Arbitration in the Fifth - February 2024

March 12, 2024 Odean Volker

PRACTICES Litigation, International Arbitration

In February 2024, the Eastern District of Louisiana continued its long line of cases compelling arbitration in "surplus lines" insurance disputes and insurance disputes covered by the New York Convention. In the Western District of Texas, Concierge Auctions, LLC v. ICB Properties of Miami, LLC confirmed an arbitration award that granted recovery of attorneys' fees (that had been incurred in state court litigation) as damages for a party's breach of an arbitration agreement. It also granted conditional attorneys' fees in the event of an unsuccessful appeal.

Opinion of the Fifth Circuit Court of Appeals

Cameron Par. Recreation #6 v. Indian Harbor Ins. Co., 92 F.4th 1152, 1154 (5th Cir. 2024) (insurance). Remanded to decide whether to grant arbitration. The district court had declined to stay the litigation and had ordered "limited discovery" into arbitrability. Plaintiffs argued the Fifth Circuit Court of Appeals lacked jurisdiction. The Court found jurisdiction" under 9 U.S.C. § 16(a)(1)(A) over the district court's refusal to stay the case." Discovery was not needed to determine whether there was a valid agreement to arbitrate because the dispute could be decided as a matter of law. "Because the district court did not expressly address whether arbitration is proper, we determine that it is appropriate to give the district court the first instance and have it determine whether to grant arbitration based upon the policy."

Opinions of United States District Courts

Motions to Compel Arbitration

Napoleon Apartments, LLC v. Indep. Specialty Ins. Co., No. 2:23-CV-4374, 2024 WL 398427 (E.D. La. Feb. 1, 2024) (insurance). Motion to compel granted. Surplus lines insurance policies are exempted from the arbitration prohibitions in La. R.S. § 22:868(A)(2) by La. R.S. § 22:868(D).

Par. of LaFourche v. Indian Harbor Ins. Co., No. CV 23-3472, 2024 WL 409019 (E.D. La. Feb. 2, 2024) (insurance). Motion to compel granted. Plaintiff "failed to distinguish any of the dozens of decisions from the Eastern District of Louisiana that . . . 'uniformly compelled insureds to comply with substantially similar, if not identical, arbitration provisions contained in their insurance policies.'" The insurance contract's service-of-suit clause dis not constitute a waiver of arbitration. Instead, the service-of-suit clause complemented "the arbitration clause by establishing a forum where the parties may enforce an arbitration award."

Carrollton St. Properties, LLC v. Indep. Specialty Ins. Co., No. CV 23-4701, 2024 WL 404955 (E.D. La. Feb. 2, 2024) (insurance). Motion to compel granted. "[F]or the reasons stated in *Ramsey, Southland Circle, Bourgeois*, and the other Eastern District cases . . . the arbitration clauses are "forum or venue selection clauses" under the terms of § 22:868(D).

First United Methodist Church of Houma v. Underwriters at Lloyds of London, No. CV 23-610, 2024 WL 474629 (E.D. La. Feb. 7, 2024) (insurance). Motion to compel granted. The following alleged acts did not amount to waiver of arbitration: "admitting" venue and jurisdiction were proper in

defendants' answer; raising affirmative defenses yet not raising the issue of arbitration; conducting discovery and providing initial disclosures; participating in a joint mediation with plaintiff; and the passage of significant time since plaintiff filed its petition in state court.

Crescent City Brewhouse, Inc. v. Indep. Specialty Ins. Co., Inc., No. CV 23-7366, 2024 WL 640005 (E.D. La. Feb. 15, 2024) (insurance). Motion to compel granted. The forum-or-venue-selection exception of La. R.S. § 22:868(D) applies to surplus lines coverage.

Hughes v. Uber Techs., Inc., No. CV 23-1775, 2024 WL 707686 (E.D. La. Feb. 21, 2024) (personal injury). Motion to compel granted. Plaintiff's daughter requested transportation via a ride share app. Plaintiff alleges she was injured as a result of the driver's negligence. Agreement to terms of us by checking the box next to a statement indicating that the user has reviewed and agreed to the terms of use, known as a "clickwrap agreement," suffices to bind individuals to the hyperlinked terms and conditions under Louisiana law. In considering the "entirety of the Terms of Use and in light of surrounding circumstances, it is manifestly clear that the parties intended to stipulate the benefit of transportation services in favor of third party guest riders such as plaintiff under the Terms of Use." Accordingly, plaintiff, though a non-signatory, was required to arbitrate.

Jackson Ave. Mgmt., LLC v. Indep. Specialty Ins. Co., No. CV 23-381, 2024 WL 707695 (E.D. La. Feb. 21, 2024) (insurance). Motion to compel granted. Arbitration clause contained in a surplus lines policy was enforced.

JCL Hosp., LLC v. Indep. Specialty Ins. Co., No. CV 23-6490, 2024 WL 707689 (E.D. La. Feb. 21, 2024) (insurance). Motion to compel granted. Insured argued that the insurance policy was not an "agreement in writing" under the New York Convention. That argument "is foreclosed squarely by *Sphere Drake Insurance v. Marine Towing, Inc.*, 16 F.3d 666 (5th Cir. 1994)." Louisiana law does not prohibit an order compelling arbitration with regard to surplus lines insurance. The court "decline[d] . . . [the] suggestion that [it] should dictate to the arbitrators the law to be applied in the upcoming arbitration proceeding.

Chicken Mart, Inc. v. Indep. Specialty Ins. Co., No. CV 23-6661, 2024 WL 758396 (E.D. La. Feb. 23, 2024) (insurance). Motion to compel granted. Foreign insurers could enforce that the arbitration clause pursuant to the New York Convention. Because plaintiff alleged intertwined conduct on the part of all defendants, the court compelled arbitration as the domestic insurers also.

Apex Hosp. Group, LLC v. Indep. Specialty Ins. Co., No. CV 23-2060, 2024 WL 758392 (E.D. La. Feb. 23, 2024) (insurance). Motion to compel granted. Even though, plaintiff's state court petition "carefully differentiates between [domestic and foreign insurers'] actions, the Court nevertheless finds that Plaintiff has alleged conduct by Defendant that was necessarily 'interdependent and concerted' with [the foreign insurers]. Equitable estoppel does not conflict with La. R. S. § 22:868(A). Arbitration "clauses are forum or venue selection clauses, and therefore, application of equitable estoppel is not precluded by Louisiana law."

Gardner v. Gary Sinise Found., No. 4:23-CV-99-SDJ, 2024 WL 477516 (E.D. Tex. Feb. 7, 2024) (notice of appeal filed) (mediated settlement agreement). Motion to compel granted. The settlement agreement stated that arbitration "will be conducted pursuant to The Texas General Arbitration Act." Accordingly, "Texas law applies." However, Texas courts do not read choice-of-law provisions as exclusive of the FAA unless a provision specifically excludes the application of federal law. The nonmovant sought to avoid arbitration by arguing that the movant cannot enforce the arbitration provision as it had breached the agreement. That argument was rejected based on severability and the requirement that challenges to the contract as a whole are for the arbitrator. A clause containing

both “any dispute” and “related to” language, is a broad arbitration clause. A broad arbitration clause is “not limited to claims that literally arise under the contract, but rather embrace[s] all disputes having a significant relationship to the contract regardless of the label attached to the dispute.”

Cedar Ridge, LLC v. Certain Underwriters at Lloyd's London, No. CV 23-7350, 2024 WL 474628 (E.D. La. Feb. 7, 2024) (insurance). Motion to compel granted. The New York Convention “does not explicitly authorize a court to stay litigation pending arbitration.” However, the Federal Arbitration Act applies in New York Convention cases to the extent that it does not conflict with the Convention. “Thus, when the parties’ arbitration agreement falls under the Convention, a party may apply for a stay under the FAA, 9 U.S.C. § 3.”

Green v. TMX Fin. of Tex., Inc., No. 1:23-CV-1006-DII, 2024 WL 409734 (W.D. Tex. Feb. 2, 2024) (Truth in Lending Act). Motion to compel granted. When party resisting arbitration places the existence of the contract containing the arbitration agreement “in issue,” the court shall proceed summarily to the trial. To put the agreement's existence ‘in issue” the part “must make at least some showing that under prevailing law, [they] would be relieved of [their] contractual obligations to arbitrate if [their] allegations proved to be true and produce some evidence to substantiate [their] factual allegations.”

Motions to Confirm/Vacate

Concierge Auctions, LLC v. ICB Props. of Miami, LLC, No. 1:21-CV-00894-RP, 2024 WL 472341 (W.D. Tex. Feb. 7, 2024) (Hightower, Mag. J.), report and recommendation adopted, 2024 WL 737777 (Feb. 22, 2024) (real property auction agreement). Award confirmed. The parties’ auction agreement contained an arbitration clause. However, the owner refused to pay the commission to the buyer’s broker. The buyer’s broker sued the owner in state court and the owner filed a third-party action against the auction company. The auction company filed a demand for arbitration. The arbitrator ruled in its favor for breach of the arbitration agreement and awarded recovery of attorney’s fees incurred in the litigation and conditional attorney’s fee in the event of an unsuccessful opposition to confirmation of the award or appeal. The arbitration provision in the auction agreement stated that “any award of the arbitrator(s) ... will include costs and reasonable attorneys’ fees to the prevailing party.” Because the arbitrator's “award of conditional appellate attorney's fees is drawn from the auction agreement, the Court cannot reconsider it, and the District Court has confirmed the award. Under the terms of the Final Arbitration Award, as confirmed by the District Court, [auction company] is entitled to $85,000 in attorney's fees for the unsuccessful appeal.”

Other Arbitration-related Decisions

Par. of LaFourche v. Indian Harbor Ins. Co., No. CV 23-3472, 2024 WL 397785 (E.D. La. Feb. 2, 2024) (insurance). Motion to remand denied. The primary basis for removal was 28 U.S.C. §1332 and an arbitration clause governed by the New York Convention. Plaintiff’s request for abstention pursuant to Burford v. Sun Oil Co., 319 U.S. 315 (1943) was rejected.

Deaton v. Johnson, No. 4:23-CV-00415-O, 2024 WL 582720 (N.D. Tex. Feb. 12, 2024 (legal services). Motion to dismiss granted. Doctrines of res judicata and collateral estoppel apply equally with respect to a final judgment confirming an arbitration award.

In re Westbank Holdings, LLC, No. 22-10082, 2024 WL 670755 (Bankr. E.D. La. Feb. 17, 2024) (insurance). Motion to compel granted. A bankruptcy court possesses discretion to refuse to

enforce an otherwise applicable arbitration agreement when the underlying nature of a proceeding derives exclusively from the provisions of the Bankruptcy Code and the arbitration of the proceeding conflicts with the purpose of the Code. The domestic insurers were allowed to utilize the theory of equitable estoppel to compel arbitration of claims against them together with the foreign insurers in one arbitration proceeding.