Arbitration in the Fifth - November 2023

By Odean L. Volker | December 13, 2023

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November 2023 opinions from the courts within the Fifth Circuit include the Eastern District of Louisiana's Baker Hughes Saudi Arabia Co. Ltd. v. Dynamic Indus., Inc. which considers a motion to compel arbitration with the abolished Dubai International Financial Center as well as the District's latest additions to its growing collection of opinions addressing motions to compel arbitration of insurance coverage related claims. The Northern District of Mississippi and the Southern and Western Districts of Texas considered arguments where parties waived arbitration.

Opinions of United States District Courts

Motions to Compel Arbitration

Barcadia Bar & Grill of New Orleans, LLC v. Indep. Specialty Ins. Co., No. CV 23-3125, 2023 WL 7220327 (E.D. La. Nov. 2, 2023) (insurance). Motion to compel granted. The agreement to arbitrate was contained in an insurance policy. Plaintiff argued that to be enforceable under the New York Convention an "agreement in writing" must be signed. Plaintiff's argument was foreclosed by current Fifth Circuit precedent. *Sphere Drake Insurance PLC v. Marine Towing, Inc.*, 16 F.3d 666 (5th Cir. 1994) construed Article II of the New York Convention to require 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. The district court noted that "Fifth Circuit's holding in this regard is in the minority view among circuits, and that the Fifth Circuit itself has suggested it may reconsider the ruling at some point."

Beachcorner Properties, LLC v. Indep. Specialty Ins. Co., No. CV 23-1287, 2023 WL 7280516 (E.D. La. Nov. 3, 2023) (insurance). Motion to compel granted. Under Louisiana law, "invalidity" includes contracts that contain provisions that are (1) unconscionable or (2) possess features of both adhesionary formation and unduly harsh substance. In order to be invalidated, a provision must possess features of both adhesionary formation and unduly harsh substance. Louisiana courts consider four factors in making this determination: (1) the physical characteristics of the clause; (2) the distinguishing features of the clause; (3) the mutuality of the clause, in terms of the relative burdens and advantages; and (4) the relative bargaining strength of the parties. Where a party seeks to invalidate an arbitration agreement on the ground that arbitration would be prohibitively expensive, that party bears the burden of showing the likelihood of incurring such costs.

Li v. Georges Media Group LLC, No. CV 23-1117, 2023 WL 7280519 (E.D. La. Nov. 3, 2023) (Video Privacy Protection Act). Motion to compel granted. Defendant's websites included terms and conditions. Those terms and conditions stated that website users were bound to arbitrate disputes arising out of their use of the websites.

Baker Hughes Saudi Arabia Co. Ltd. v. Dynamic Indus., Inc., No. 2:23-CV-1396, 2023 WL 7299129 (E.D. La. Nov. 6, 2023) (oil field services) (notice of appeal filed). Motion to compel denied. The parties had agreed that disputes would be resolved "by arbitration under the Arbitration Rules of the [Dubai International Financial Center London Court of International Arbitration ("DIFC LCIA")]." In 2021, the DIFC LCIA was abolished and replaced with the Dubai International Arbitration Center

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("DIAC"). A court "cannot compel arbitration when the agreed upon arbitration tribunal is unavailable or no longer exists." The Dubai government's decree dissolving the DIFC LCIA and transferring its assets, rights and obligations to DIAC and providing that DIFC-LCIA arbitration agreements entered into before the effective date of the decree were deemed valid did not change this result. The Dubai government did not have authority to rewrite the parties' agreement and "order arbitration in a forum to which the parties did not contractually agree."

The Cornerstone Assoc. v. Indep. Specialty Ins. Co., No. CV 23-2478, 2023 WL 8257987(E.D. La. Nov. 29, 2023) (insurance). Motion to compel granted. Under Louisiana law, an arbitration clause in a surplus lines policy may be enforced.

Edenborn Office Owners, Condominium Assoc. v. Certain Underwriters at Lloyd's London, No. B604510568622021, No. CV 23-3546, 2023 WL 8258129 (E.D. La. Nov. 29, 2023) (insurance). Motion to compel granted. Argument alleging unequal bargaining power of the parties to the agreement were not properly raised under the New York Convention Article II's "null and void" clause, because the argument cannot be applied "neutrally on an international scale." The New York Convention is not preempted by state law through the McCarran-Ferguson Act.

Winston v. Horseshoe Entm't, No. 23-CV-818, 2023 WL 8361766 (W.D. La. Nov. 16, 2023) (Hornsby, Mag. J.), report and recommendation adopted, 2023 WL 8355903 (Dec. 1, 2023) (race discrimination in accommodation). Motion to compel denied. Plaintiff's claims were not covered by the arbitration clause that provided for arbitration of claims involving "Telephone Consumer Protection Act and/or related state and federal laws."

Tupelo Children's Mansion, Inc. v. Elegant Reflections LLC, No. 1:23-CV-76-SA-DAS, 2023 WL 8259254 (N.D. Miss. Nov. 29, 2023) (construction). Motion to compel granted. Under Mississippi law, a foreign limited liability company that is not registered to do business in the state may defend actions brought against it. Enforcing an arbitration clause was a part of that defense. The failure to plead arbitration as an affirmative defense, standing alone, did not constitute sufficient grounds for finding waiver of the right to compel arbitration. Fed. R. Civ. P. 8 applies only when disputes have already been arbitrated and the award has been obtained.

Stonex Commodity Sols. LLC v. Garcia, No. 7:23-CV-00163, 2023 WL 7299128 (S.D. Tex. Nov. 6, 2023) (personal guaranty of commodities transaction). Motion to compel granted. The defendant did not waive arbitration. The court found that defendant's participation in the litigation was "to the extent required to defend himself against Plaintiff's complaint" and that plaintiff "failed to show that there was a significant delay in filing the motion to compel that could prejudice Plaintiff."

Williams v. GC Services Ltd. P'ship, No. EP23CV00205FMMAT, 2023 WL 8008004 (W.D. Tex. Nov. 17, 2023) (Torres, Mag. J.) (employment). Motion to compel granted. A party waives arbitration by seeking a decision on the merits before attempting to arbitrate. The question of what constitutes a waiver of the right of arbitration depends on the facts of each case. Factors considered include (1) how much pretrial activity related to the merits rather than arbitrability or jurisdiction; and (2) whether the movant sought or opposed arbitration earlier in the case. While defendant "invoke[d] the judicial process in asking the Court to dismiss any of Plaintiff's non-cognizable claims and then compel arbitration on any remaining claims," the facts of the case did not support waiver. The court, however, did not address the merits of any of the allegedly "non-cognizable" claims.

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