

Arbitration in the Fifth - September 2023

October 10, 2023 Odean Volker

PRACTICES Litigation, International Arbitration

In September 2023, Mai v. The Art Institute of Dallas Aii, LLC, decided by the Northern District of Texas, held that a motion to vacate an award must be both filed and served within the Federal Arbitration Act's three-month limitation. Mai and the Southern District of Texas' Salzgitter Mannesmann Int'l (USA) Inc. v. Esmark, Inc. address the high standard for applied to challenges to awards on the basis of alleged arbitrator partiality. In the Western District of Texas, Sisam v. Strategic Funding Source, Inc. applied the "demand approach" to determine the amount in controversy for jurisdictional purposes.

Opinions of United States District Courts

Motions to Compel Arbitration

Cintas Corp. No. 2 v. Backwoods Investments, LLC, No. 422CV00799SDJAGD, 2023 WL 6531519 (E.D. Tex. Sept. 13, 2023) (Durrett, Mag. J.). Motion to compel denied. Plaintiff waived arbitration by filing its petition to resolve the merits of its breach of contract claim. "It is difficult to see how a party could more clearly evince a desire to resolve a dispute through litigation rather than arbitration than by filing a lawsuit going to the merits of an otherwise arbitrable dispute"

3155 Dauphine, LLC v. Indep. Specialty Ins. Co., No. CV 23-2213, 2023 WL 6293818 (E.D. La. Sept. 26, 2023) (insurance). Motion to compel granted. The McCarran-Ferguson Act does not apply to the New York Convention which "remains an international agreement or contract negotiated by the Executive Branch and ratified by the Senate, not by Congress." Therefore, the "Convention Act is not reverse-preempted by state law, and arbitration provisions that fall under the Convention Act are enforceable in Louisiana."

Intermed Services Mgmt. Co., LP v. Horseshoe, LLC, No. 3:22-CV-0191-N, 2023 WL 5758879 (N.D. Tex. Sept. 6, 2023) (sale of real estate). Motion to compel granted. Courts apply state contract law to determine whether the arbitration agreement is valid and if the claims are within its scope. The party seeking to compel arbitration bears the burden of establishing the required elements and need only prove the existence of an agreement to arbitrate by a preponderance of the evidence. Evidence presented to compel or resist arbitration must be competent summary judgment evidence.

Rivera v. Ross Dress for Less, Inc., No. 4:22-CV-74, 2023 WL 6282836 (S.D. Tex. Sept. 26, 2023) (nonsubscriber personal injury). Motion to compel granted. The Fifth Circuit has not articulated the appropriate procedure to resolve a motion to compel, however district courts have used the Federal Rule of Civil Procedure 56 standard. The Rule 56 standard requires the movant to present evidence sufficient to demonstrate an enforceable agreement to arbitrate. Once that burden has been met, the burden shifts to the non-movant to raise a genuine dispute of material fact. Under Texas law, in the context of a party not reading/speaking the language of the contract, procedural unconscionability arises where the party was incapable of understanding the agreement without assistance, and the other party did not provide that assistance. No evidence was presented showing either that assistance was requested or that assistance was refused. Further,

procurement, acceptance, and retention of benefits ratified the agreement to be bound by the employment plan's arbitration provisions.

Chatman v. Capital One Bank (USA), N.A., No. 523CV00408JKPRBF, 2023 WL 6056992 (W.D. Tex. Sept. 15, 2023) (Farrer, Mag. J.) (Fair Credit Reporting Act). Motion to compel granted. Plaintiff created an account with a credit monitoring service. She received notice that by clicking the button to create her account she would be agreeing to the Terms of Use. Plaintiff had an opportunity to click the link provided and read the Terms of Use. Therefore, by creating an account plaintiff manifested her assent to be bound by the Terms of Use and the arbitration agreement contained therein.

Motions to Vacate/Confirm

Mai v. The Art Institute of Dallas Aii, LLC, No. 3:23-CV-1275-D, 2023 WL 5986464 (N.D. Tex. Sept. 14, 2023) (education). Motion to vacate denied and motion to confirm granted. Under Federal Arbitration Act ("FAA") section 10(a)(2), evident partiality requires more than a mere appearance of bias. A party must show "a concrete, not speculative impression of bias" that "stem[s] from a significant," not trivial, "compromising connection." The party challenging the award must produce specific facts from which a reasonable person would have to conclude that the arbitrator was partial to its opponent. Under FAA § 10(a)(3), to constitute misconduct requiring vacation of an award, an error in the arbitrator's determination must be one that is not simply an error of law, but which so affects the rights of a party that it may be said that the party was deprived of a fair hearing. Courts will not find that a movant was denied a fair hearing if the record supports a reasonable basis for the arbitrator's decision. While the motion to vacate was filed within three months of the award, it was served 25 days after expiration of the three-month period contained in FAA §12. By failing to serve the other party or its attorney within the three-month period, movant forfeited the right to seek judicial review of the award.

Salzgitter Mannesmann Int'l (USA) Inc. v. Esmark, Inc., No. 3:22-CV-00030, 2023 WL 5916566 (S.D. Tex. Sept. 11, 2023) (Edison, Mag. J.) (purchase of steel) (appeal filed). Motion to confirm granted and motion to vacate denied. Respondent objected that the arbitrator appointed by petitioner on the basis of partiality. That arbitrator had disclosed to the parties that his daughter had become employed as a non-lawyer with the law firm that represented petitioner. The court found "nothing in the record that suggests that [the arbitrator] knew that his daughter had applied for a job at [the law firm representing petitioner] and was interviewing for a position at the firm before she received a job offer." The daughter held the job for four months, and left the job when her husband was transferred out of state. A party moving to vacate an arbitration award under section 10(a)(2) must "establish evident partiality by demonstrating either that [the arbitrator] failed to disclose relevant facts or that he displayed actual bias at the arbitration proceeding." In a failure to disclose case, "the integrity of the process by which arbitrators are chosen is at issue; in an actual bias case, the integrity of the arbitrators' decision is at issue." The mere failure to disclose a conflict is insufficient. Rather, vacatur based on nondisclosure "is only warranted upon nondisclosure that involves a significant compromising relationship," and the act of nondisclosure "creates a concrete, not speculative impression of bias." Courts have articulated four factors to aid in determining whether the nondisclosure involves a significant compromising connection to a party (1) any personal interest, pecuniary or otherwise, the arbitrator has in the proceeding; (2) the directness of the relationship between the arbitrator and the party the arbitrator allegedly favored, keeping in mind that the relationship must be substantial, rather than trivial, in order to establish evident partiality; (3) the relationship's connection to the arbitration; and (4) the proximity in time between the relationship and the arbitration proceeding. Evidentiary and procedural rulings identified by

respondent did not show actual bias. Arbitrators have “wide latitude” to conduct their proceedings and are not bound by judicial rules of evidence or procedure.

Chicory Court Midland, LP v. Colony Ins. Co., No. MO:23-CV-027-DC-RCG, 2023 WL 6147855 (W.D. Tex. Aug. 11, 2023) (Griffin, Mag. J.), report and recommendation adopted, 2023 WL 6201527 (Sept. 22, 2023) (insurance). Motion to compel granted. Substantial steps toward litigation of the arbitral dispute, or participation substantially in litigation procedures, ordinarily will not waive the right to arbitrate. Participation in discovery alone is not sufficient to waive the right to arbitrate.

Other Arbitration-related Decisions

Ascension Data & Analytics, LLC v. Pairprep, Inc., No. 3:23-CV-00552-N, 2023 WL 5945859 (N.D. Tex. Sept. 11, 2023) (data breach). Dismissed for lack of subject matter jurisdiction. The Eastern District of Texas had compelled arbitration in prior suit. Petitioner sought a preliminary injunction to enjoin a state court action to confirm the award. The FAA permits parties to file applications to vacate arbitration awards in federal court under sections 9 and 10, but these provisions do not themselves confer subject matter jurisdiction. Courts may not “look through” the application to the underlying substantive controversy to find a basis for federal jurisdiction.

Sisam v. Strategic Funding Source, Inc., No. SA-23-CV-0914-JKP, 2023 WL 6348878 (W.D. Tex. Sept. 28, 2023) (lending). Motion to remand granted. When plaintiffs seek to confirm, modify, or vacate an arbitration award the “Fifth Circuit has affirmed the use of the “demand approach” to determine the amount in controversy.” The Fifth Circuit “specifically agreed that it was the ‘more appropriate’ approach” to determine the amount in controversy. Under such an approach, the amount in controversy is the amount sought in the underlying arbitration rather than the amount awarded.” Thus, “to determine the amount in controversy, courts look to the amount ‘initially sought in arbitration’.”