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Arbitration in the Fifth – June 2022

By Odean Volker

In June 2022, the spotlight was again on the U.S. Supreme Court with three important arbitration-related decisions. In the Fifth Circuit, the court further explored the expectations for arbitration of claims by made by employees of staffing companies against the companies' customers.

Opinions of the U.S. Supreme Court

Sw. Airlines Co. v. Saxon, No. 21-309, 2022 WL 1914099 (U.S. June 6, 2022). The question presented was whether, under Section 1 of the Federal Arbitration Act (the "FAA"), plaintiff belonged to a "class of workers engaged in foreign or interstate commerce" that is exempted from the FAA's coverage. To resolve the question, the Court engaged in a highly textual analysis of Section 1. The Court explained that the FAA speaks of "workers", not employees' or servants, and the word "workers" directs the interpreter's attention to "the performance of work." Further, the word "engaged" similarly emphasizes the actual work of the members of the class. Therefore, the Court considered whether the "class of workers" who physically load and unload cargo on and off airplanes on a frequent basis is "engaged in foreign or interstate commerce." The Court concluded that any class of workers directly involved in transporting goods across state or international borders falls within Section 1's exemption. It is "too plain to require discussion that the loading or unloading of an interstate shipment by the employees of a carrier is so closely related to interstate transportation as to be practically a part of it." Section 1, does not however reach to all "airline employees who carry out the customary work of the airline," but is not so narrow as to cover only that class of workers that "physically accompany freight across state or international boundaries."

ZF Auto. US, Inc. v. Luxshare, Ltd., No. 21-401, 2022 WL 2111355 (U.S. June 13, 2022). The question presented was whether private adjudicatory bodies count as "foreign or international tribunals" under 20 U.S.C. 1782. They do not. The statute reaches only governmental or intergovernmental adjudicative bodies. To arrive at its conclusion, the Court conducted a textual, though somewhat circular and seemingly purpose-built, analysis. A Section 1782 "tribunal" need not be a formal "court," and the broad meaning of "tribunal" does not itself exclude private adjudicatory bodies. The Court's analysis continued that since "tribunal" does not stand-alone—it belongs to the phrase "foreign or international tribunal"—and its meaning should be taken in context. Since "tribunal" is attached to the modifiers "foreign or international," the Court explained, "'tribunal' is best understood as an adjudicative body that exercises governmental authority." The word "foreign" takes on its more governmental meaning when modifying a word with potential governmental or sovereign connotations. "Tribunal" is a word with potential governmental or sovereign connotations, so "foreign tribunal," the Court determined, more naturally refers to a tribunal belonging to a foreign nation than to a tribunal that is simply located in a foreign nation. And, for a tribunal to belong to a foreign nation, the tribunal must possess sovereign authority conferred by that nation. A tribunal is "international" when it involves or is of two or more nations, meaning that those nations have imbued the tribunal with official power to adjudicate disputes.

Viking River Cruises, Inc. v. Moriana, No. 20-1573, 2022 WL 2135491 (U.S. June 15, 2022). The question presented was whether FAA, preempts a rule of California law that invalidates contractual waivers of the right to assert representative claims under California's Labor Code Private Attorneys General Act of 2004 ("PAGA"). PAGA authorizes any "aggrieved employee" to initiate an action against a former employer "on behalf of himself or herself and other current or former employees" to obtain civil penalties that previously could have been recovered only by the State. An employee who alleges he or she suffered a single violation is entitled to use that violation as a gateway to assert a potentially limitless number of other violations as predicates for liability.

California law prohibits division of a PAGA action into constituent claims (the individual's clam and the claim on behalf of others), therefore the state courts refused to compel arbitration of the individual claim. *Viking River Cruises'* answer to whether the FAA preempts PAGA: yes and no.

The Court's interpretations of the FAA are usually quite clear with guided by the lodestar of textualism. V*iking River Cruises* is not one of those cases. Section II of the opinion, which drew the least support, may create uncertainty about preemption and waivers of representative actions. In her concurrence, Justice Barrett observes that the discussion in Parts II and IV "is unnecessary to the result, and much of it addresses disputed state-law questions as well as arguments not pressed or passed upon in this case."

Section II explains: "Nothing in the FAA establishes a categorical rule mandating enforcement of waivers of standing to assert claims on behalf of absent principals. Non-class representative actions in which a single agent litigates on behalf of a single principal are part of the basic architecture of much of substantive law. . . we have never held that the FAA imposes a duty on States to render all forms of representative standing waivable by contract. Nor have we suggested that single-agent, single-principal representative suits are inconsistent the [sic] norm of bilateral arbitration as our precedents conceive of it." Section II, then confirmed that it is "the 'changes brought about by the shift from bilateral arbitration to *class-action arbitration*'" that "are too fundamental to be imposed on parties without their consent."

The holding of *Viking River Cruises* is found in Section III and does not obviously rely on the seeming *dicta* of Section II. Section III holds that PAGA's mandate that individual claims and representative claims be joined in a single action defeats the ability of parties to control which claims are subject to arbitration. "The only way for parties to agree to arbitrate *one* of an employee's PAGA claims is to also "agree" to arbitrate *all other* PAGA claims in the same arbitral proceeding." The Court held: "We hold that the FAA preempts the [joinder rule] insofar as it precludes division of PAGA actions into individual and non-individual claims through an agreement to arbitrate." The arbitration agreement should have been enforced as to the individual claims. The Court concluded that with the individual claims pared away, the employee lost PAGA standing for the representative claims and those claims should be dismissed.

In a concurrence, Justice Sotomayor points out the obvious. "If this Court's understanding is right, the California Legislature is free to modify the scope of statutory standing under PAGA within state and federal constitutional limits" and avoid the reach of the FAA.

What goes unanswered is the practical question that was likely not before the Court: What happens if each of the absent employees in a PAGA representative action are parties to individual arbitration agreements? Is arbitration required or does the notion that the PAGA plaintiff is a proxy for the State avoid the arbitration agreement.

Opinions of the Fifth Circuit Court of Appeals

Field v. Anadarko Petroleum Corp., 35 F.4th 1013 (5th Cir. 2022) (FLSA). Order denying intervention reversed. Intervenor developed an app that connects oilfield workers with operators. Using the app workers agreed to arbitrate "every claim, controversy, allegation, or dispute arising out of or relating in any way to" not only their relationship with the developer, but also their resulting work placements with operators. The contracts expressly encompass third party beneficiaries such as operators. Thus, the Intervenors' interest in enforcing the arbitration agreements, "particularly given the interrelatedness of the parties' contractual relationships and the plaintiffs' claims, is a stake in the matter that goes beyond a generalized preference that the case come out a certain way."

Anadarko E&P Onshore, L.L.C. v. California Union Ins. Co., No. 21-20548, 2022 WL 2093836 (5th Cir. June 10, 2022) (per curiam) (insurance). Order compelling arbitration affirmed. A two-step analysis determines whether to compel parties to arbitrate. First, the court asks whether there is a valid agreement to arbitrate and, second, whether the current dispute falls within the scope of a valid agreement.

Barnett v. Am. Express Nat'l Bank, 37 F.4th 1100 (5th Cir. 2022) (Fair Credit Reporting Act). Order denying motion to compel vacated in light of intervening decisions. After the district court denied the motion to compel, the Fifth Circuit clarified that the test for waiver is applied on a claim-by-claim basis, and the U.S. Supreme Court changed the test for waiver of the right to compel arbitration.

Kennedy v. Pioneer Nat. Res. Co., No. 21-50256, 2022 WL 2357077, at *1 (5th Cir. June 30, 2022) (per curiam) (FLSA). Motion to compel denied. Plaintiff sued customer of staffing company where he had worked. Based on the court's recent decisions, "the gravamen is that . . . [plaintiff'] did not agree to arbitrate his claims with [the customer], and [the customer did] not have a close enough relationship with [staffing company] to enforce their [arbitration] agreements through equity."

Opinions of United States District Courts

Motions to Compel Arbitration

Jamison v. Harbor Freight Tools Inc., No. 4:21-CV-171-DMB-JMV, 2022 WL 2070890 (N.D. Miss. June 8, 2022) (employment). Motion to compel granted. Under Mississippi law, the rule that a "person is charged with knowing the contents of any document that he executes" also forecloses arguments that she did not understand what she signed.

Mason v. Cannon Ford, Lincoln, Inc., No. 4:21-CV-175-DMB-DAS, 2022 WL 2070892 (N.D. Miss. June 8, 2022) (employment). Motion to compel granted.

Black v. Experian Info. Sols., Inc., No. CV H-21-04231, 2022 WL 1809307 (S.D. Tex. June 2, 2022) (banking/identity theft). Pro se motion for reconsideration of order compelling arbitration denied. Parties may agree to have an arbitrator determine the threshold question of arbitrability. The court must first determine, however, that a valid arbitration agreement exists, and any determination that the agreement delegates the question of arbitrability must be made with clear and unmistakable evidence. The agreement provided in part: "Claims regarding the application, enforceability, or interpretation of this Agreement and this arbitration provision" are subject to arbitration.

Pickaree v. Kim, No. CV H-22-901, 2022 WL 2317157 (S.D. Tex. June 28, 2022) (Fair and Accurate Credit Transactions Act of 2003). Motion to compel granted. Plaintiff did not dispute motion by party with whom she had an arbitration agreement. Plaintiff's request that co-defendants with whom there was no agreement to arbitrate also be compelled to arbitration was denied.

Broussard v. FinWise Bank, Inc., No. SA-21-CV-01238-OLG, 2022 WL 2057488 (W.D. Tex. May 12, 2022) (lending). Motion to compel granted. Federal courts may decide a challenge directed specifically at the arbitration provision, but challenges to the contract as a whole are decided by the arbitrator. Challenge to promissory note as being usurious was a challenge to the note as a whole. Unconscionability challenge to the arbitration provision that is in fact a challenge to the entire agreement is a question for the arbitrator. Choice of law is an issue that to be "decided in the first instance by the arbitrator." Incorporation of the JAMS rules delegated the question of arbitrability.

Motions to Confirm or Vacate

Carlton Energy Group, LLC v. Cliveden Petroleum Co. Ltd., No. CV H-22-170, 2022 WL 2240081 (S.D. Tex. June 22, 2022). Award confirmed as to the signatory. Payment of an award does not render a confirmation award non-justiciable. Confirmation of an award is distinguished from a defendant's payment or satisfaction of an award. The liability of the alleged alter egos remained undecided after arbitration. The Court stayed the request modify the award as to the alleged non-signatories until resolution by the court of whether the non-signatories are the alter egos. The court had jurisdiction to decide whether to award pre-arbitration attorneys' fees (which the arbitration panel ruled were outside its jurisdiction) because the party did not have an opportunity to assert its claim for attorneys' fees in the prior litigation.

Liberty Ins. Corp. v. Omni Constr. Co., Inc., No. 4:21-CV-02119, 2022 WL 2373734 (S.D. Tex. June 9, 2022) (Yo, Mag. J.), report and recommendation adopted, 2022 WL 2359643 (S.D. Tex. June 29, 2022) (insurance). Confirmation denied. Insurer was not a party to the arbitration award. Confirmation is not the appropriate vehicle to hold the insurer "ultimately ... liable for the arbitration award ...." Instead, the "proper avenue for holding a party liable is to enforce an arbitration award that was already confirmed." Unconfirmed award cannot be "enforced."

Concierge Auctions, LLC v. ICB Properties of Miami, LLC, No. A-21-CV-894-LY-SH, 2022 WL 2373704 (W.D. Tex. June 30, 2022) (Hightower, Mag. J.) (real estate sales). Award confirmed. FAA Section 10(a)(4) provides that a court may vacate an arbitration award "where the arbitrators exceeded their powers." Section 10(a)(4) has been interpreted narrowly and allows vacatur of an award "[o]nly if the arbitrator acts outside the scope of his contractually delegated authority—issuing an award that simply reflects his own notions of economic justice rather than drawing its essence from the contract." The parties delegated the power to rule on arbitrability to the Arbitrator by expressly incorporating the AAA Rules.

Other Arbitration-Related Issues

Garcia-Alvarez v. Fogo De Chao Churrascaria (Pittsburgh) LLC, No. 4:21-CV-00124, 2022 WL 2119542 (E.D. Tex. June 13, 2022) (FSLA). All current employees were subject to arbitration agreements. Therefore, posting the collective action notice at the work sites would be improper.

Pairprep, Inc. v. Ascension Data & Analytics, LLC, No. 2:21-CV-00057-JRG, 2022 WL 2155951, at *2 (E.D. Tex. June 14, 2022). Motion to lift stay pending arbitration denied. The defendant moved to compel arbitration as to the plaintiff and its shareholders (nonsignatories). The motion was granted as to the plaintiff, but implicitly denied as to the shareholders who were not parties to the federal court action. The arbitrators declined to determine arbitrability as to the shareholders. Defendant then sought to file a third-party action in the stayed federal court lawsuit, so that defendant could seek to compel arbitration as to the shareholders. Denying leave, the court explained: "The Court stayed this case so that the parties (Plaintiff and [Defendant]) could arbitrate their dispute. There is nothing in the record to suggest that the Arbitration has concluded or that the Arbitration Panel has decided that the parties' dispute is not arbitrable. Accordingly, the Court declines to lift the stay in this case as the Arbitration is apparently still active."

Salzgitter Mannesmann Int'l (USA) Inc. v. Sun Steel Co. LLC, No. 3:22-CV-00030, 2022 WL 2292878 (S.D. Tex. June 24, 2022) (Edison, Mag. J.). Subject matter jurisdiction sustained. The parties' agreement required the claimant to purchase steel from a Canadian supplier at a price negotiated by the respondent. This was sufficient to demonstrate a reasonable relation with a foreign country for purpose of the court's subject matter jurisdiction under the New York Convention.