Arbitration in the Fifth - August 2023

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PRACTICES Litigation, International Arbitration

In August 2023, the Eastern District of Louisiana continued its line of cases holding that Louisiana law does not reverse-preempt the New York Convention and thereby deprive foreign insurers of the right to arbitrate. However, the Southern District of New York's Certain Underwriters at Lloyds v. 3131 Veterans Blvd. LLC, No. 22-CV-9849, 2023 WL 5237514 (S.D.N.Y. Aug. 15, 2023) (addressing a claim arising from hurricane damage in Louisiana) reached the opposite conclusion. Relying on Second Circuit precedent that the Convention could be preempted and Louisiana law rejecting arbitration clauses in insurance agreements, arbitration was denied. In the Northern District of Texas, JPAY LLC v. Burton rejected the application of "look-through" jurisdiction to determine the amount in controversy in a case that did not involve a Federal Arbitration Act Section 4 claim.

Opinions of the Fifth Circuit Court of Appeals

Concierge Auctions, L.L.C. v. ICB Properties of Miami, L.L.C., No. 22-50850, 2023 WL 5031485 (5th Cir. Aug. 7, 2023) (per curiam). Confirmation of award affirmed. The "first to file rule" governing related cases that are pending before two federal courts was inapplicable where the dispute concerned a Florida state case and an arbitration. Incorporation of the American Arbitration Association ("AAA") Rules and agreement that granted "all powers to the arbitrator to the fullest extent of the [AAA] Rules was clear and unmistakable evidence that the parties agreed to arbitrate arbitrability.

Opinions of United States District Courts

Motions to Compel Arbitration

Ramsey v. Indep. Specialty Ins. Co., No. CV 23-0632, 2023 WL 5034646 (E.D. La. Aug. 8, 2023) (surplus lines insurance). Motion to compel granted. The arbitration clause did not divest the court of jurisdiction and therefore was not precluded by La. Rev. Stat. § 22:868. The arbitration clause was a forum or venue selection clause and was an enforceable agreement to arbitrate between the parties.

Evergreen Assocs, inc. v. Indep. Specialty Ins. Co., No. CV 23-1689, 2023 WL 5333188 (E.D. La. Aug. 18, 2023) (insurance). Motion to compel granted. At the motion to compel stage of litigation, the "null and void" clause of the New York Convention is the only defense. Objections that a service of suit endorsement mandated that the dispute remain in court and that the arbitration clause was null and void because the "board member who managed the insurance contracts for Plaintiff was unaware that there was an arbitration provision in the Policies" were not within the scope of the Convention's "null and void" defense.

Amer. Paint Bldg., LLC v. Indep. Specialty Ins. Co., No. CV 22-3308, 2023 WL 5608012 (E.D. La. Aug. 30, 2023) (insurance). Motion to compel granted. Plaintiff's argument that its bad-faith claims fall outside the scope of the arbitration agreement because they are "statutory" and "not based on the Policy" was rejected. Also, the prohibition on an award of "award exemplary, punitive, multiple,

or other damages of a similar nature" was not a waiver of arbitration. At most, this clause limited the damages that the arbitrators might award in the event that a claimant were to prevail in the arbitration.

Briggs v. Populas Fin. Group, Inc., No. 1:22-CV-02185, 2023 WL 5005547 (W.D. La. July 20, 2023) (Perez-Montes, Mag. J.), report and recommendation adopted sub nom. 2023 WL 5004524 (Aug. 4, 2023) (employment). Motion to compel granted. A corporate name change did not affect the contractual obligations of the parties existing prior to the name change, so a business entity with a new name could invoke an arbitration agreement that was signed by the same company prior to the name change. Louisiana law supports enforcement of an arbitration clause contained in an employment application.

Watson v. Blaze Media LLC, No. 3:23-CV-0279-B, 2023 WL 5004144 (N.D. Tex. Aug. 3, 2023) (employment/sexual harassment). Motion to compel denied. If the court finds that the parties agreed to arbitrate, the court typically must consider whether any federal statute or policy renders the claims non-arbitrable. The Ending Forced Arbitration of Sexual Assault and Sexual Harassment Act of 2021 ("EFAA"), carves out sexual assault and sexual harassment claims from the Federal Arbitration Act. If a plaintiff "alleges a sexual harassment dispute, a predispute arbitration agreement is unenforceable as to 'the entirety of the case relating to the sexual harassment dispute, not merely the discrete claims in that case that themselves either allege such harassment or relate to a sexual harassment dispute.'" Whether the EFAA applies to a dispute is a question for the court

Other Arbitration-related Decisions

RSM Prod. Corp. v. Gaz du Cameroun, S.A., No. 4:22-CV-03611, 2023 WL 4933956 (S.D. Tex. Aug. 1, 2023). Objection to personal jurisdiction denied. A defendant's agreement to arbitrate in Texas does not necessarily constitute consent to personal jurisdiction beyond the limited purpose of compelling arbitration. The presence of a choice-of-law provision is particularly probative for jurisdictional purposes as it reinforces the defendant's "deliberate affiliation with the forum State and the reasonable foreseeability of possible litigation there."

JPAY LLC v. Burton, No. 3:22-CV-1492-E, 2023 WL 5253041 (N.D. Tex. Aug. 15, 2023) (communications and media products and services). Case dismissed for lack of subject matter jurisdiction. Plaintiff, the respondent in the underlying arbitration, sought a stay of the arbitration, a declaration that a class action waiver was enforceable and other relief. The court sua sponte examined its subject matter jurisdiction and explained: "The question of whether to apply the "look through" approach to § 1332's amount-in-controversy requirement is an issue of first impression in the Fifth Circuit. Considering that (1) the Fifth Circuit has reversed the sole district court ruling the Court can find applying the approach to diversity jurisdiction, and (2) no other circuits have joined the Eighth Circuit in applying the approach to the amount-in-controversy requirement, the Court is unconvinced that the "look through" approach is appropriate [because this case does not involve a § 4 petition to compel arbitration]."

Wongu Ann v. Lone Star Fund IV (US), L.P., No. 3:22-CV-01734-N-BH, 2023 WL 5727317 (N.D. Tex. Aug. 22, 2023) (Ramirez, Mag. J.), report and recommendation adopted, 2023 WL 5725538 (Sept. 5, 2023). (ICSID). Action dismissed for lack of standing. A South Korean taxpayer sought a declaratory judgment that defendants made fraudulent misrepresentations to South Korean regulators to obtain approval to acquire a bank in violation of South Korean law, and as a result the defendant "was not entitled to submit its alleged dispute to ICSID in the first place." Plaintiff argued that an arbitration award in a defendant's favor would affect South Korean taxpayers, including him.

This generalized injury that a taxpayer suffers with other taxpayers was insufficient for purposes of standing.