Avoiding a Jury Trial for Jones Act Seamen's Injury Claims: *It Can Be Done!*

Marissa M. Henderson, Esq.*

Maritime lawyers, marine insurers, vessel operator risk managers: what is your gut reaction when I ask, "Can you get a Jones Act seaman to arbitrate his personal injury claims?"

I'm pretty sure your initial thought is, "No, of course not." You may even be more cerebral in thinking, "That would be nice, but a seaman's right to a jury trial in a forum of his choice is protected under the Savings to Suitors Clause of the Constitution."[1] Technically, that would be a true statement. But there *is* a way to contract around a Jones Act seaman's right to a jury trial—an absolutely enforceable way to do it. And it could save vessel operators literally millions of dollars by avoiding the risk of a jury trial. So, let's talk about post-injury claims arbitration agreements.

This article's focus is to dispel the myth that arbitration agreements with seamen are unenforceable and to encourage vessel operators to use post-injury arbitration agreements.[2] First, I will address the reasons a vessel operator would want to offer its injured seamen something to persuade them to arbitrate their injury claims. Then I will discuss the law surrounding post-injury arbitration agreements. Spoiler alert—they have beat every legal challenge thrown at them, except perhaps relating to true cases of unfair dealing with a seaman or their incapacity to contract. Finally, I will address more practical information on best practices for a vessel operator to effectively implement a program of post-injury arbitration agreements, and what to expect when they are in place.[3] Hopefully, by then readers will be convinced to incorporate post-injury arbitration agreements into their risk management plans. If so, we have a few suggestions on who to consult to get started.

What Are Claims Arbitration Agreements and Why Choose Arbitration Anyway?

By "post-injury claims arbitration agreement" I mean a written agreement between an injured seaman and his employer to bring any claims he may have relating to his injuries in an arbitration forum rather than in a court. Let's unpack that. The seaman is *already* injured when he signs the agreement. It is not something he signs before he starts working—indeed, caution is warranted

---

* Marissa M. Henderson is a partner in the boutique maritime and transportation firm in Norfolk, Virginia, Ventker Henderson, PLLC. She is licensed to practice law in both Virginia and North Carolina.

[1] The Savings to Suitors Clause, part of the statute setting forth the original jurisdiction of federal district courts, protects a seaman's right to a trial by jury for their injury claims against their employer. It states, "The district courts shall have original jurisdiction, exclusive of the courts of the States, of (1) Any civil case of admiralty or maritime jurisdiction, savings to suitors in all cases all other remedies to which they are otherwise entitled." 28 U.S.C. § 1333.

[2] This article began, in a much simpler form, as a paper submitted as part of a maritime contracts panel for the American Bar Association's Admiralty and Maritime Law Committee's seminar, Admiralty Disruption, on March 22, 2019, in New Orleans, Louisiana.

[3] Some vessel operators, namely cruise lines, can get their Jones Act seamen to agree to arbitrate future claims, including Jones Act and personal injury claims, by including an agreement in the employment contract. Agreements that "envisage performance abroad" are covered under the United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards, which was adopted by the United Nations in 1958, 21 U.S.T. 2517, 330 U.N.T.S. 33, and implemented in the United States in 1970 by 9 U.S.C. §§ 201 – 208. The operative provision setting forth which arbitration agreements are covered by the Convention is 9 U.S.C. § 202.

because an arbitration agreement for future claims as part of a seaman's employment contract is entirely unenforceable in the United States. Section 1 of the Federal Arbitration Act ("FAA") expressly excludes them from the FAA's purview.[4]

How could having seamen elect an arbitration forum for their injury claims be so beneficial to the vessel operator/Jones Act employer? Two words—no jury. At the risk of stating the obvious, members of the crew who are injured in the service of a vessel can sue their employer in negligence under the Merchant Marine Act of 1920, commonly known as the Jones Act, and they are entitled to a jury trial. Vessel owners are thus put in a difficult spot with injured crew—they owe them the ancient seafarer's remedy of maintenance and cure (medical care and a daily rate for subsistence), yet all the while they are dealing with a potential plaintiff who can sue them for literally millions of dollars for personal injuries and economic losses. This situation, shared only with railroad employers, is unique among employers in our country. Under state and federal worker's compensation statutes, all other employers must provide medical and disability compensation for workers injured on the job, but they are otherwise immune from being sued by their employees. It is these claims for which the injured seaman can sue his employer—negligence, unseaworthiness, and a refusal to provide maintenance and cure—that we are concerned with here.

What is the consideration for a claims arbitration agreement, you may ask, such that it is an enforceable contract? Simple—the employer promises to provide the injured seaman something above and beyond what the employer has a duty to provide him (or her) under the law. Typically, the employer agrees to pay the seaman advanced wages, over and above the daily maintenance rate, while he or she is recovering from injury. The wage advances would be credited against a future settlement for those lost wages. It is well-settled in contract law that an agreement to pay something sooner than it is due is an agreement supported by substantial consideration.[5] Having defended maritime operators for some time, I can say with confidence that many Jones Act employers already provide injured crew advance wages (or crew shares for fishing vessels). Yet, they get nothing for it except goodwill in treating employees properly (valuable, clearly), and often *they get sued anyway*. Employers choosing to provide wages during the injury recovery period should know they can benefit from their generous wage policy by conditioning wages or other benefits on the seaman's written agreement to arbitrate any claims relating to the injury. As long as the employer agrees to provide the injured seaman some benefit *over and above* what he or she is legally entitled to (i.e., above maintenance and cure) in exchange for the agreement to arbitrate, courts will enforce the arbitration agreement.

So back to why a vessel operator would want to make crew arbitration agreements part of its risk management program. Let me be clear (and a bit repetitive)—vessel operators can save millions of dollars in Jones Act liability exposure and (sorry, fellow defense lawyers) a ton in Jones Act defense costs by effectively implementing post-injury arbitration agreements as part of their risk management strategy. The reduced loss record from lower exposure results in hard savings in

---

[4] 9 U.S.C. § 1.

[5] Agreements to pay money early against a future payment or settlement are supported by bargained-for consideration. *E.g., In Re OSG Ship Mngmt.*, No. 14-16-240, 2016 Tex. App. LEXIS 13785 (Tex. App. Houston 14th Dist. Dec. 29, 2016) (noting agreement was supported by consideration because seaman was "getting the money early" under an advance payment plan that could in the future add up to his maintenance and cure benefits).

protection and indemnity ("P&I") insurance premiums, which is the insurance vehicle that typically covers this risk. I have interviewed risk managers for large vessel operators who used these arbitration agreements over a significant period of time, and they will fully back up these claims of cost savings.

This risk of jury exposure for Jones Act and related claims is high for vessel owners. Indeed, the very *risk* of a jury trial puts significant pressure on owners and their underwriters to settle. Without any cap on what a jury can award for pain and suffering, and when pitting a seaman against a larger employer, the risk of a runaway jury issuing a huge verdict is real. Plaintiff's lawyers often use the risk of a jury trial as their best leverage (in an otherwise mediocre case) at mediation. In sum, and to state the obvious to anyone familiar with Jones Act claims, jury trial exposure for Jones Act claims poses a significant risk for vessel owners. While seamen cannot contract away their Jones Act remedy, they can be persuaded to contract around a judicial forum in which to bring their claims. That is the beauty of post-injury claims arbitration agreements. The trade-off for avoiding an unpredictable jury is that arbitral awards are not appealable except on very limited grounds, such as fraud. That trade-off is well worth it to avoid a jury exposure in a Jones Act personal injury case.

Some practitioners have had bad experiences with arbitration and consider the cost and effort of arbitration to provide little advantage over judicial litigation. This is especially the case when commercial disputes are involved. Indeed, arbitration can be complex, costly, and slow. For that reason, care should be taken to write into these arbitration agreements provisions to avoid or reduce many of those concerns, including designating a *sole* arbitrator and specifying arbitration before a private ADR provider.[6] Since many Jones Act cases currently go to mediation, maritime lawyers and risk managers will already have their go-to ADR provider and neutrals. I also recommend expressly adopting any expedited rules of the ADR provider. For example, JAMS, a global ADR provider, has expedited arbitration procedures under its comprehensive rules and a streamlined set of rules for claims under $250,000 or when adopted by agreement.[7] With these provisions in place in the arbitration agreement, many of the objections to arbitration—costs and being as complex as judicial litigation—can be eliminated.

Legal Challenges

The Federal Arbitration Act "Exclusion" for Employment Contracts

The widespread belief that seamen cannot be forced to arbitrate their injury claims arises from the language of the Federal Arbitration Act ("FAA") that expressly carves out from its purview

[6] Owners want to avoid any argument that a high filing fee serves as a barrier to a seaman enforcing his or her rights under the Jones Act. In at least one case, an employer had to overcome this argument, and it agreed (after moving to compel arbitration) to advance the filing fee. *Barbieri v. K-Sea Transp. Corp.*, 566 F. Supp. 2d 187, 191, 195 (E.D.N.Y. 2008) (noting the AAA had a $10,000 filing fee for the claimant under the Commercial Arbitration Rules, and compelling arbitration on the condition that K-Sea pays any filing fees not waived by the AAA).

[7] Rules 16.1 & 16.2, JAMS Comprehensive Arbitration Rules and Procedures, avail. at https://www.jamsadr.com/rules-comprehensive-arbitration/#Rule-16-1 (accessed on Mar. 31, 2019); JAMS Streamlined Arbitration Rules and Procedures, avail. at https://www.jamsadr.com/files/Uploads/Documents/JAMS-Rules/JAMS_streamlined_arbitration_rules-2014.pdf (accessed on Mar. 31, 2019).

"contracts of employment of seamen."[8] As such, courts have no authority to compel arbitration based on arbitration clauses in a seaman's employment contract.[9] Thus, marine employers cannot have vessel crewmembers agree to arbitrate future disputes or injury claims as part of a new hire package. However, when an agreement is executed *after* the seaman's accident and injury, courts will almost universally compel arbitration based on an agreement that a seaman and the employer have "admittedly signed" *after* the injury.[10] Seamen have nonetheless challenged post-injury arbitration agreements, arguing that because the agreement was made with an employer, and references employment-type terms such as compensation or maintenance and cure, that they are unenforceable employment contracts under the FAA. These arguments have all failed.

In 2016, the United States District Court for the Southern District of Florida examined the prior cases on this issue, finding "courts have uniformly held that post-incident agreements to pay a seaman advanced wages are non-employment agreements under the FAA."[11] For example, the United States Court of Appeals for the Fifth Circuit had previously held that a written agreement that was a partial release by a seaman of his injuries to date, with an agreement to arbitrate later-arising injuries related to the same incident, and which acknowledged the seaman's "maintenance and cure" rights, was not subsumed into the seaman's employment contract and thus not excluded from the FAA.[12] Likewise, the United States District Court for the Eastern District of Louisiana found a post-injury arbitration agreement was not part of the seaman's employment contract because there was no language in the agreement indicating acceptance of the agreement was a condition of continued employment.[13] The New York Court of Appeals reached the same conclusion at around the same time.[14] As the United States Court of Appeals for the Second Circuit has explained:

> Although the FAA exempts from its coverage 'contracts of employment of seamen,' the Supreme Court has strongly suggested that arbitration agreements such as the one at issue in this case do not constitute 'contracts of employment' where the arbitration agreement is 'not contained' in a broader employment agreement between the parties.[15]

---

[8] 9 U.S.C. § 1.

[9] One exception is if the employment contract is governed not by the FAA but by the United Nations Convention. *See* discussion in footnote 4 regarding agreements covered by the U.N Convention.

[10] *Vane Line Bunkering, Inc. v. Hooper*, No. 16-21348, 2016 U.S. Dist. LEXIS 184372, *6 (S.D. Fla. July 6, 2016) (enforcing post-injury seaman's arbitration agreement).

[11] *Id.* at *7.

[12] *Terrebone v. K-Sea Transp. Corp.*, 477 F3d 271, 279 (5th Cir. 2007).

[13] *Nunez v. Weeks Marine, Inc.*, No. 06-3777, 2007 U.S. Dist. LEXIS 10807, *10-11 (E.D. La. Feb. 13, 2007).

[14] *In re Schrieber v. K-Sea Transp. Corp.*, 879 N.E.2d 733, 737 (N.Y. Ct. App. 2007).

[15] *Harrington v. Atlantic Sounding Co., Inc*., 602 F.3d 113, 121 (2nd Cir. 2010) (internal citations omitted) (citing, among other cases, *Gilmer v. Interstate/Johnson Lane Corp.*, 500 U.S. 20, 25 n.2 (1991)).

There can be little doubt that any future challenge that an agreement between an injured seaman and his or her employer to arbitrate the seaman's claims is a "contract of employment" under Section 1 of the FAA (and unenforceable) will be dead in the water (forgive my pun).

Seamen as "Wards of the Admiralty"

Another argument that has been raised in various forms is that an arbitration agreement with a seaman should be more closely scrutinized than any other arbitration agreement because seamen deserve "special solicitude"[16] from the courts. I refer to the "wards of the admiralty" doctrine. As the United States Supreme Court has explained,

> [Seamen] are emphatically the wards of the 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, dealing with their expectancies, wards with their guardians . . . [.] If there is any undue inequality in the terms, any disproportion in the bargain, any sacrifice of rights on one side, which are not compensated by extraordinary benefits 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 *protanto* the bargain ought to be set aside as inequitable.[17]

Seamen have invoked this doctrine to attempt to turn on its head the strong federal policy in favor of arbitration agreements. The FAA establishes a "clear and unequivocal presumption in favor of arbitration and requires that courts 'rigorously enforce agreement to arbitrate.'"[18] Per the FAA, a written arbitration agreement is *prima facie* valid, and the party opposing it has the burden to prove the agreement was the result of fraud, coercion, overreaching, or some ground that would justify invalidating any contract.[19] By contrast, under the wards of the admiralty doctrine, releases with seamen are highly scrutinized, and vessel owners have a heavy burden to prove a release "was executed freely, without deception or coercion, and that it was made by the seaman with full understanding of his rights."[20]

These arguments have repeatedly failed, however, because arbitration agreements, unlike releases, do not affect substantive rights. An agreement to resolve claims in arbitration rather than in a jury

---

[16] In a recent products liability case in a maritime context, the United States Supreme Court reaffirmed its "'special solicitude for the welfare' of those who undertake to 'venture upon hazardous and unpredictable sea voyages.'" *Air & Liquid Sys. Corp. v. Devries*, 203 L. Ed. 373, 383 (2019) (quoting *American Export Lines, Inc. v. Alvez*, 446 U.S. 274, 285 (1980)).

[17] *Garrett v. Moore-McCormack Co*., 317 U.S. 239, 246-47 (1942) (quoting *Harden v. Gordon*, 11 F. Cas 489, 485, F. Cas. No 6047 (CC Me. 1823)); *see also Karim v. Finch Shipping Co*., 374 F.3d 302, 310 (5th Cir. 2004) ("Seamen . . . are wards of admiralty whose rights federal courts are duty-bound to jealously protect.").

[18] *Barbieri*, 566 F. Supp. at 193 (quoting *Sphere Drake Ins. Ltd. v. Clarendon Nat'l Ins. Co.*, 263 F.3d 26, 30 (2d Cir. 2001)).

[19] *See* FAA, 9 U.S.C. § 2 ("[A]n agreement in writing to submit to arbitration an existing controversy arising out of such a contract . . . shall be valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract.").

[20] *Garrett*, 317 U.S. at 344.

trial is not a release of any rights.[21] Similarly, courts have rejected arguments that the right to a trial by jury is a special, substantive right created by Congress under the Jones Act.[22] Additionally, a seaman's lack of counsel when signing a claims arbitration agreement has been rejected as grounds to invalidate an arbitration agreement.[23]

Moreover, as at least one court has noted in this context, "there is something antiquated in the idea that seamen are less capable than other people of making contracts for themselves."[24] Regardless of the viability of the doctrine, all courts considering the issue have found the "wards of the admiralty" doctrine does not shift the burden of proof in cases concerning the enforceability of a post-injury arbitration agreement. The FAA's strong policy in favor of arbitration and the presumptive validity of arbitration agreements outweighs any concern that a seaman needs special protection by courts.

What Challenges are Left?

Certain fundamental challenges to the validity of a contract as a whole pose the greatest risk to post-injury arbitration agreements. Post-injury arbitration agreements can be challenged just as all other contracts may be challenged—for fraud, fraud in the inducement, duress, incapacity, or overreaching. As noted above (n. 19) Section 2 of the FAA states "an agreement in writing to submit to arbitration an existing controversy arising out of such a contract . . . shall be valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract."[25] In other words, if the seaman was duped, and can prove it, or if he was drunk or high or there is some other public policy reason to invalidate the seaman's agreement, the contract can be struck down. For example, in *In re Schreiber* (another K-Sea Transportation case), the New York Court of Appeals (New York's highest court) was concerned that the seaman was misled by the language of the arbitration agreement into believing he would not have to pay filing fees. The arbitration clause noted that the company would advance up to $750 of the arbitration filing fee, but the AAA filing fee turned out to be $10,000. As such, the court (after rejecting all other legal challenges to the arbitration agreement), held an evidentiary hearing to determine whether K-Sea acted in good faith or intentionally misled and induced the seaman into signing the agreement. *In re Schreiber*, 879 N.E.2d at 739. However, the court noted that, under the FAA, the seaman bore the burden to prove the agreement was invalid.[26]

---

[21] *See Harrington,* 602 F.3d at 124 ("By agreeing to arbitrate a statutory claim, a party does not forgo the substantive rights afforded by the statute; it only submits to their resolution in an arbitral, rather than a judicial, forum.") (quoting *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.,* 473 U.S. 614, 628 (1985)); *Terrebone,* 477 F.3d at 284 (same).

[22] *Nunez*, 2007 U.S. Dist. LEXIS at *17 ("There is nothing in the Jones Act that states a Plaintiff may not waive the right to a jury trial. In fact, a seaman does in effect waive his right to a jury trial when he files his claim under Rule 9(h) of the Federal Rules of Civil Procedure.").

[23] *See, e.g., Barbieri.,* 566 F. Supp. 2d at 193.

[24] *In re Schreiber*, 879 N.E.2d at 738 (noting the ward of the admiralty doctrine has shown some signs of erosion).

[25] 9 U.S.C. § 2.

[26] Interestingly, it appears the large AAA filing fee was also a surprise to the vessel owner. *See Barbieri*, 566 F. Supp. 2d at 194-95 (noting company witnesses testified they did not know what the AAA filing fee would be and noting the seaman failed to show the company intentionally misled him or acted in bad faith when negotiating the contract).

A seaman challenging the validity of an entire contract containing an arbitration agreement faces an uphill battle. He or she has the burden of proof and will not be saved by the traditional "ward of the admiralty" doctrine. Indeed, standard contract law applies and can bite the seaman; a seaman can ratify a voidable contract by taking the money offered. The Fifth Circuit in *Harrington* noted just that.[27]

In any event, vessel owners should try to avoid lengthy legal battles (in a judicial forum) by designating that any claims as to the validity of the entire agreement shall be determined in arbitration.[28] As the United States Supreme Court recently noted in *New Prime Inc. v. Olivera*, 139 S. Ct. 532, 538 (2019), "[u]nless a party specifically challenges the validity of the agreement to arbitrate, both sides may be required to take all of their disputes—including disputes about the validity of their broader contract—to arbitration." All disputes about whether a claim is arbitrable can be designated to the arbitrator, except for the question of whether a contract falls under the purview of FAA and is therefore enforceable.[29] However, for our purposes, that question has already been decided uniformly and repeatedly in many courts: a post-injury agreement with a seaman, containing an agreement to arbitrate any claims relating to his or her injuries, falls under the purview of FAA, and federal courts have statutory authority to compel arbitration.

How to Do it Right: Some Best Practices to Implement an Arbitration Program

I have simple guidance here—vessel operators should be up front and honest. They are giving a benefit to the seaman to get a benefit. Also, timing matters. This is not a time to do any ambulance chasing with an arbitration agreement to be signed in one hand and a check for advanced wages in the other! Seamen should be given time to treat and return home for recuperation. Thus, some wage advances (or some other benefit) can be offered before an agreement is signed. A well-executed program will have one or two key people as the spokesperson for an arbitration agreement and for any future settlement. A cover letter explaining the agreement with a blank wage/arbitration agreement can be mailed or given to the injured seaman, to be followed up with a conversation with the company spokesperson. That person, usually the risk manager, should have a controlled and consistent message across the board with all injured seamen. The person serving as the face of the company must be credible and candid, and available to answer all

---

[27] The Court instructed the lower court on remand to determine whether the seaman lacked mental capacity and/or was intoxicated when he signed the agreement, but in so doing the Court noted that the seaman may nonetheless have ratified the (voidable) contract by cashing the checks. *Harrington*, 602 F.3d at 126.

[28] *Vane Line Bunkering, Inc. v. Hooper*, 2016 U.S. Dist. LEXIS at *10-11, citing *Buckeye Check Cashing, Inc. v. Cardegna*, 546 U.S. 440, 445 (2006) (compelling arbitration and leaving challenges to the contract containing the arbitration agreement as a whole for the arbitrator).

[29] There may be some confusion that the *New Prime* case undercuts the strong federal policy in favor of arbitration. I disagree. The Court merely held that whether a contract is removed from the FAA's coverage under Section 1 (excluding certain contracts of employment) is an antecedent question for a court to determine, not an arbitrator. *New Prime*, 139 S. Ct. at 538 (determining whether the contract at issue, an agreement between a truck driver labelled an independent contractor and a trucking company, was a "contract of employment" under Section 1 of the FAA). The Court found the agreement to drive was a "contract of employment" within Congressional intent, because it was an agreement to perform work, whatever the label given to the worker by the company. The Court's intent was not to restrict the coverage of the FAA. The gravamen of the opinion is that the courts must determine on their own whether the statutory authority to compel arbitration exists in a given situation; that question cannot be delegated to an arbitrator.

questions. As Alton Peralta,[30] the former risk manager at K-Sea Transportation ("K-Sea") (a party in three published opinions defeating challenges to these agreements during his tenure), explained to me, you cannot take the personal out of a personal injury claim.

A simple way for a company representative to explain an arbitration agreement is to note the seaman is giving up a public jury trial and judicial forum in favor of a private hearing before a private arbitrator. Again, the company "face" of the arbitration agreement can candidly explain the company is offering a benefit over and above what the law requires for maintenance, because a private forum is better for the company. The seaman should understand the company gets some benefit. The seaman should also be told this is his or her choice, he or she can elect advanced wages (or whatever the benefit) and agree to arbitrate, or he or she can receive just what the law requires the employer to provide, maintenance and cure, and sue for more later. Also, it should be clear any advanced wages received would be credited against any future claim the seaman makes for lost wages. A shorter, rather than a long agreement, is better in my mind. It is certainly easier to argue later that someone understood what he or she signed when a contract is one page and has simple, direct language.

Back to the personal element of an effective program. The risk manager should cultivate a reputation of treating injured crew members fairly but firmly, on behalf of the company. Logistically, when an unrepresented crewmember reaches maximum medical improvement and (hopefully) returns to work, the risk manager can bring him or her in to discuss settling all their claims relating to their injuries. A face-to-face meeting is preferable and more likely to succeed. The portion of the wages not advanced can be offered, along with another amount on top of that at the discretion of the risk manager. Some generosity should be exercised so that crewmembers are encouraged to try to negotiate settlements on their own. For example, a $10,000 wage loss representing one-third wages that were not provided in the advanced wage/arbitration agreement, plus another $10,000 on top of that, as a settlement for a minor injury with a full recovery seems reasonable in exchange for the release all of the seaman's Jones Act and related claims.[31] Companies can, of course, take a harder line with injured Jones Act seamen, but the risk is that the injured crewmembers feel confused or pressured and consult a lawyer sooner rather than later or never. Even in a different risk management culture than I propose, however, the use of post-injury arbitration agreements can be tailored to the program.

Bill Neubrand,[32] the former risk manager at the marine transportation company Vane Brothers ("Vane"), for example, reports they preferred to settle with represented crewmen, to reduce the

---

[30] Mr. Peralta is now a Marine Claims Manager with Crum & Forster, in Jersey City, New Jersey. He is quick to credit Thomas M. Canevari, Esq., of Freehill Hogan & Mahar, for guiding K-Sea in its claims arbitration agreements program.

[31] Settling with unrepresented Jones Act seamen is a quandary for vessel owners. As long as a detailed, red letter release is used (consult a maritime lawyer, please!), indicating things such as this unrepresented seaman can (i) read, (ii) understands he is giving up all his rights regarding the injury, (iii) had a chance to get counsel but chose not to, and other safeguards such as a video or audio recording of the execution are used as needed, a red letter release (using actual red print for certain items) with an unrepresented seaman should hold up against challenge. The use of court reporters and/or video recording the reading and signing of the agreement may also be prudent.

[32] Mr. Neubrand currently lives in Baltimore, Maryland, and he is affiliated with Dominion Maritime Adjusters, LLC. He has spoken on this subject, and his experiences at Vane, before the American Institute of Marine Underwriters and

risk of a seaman being able to overturn the release later under the heightened scrutiny courts give to releases with "wards of the admiralty." However, counsel representing Vane's crew members, with minor exceptions, did not challenge the arbitration agreement. By the time Vane implemented its program under Bill Neubrand in 2012, it was firmly established in the law that a post-injury agreement with a Jones Act seaman to arbitrate his personal injury claims *is* enforceable. K-Sea, another maritime transportation company, had won three cases in 2007 and 2008 (*Barbieri*, *In re Schreiber*, and *Terrebone*), so plaintiff's lawyers by and large stopped challenging these agreements.[33]

Since Vane prevailed on another legal challenge to post-injury arbitration agreements as recently as 2016,[34] other vessel operators should expect little legal challenge to such agreements. Indeed, it seems plaintiff's lawyers were even dissuaded from taking claims from K-Sea's crews. Mr. Peralta learned from plaintiff's lawyers he knew well that they had been approached by K-Sea crewmembers to take their Jones Act case, but the lawyers instead advised the crewmembers to negotiate a settlement directly with K-Sea and Mr. Peralta. Vane, as noted above, preferred its crew members to have reasonable lawyers represent them to work out a reasonable settlement with an air-tight release. Both approaches work, and each company will find the path that works best for it as it executes the program.

One point is worth emphasizing—with an effective post-injury arbitration agreement program in place, most injured claimants will choose to settle in lieu of arbitration. Ironically, then, the result of an arbitration agreement program is very few actual arbitrations! As Mr. Neubrand experienced, once a crewmember's lawyer realized he or she could not beat the arbitration agreement, they would seek to negotiate a settlement directly or request non-binding mediation. In Mr. Neubrand's experience, then, plaintiff's lawyers simply do not like arbitration.

Indeed, Mr. Neubrand has indicated that once Vane "won" its first arbitration with a shockingly favorable ninety percent comparative fault finding against the seaman in a case of very serious injuries, Vane was not afraid of going to arbitration. Most readers can understand that the chances of a *jury* allocating ninety percent of fault to a severely injured, sympathetic seaman are essentially nil. But a seasoned former judge, serving as an arbitrator, will objectively apply tort law principles to assess if a seaman bears comparative fault for his accident or injuries, and, if so, assign an appropriate percentage of fault. This distinction between triers of fact probably explains why plaintiff's lawyers do not like taking Jones Act claims to arbitration.

Not being afraid to walk away from a negotiation is a powerful position. Having an arbitration agreement in place with a Jones Act seaman provides this confidence. Both Vane and K-Sea's settlement figures for its Jones Act claims decreased significantly with arbitration agreements in place. This should be music to defense counsel, vessel owners', and marine insurer's ears!

---

the Inland Waters and Towing Committee of The Maritime Law Association of the United States. He is available to help implement claims arbitration agreements into vessel operators' risk management programs. Mr. Neubrand can be reached at bneubrand@dmadjusters.com.

[33] The notable exception was Mr. Hooper in the 2016 Vane case, cited herein.

[34] *Vane Line Bunkering, Inc. v. Hooper*, No. 16-21348, 2016 U.S. Dist. LEXIS 184372 (S.D. Fla. July 6, 2016).

Indeed, with an effective risk management program that includes claims arbitration agreements, most injured crew will sign the agreements, few claims will actually go to arbitration, and a high percentage of claims can be settled at favorable numbers. This is not a fairy tale. It was the experience of the former risk managers for two large vessel operators, K-Sea and Vane, who had claims arbitration agreements in place for a long time and survived various legal challenges. The beauty of implementing the program is that many vessel operators are *already* paying its injured crew advanced wages. For them, then, there would be no additional cost to implement this program.

Conclusion

In sum, vessel operators facing Jones Act liability should consider implementing a policy of offering injured seamen a financial incentive to agree to arbitrate any claims arising from the incident. The strong federal policy in favor of arbitration established by the FAA makes such agreements almost universally enforced. Indeed, a seaman who has signed an arbitration agreement faces an uphill battle to fight a motion to compel arbitration, and absent substantial proof of fraud, deceit, or overreaching, courts will compel arbitration. The "wards of the admiralty" arguments to support invalidating post-injury agreements with seamen have fallen on deaf ears, because the seaman is not being asked to contract away any of his substantive rights. An agreement to arbitrate is akin to a forum selection clause, affecting procedural rather than substantive rights. Thus, unlike in many other contexts in which marine employers find themselves at a disadvantage defending claims by their injured seamen, the employer with a signed post-incident claims arbitration agreement has an upper hand. This strategy eliminates the risk posed by a jury trial, in favor of a binding, non-appealable arbitral decision. With costs of defending Jones Act claims averaging in the six-figures, and with Jones Act liability exposure also at increasingly high levels, the benefit of avoiding protracted, risky Jones Act litigation can be substantial. Employers can and should adopt in their arbitration agreements streamlined arbitration procedures of chosen arbitration services to further control the costs of defense at arbitration.

There are not many legal strategies to reduce Jones Act exposure and P&I premiums. The use of post injury arbitration agreements is a largely untapped method vessel operators can do so. It does not exploit seamen or take away any of their substantive rights. But it does turn the tables on plaintiff's lawyers by taking away their ace in the hole—a risk of a jury's verdict—replacing it with a binding ruling by a rationale trier of fact, an arbitrator. Forget the myth; post-injury arbitration agreements *are* enforceable under the FAA and courts have recognized this time and again. If for some reason a court fails to compel arbitration, the operator is no worse off than if it had no agreement. Many vessel operators *already* offer wage advances above the maintenance rate without any *quid pro quo*, thus wasting a wonderful opportunity to reduce their Jones Act liability exposure. What is there to lose? Get started on the road to savings and a more rationale Jones Act defense program![35]

[35] Of course, I would be happy to work with companies wanting to implement a program of post-injury claims arbitration agreements. My law partner, Dave Ventker, and I are also happy to speak to stakeholders on this subject, such as vessel operator groups and marine underwriters and claims adjusters. I can be reached at mhenderson@ventkerlaw.com.