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**HOUSTON COURT OF APPEALS HOLDS THAT
POST-INJURY ARBITRATION AGREEMENT WAS NOT
EXEMPTED FROM FAA OR INVALID UNDER FELA**

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Granting mandamus review, the Houston Court of Appeals, in *In re Weeks Marine, Inc.*, held that it was an abuse of discretion for the trial court to deny the employer's motion to compel arbitration. *In re Weeks Marine, Inc.*, No. 14-07-00501-CV, 2007 WL 4442012 (Tex. App.—Houston [14th Dist.] Dec. 20, 2007). Recognizing that mandamus review is an extraordinary remedy that will issue only to correct a clear abuse of discretion when the abuse cannot be remedied by appeal, the court held that a party has no remedy for wrongful denial of its right to arbitrate under an agreement subject to the Federal Arbitration Act ("FAA").

Following an injury on a deck barge, Jose Jimenez executed a claim arbitration agreement wherein he agreed to arbitrate any claims arising from his injury in exchange for Weeks Marine's agreement to advance money to Jimenez which was to be credited against any recovery Jimenez may ultimately have against Weeks Marine. Two months later, Jimenez filed suit against Weeks Marine under the Jones Act and general maritime law in state court. Although he continued to accept the advance payments, Jimenez refused Weeks Marine's demand to arbitrate his claims.

Weeks Marine filed a motion to compel arbitration which was denied by the trial court. Weeks Marine then filed a mandamus proceeding seeking relief from the trial court's denial of its motion to compel arbitration. Jimenez relied upon five arguments in an attempt to circumvent and invalidate the agreement:

- (1) the agreement was an employment contract exempted from the FAA;
- (2) the agreement was an invalid attempt by employer to exempt itself from FELA liability;

MARITIME TERM OF THE DAY - *stevedore*

From the Spanish *estibador*, a packer.

- (3) the agreement diminished his substantive rights;
- (4) the agreement was substantively unconscionable; and
- (5) the agreement was procedurally unconscionable.

On appeal, the court disagreed with all of Jimenez's arguments, but found that the issue of whether the agreement was procedurally unconscionable was an issue to be decided by the trial court.

As to his first argument, Jimenez asserted that the agreement was exempted under Section 1 which states that "nothing herein contained shall apply to contracts of employment of seamen." *Id.* at *2 (9 U.S.C.A. § 1 (1999)). Although the court refused to opine as to which party had the burden to prove whether the agreement fell within the exception under Section 1, the court held that, as a matter of law, the agreement was not a contract of employment. *Id.* at *3. The court reached that conclusion based, in part, upon the wording of the agreement referring to his employment only in the past tense. Jimenez argued that the agreement constituted at least a modification of his employment contract because it tied his advances to his prior compensation. According to Jimenez, those advances were effectively a continued payment under his employment contract. The court, however, found that the agreement did not address or define any terms of employment nor modify an employment relationship. *Id.* The court also determined that "the parties intended the Agreement to be an agreement to arbitrate claims in exchange for voluntary payment of a portion of the potential value of those claims." *Id.* The court held that the advances did not constitute wages because Jimenez performed no work after his injury. The court further explained as follows:

The Agreement is not somehow transformed into a contract of employment merely because it provides for advances to be calculated from Jimenez's historical wages or credited against any eventual recovery for lost wages under the Jones Act. Likewise, the Agreement is not transformed into a contract of employment by virtue of Weeks Marine's choosing to assure Jimenez, in a letter, that any advances under the Agreement would be in addition to the maintenance and cure to which he was already fully entitled.

Id. at * 4.

Next, Jimenez argued that the post-injury agreement was invalid under Section 5 of the Federal Employers' Liability Act ("FELA") which invalidates any contract that enables a common carrier to exempt itself from any liability created by FELA relying upon *Boyd v. Grand Trunk Western Railroad Co.*, 338 U.S. 263 (1949) (post-injury agreement to pay advance against future recovery in exchange for agreement to only file suit in Michigan held invalid under Section 5 because it purported to exempt employer from suit in FELA-designated venues) and *Duncan v. Thompson*,

315 U.S. 1 (1942) (post-injury agreement to pay employee \$600 in exchange for employee's agreement to resolve dispute without litigation and return money before filing suit was invalid under FELA Section 5 because effect was to exempt employer from liability). Weeks Marine argued that based upon the Fifth Circuit's holding in *II*, which held that FELA Section 5 does not invalidate a seaman's agreement to arbitrate personal injury claims, the agreement was enforceable. *Terrebonne v. K-Sea Transportation Corp.*, 477 F.3d 271, 284 (5th Cir. 2001) (holding that Terrebonne did not forgo the substantive rights afforded by the Jones Act and general maritime law; instead, he agreed to submit his claims to an arbitral rather than a judicial forum); *see also Great Lakes Dredge & Dock Co. LLC v. Larrisquitu*, Civil Action Nos. H-06-3489, H-06-3669, H-06-4040, 2007 WL 2330187 (S.D. Tex. Aug. 15, 2007) (holding that *Boyd* does not preclude enforcement of forum selection clause in Jones Act case). On appeal, taking into consideration the federal policy favoring arbitration, the court concluded that the post-injury arbitration agreement required Jimenez to give up nothing that was created by FELA. *Id.* at *5.

Further, Jimenez argued that the "stringent standard" espoused in *Garrett* placed the burden on Weeks Marine to prove that the agreement was fair to Jimenez. *Garrett v. Moore-McCormack Co., Inc.*, 317 U.S. 239, 243 (1942). Jimenez argued that the agreement was invalid because it improperly diminished a seaman's substantive rights. The court, however, held that given the strong federal policy in favor of arbitration, the reasoning in *Garrett* was not fully applicable. Continuing to cite to the strong federal policy favoring arbitration, the court held that even if it were to apply the "stringent standard" set forth in *Garrett*, the agreement would meet that standard. *Id.* at *6.

Additionally, the court held that the agreement was not substantively unconscionable, as argued by Jimenez, since it provided for subsequent allocation of the arbitration costs. The court noted that Weeks Marine averred that it would bear the entire cost of the arbitration.

Finally, Jimenez argued that the agreement was procedurally unconscionable because it was procured under improper circumstances, and he did not understand the agreement. In response, Weeks Marine argued that procedural unconscionability is a question for the arbitrator, not the court. The court, however, concluded that Jimenez's procedural unconscionability attack was directed to the agreement to arbitrate and not to a "contract as a whole." Relying on *Prima Paint*, the court held that such an attack presents a question for the trial court rather than the arbitrator. *Id.* at * 8 (citing *Prima Paint Corp. v. Flood & Conklin Mfg. Co.*, 388 U.S. 395, 404 (1967)).

The court concluded that the trial court's order denying arbitration could not be sustained on any ground and directed the trial court to decide the issue of procedural unconscionability pursuant to an evidentiary hearing given the conflicting affidavits. *Id.* at *10.



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