Arbitration in the Fifth - January 2024

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PRACTICES Litigation, International Arbitration

In January 2024, the Fifth Circuit Court of Appeals joined other Circuits in holding that contacts related to the parties' underlying dispute should be considered when assessing personal jurisdiction. Meanwhile, Pumphrey v. Triad Life Scis. Inc., in the Northern District of Mississippi, and Dheera Ltd. Co. v. Johnson Controls Inc., in the Northern District of Texas, offered contrasting, albeit fact-specific, perspectives on the impact of a Rule 12 motion on the question of waiver.

Opinions of the Fifth Circuit Court of Appeals

Conti 11. Container Schiffarts-GMBH & Co. KG M.S., MSC Flaminia v. MSC Mediterranean Shipping Co. S.A., No. 22-30808, 2024 WL 319267 (5th Cir. Jan. 29, 2024) (vessel charter). To confirm an arbitral award, a court needs personal jurisdiction over the parties. "When assessing personal jurisdiction in a confirmation action under the New York Convention, a federal court should consider contacts related to the parties' underlying dispute and not only contacts related to the arbitration proceeding itself." *Badgerow v. Walters*, 596 U.S. 1 (2022) does not preclude this approach.

Opinions of United States District Courts

Motions to Compel Arbitration

Harbor Homeowner's Ass'n, Inc. v. Certain Underwriters at Lloyd's, London, No. CV 23-5043, 2024 WL 147853 (E.D. La. Jan. 12, 2024) (insurance). Motion to compel granted. Plaintiff's request that the court rely on the agreement's choice of New York state law to apply Second Circuit case law to the motion to compel rejected. Arbitrability "under the FAA is a question of federal law, not state law. A choice-of-law clause, meanwhile, provides the substantive insurance law which applies to the contract. Thus, a choice-of-law clause does not bear on the arbitrability of the dispute."

Causeway Partners, L.L.C. v. Indian Harbor Ins. Co., No. CV 23-6108, 2024 WL 183484 (E.D. La. Jan. 17, 2024) (insurance), Motion to compel granted. Plaintiff argued that that arbitration should be denied because 1)"there is no valid agreement in writing to arbitrate" this dispute "within the meaning" of the New York Convention, 2) it would contravene controlling law to force the domestic insurers to arbitration. and 3) "the arbitration provision at issue is unenforceable under the FAA" because it is effectively preempted by Louisiana state law.

Gen. Mill Supplies, Inc. v. Underwriters at Lloyd's, London, No. CV 23-6464, 2024 WL 216924 (E.D. La. Jan. 19, 2024) (insurance). Motion to compel granted. The insurance agreement contained an agreement in writing to arbitrate. The New York Convention applied. Reverse preemption under the McCarran-Ferguson Act was rejected. Equitable estoppel applied to compel arbitration of claims against domestic insurers.

Siddiqui Enterprises, LLC v. Indep. Specialty Ins. Co., No. CV 23-4329, 2024 WL 209037 (E.D. La. Jan. 19, 2024) (insurance). Motion to compel granted. The New York Convention requires either (1) an arbitral clause in a contract or (2) an arbitration agreement signed by the parties or contained in

an exchange of letters or telegrams. A signature was not required to enforce the arbitration clause contained in the insurance policy.

Fed. Deposit Ins. Corp. v. Ernst & Young LLP, No. CV 20-1259, 2024 WL 247076 (E.D. La. Jan. 23, 2024) (audit services). Motion to compel granted. The audit customer was a bank for which the F.D.I.C had become receiver. The auditor's engagement letter contained an arbitration agreement. Arbitration may be disallowed if a litigant is a federal agency. Federal agencies" may not be compelled to arbitrate when they have the statutory authority to pursue a claim in their own name." The FDIC, however, "can act in its corporate capacity, which is how it acts when it serves in its regulatory and enforcement role, or it can serve as a receiver, whereupon it assumes the rights of the institution into whose shoes it steps." The FDIC as receiver may be compelled to arbitrate a claim that the bank would have been require dot arbitrate.

Lacey v. Apex Roofing & Restoration, L.L.C., No. CV 23-6757, 2024 WL 307804 (E.D. La. Jan. 26, 2024) (employment). Motion to compel granted. Federal courts do not consider challenges to the validity of the entire contract when determining whether an agreement to arbitrate exists. Arbitration agreements are severable from the underlying contract. A party's challenge to the contract as a whole does not prevent a court from enforcing a specific agreement to arbitrate. "It is well settled in this Circuit that agreements that expressly incorporate the AAA rules demonstrate that the parties agreed to arbitrate."

Daigle v. CMH Mfg. Inc., No. 2:23-CV-01100, 2024 WL 251153 (W.D. La. Jan. 23, 2024) (manufactured home construction). Motion to compel granted. A manufactured home owner's request and receipt of warranty service and repairs under the manufacturer's warranty containing an arbitration provision constitutes acceptance of the arbitration provision.

Pumphrey v. Triad Life Scis. Inc., No. 3:23CV299-MPM-RP, 2024 WL 69914 (N.D. Miss. Jan. 5, 2024) (employment). Motion to compel denied. Arbitration was waived. Defendant filed a Rule 12 motion to dismiss seeking dismissal with the "central argument was that plaintiff's claims substantively lacked merit under Mississippi law." The court had not yet decided the motion, however, by "filing their motion to dismiss, defendants made an attempt to 'go to the merits'." Waiver requires intentional relinquishment of a known right, and it is the knowledge of the party and not that of counsel that the court considered.

Dheera Ltd. Co. v. Johnson Controls Inc., No. 3:23-CV-1301-X, 2024 WL 42316 (N.D. Tex. Jan. 3, 2024) (construction). Motion to compel granted. Under Texas law, if a written draft of an agreement is prepared, submitted to both parties, and each of them expresses unconditional assent thereto, there is an agreement regardless of whether it is signed. Performance of the contract is assent to the agreement. Provision of agreement providing that there could be no change or modification of the agreement without consent of the seller did not render the agreement unenforceable, rather it "reinforce[d] the requirement of mutuality." Defendant had moved to dismiss plaintiff's original complaint. Before the court ruled, plaintiff amended its complaint. Defendant moved to compel arbitration in response to the amended complaint. Defendant "did not wait for a merits ruling or get a sense of the Court's view of the case before moving to compel arbitration." The court rejected a "bright-line test" that would require finding waiver if a motion to dismiss with prejudice is filed prior to moving for arbitration. Property owners coverage claim against its insurer was stayed as "a full stay of these proceedings is mandatory under the Federal Arbitration Act" and was "in the interest of judicial economy."

Swenson v. Clay Cnty. Mem'l Hosp., No. 7:23-CV-00056-O, 2024 WL 262576 (N.D. Tex. Jan. 24, 2024) (employment). Motion to compel granted. A court is required to determine whether a

governmental entity is entitled to governmental immunity before it can compel it to arbitration.

Leach v. H.E.B., No. SA-23-CV-01426-OLG, 2024 WL 150771 (W.D. Tex. Jan. 12, 2024) and *Leach v. H.E.B.*, No. SA-23-CV-01428-XR, 2024 WL 150777 (W.D. Tex. Jan. 12, 2024) (Chestney, Mag. J.) (employment). Motion to compel granted. Under the FAA, ordinary state law contract principles apply to determine the validity of an arbitration agreement. Under Texas law, "[a]n employer may enforce an arbitration agreement entered into during an at-will employment relationship if the employee received notice of the employer's arbitration policy and accepted it." Texas law also provides that "an employee demonstrates acceptance of an agreement to arbitrate by continuing to show up for the job and accept wages in return for work." Mutual promises to arbitrate employment disputes constitute adequate consideration to form a binding contract.

Motions to Confirm/Vacate

Redhawk Med. Products & Services, LLC v. N95 Shield, LLC, No. 6:23-CV-01021, 2024 WL 263942 (W.D. La. Jan. 24, 2024) (purchase of goods). Motion to vacate denied. The award was entered after a hearing, but no appearance was made by or on behalf of the respondent. Respondent sought to have the award vacated under 9 U.S.C. § 10(a)(4) arguing that it had not received proper notice of the arbitration. The parties' agreement contained a notice provision that required notice be addressed " to the addresses in the Agreement." The respondent had one address in the notice provision and a different address on the first page of the agreement. Based on the language on the agreement, the court determined that service was appropriate to either address. Claimant sent respondent 30 notices of the proceedings in the arbitration including by email, text, FedEx and US Postal Service.