

## Arbitration in the Fifth - March 2024

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**PRACTICES** International Arbitration, Litigation

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*In March 2024, the Fifth Circuit Court of Appeals issued two opinions addressing arbitration of insurance coverage disputes in Louisiana. In Bufkin Enters., L.L.C. v. Indian Harbor Ins. Co., the court reaffirmed its position that state law does not reverse-preempt the New York Convention and rejected the “plead and then dismiss gamesmanship” that saw foreign insurers dismissed from cases with prejudice as a strategy to prevent domestic insurers relying on equitable estoppel to enforce arbitration agreements. In Indian Harbor Ins. Co. v. Belmont Commons, L.L.C., the court sidestepped the New York Convention analysis entirely, ruling that surplus lines coverage is not subject to Louisiana’s ban on arbitration clauses in insurance agreements.*

### Opinion of the Fifth Circuit Court of Appeals

*Indian Harbor Ins. Co. v. Belmont Commons, L.L.C.*, No. 23-30246, 2024 WL 962376 (5th Cir. Mar. 6, 2024) (insurance) (per curiam). Order compelling arbitration affirmed. Surplus lines insurers’ forms for property coverage are not subject to approval by the Louisiana Department of Insurance. Therefore, surplus lines insurers are excepted from LA. R.S. § 22:868(A)’s prohibition on arbitration clauses contained in insurance policies. Because arbitration clauses are characterized as a type of venue selection clause, “we conclude that the carve-out contained in LA. R.S. § 22:868(D) unambiguously includes arbitration clauses.”

*Bufkin Enters., L.L.C. v. Indian Harbor Ins. Co.*, No. 23-30171, -- F.4th --, 2024 WL 1262225 (5th Cir. Mar. 26, 2024) (per curiam) (insurance). Order denying motion to compel reversed and case remanded with instructions to grant the motion. Louisiana law does not reverse preempt the New York Convention because the McCarran-Ferguson Act does not apply to treaties. Plaintiff initially sued only the domestic insurers, but then filed an amended petition that named the foreign insurers as defendants. The amended petition was “expressly filed for the purpose of then dismissing the foreign insurers ‘with prejudice[,] foregoing [sic] any rights against them[.]’” Plaintiff alleged that the foreign and domestic insurers collectively engaged in the same culpable conduct, and had submitted its insurance claim to all the insurers. Equitable estoppel was appropriate to compel arbitration under the New York Convention. “It is of no moment that [plaintiff] is no longer pursuing claims against the foreign insurers . . . [applicable case law] simply asks whether the signatory to the arbitration agreement [here the plaintiff] raises allegations of substantially interdependent and concerted misconduct by both a non-signatory (the domestic insurers) and one or more signatories to the contract (the foreign insurers).” While plaintiff “was 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.” Indulging this “pleading-and-then-dismissing gamesmanship by denying arbitration turns on its head the axiom that ‘[t]he linchpin for equitable estoppel is equity—fairness.’”

*Jackson v. World Wrestling Entm’t, Inc.*, 95 F.4th 390, 392 (5th Cir. 2024). Order compelling arbitration affirmed. Plaintiff alleged that he was injured at a sports entertainment event that he attended with his nephew. All tickets required the buyer to accept an arbitration agreement and buyers were advised that entering the event would constitute acceptance of the arbitration agreement. Plaintiff’s argument that he was not bound to arbitrate because he didn’t purchase the

ticket himself, but received it as a gift from his nephew, was rejected. The nephew acted as plaintiff's agent when plaintiff allowed his nephew to present the ticket on his behalf for admittance to the stadium. "Event attendees routinely purchase and present tickets on behalf of family and friends, and in doing so, accept the required terms and conditions."

## Opinions of United States District Courts

### Motions to Compel Arbitration

*Gotreaux v. Stevens Transp., Inc.*, No. 1:23-CV-00159-MJT, 2024 WL 1164445 (E.D. Tex. Feb. 29, 2024), report and recommendation adopted, 2024 WL 1161318 (Mar. 18, 2024) (employment). Motion to compel granted. The agreement at issue was ultimately governed by the Texas Arbitration Act ("TAA"), and "thus, Texas common law cannot serve as a basis for invalidating the Agreement." The court presumes a signatory to an agreement read the agreement. Regardless of whether the parties' arbitration agreement was exempt under the Federal Arbitration Act's ("FAA") "transportation worker exemption," it was still enforceable under the TAA.

*Chifici Enter. v. Certain Underwriters at Lloyd's London*, No. CV 23-5764, 2024 WL 1299551 (E.D. La. Mar. 27, 2024) (insurance). Motion to compel granted. Arbitration agreement in the parties' insurance contract was governed by the New York Convention. Equitable estoppel applied to compel arbitration against all insurers.

*6101 Tullis Drive, LLC v. Interstate Specialty Ins. Co.*, No. CV 23-7066, 2024 WL 1344414 (E.D. La. Mar. 29, 2024) (insurance). Motion to compel granted. Because the policy at issue was a surplus lines policy, "Louisiana law has no bearing on the enforceability of the Arbitration Agreement as to both the foreign and domestic insurers. Each insurer can invoke the Arbitration Agreement to compel arbitration of this dispute."

*Stonelake Condo. Assoc., Inc. v. Certain Underwriters at Lloyd's London*, No. CV 23-279-JWD-SDJ, 2024 WL 1308072 (M.D. La. Mar. 27, 2024) (insurance). Motion to compel granted. The New York Convention "is not reverse-preempted by state law, and arbitration provisions that fall under the Convention are enforceable in Louisiana." The doctrine of equitable estoppel applied to compel arbitration of domestic insurers. No authority was provided to support argument that "drastically changed" market conditions rendered the contract adhesionary.

*Banks v. Cavalier Homes, Inc.*, No. 3:23-CV-58-SA-RP, 2024 WL 1315859 (N.D. Miss. Mar. 27, 2024) (manufactured housing). Motion to compel denied without prejudice. The arbitration agreement was contained within the parties' purchase agreement pursuant to which each party agreed to "give up" certain things and was supported by consideration. Subjective belief that the arbitration agreement was not enforceable or the failure to read the agreement did not preclude its enforcement. The parties disputed the circumstances of the execution of the arbitration agreement and discovery was allowed as to "unconscionability arguments." The court declined to enforce the arbitration agreement contained in the warranty because the purchase agreement, which provided information as to several aspects of the warranty, provided no notice that the warranty contained a dispute resolution agreement.

*Nichols v. Austin Bridge & Rd. LP*, No. 3:23-CV-1318-B, 2024 WL 1054629 (N.D. Tex. Mar. 11, 2024) (employment). Motion to compel granted. Plaintiff was a "Dispatch Coordinator and a Commercial Motor Vehicle Driver." Dispatching involved deliveries within Texas and plaintiff did not drive a vehicle outside of Texas for his job. To determine whether the "transportation worker exemption" of the AA applies, the court employs a two-step analysis. First, the court defines the

“relevant class of workers to which [the worker] belongs” based on the actual work they “typically carry out.” Second, the court determines whether this class of workers “play[s] a direct and necessary role in the free flow of goods across borders.” Even assuming that the plaintiff delivered “asphalt solely within Texas that later became part of interstate highways” that connects the class of worker to ‘instrumentalities of interstate commerce,’ which is insufficient to be ‘engaged in interstate commerce.’”

*Cleveland v. Salesforce, Inc.*, No. 1:23-CV-762-RP, 2024 WL 1023898 (W.D. Tex. Feb. 20, 2024), report and recommendation adopted, 2024 WL 1023061 (Mar. 7, 2024) (employment). Motion to compel granted. Limitations on discovery in arbitration do not render arbitration agreements substantively unconscionable.

*Mega Point Ltd. v. Villa T, LLC*, No. 1:23-CV-1565-DII, 2024 WL 1123602 (W.D. Tex. Mar. 13, 2024) (purchase of property). Motion to compel granted. Plaintiff argued that the dispute at issue related to the parties’ purchase agreement and not an escrow agreement. The purchase agreement did not contain an arbitration clause. The dispute to resolve the disposition of the escrow funds necessitated a decision about whether either party breached the purchase agreement in failing to close. A party cannot assert a defense of conditions precedent (participation in mediation) when it acted to prevent a condition precedent from being completed. Jurisdiction clause in the parties’ contract applied only to lawsuits and not to arbitration.

*Jensen v. Burgers of Beaumont I, Ltd.*, No. 1:23-CV-686-DII, 2024 WL 1112962 (W.D. Tex. Mar. 12, 2024) (employment). Motion to compel denied. The parties’ agreement required arbitration before the now defunct American Mediation Association (“AMA”) using its rules. “Because the AMA no longer exists, the parties cannot be compelled to arbitrate before them or any another entity.”

## **Motions to Confirm/Vacate**

*Predmore v. Nick Mehmeti*, No. 3:23-CV-0253-X, 2024 WL 1260585 (N.D. Tex. Mar. 25, 2024) (employment). Award confirmed. To succeed on an objection under FAA Section 10(a)(2) the movant must “demonstrate actual bias at the arbitration proceeding by producing specific facts from which a reasonable person would have to conclude that the arbitrator was partial to one party.” Section 10(a)(4) of the FAA permits courts to vacate an arbitration award where the arbitrator exceeded her powers. Courts must resolve any doubts in favor of upholding the award. Courts do not have authority to review an “arbitrator’s decision on the merits, including both in her factfinding and application of law.”

## **Other Arbitration-related Decisions**

*Deaton v. Johnson*, No. 4:23-CV-00415-O, 2024 WL 920082 (N.D. Tex. Mar. 4, 2024). The doctrines of res judicata and collateral estoppel apply to a final judgment confirming an arbitration award.

*Vuoncino v. Forterra, Inc.*, No. 3:21-CV-01046-K, 2024 WL 967846 (N.D. Tex. Mar. 6, 2024). Arbitrator’s “opinion” was not given preclusive effect. The opinion at issue explained the arbitrator’s denial of a motion to dismiss based on statute of limitations. “Because the denial of a motion to dismiss is not a final decision, the Court would not treat even a fellow court’s opinion on the matter as preclusive . . . It will not give that treatment to the arbitrator’s opinion.”

*Wealth Assts. LLC v. Thread Bank*, No. CV H-24-040, 2024 WL 1348441 (S.D. Tex. Mar. 29, 2024) (banking). Court declined to consider applicability of arbitration clauses in deciding whether to

permit an intervention. “It is doubtful that the court could compel arbitration of a claim that is not before the court.”