Arbitration in the Fifth - June 2024

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PRACTICES Litigation, International Arbitration

In June 2024, the Fifth Circuit Court of Appeals again addressed arbitration-related issues in Louisiana insurance coverage disputes. Meanwhile, the Western District of Texas considered dismissal for failure to prosecute an arbitration in two separate cases. One those, Yanez v. DISH Network, LLC, considered the impact of Smith v. Spizzirri on such a dismissal.

Opinion of the Fifth Circuit Court of Appeals

S. K. A. V., L.L.C. v. Indep. Specialty Ins. Co., 103 F.4th 1121 (5th Cir. 2024). "Does § 22:868 of the Louisiana Revised Statutes void an arbitration provision in a contract for surplus lines insurance? We venture an Erie guess and answer 'yes.'"

LMP Properties, L.L.C. v. Interstate Fire & Cas. Co., No. 23-30833, 2024 WL 2988938 (5th Cir. June 14, 2024) (per curiam) (insurance). Order denying motion to compel reversed. "While [plaintiffs were certainly free to name and then dismiss the foreign insurers, the district court was not free to disregard them in considering the domestic insurers' motion to compel arbitration." . . . Because the motion to compel arbitration should have been granted, we REVERSE and REMAND."

Ascension Data & Analytics, L.L.C. v. Pairprep, Inc., No. 23-11026, 2024 WL 3154797 (5th Cir. June 25, 2024). Order dismissing application to vacate award for lack of subject matter jurisdiction affirmed. When a party applies to a court to confirm, modify, or vacate an arbitral award, the party must establish on the face of the application a basis for subject matter jurisdiction separate and apart from the Federal Arbitration Act. The parties conceded that their citizenship was not diverse, and plaintiff did not identify a federal question that supported subject matter jurisdiction. Therefore, "the enforceability of the arbitral award must be litigated in state court."

Opinions of United States District Courts

Motions to Compel Arbitration

LAG Oasis, LLC v. Indep. Specialty Ins. Co., No. CV 23-6584, 2024 WL 2977871 (E.D. La. June 13, 2024) (insurance). Motion to compel granted. The arbitration agreement in the insurance policy satisfied the requirements of the New York Convention. The "effective vindication" and "prospective waiver" doctrines did not preclude enforcement of the arbitration agreement.

*Disch v. Grubbs Auto. GRA, LL*C, No. 4:23-CV-01202-P, 2024 WL 2819524 (N.D. Tex. June 3, 2024) (automobile purchase). Motion to compel granted. After movant produces a facially relevant arbitration agreement signed by the respondent, the burden of proof shifts to respondent to prove the arbitration agreement was defective, invalid, or otherwise inapplicable. Not remembering signing the agreement is not a defense. A merger clause in one of the documents executed to purchase the automobile did not supersede the arbitration agreement (contained in another) as the merger clause incorporated other documents that were part of the transaction. Arbitration was not

waived by “fil[ing] required responsive pleadings and mov[ing] to enforce a valid arbitration agreement.”

Burks v. Plainscapital Bank, No. 3:23-CV-2472-N, 2024 WL 2970053 (N.D. Tex. June 12, 2024) (banking). Individual arbitration compelled. Plaintiff filed a putative class action and then sought to dismiss her individual claims, but argued that she did not have authority to dismiss the class claims. The court ordered individual arbitration based on the parties’ agreement. Class claims were dismissed without prejudice.

Garcia v. Fuentes Rest. Mgmt. Services Inc., No. 3:23-CV-01585-K, 2024 WL 2988278 (N.D. Tex. May 29, 2024) (Rutherford, Mag. J.) (FLSA). Motion to compel denied. When assessing waiver, courts have “asked simply whether the party has substantially invoked the judicial process to evaluate whether the party has waived its arbitration rights.” The court does so “without applying a heavy burden of proof to the party asserting waiver, or any presumption against a finding of waiver.” In this case, “Defendants filed an answer, participated in discovery, unequivocally represented to opposing counsel and the Court [in the Joint Report] that they were not considering arbitration to resolve this dispute, and participated in mediation. Only after they failed to resolve the dispute, and other plaintiffs began to opt-in to the lawsuit, did Defendants advance the argument that [the initial Plaintiff] must arbitrate her claims. Under the circumstances . . . that Defendants have waived their right to arbitrate this dispute.”

Williams v. Wallace Fin., LLC, No. 3:24-CV-0662-D, 2024 WL 3094608 (N.D. Tex. June 18, 2024) (debt collection). Motion to compel granted.

Meritage Homes of Tex. LLC v. de Villiers, No. 4:23-CV-02931, 2024 WL 2820106 (S.D. Tex. June 3, 2024) (home construction). Declaration that arbitration agreement was not unconscionable granted. The relevant home warranty provided for JAMS arbitration. The parties allegedly agreed to an ad hoc arbitration, but home buyer filed a state court action and “filed a motion in the state court lawsuit arguing that the arbitration terms are unconscionable.” The builder “brought this suit seeking a declaratory judgment that the arbitration terms are valid and enforceable.” The parties’ agreement provided that “any determination of arbitrability will be made by a federal court in Texas.” The court considered whether the following were unconscionable terms: two-day limits for each party's case-in-chief; JAMS Optional Arbitration Appeal Procedure if the final award exceeds $100,000; and cost-sharing provisions. The terms were not unconscionable. The parties agreed to the two-day limit, and the arbitrator could modify the limit for good cause. The threshold for appeal “goes both ways” and the “insinuation that the arbitrator would connive to manipulate the award to benefit [the builder] is both unfounded and unbecoming.” To demonstrate unconscionability based on expense, the party must produce some evidence that it will likely incur costs in an amount that would deter enforcement of statutory rights in arbitration.

Wealth Assistants LLC v. Thread Bank, No. CV H-24-0040, 2024 WL 2980812 (S.D. Tex. June 13, 2024) (banking). Motion to compel granted. Plaintiff argued that its Texas Deceptive Trade Practices Act (“TDTPA”) claim was not covered by the parties arbitration agreement. The arbitration agreement contained a valid delegation clause. “[W]hether the TDTPA prohibits arbitration of this dispute is a gateway question of arbitrability that the parties have agreed to delegate to the arbitrator.” Likewise, plaintiff’s “procedural and substantive unconscionability arguments must be decided by the arbitrator and not the court. Plaintiff's unconscionability arguments attack either the Deposit Agreement or its arbitration provision as a whole,” and do not attack the delegation clause in particular.

Engebretson v. Randolph-Brooks Fed. Credit Union, No. 1:23-CV-1002-RP, 2024 WL 2871317 (W.D. Tex. May 21, 2024 (Fair Credit Reporting Act). Motin to compel granted. Adoption of the American Arbitration Association's ("AAA") Consumer Arbitration Rules was clear and unmistakable delegation of arbitrability. Argument that movant waived arbitration by waiting "seven months after the complaint was served to file its motion to compel arbitration, by participating in a Joint Rule 26(f) Discovery Report/Case management plan, by exchanging discovery requests and responses, and by scheduling a deposition" was rejected.

Motions to Confirm/Vacate Arbitration Award

Jamison v. Harbor Freight Tools, Inc., No. 4:21-CV-171-DMB-JMV, 2024 WL 3217418 (N.D. Miss. June 27, 2024) (employment). Motion to vacate denied and award confirmed. Claimant was represented in the arbitration by a non-attorney representative. Arbitrator's ruling that plaintiff would "not be allowed to call any witnesses since he has failed to submit a witness or exhibit list or participate in the pre-hearing conference" was not a sufficient basis for vacating the award. The arbitrator has "inherent authority to police the arbitration process and fashion appropriate remedies to effectuate this authority." As an award "'will be confirmed unless an error was material and caused substantial prejudice to the losing party,' the arbitrator's decision will not be vacated simply because the hearing was conducted by video conference.

Other Arbitration-related Decisions

Yax Ecommerce LLC v. Proficient Supply LLC, No. CV 24-809, 2024 WL 2881009 (S.D. Tex. June 7, 2024). Dismissed for lack of personal jurisdiction to resolve the merits. "[W]hen 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 litigation relating to enforcing an arbitration clause does not, itself, constitute consent to the personal jurisdiction of Texas courts for all issues and purposes."

Yanez v. DISH Network, LLC, No. EP-21-CV-00129-FM, 2024 WL 3016565 (W.D. Tex. June 14, 2024). Motion to modify dismissal for failure to prosecute denied. The question before the court was "whether the holding in *Smith v. Spizzirri* changed the controlling law insofar that a district court dismissing an already stayed case pending arbitration is no longer legally permissible." The court held: "*Smith* still allows a trial court to dismiss a stayed FAA case so long as there is a valid 'separate reason' to do so." A "valid 'separate reason' exists when the court has docket management orders in place and the parties fail to adhere to the court's orders or fail to prosecute their case in arbitration."

Big Picture Loans, LLC v. Eventide Credit Acquisitions, LLC, No. 4:24-CV-00103-P, 2024 WL 3239935 (N.D. Tex. June 27, 2024) (bankruptcy). Limited stay of proceeding following appeal of denial of motion to compel. "The Supreme Court's decision in *Coinbase* does not support a blanket stay of all proceedings in the bankruptcy case; it specifically contemplates a stay of litigation directly related to the arbitrability issue."

Mattos v. Nat'l Western Life Ins. Co., No. 1:22-CV-00934-DII, 2024 WL 3270689 (W.D. Tex. June 4, 2024) (Howell, Mag. J.), report and recommendation adopted 2024 WL 3264535 (June 28, 2024). Order to show cause why claims should not be dismissed for failure to prosecute. "Given that in the last year since the Court ordered this case to arbitration, Plaintiffs have not submitted their case to the now-complete arbitration panel, the undersigned recommends that the District Court order Plaintiffs to show cause in writing why this case should not be dismissed for failure to prosecute

and for failure to comply with the Court's arbitration order. If Plaintiffs fail to respond, state that they do not intend to participate in arbitration, or do not otherwise demonstrate that they are moving forward with arbitration, the Court should dismiss Plaintiffs' claims without prejudice."