Arbitration in the Fifth - May 2024

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In May 2024, the Supreme Court of the United States took centerstage with two decisions focusing on arbitration. Smith v. Spizzirri resolved the fundamental question of whether a court may dismiss a case after compelling arbitration. Meanwhile Coinbase, Inc. v. Suski serves as a reminder that traditional contract principles apply when deciding whether the parties agreed to arbitrate.

What's left in the stay or dismiss debate after Smith v. Spizzirri?

Since at least 1992, the district courts of the Fifth Circuit have exercised discretion to stay or dismiss a case after granting a motion to compel arbitration. The Supreme Court brought that discretionary authority to an end in *Smith v. Spizzirri*, No. 22-1218, 2024 WL 2193872 (U.S. May 16, 2024). In succinct and certain terms, the Court explained that the Federal Arbitration Act's "plain statutory text requires a court to stay the proceeding." FAA section 3 provides, in part:

> [T]he court [when the issue involved in a suit is subject to arbitration] shall on application of one of the parties stay the trial of the action until such arbitration has been had in accordance with the terms of the agreement, providing the applicant for the stay is not in default in proceeding with such arbitration.

Smith's seemingly simple holding leaves important questions for another day.

Possibly the most obvious question derived from the "plain statutory text" is whether a court may dismiss if no party asks for a stay. Section 3 seems to contemplate a party's application, but should a party request a stay? If the case is dismissed, the order compelling arbitration may be appealed. If the case is stayed, the order is interlocutory and may not be appealed. Imagine the scenario where the parties spend 12 – 18 months arbitrating to a final award that is then confirmed, but on appeal the order compelling arbitration is reversed. Starting over in the district court would benefit the party that lost in the arbitration, but at significant cost. Would the litigation then begin from scratch? Alternatively, the stay preserves the district court's jurisdiction to confirm or vacate an award. Given the limited scope of subject matter jurisdiction for a motion to confirm or vacate (see *Badgerow v. Walters*, 596 U.S. 1 (2022)), a party hoping to ensure the district court's review of an award may prefer a stay.

There is also the question of what court hears the motion to confirm/vacate? FAA sections 9, 10 and 11 provide that the "court in and for the district wherein the award was made" is the default venue for petitions confirm, vacate or modify, respectively. While the FAA venue provision is currently seen as supplemental to the general venue statute (*Cortez Byrd Chips, Inc. v. Bill Harbert Const. Co.*, 529 U.S. 193 (2000)), how much of *Cortez Byrd's* application of that holding survived *Badgerow's* discussion of award litigation? If a hypothetical motion to compel arbitration of an insurance coverage dispute is granted by the Eastern District of Louisiana and the case is stayed pending arbitration in New York, what court should hear the award petition? Would it matter if the insurance contract contained a choice of New York courts? If a new action is filed in a district of New York, will the district court conduct a *Badgerow* jurisdictional analysis? Alternatively, should the Eastern District of Louisiana transfer the case to New York? Currently, the courts in the Second

Circuit hold, in the insurance context, that the New York Convention is reverse-preempted by Louisiana law. A court in the Second Circuit would therefore have denied the motion to compel the insurance dispute to arbitration, so what does that court do when presented with an award entered in an arbitration that should not (under current Second Circuit law) have been compelled? Stay tuned! This scenario could certainly come to pass.

Finally, what is likely the most important of the observations in *Smith*, is the final sentence of its penultimate paragraph: "District courts can, of course, adopt practices to minimize any administrative burden caused by the stays that §3 requires." Many courts already require status reports while cases are stayed pending arbitration. Some, however, do not. Vigilance and monitoring are now needed by all courts in order to avoid lengthy stays in cases that do not proceed to arbitration as expected or that do not move forward at all.

Opinions of the Supreme Court of the United States

Smith v. Spizzirri, No. 22-1218, 2024 WL 2193872 (U.S. May 16, 2024). See above.

Coinbase, Inc. v. Suski, 144 S. Ct. 1186, 1192 (2024). The parties entered into a User Agreement that contained arbitration and delegation clauses. Later, the parties entered into a sweepstakes agreement. The sweepstakes agreement contained a forum selection clause. Plaintiff's lawsuit alleged the sweepstakes violated California law. Before the Court was the question of "who—a judge or an arbitrator—should decide whether a subsequent contract supersedes an earlier arbitration agreement that contains a delegation clause." The Court's prior caselaw "addressed three layers of arbitration disputes: (1) merits, (2) arbitrability, and (3) who decides arbitrability. This case involves a fourth: What happens if parties have multiple agreements that conflict as to the third-order question of who decides arbitrability? As always, traditional contract principles apply." Reviewing "the conflict between the delegation clause in the first contract and forum selection clause in the second, the question is whether the parties agreed to send the given dispute to arbitration—and, per usual, that question must be answered by a court."

Opinion of the Fifth Circuit Court of Appeals

Work v. Intertek Res. Sols., Inc., No. 23-20120, 2024 WL 2716871 (5th Cir. May 28, 2024) (employment). The parties' arbitration clause provided for arbitration "pursuant to" the JAMS Rules. This was sufficient to incorporate those rules. "Express adoption of [the JAMS Rules] presents clear and unmistakable evidence that the parties agreed to arbitrate arbitrability" including whether class arbitration was available.

Opinions of United States District Courts

Motions to Compel Arbitration

Chubb Capital I Ltd. v. New Orleans City, No. CV 23-5806, 2024 WL 1991492 (E.D. La. May 6, 2024) (insurance). Motion to compel denied and preliminary injunction granted. The dispute arose from a contract to provide "engineering and architectural design and related services". The owner had initiated arbitration against the design firm as well as its insurers. The insurers filed this suit to enjoin the arbitration and resisted the owner's motion to compel. Being "compelled to arbitrate a dispute where the parties have not agreed to arbitrate constitutes irreparable harm *per se*." Forcing a party to arbitrate that has not agreed to do so would disserve the public interest. In the absence of a final decision by the Louisiana Supreme Court, the court made an Erie guess holding that the

Louisiana Direct Action Statute does not require an insurer to submit to arbitration where its insureds have agreed to arbitrate.

Reid v. Cafe Habana Nola, LLC, No. CV 23-7201, 2024 WL 2022954 (E.D. La. May 7, 2024) (employment). Motion to compel denied. Plaintiff was a current employee of the defendant. Plaintiff "viewed a job posting on defendant's website." After reviewing the posting plaintiff "asked to renegotiate her . . . salary." Plaintiff did not submit an application through the online form. The web page stated that "[b]y submitting this application" employee consented to the arbitration agreement. Consent is "foundational" to arbitration. Defendant argued that "potentially viewing a hyperlink to the Arbitration Provision and then using information learned on the website . . . without submitting an online application is equivalent to consent." "[N]othing in the jurisprudence on website arbitration agreements suggests that a plaintiff manifests consent merely by viewing a hyperlink and later using information learned through the web page containing the hyperlink to renegotiate her salary." While courts have enforced some "clickwrap" agreements, "[t]his is not a clickwrap case . . . because nothing suggests that plaintiff ever clicked a button accepting the Arbitration Provision." Further "[c]ourts have also enforced some 'browsewrap' agreements, which notify users that by using a website application they are agreeing to certain terms . . . This is not a browsewrap case, however, because plaintiff did not proceed to use the online job application form."

3131 Veterans Blvd LLC v. Indian Harbor Ins. Co., No. CV 24-753, 2024 WL 2350711 (E.D. La. May 23, 2024) (insurance). Motion to compel granted. "Here, as in numerous cases before this court regarding this form of arbitration clause, all four requirements for compelling arbitration under the [New York] Convention are satisfied. The agreement is in writing to arbitrate the dispute. The agreement provides for arbitration in a signatory nation: the United States. The agreement also arises out of a commercial legal relationship through the contract of insurance between plaintiffs and defendants . . . And finally, at least one party to the agreement . . .is not a citizen of the United States. . ."

Sisodra Lodging, LLC. Indep. Specialty Inc. Co., No. CV 23-6463, 2024 WL 2700010 (E.D. La. May 24, 2024) (insurance). Motion to compel granted. "At least ten sections of this Court and the Fifth Circuit have agreed that Louisiana law recognizes an arbitration clause as a type of forum selection clause, and therefore under [La. Revised Statutes] § 22:868(D) surplus lines insurers are not prohibited from including arbitration clauses in their policies. Accordingly, Defendant is not prohibited from including an arbitration clause in its surplus lines policy."

Shubham, LLC v. Great Am. Ins. Co., No. 6:21-CV-03027, 2024 WL 2261953 (W.D. La. May 17, 2024) (insurance). Motion to compel denied. The issue of "litigation-conduct waiver is presumptively a judicial matter." Insurer was found to have waived arbitration by its "litigation conduct." The court determined tha the insurer 1) did not invoke arbitration in its answer, 2) did not indicate intent to opt out of the court's "Streamed Settlement Process" for hurricane cases, 3) participated in exchange of initial disclosures, 4) one year later unsuccessfully participated in a court-ordered mediation, 4) "Almost one year later" scheduled a second mediation and not until the day before the second mediation did the insurer seek to compel arbitration. "This record of litigation-related activities shows that [the insurer] was operating under the Court's [Case Management Order] . . . Under these circumstances, the Court finds that the defendant substantially invoked this Court's jurisdiction and the litigation process it established for hurricane-related claims."

Lower, LLC v. Amcap Mortgage, Ltd., No. 4:23-CV-685, 2024 WL 2784326 (E.D. Tex. May 30, 2024) (employment). Motion compelled as to signatories and denied as to nonsignatory. Faced with an unchallenged delegation clause, the arbitrability questions as to the enforceability or scope of the arbitration clause were to be determined by an arbitrator. Under Ohio law, "[a]rbitration may be

compelled by a nonsignatory against a signatory when there is a 'close relationship between the entities involved, as well as the relationship of the alleged wrongs to the nonsignatory's obligations and duties in the contract ... and [the fact that] the claims were intimately founded in and intertwined with the underlying contract obligations.'"

Thomas v. Cognizant Tech. Solutions Corp., No. 3:24-CV-00223-E, 2024 WL 2331751 (N.D. Tex. May 22, 2024) (employment). Motion to compel granted. Plaintiff signed the arbitration agreement electronically. Adoption of the JAMS Rules constitutes clear and unmistakable evidence that parties have agreed to arbitrate arbitrability.

Coon v. Crawford & Co., No. 3:23-CV-2732-S, 2024 WL 2804931 (N.D. Tex. May 30, 2024) (employment). Motion to compel denied without prejudice and case set for "trial limited to whether there is a binding agreement to arbitrate." Where a party attacks the very existence of an agreement, as opposed to its continued validity or enforcement, the courts must first resolve that dispute. "The 'threshold burden" for the party attacking the arbitration agreement is to put the existence of the agreement 'in issue.'" Plaintiff unequivocally denied signing the arbitration agreement and provided a corroborating declaration from a third-party witness.

Allen v. Experian Info. Solutions, Inc., No. SA-24-CV-00157-XR, 2024 WL 2228164 (W.D. Tex. May 16, 2024) (Fair Credit Reporting Act). Motion to compel granted. The strong presumption in favor of arbitration arises only after the party seeking to compel arbitration proves that a valid arbitration agreement exists. The party moving to compel arbitration bears the initial burden of proving the existence of a valid agreement to arbitrate. Once that initial burden is met, the burden shifts to the party resisting arbitration to assert a reason that the arbitration agreement is unenforceable. "Federal courts have authority where a party questions the 'very existence of a contract' containing the arbitration agreement . . . Courts 'do not consider general challenges to the validity of the entire contract.'" Military Lending Act prohibition on arbitration of claims did not apply retroactively to credit card accounts opened prior to 2017.