

PRE-INJURY ARBITRATION CLAUSES IN SEAMAN EMPLOYMENT AGREEMENTS

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WHAT IS THE KEY ISSUE? Federal Arbitration Act

- ▶ “... but nothing herein contained shall apply to *contracts of employment of seamen, railroad employees, or any other class of workers engaged in foreign or interstate commerce.*”

9 U.S.C.A. § 1 (FAA)

TWO AREAS OF DISCUSSION

- 1. THE RESIDUAL CLAUSE OF SECTION 1
TRUCKERS AND CARGO HANDLERS
WHERE TO DRAW THE LINE?**
- 2. COMPELLING ARBITRATION UNDER STATE LAW WHEN THE
EMPLOYEE IS EXEMPT UNDER SECTION 1**

THE RESIDUAL CLAUSE

- ▶ ...any other class of “workers” engaged in foreign or interstate commerce...

WHO COMES UNDER FAA SCOPE?

- ▶ ***NEW PRIME INC. V. OLIVEIRA*, 139 S.Ct. 532 (2019)**
 - ▶ CLARIFIED THAT AN INDEPENDENT CONTRACTOR WAS COVERED BY THE FAA IN SAME MANNER AS AN EMPLOYEE

- ▶ ***FLI-LO FALCON, LLC V. AMAZON.COM INC.*, 2022 WL 4451273 (W.D. WA. 9/8/22)**
 - ▶ COMPANIES ARE NOT “WORKERS” UNDER FAA

GOODS OR PEOPLE?

- ▶ A CIRCUIT COURT CONFLICT EXISTED ON THIS ISSUE
- ▶ 3rd Cir.
 - ▶ ***SINGH v . UBER TECHNOLOGIES* (11/11/19) remanded (Transport of passengers)** “Whether employee belongs to a class of workers engaged in interstate commerce or in work so closely related thereto as to be in practical effect a part of it.”
- ▶ 1ST Cir.
 - ▶ ***Waithaka V. AMAZON* (7/17/20) LOCAL DELIVERY DRIVER COVERED BY FAA, LOOK AT MOVEMENT OF GOODS**
- ▶ 7th CIR.
 - ▶ ***Wallace v GRUBHUB* (8/4/20) FOOD DELIVERY DRIVER NOT COVERED, LOOK AT WHERE THE DRIVER TRAVELED WITH THE GOODS**
- ▶ 9TH CIR.
 - ▶ ***Rittman V. AMAZON* (8/9/20) LOCAL DELIVERY DRIVERS COVERED BY FAA, LOOK AT THE MOVEMENT OF GOODS**

IT'S THE PEOPLE!

▶ SUPREME COURT

- ▶ *SOUTHWEST AIRLINES CO. V. SAXON* (6/6/22)
- ▶ AIRLINE RAMP EMPLOYEE COVERED - WORKERS “MUST BE ACTIVELY ENGAGED IN TRANSPORTATION OF GOODS ACROSS BORDERS VIA CHANNELS OF FOREIGN OR INTERSTATE COMMERCE.,” BUT THEY DO NOT HAVE TO TRANSPORT THE GOODS ACROSS BORDERS.
- ▶ ‘CLASS OF WORKERS ENGAGED IN ... COMMERCE’ ” SHOULD BE “CONTROLLED AND DEFINED BY REFERENCE” TO THE SPECIFIC CLASSES OF “ ‘SEAMEN’ ” AND “ ‘RAILROAD EMPLOYEES’ ” THAT PRECEDE THAT LANGUAGE .

POST-SAXON

- ▶ 5TH CIR.
 - ▶ *Lopez v. Cintas* (8/3/02022) LOCAL DELIVERY DRIVERS NOT COVERED BY FAA, LOOK AT THEIR WORK, NOT THE GOODS, FINDING UNLIKE SEAMAN OR RAIL WORKERS, LOPEZ WAS MORE “CUSTOMER FACING”
- ▶ 2ND CIR.
 - ▶ *Bissonnette v. LePage Bakeries Park St., LLC*, 49 F.4th 655 (Sept 2022)
 - ▶ Dissent - DOES NOT FOLLOW SAXON – FOCUSED ON EMPLOYER WORK, NOT EMPLOYEE
- ▶ SO FOR NOW, WE DO NOT KNOW WHERE THE LINE IS DRAWN, BUT THE SUPREME COURT HAS PROVIDED GUIDANCE AS TO WHO IS “ACTIVELY ENGAGED IN TRANSPORTATION OF GOODS ACROSS BORDERS VIA CHANNELS OF FOREIGN OR INTERSTATE COMMERCE.”
- ▶ BUT, THAT IN MY MIND IS NOT THE REAL SOLUTION.....

- ▶ THE SOLUTION IS TO DRAFT EMPLOYMENT AGREEMENTS THAT SUBSUME THIS GRAY AREA BY PROVIDING COURTS WITH AN ALTERNATIVE LAW TO BE APPLIED WHERE THE EMPLOYEE IS EXEMPT UNDER THE FAA

WATERSHED CASE

- ▶ **Palcko v. Airborne Express, Inc., 372 F.3d 588 (3d Cir. 2004)**
- ▶ Palcko was an airline management employee who filed a Title VII claim. The court found her to be exempt under Sec 1, reversing the District Court finding of federal **pre-emption**, and held that where employees are exempt under Sec 1 of the FAA the analysis of enforceability of the Arbitration Clause should **proceed as if the FAA did not exist**, and compelled Palcko to Arbitrate pursuant to Washington State Law.

WHERE THE EFFORT BEGAN . . . AND HOW TO CURE

► Patola - Sept. 2014 POORLY DRAFTED

In the event of an injury I agree to cooperate fully in my recovery and in my effort to reach an amicable settlement with the vessel owner. In the event we are unable to settle between ourselves the losses associated with the injury, I agree to binding arbitration, instead of litigation. I will choose a representative, the vessel owner will choose a representative and between them they will appoint a third party to be binding Arbitrator whose decision I hereby agree to abide by and will fully settle my injury claims based upon the arbitrator's decision.

DRAFTING OF AGREEMENT

- ▶ SURVEY OF STATES LIKELY TO HAVE AN INTEREST - DRAFT TO MATCH THE MOST STRINGENT STATE LAW
- ▶ IN NJ, NO MAGIC WORDS, BUT...
- ▶ AVOID CREATING AMBIGUITIES
 - ▶ *Bissonnette v. LePage Bakeries Park St., LLC*, 49 F.4th 655 (2nd Cir. Sept. 2022)
 - ▶ “CONNECTICUT LAW NOT INCONSISTENT WITH FAA”
- ▶ USE BOLD CAPITALIZED LETTERS
- ▶ IDENTIFY CLAIMS (ALL), SPECIFY STATUTORY CLAIMS AND MARITIME CLAIMS; IDENTIFY LOCATION AND PROVIDER OF ARBITRATION; STATE RIGHTS GIVEN UP - VENUE, JURY, SUE
- ▶ EMPLOYER PAYS, EXCEPT FOR INTERLOCUTORY MOTIONS AND CHALLENGES TO ENFORCEABILITY
- ▶ **MUST INCLUDE ALTERNATIVE STATE LAW**

PRACTICAL IMPLICATIONS

- ▶ LANGUAGE

- ▶ VIETNAMESE

- ▶ SPANISH

- ▶ PORTUGUEUSE

- ▶ WHO SHOULD INTERPRET AND DRAFT THE NON-ENGLISH VERSION

- ▶ COURT APPROVED TRANSLATER

PRACTICAL IMPLICATIONS

▶ HOW OFTEN

- ▶ Depends on type vessel and fishing schedule
 - ▶ Multi-week trip, every trip crew should sign
 - ▶ Multi-trips/week, at least every new sign on executes, and annually
- ▶ Provide every crew member who does not execute once a week a copy upon original execution

THE NEXT ATTEMPT AT ENFORCEMENT

- ▶ **KOZUR -2020 WL 5627019 (D.N.J. 2020)**
- ▶ ***2017 CASE, KOZUR WAS COMMERCIAL FISHERMAN, EMPLOYER MOVED TO DISMISS OR STAY AND COMPEL ARBITRATION BASED UPON NEW ARBITRATION CLAUSE***

NJ STATE COURT CASES

- ▶ **WHILE THE KOZUR MOTION WAS PENDING...**
- ▶ **NJ SUPREME COURT DECIDED:**
- ▶ **Colon v. Strategic Delivery Solutions, LLC (2020) companion case w/**
- ▶ **Arafa v. Health Express Corporation, 243 N.J. 147 (2020)**
 - ▶ **ENFORCEABILITY OF ARB AGREEMENTS WHERE EMPLOYEES EXEMPT UNDER FAA SEC 1**
 - ▶ **NO FEDERAL PREEMPTION, CITING:**
 - ▶ *VOLT INFO. SCIS., INC. V. BRD. OF TRS. OF LELAND STANFORD JR. UNIV,*
 - ▶ 489 U.S. 468 (1989)
 - ▶ **NJAA applies automatically if FAA does not**
- ▶ ***JUDGE RODRIGUEZ ORDERED ARBITRATION AND STAYED LITIGATION***
- ▶ ***ENFORCEABLE UNDER BOTH NY AND NJ LAW***

KOZUR DECISION AND LEGAL IMPLICATIONS OF STAY V DISMISSAL

- ▶ KOZUR APPEALED
 - ▶ 3D CIR., DESPITE CONSENT OF PARTIES, WOULD NOT HEAR APPEAL
 - ▶ STAY OF CASE DEFEATED JURISDICTION
- ▶ *Bissonnette v. LePage Bakeries Park St., LLC*, 49 F.4th 655 (2nd Cir. Sept. 2022)
 - ▶ IF STAYED, THE MATTER IS NOT APPEALABLE (CONCURRING OPINION)

SEAMAN CASES IN NEW JERSEY ARB

- ▶ *AARON TREJO 2021 WL 4311958 (D. MASS 2021)*
 - ▶ *DEFENDANT MOVED TO DISMISS OR STAY AND COMPEL ARBITRATION*
 - ▶ *JUDGE BURROUGHS ORDERED CLAIMANT TO ARBITRATION TO DECIDE ISSUE OF ARBITRABILITY, AND DISMISSED THE CASE WITHOUT PREJUDICE*
- ▶ *SAULO TREJO*
 - ▶ *DEMANDED ARBITRATION UNDER SAME CREW AGREEMENT AS KOZUR AND BROTHER AARON TREJO*
- ▶ *AARON AND SAULO CHALLENGED THE ENFORCEABILITY OF THE ARBITRATION*
 - ▶ *JUDGE SCHNEIDER GRANTED THE EMPLOYERS MOTION TO COMPEL*
 - ▶ *CLAIMANT PAYS FOR CHALLENGE*
- ▶ *ALL THREE CLAIMS ARE NOW BEFORE RET. JUDGE JOEL SCHNEIDER*

CLAIMANT ARGUMENTS

- ▶ FEDERAL PREEMPTION (FAA DOES THE OPPOSITE, *PROHIBITS STATES FROM DISCRIMINATING AGAINST ARBITRATION AS AN ALTERNATIVE*)
- ▶ UNIFORMITY OF MARITIME LAW
- ▶ FELA VENUE PROVISION INCORPORATED INTO JONES ACT
- ▶ DID NOT READ AGREEMENT
- ▶ CANNOT READ OR UNDERSTAND ENGLISH
- ▶ FRAUD OR MISCONDUCT
- ▶ UNCONSCIONABLE CONTRACT
 - ▶ 9TH CIR *Reyes v. Hearst Communications, Inc.*, 2022 WL 2235793 MAKING EMPLOYEE SHARE ½ COST IS UNCONSCIONABLE UNDER CAL. LAW

AMAZON FINALLY GOT IT RIGHT

- ▶ Amos v. Amazon Logistics, Inc., 2022 WL 2181448 Slip Copy (M.D.N.C. 6/16/22)
 - ▶ AMAZON PROVIDED ALTERNATIVE LAW OF WASHINGTON STATE IN THEIR AGREEMENT
 - ▶ APPEAL TO 4TH CIRCUIT FILED

STATE RESPONSE TO ARBITRATION IN EMPLOYMENT AGREEMENTS

- ▶ STATES ARE NOW PASSING LEGISLATION TO EXCLUDE DISCRIMINATION AND HARASSMENT CLAIMS FROM BEING SUBJECT TO ARBITRATION
- ▶ NEW YORK HAS DONE SO
- ▶ NEW JERSEY HAS DONE SO
- ▶ FAA PREEMPTION MAY STRIKE THESE EFFORTS, WHERE THE EMPLOYEE IS NOT EXEMPT UNDER SEC 1
- ▶ NJ APPELLATE COURT HAS ALREADY DECIDED THAT THE FAA PREEMPTS THESE NEW STATE LAWS
 - ▶ *Antonucci v. Curvature Newco, Inc.*, 470 N.J. Super. 553 (App. Div. 2022)

WHY IS ARBITRATION IMPORTANT?

- ▶ RISK MANAGEMENT STRATEGY
- ▶ JURORS ARE UNPREDICTABLE - MONOPOLY MONEY
- ▶ CLAIM INFLATION IS A REAL ISSUE FOR INSURERS AND OWNERS
- ▶ OWNER PREMIUMS ARE SKYROCKETING, WHILE REVENUES DECLINE
- ▶ MARKET FOR US MARINE INSURANCE IS SHRINKING

THE KOZUR ARBITRATION CLAUSE

11. Arbitration: I understand and agree that any dispute, claim or controversy arising out of my work as a crewmember, including but not limited to statutory Jones Act claims, negligence, unseaworthiness, maintenance and cure, and wage claims, and whether such claim or controversy be brought against the vessel, vessel owner[s] or vessel operator/employer, or any combination of them; or disputes relating to this Agreement, or the breach, termination, enforcement, interpretation or validity thereof, including the determination of the scope or applicability of this arbitration clause, shall be determined by one arbitrator sitting in Philadelphia, Pennsylvania.

The arbitration shall be administered by JAMS pursuant to its Comprehensive Arbitration Rules and Procedures. If this agreement to arbitrate is determined to be exempt from enforcement under the Federal Arbitration Act, the laws of the State of New York shall be applied in determining the validity and enforceability of this agreement.

ARBITRATION SHALL BE MY EXCLUSIVE REMEDY AND I UNDERSTAND THAT I GIVE UP MY RIGHT TO SUE. I FURTHER UNDERSTAND AND AGREE THAT I GIVE UP MY RIGHT TO SELECT THE VENUE FOR ANY CLAIM OR CONTROVERSY AND THAT I GIVE UP MY RIGHT TO TRIAL BY JUDGE OR JURY FOR ANY AND ALL CLAIMS, INCLUDING BUT NOT LIMITED TO STATUTORY JONES ACT, NEGLIGENCE, MAINTENANCE AND CURE, UNSEAWORTHINESS, AND WAGES.

The fee for arbitration, except the cost of any dispute concerning the enforceability of this Agreement or appeal of the arbitrator's decision, shall be borne by the Vessel's owner or Operator/employer as they may amongst themselves decide. Each party shall be responsible for their own attorney fees and costs and lay and expert witness fees and costs, unless contrary to law. Judgment on the Arbitration Award may be entered in any court having jurisdiction. This clause shall not preclude parties from seeking provisional remedies in aid of arbitration from a court of appropriate jurisdiction; however, each party shall bear its own costs in pursuing such remedies.

FEDERAL CASE CITATIONS

- ▶ *AMOS V. AMAZON LOGISTICS, INC.*, 2022 WL 2181448 (M.D.N.C. 2022)
- ▶ *BISSONNETTE V. LEPAGE BAKERIES PARK ST., LLC*, 49 F.4th 655 (2nd Cir. 2022)
- ▶ *CINTAS CORP. V. LOPEZ*, 2022 WL 3753256 (5TH CIR. 2022)
- ▶ *FLI-LO FALCON, LLC V. AMAZON.COM INC.*, 2022 WL 4451273 (W.D. WA. 9/8/22)
- ▶ *NEW PRIME INC. V. OLIVEIRA*, 139 S.Ct. 532 (2019)
- ▶ *PALCKO V. AIRBORNE EXPRESS, INC.*, 372 F.3d 588 (3d Cir. 2004)
- ▶ *REYES V. HEARST COMMUNICATIONS, INC.*, 2022 WL 2235793 (9TH Cir. 2022)
- ▶ *RITTMAN v. AMAZON.COM, INC*, 971 F.3d 904 (9th Cir. 2020)
- ▶ *SOUTHWEST AIRLINES CO. v. SAXON*, 142 S.Ct. 1783 (2022)
- ▶ *TREJO* 2021 WL 4311958 (*D. MASS 2021*)
- ▶ *VOLT INFO. SCIS., INC. V. BRD. OF TRS. OF LELAND STANFORD JR. UNIV*, 489 U.S. 468 (1989)
- ▶ *WAITHAKA V. AMAZON.COM, INC.*, 966 F.3d 10 (1st Cir. 2020)
- ▶ *WALLACE V. GRUBHUB*, 970 F.3d 798 (7th Cir. 2020)

NEW JERSEY CASES

- ▶ ***ANTONUCCI V. CURVATURE NEWCO, INC.***, 470 N.J. Super. 553 (App. Div. 2022)
- ▶ ***ARAFI V. HEALTH EXPRESS CORPORATION***, 243 N.J. 147 (2020) ***COLON V. STRATEGIC DELIVERY SOLUTIONS, LLC*** (2020) companion case
- ▶ ***KOZUR v. F/V ATLANTIC BOUNTY, LLC*** 2020 WL 5627019 (D.N.J. 2020)