

Arbitration in the Fifth - July 2023

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PRACTICES Litigation, International Arbitration

In July 2023, *Ten G, LLC v. Certain Underwriters at Lloyd's London*, decided in the Eastern District of Louisiana, recognized that a limitation on the type of damages an arbitrator can award did not waive the right to arbitrate claims. In the Northern District of Texas, *Coleman v. Brozen* relied on the “effective vindication exception” to refuse arbitration of an ERISA dispute where the arbitration procedure included a class action waiver.

Opinions of the Fifth Circuit Court of Appeals

Lynch v. Tesla, Inc., No. 22-51018, 2023 WL 4351236 (5th Cir. July 5, 2023) (per curiam) (Worker Adjustment and Retraining Notification Act). In the district court, a magistrate judge had ordered the defendant to give notice to potentially affected employees and also recommended that the matter be compelled to arbitration. The district judge adopted the arbitration recommendation and the case was dismissed. The defendants had objected to the order to give notice, and that objection was not resolved. Plaintiff moved for reconsideration of the dismissal so the district judge could consider the order to give notice. Reconsideration was denied. “The district court committed no error in adopting the magistrate judge's recommendation prior to ruling on [defendant's] [objection].”

Matter of Amberson, 73 F.4th 348, 351 (5th Cir. 2023). Order sustaining objection to discharge of award in bankruptcy affirmed. Statement in the award that it was a “reasoned award” and not “findings of fact and conclusions of law as might be entered by a court” did not preclude the application of collateral estoppel or the preclusive effect of the award.

Opinions of United States District Courts

Motions to Compel Arbitration

Ten G, LLC v. Certain Underwriters at Lloyd's London, No. CV 22-4426, 2023 WL 4744170 (E.D. La. July 25, 2023) (insurance). Motion to compel granted. Provision of the arbitration agreement that prohibited the award of exemplary or punitive damages was not a clear and unequivocal waiver of the right to arbitrate a claim that might result such damage.

Maxwell Heirsch, Inc. v. Velocity Risk Underwriters, LLC, No. CV 23-495, 2023 WL 4763104 (E.D. La. July 26, 2023) (insurance). Motion to compel granted. Argument that an insurance contract containing an arbitration clause must be signed by both parties in order to fall under the New York Convention was rejected. Plaintiffs request that the court hold that the insurance contract was governed by Louisiana law was rejected.

Morningstar v. Amazon.com, No. 3:23-CV-285-TSL-RPM, 2023 WL 4380047 (S.D. Miss. June 16, 2023) (internet self-publishing service). Motion to compel granted. “[B]ecause plaintiff's apparent argument is not that he was fraudulently induced to enter the arbitration agreements, but rather that the contract or contracts were induced by fraud, it follows that plaintiff should be compelled to arbitrate.”

Coleman v. Brozen, No. 3:20-CV-01358-E, 2023 WL 4498506 (N.D. Tex. July 12, 2023) (ERISA). Motion to compel denied. There is an “effective vindication” exception to the enforcement of an otherwise valid arbitration agreement. This exception “rests on public policy” and “finds in its origins the desire to prevent ‘prospective waiver of a party’s right to pursue statutory remedies[.]’ ” The question of whether the effective vindication exception applies rests on whether a “prospective litigant effectively may vindicate its statutory cause of action in the arbitral forum.” The class action waiver provision at issue was found to be unenforceable because it prevented plaintiffs “from effectively vindicating their statutory right to seek plan-wide relief under ERISA.” The court concluded “that the Class Action Waiver—in preventing Plaintiffs from ‘seek[ing] or receiv[ing] any remedy which has the purpose or effect of providing additional benefits or monetary or other relief’ to anyone other than themselves—prevents the effective vindication of Plaintiffs’ right to seek plan-wide relief.” The class action waiver was not severable from the arbitration procedure as a whole.

Seifert v. United Built Homes, LLC, No. 3:22-CV-1360-E, 2023 WL 4826206 (N.D. Tex. July 27, 2023) (residential construction). Motion to compel granted. The incorporation of the American Arbitration Association rules is a valid delegation clause. Under Texas law, unconscionability challenges are a matter of enforceability, not contract formation, and therefore are not relevant to the question of whether the parties entered into an arbitration agreement. Argument that provisions of the contract unrelated to the arbitration clause rendered the agreement as a whole unenforceable did not prevent enforcement of the arbitration clause. Sending a notice of default letter did not amount to waiver of arbitration.

Yates v. Experian Info. Sols., Inc., No. 3:22-CV-00143, 2023 WL 4747386 (S.D. Tex. July 25, 2023), amending and superseding 2023 WL 4355045 (July 5, 2023) (Edison, Mag. J.) (Fair Credit Reporting Act). Motion to compel granted. Agreement that provided for the arbitrator to decide “the scope and enforceability of this arbitration provision . . . and any such dispute relating to the scope and enforceability of this arbitration provision” was a delegation clause. Therefore, the argument that claims were outside the scope of the arbitration clause was for the arbitrator to decide. Arbitration was not waived by a four month delay in filing a motion to compel. The failure to “identify any ‘overt act’ by [defendant] ‘that evinces a desire’ to resolve this dispute through litigation as opposed to arbitration . . . ends the waiver inquiry right away.”

Egbert v. Silverado Senior Living Mgmt., Inc., No. 4:22-CV-4143, 2023 WL 4764697 (S.D. Tex. July 26, 2023) (FLSA). Motion to compel denied. In Texas, an arbitration clause is illusory if it can be retroactively modified by one party who retains the power to terminate the agreement.

Motions to Confirm/Vacate

Barysas v. Uber Techs. Inc., No. 4:22-CV-03876, 2023 WL 4549593 (S.D. Tex. July 14, 2023) (Edison, Mag. J.), report and recommendation adopted 2023 WL 4933953 (S.D. Tex. Aug. 2, 2023) (FLSA). Award confirmed. The court is not permitted to re-examine the legal or factual underpinnings of an arbitration award. So long as the arbitrator “even arguably construed or applied the contract,” the final award must stand because the parties “bargained for [the arbitrator’s] construction of their agreement.” Portion of the arbitration agreement that provided that the “Arbitrator shall not have the power to commit errors of law or legal reasoning, and the award may be vacated or corrected on appeal to a court of competent jurisdiction for any such error” was an impermissible attempt to expand judicial review beyond that authorized by the Federal Arbitration Act. Section 10(a)(3) permits a district court to vacate an arbitration award “where the arbitrators were guilty of misconduct . . . in refusing to hear evidence pertinent and material to the controversy; or of any other misbehavior by which the rights of any party have been prejudiced.” However, as a legal matter, an arbitrator has “broad discretion to make evidentiary decisions.” It is not the role of

the court “to second-guess each and every discovery ruling an arbitrator makes during an arbitration proceeding.”

Kora Pack Private Ltd. v. Motivating Graphics LLC, No. 4:22-CV-00377-BP, 2023 WL 4826222 (N.D. Tex. July 27, 2023) (manufacturing agreement). Award confirmed. Objection that the panel was not properly formed was rejected where respondent elected to not participate in the appointment process or hearings before an Indian court that led to appointment of an arbitrator and respondent did not participate in the arbitration. A party challenging an award on public policy grounds must show that enforcing the award is contrary to the public policy of the enforcing country. Moreover, a party complaining about an arbitration award cannot avoid enforcement due to circumstances that were of its own making. Parties to a confirmation proceeding usually may not counterclaim under Fed. R. Civ. P. 13.