biggest disadvantage when an award is given. A disputed award through arbitration does not follow the normal appeal process, no matter how wrong or unjust it may appear.[230] Under section 10(a)(4) of the FAA, a court may vacate an award where the arbitrator exceeded his or her powers, which is when they issue a completely irrational award.[231] An award will not be overturned unless there are outlandish and certain circumstances present.[232] For example, an arbitration award will be overturned if an arbitrator issues an award when he or she was not given the authority to do so.[233] Furthermore, the courts do not decide the "rightness or wrongness of the arbitrator's contract interpretation, they essentially look at whether the arbitrator dispenses his brand of industrial justice that his decision may be unenforceable."[234] The courts are not looking at the gravity of the arbitration award but rather look at the award to make sure that it was not influenced by the arbitrators themselves.

Is the quicker route of avoiding a courtroom worth giving up a right to a trial by jury, longer filing deadlines, a traditional appeal process, and other protections against an unsatisfactory decision? Employees are giving up their ability to use the legal system in favor of the rights of

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[222] Imre S. Szalai, *A New Legal Framework for Employment and Consumer Arbitration Agreements*, 19 CARDOZO J. CONFLICT RESOL. 653, 668 (2018).
[223] *Id.*
[224] *Id.* at 669.
[225] *Id.* at 655.
[226] *Id.* at 672.
[227] Szalai, *supra* note 207 at 672.
[228] *Id.* at 674.
[229] *Id.*
[230] George Wolff, *Procedure and Ground for Requesting a U.S. District Court to Correct an Arbitration Award or Vacate an Arbitration Award Under the Federal Arbitration Act*, Wolff Law Office (Mar. 23, 2022), https://www.wolfflaw.com/procedures-and-grounds-for-requesting-a-u-s-district-court-to-co.html.
[231] 9 U.S.C. §10(a)(4) (2002).
[232] Wolff, *supra* note 215.
[233] *Id.*
[234] *Id.*

employers who are writing arbitration agreements to take advantage of their employees.[235] The federal government, under the FAA, is asking courts to enforce agreements that infringe upon employees' rights, as long as the agreement is signed after the injury occurred.[236] Thus, the FAA allows employers to draft contracts for arbitration agreements that favor the vessel owner and are a detriment to the employee.

B. ASKING SEAMEN TO SIGN AN ARBITRATION AGREEMENT FOR MAINTENANCE AND CURE IS A VIOLATION OF THE FAA

It can be implied that asking a seaman to enter into an arbitration agreement for maintenance and cure is a violation of the FAA, whether the arbitration agreement is signed before or after the injury of the seaman. The basic obligation of a vessel owner is the duty of maintenance and cure.[237] Maintenance and cure requires a ship master to provide food, lodging, and medical treatment payments to seamen injured while serving the ship arising from a contract of employment.[238] This obligation does not rest on any negligence or culpability on part of the owner or the master, nor is it restricted where the seaman's employment is the cause of injury or illness.[239] From Justice Alito's dissent in *Atlantic Sounding Co.*, "the duty to furnish maintenance and cure is one annexed to the employment."[240] His dissent argues that maintenance and cure are part of a seaman's contract and that the duty is quasi-contractual.[241]

A quasi-contract is an obligation imposed by law to prevent unjust enrichment.[242] A quasi-contract may be presumed by a court in the absence of a true contract.[243] As a quasi-contract is not a true contract, mutual assent is not necessary, and a court may impose an obligation without regard to the intent of the parties.[244] Therefore, maintenance and cure are considered part of the employment agreement and/or contract. Since maintenance and cure are part of a seaman's employment contract, is it a violation for the employer to require the employee to sign an arbitration agreement to govern part of a seaman's contract?

Under section 1 of the FAA, the FAA does not govern contracts of employment of seamen, railroad employees, or any other class of workers engaged in foreign or interstate commerce.[245] The FAA is not enforceable when it involves claims of a seaman's contract. Therefore, by asking a seaman to sign an arbitration agreement for maintenance and cure, whether it be before or after the injury, the employer is asking the seaman to arbitrate part of his contract by the guidelines of the FAA, which is a direct violation of section 1 of the FAA.

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[235] Szalai, s*upra* note 207.
[236] *See* Harrington v. Alt. Sounding Co., 602 F.3d 113 (2nd Cir. 2010).
[237] *See* Atlantic Sounding Co., Inc. v. Townsend, 557 U.S. 404, 407-408 (2009).
[238] *Id.*
[239] *Id.* at 407-408.
[240] *Id.* at 431-432.
[241] *Id.*
[242] Legal Information Institute, *Quasi Contract*, Cornell Law School (Mar. 23, 2022), https://www.law.cornell.edu/wex/quasi_contract_(or_quasi-contract).
[243] *Id.*
[244] *Id.*
[245] Szalai, *supra* note 3, at 30.

Furthermore, since seamen have admiralty protection, forcing seamen to sign arbitration agreements after they are injured is contrary to Congress's initial goal in creating the Jones Act and the FELA. Therefore, there needs to be an amendment to the current FAA legislation stating the following: Section 1 of the Federal Arbitration Act ("FAA") provides that the FAA does not apply "*to any and all* contracts of seamen, railroad employees, or any other class of workers engaged in foreign or interstate commerce." Since the FAA did not originally intend to interfere with the current legislation under the Jones Act and the FELA,[246] then it should not be problematic to take the provision a step further and exclude all contracts, not just the contracts that are a part of the employment agreements. This proposed provision would not allow a distinction between post or pre-injury arbitration agreements and allow the Jones Act and the FELA to determine the outcome of the claims. Adhering to the level of protection that Congress initially envisioned for seamen by making sure that seamen are not being taken advantage of by their employers.

IV. CONCLUSION

Through various examples of case law, courts have made a distinction between arbitration agreements signed by seamen before the injury takes place and is thus dependent on their employment, versus arbitration agreements signed after the injury has already taken place. The Fifth and Second Circuits have found that arbitration agreements signed before a seaman's injury takes place are not valid or enforceable.[247] However, courts have continuously rejected the idea that arbitration agreements signed after the injury have taken place are against the FAA's explicit exclusion for seamen.[248] Additionally, it rejected the argument that because seamen are wards of admiralty, contracts with seamen should be closely securitized and deserve special protection.[249] The Fifth and Second Circuits further rejected the argument that the FELA and the Jones Act are not preempted by the FAA, and therefore the FAA cannot govern seamen contracts.[250] Courts have only recognized that an arbitration agreement can be challenged under fraud or coercion with the burden on the seaman to prove it.[251]

While some argue in favor of arbitration agreements, it is clear that by asking a seaman to arbitrate their claim, one is asking them to give up the rights that come with a trial by jury or a bench trial. The pros of arbitration do not outweigh the cons of arbitration when asking employees to give up their rights and the procedural advantages of bringing their claim through the court system. The ability to bring their claim before a judge or jury has its faults. However, the court allows employees to have a more even-handed outcome as opposed to arbitration agreements. Furthermore, and most importantly, asking a seaman to enter into an arbitration agreement for maintenance and cure is a violation of the FAA, whether the arbitration agreement is signed before or after the injury of the seaman.

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[246] *Supra*, section II "Federal Arbitration Agreements 'FAA.'"
[247] *See* Buckley v. Nabors Drilling USA, Inc., 190 F. Supp. 2d 958 (5th Cir. 2022). *See* also Brown v. Nabors Offshore Corp., 339 F.3d 391 (5th Cir. 2003).
[248] *See*, *e.g.*, Harrington v. Alt. Sounding Co., 602 F.3d 113 (2nd Cir. 2010).
[249] *See* Schreiber v. K-Sea Trans. Corp., 879 N.E.2d 733 (N.Y. 2007).
[250] *See* Harrington v. Alt. Sounding Co., 602 F.3d 113 (2nd Cir. 2010).
[251] *See Id.*; S*ee* Barbieri, 2006 WL 3751215.