Arbitration in the Fifth - August 2024

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PRACTICES Litigation, International Arbitration

In August 2024, click-wrap agreements were the focus of opinions in the Western District of Louisiana and the Southern Districts of Mississippi and Texas. Also in the Southern District of Texas, Yax Ecommerce LLC v. Proficient Supply LLC addressed an arbitration agreement's limited impact on personal jurisdiction.

Opinions of the Fifth Circuit

U.S. Trinity Energy Services, L.L.C. v. Se. Directional Drilling, L.L.C., No. 23-11071, 2024 WL 3738879 (5th Cir. Aug. 9, 2024). Appeal dismissed for lack of jurisdiction. Federal courts of appeals have jurisdiction over "appeals from all final decisions of the district courts of the United States." The district court denied a motion to vacate an arbitral award. That order was appealed. The district court did not decide a cross-motion to confirm the award or otherwise enter a final judgment. The appeal was therefore premature.

Opinions of United States District Courts

Motions to Compel Arbitration

Hill v. Jackson Offshore Holdings, LLC, No. CV 24-994, 2024 WL 3845976 (E.D. La. Aug. 15, 2024) (personal injury). Limited discovery allowed on the "issue of the enforceability of the arbitration agreement." "[T]he severability principle does not require that a party challenge only the arbitration clause or delegation provision." Rather, "where a challenge applies 'equally' to the whole contract and to an arbitration or delegation provision, a court must address that challenge.

Jefferson-James v. Toyota Motor Credit Corp., No. CR 6:24-CV-00508, 2024 WL 3625220 (W.D. La. Aug. 1, 2024) (Fair Credit Reporting Act). Motion to compel granted. Under Louisiana law, "a party who signs a written instrument is presumed to know its contents and cannot avoid its obligations by contending that she did not read or understand it." Here, plaintiff "both checked the 'opt-in' box, agreeing to be bound by the Arbitration Provision, and affixed her signature immediately below."

Broad v. Nat'l Oilwell Varco, LP, No. CV 22-0252, 2024 WL 3729876 (W.D. La. Aug. 8, 2024) and *Hartman v. Nat'l Oilwell Varco, LP*, No. CV 22-0253, 2024 WL 3729878 (W.D. La. Aug. 8, 2024) (employment). Motion to compel granted. Provision in arbitration agreement that "any modification or termination shall be prospective only," applied equally to both employer and employee's claims, and with the requirement for thirty days written notice before the modification or termination the agreement was illusory. "When a party seeking to avoid arbitration . . . files suit in a district other than the one specified in the arbitration agreement, the party seeking arbitration . . . retains its right to have arbitration take place in accordance with the terms of the agreement."

Viking Automatic Sprinkler Co. v. O'Neal Constructors, LLC, No. 1:24CV123-HSO-BWR, 2024 WL 3687090 (S.D. Miss. Aug. 5, 2024) (construction). Motion to compel granted. After considering the

parties' delegation clause, the court declined plaintiff's request to compel the defendant to participate in mediation which was also provided for in the parties' dispute resolution provision.

Warren Paving, Inc. v. O'Neal Constructors, LLC, No. 1:24-CV-009-HSO-BWR, 2024 WL 3687088 (S.D. Miss. Aug. 5, 2024) (construction). Motion to compel granted. "Where an arbitration agreement states that arbitration is to be "conducted 'in accordance with a named forum's rules,' forum selection is not an essential term." The parties' dispute resolution clause included a delegation provision that was not challenged. The court therefore did not decide plaintiff's arguments that the arbitration clause was "permissive and optional" or that mediation was a condition precedent to arbitration.

Mackey v. Airbnb, Inc., No. 3:23-CV-582-CWR-ASH, 2024 WL 3840608 (S.D. Miss. Aug. 15, 2024) (RICO / property booking). Motion to compel granted. Under California law, "mutual assent to an arbitration clause requires only that 'a reasonably prudent Internet customer would be put on inquiry notice of the agreement's existence and contents.'" This does not require "actual notice of the terms of an arbitration agreement." Courts "consider the 'conspicuousness and placement of the Terms of Use hyperlink, other notices given to users of the terms of use, and the website's general design in assessing whether a reasonably prudent user would have inquiry notice' of the terms of online contracts."

Regions Bank v. Scarbrough, No. 3:23-CV-00350-MPM-RP, 2024 WL 3901189 (N.D. Miss. Aug. 21, 2024) (ownership of certificate of deposit). Motion to compel denied. Respondent sought to dismiss this action to compel arbitration arguing that an indispensable party, the movant's former employee, was not joined. "The mere existence of a state suit against an agent does not automatically deem that party 'indispensable' to an action in federal court compelling arbitration by the principal." Respondents brother had made him the beneficiary of certificate of deposit. His brother then terminated that certificate of deposit and opened a new account for which respondent was to remain the beneficiary. However, he was not identified as beneficiary. The court determined that "it would be inequitable to hold [respondent] to the arbitration provision that is inconspicuously referred to on the Signature Card for the new account when [respondent] did not sign the Signature Card nor was his name included as the third-party POD beneficiary." The court rejected application of equitable estoppel finding "it inequitable to allow [the bank/movant] to treat [respondent] as a beneficiary for purposes of binding him to arbitration but not treat him as the beneficiary of the decedent's joint account entitling him to his brother's funds."

Abebe v. Yum! Brands, Inc., No. 4:23-CV-682, 2024 WL 3891357 (E.D. Tex. Aug. 21, 2024) (employment). Motion denied without prejudice, arbitral discovery allowed, and jury trial granted. Employer presented evidence sufficient to demonstrate the existence of an enforceable arbitration agreement. The burden then shifted to the employee to "make at least some showing that under prevailing law, he would be relieved of his contractual obligation to arbitrate if his allegations proved to be true and he must produce at least some evidence to substantiate his factual allegations." Here, the employee submitted a "Declaration denying that he signed the Arbitration Agreement . . . Moreover, [the employee] declare[d] several plausible ways in which his electronic signature could have been forged."

Martinez v. Experian Info. Sols., Inc., No. 3:24-CV-0744-X, 2024 WL 3906775 (N.D. Tex. Aug. 22, 2024) (Fair Credit Reporting Act and Fair Debt Collection Practices Act). Motion to compel granted. Plaintiff signed-up for an account with defendant which required that he agree to a user agreement before proceeding. "This meant that he was required to access, read, and agree to [the agreement]. There is no reason for the Court to believe otherwise; [defendant] demonstrated that [plaintiff]

clicked the hyperlink acknowledging that he read and agreed to the terms in the agreement . . . Courts within Texas routinely enforce agreements that are acknowledged in this manner."

Healtheon, Inc. v. Clean Air Sols., Inc., No. CV H-23-1992, 2024 WL 3744395 (S.D. Tex. Aug. 9, 2024) (construction). Motion to compel granted. Defendant signed the agreement. "The law presumes that Defendant read and understood the [agreement's] scope of work. By its terms, the agreement superseded "the parties' prior understandings." "Therefore, regardless of Defendant's subjective belief, there was outward, objective mutual consent (i.e., a meeting of the minds) when the parties signed the [agreement]. Plaintiff accepted the clickwrap agreement. "A failure to read a legally binding agreement is no defense to contract formation." The agreement was not unconscionable.

Hernandez v. FVE Managers, Inc., No. 4:23-CV-04592, 2024 WL 3976860 (S.D. Tex. Aug. 27, 2024) (employment). Motion to compel granted. Under Texas law, unconscionability includes two aspects: (1) procedural unconscionability, which refers to the circumstances surrounding the adoption of the arbitration provision, and (2) substantive unconscionability, which refers to the fairness of the arbitration provision itself. The burden of proving unconscionability rests on the party seeking to invalidate the arbitration agreement. The evidence showed that plaintiff could read and understand at least some documents in English and his eye condition did not render him unable to read. Moreover, "'[i]t has long been recognized' under Texas law that 'illiteracy or language barriers ... will not relieve a party of the consequences of his contract.'" Evidence was not produced to support objection that the arbitral body did not have a sufficient pool of arbitrators. Enforcement of discovery limitations was to be decided by the arbitrators.

Other Arbitration-related Decisions

Yax Ecommerce LLC v. Proficient Supply LLC, No. 4:24-CV-809, 2024 WL 3627776 (S.D. Tex. Aug. 1, 2024) (asset purchase agreement). Dismissed for lack of personal jurisdiction. The parties' dispute resolution clause provided for arbitration in Harris County, Texas. In a separate decision, the court had dismissed the claims against the signatory to the contract for lack of personal jurisdiction. *Yax Ecommerce LLC v. Proficient Supply LLC*, No. CV 24-809, 2024 WL 2881009 (S.D. Tex. June 7, 2024). Officers of the signatory remained before the court and sought dismissal based on lack of personal jurisdiction. As to the signatory company and the officers, the court held: "The [dispute resolution] clause states that '[t]he place of arbitration shall be in Harris County, Texas. The arbitration shall be governed by the laws of the State of Texas.' When a party agrees to arbitrate in a particular state, via explicit or implicit consent, the district courts of the agreed-upon state may exercise personal jurisdiction over the parties *for the limited purpose of compelling arbitration*. A forum-selection clause that specifies the jurisdiction and venue for arbitration proceedings in Texas does not, itself, operate as consent to personal jurisdiction in Texas courts." (citations and quotations omitted, emphasis original).

Petry v. Versabar, Inc., No. CV 4:24-1981, 2024 WL 3741240 (S.D. Tex. Aug. 9, 2024) (personal injury). Remanded to state court. The case was removed under 9 U.S.C. § 205 as a defendant argued that the subject matter of an action pending in state court "relates to" an arbitration agreement falling under the New York Convention. The court rejected the argument that the state court action related to contracts to which plaintiff not a signatory, did not work for either contracting company, and did not participate in work under the contracts. The contracts were executed 18 years before the [plaintiff] was injured. Direct benefits estoppel did not apply as the plaintiff was not knowingly claiming benefits under the contracts that contained the arbitration clauses. To satisfy the knowledge requirement for direct benefits estoppel it is required that "the non-signatory have

had actual knowledge of the contract containing the arbitration clause." Further, plaintiff did not "rely on, seek to enforce, or require reference to" the contracts.

In re Hunan Sokan New Materials Co., Ltd., No. 1:23-MC-01445-DII, 2024 WL 3670195 (W.D. Tex. Aug. 2, 2024) (Hightower, Mag. J.), report and recommendation adopted, 2024 WL 3976017 (Aug. 27, 2024). Discovery under 28 U.S.C. 1782 denied. Applicant did not meet its burden to show that the Shanghai International Economic and Trade Arbitration Commission is a governmental or intergovernmental body that qualifies as a "foreign or international tribunal" under § 1782.