

Arbitration in the Fifth – April 2022

May 10, 2022 Odean Volker

PRACTICES International Arbitration, Litigation

Notable arbitration-related decisions decided by the courts of the Fifth Circuit in April 2022 include the Fifth Circuit's Noble Capital Fund Mgmt., L.L.C. v. US Capital Glob. Inv. Mgmt., L.L.C. addressing the consequences on subsequent litigation of dismissal of an arbitration for failure to pay fees and Gonzalez v. Mayhill Behavioral Health, LLC, issued by the Eastern District of Texas, examining the deadline for filing a motion to modify an award and the means of serving that motion.

Opinions of the Fifth Circuit Court of Appeals

Noble Capital Fund Mgmt., L.L.C. v. US Capital Glob. Inv. Mgmt., L.L.C., No. 21-50609, 2022 WL 1099006 (5th Cir. Apr. 13, 2022) (funds/investing). Order denying motion to compel affirmed. The parties had been involved in an arbitration that was dismissed by the administering institution for failure of to pay the required fees. After the dismissal of the arbitration, a new lawsuit was filed, and a motion seeking to compel the new lawsuit to arbitration was also filed. Section 3 of the Federal Arbitration Act indicates that the stay applies “until such arbitration has been had. . .” Here, even though the arbitration did not reach the final merits and was instead terminated because of a party's failure to pay fees, “the parties still exercised their contractual right to arbitrate prior to judicial resolution in accordance with the terms of their agreements.” The motion to compel the new lawsuit to arbitration was denied.

Newman v. Plains All Am. Pipeline, L.P., No. 21-51089, 2022 WL 1114407 (5th Cir. Apr. 14, 2022) (staffing/FLSA). Motion to compel denied. Plaintiffs signed employment agreements with the staffing company. Plaintiffs sued the client of the staffing company. The staffing company intervened and moved to compel arbitration of the claims against the client. “When a court decides whether an arbitration agreement exists, it necessarily decides its enforceability between parties.” The agreement signed by the plaintiffs “govern[ed] only disputes arising with the [staffing company].”

Opinions of United States District Courts

Motions to Compel Arbitration

Amalgamated Transit Union v. New Orleans Reg'l Transit Auth., No. CV 21-1790, 2022 WL 1238608 (E.D. La. Apr. 27, 2022) (collective bargaining agreement). Motion to compel denied. Plaintiff brought a claim under 42 U.S.C. § 1983. For an agreement to arbitrate in a collective bargaining agreement to be enforceable it must clearly and unmistakably require union members to arbitrate. For a waiver of an employee's right to a judicial forum for statutory discrimination claims to be clear and unmistakable, the collective bargaining agreement must identify the specific statutes the agreement purports to incorporate or include an arbitration clause that explicitly refers to statutory claims.

Nelson v. Ochsner Clinic Foundation, No. CV 22-23, 2022 WL 1288731 (E.D. La. Apr. 29, 2022) (employment). Motion to compel granted. Under Louisiana law, to determine whether an arbitration clause is adhesionary courts consider: (1) the physical characteristic of the arbitration clause; (2) the distinguishing features of the arbitration clause; (3) the mutuality of the arbitration clause; and

(4) the relative bargaining strength of the parties. The real issue in a contract of adhesion analysis is not the standard form of the contract, but rather whether a party truly consented to all the printed terms. An arbitration agreement stating that it applies to “any dispute” between the parties is broad form.

Fowlkes v. Trans Union, LLC, No. 4:21-CV-00928, 2022 WL 1143296 (E.D. Tex. Apr. 18, 2022) (Fair Credit Reporting Act). Unopposed motion to compel granted. The “weight of authority clearly supports dismissal of the case when all of the issues raised in the district court must be submitted to arbitration.” Case was dismissed without prejudice.

Gonzalez v. Mayhill Behavioral Health, LLC, Defendant., No. CV 4:21-MC-00188, 2022 WL 1185889 (E.D. Tex. Apr. 21, 2022) (employment). Motion to modify award denied. In arbitration, plaintiff proved age discrimination, but was not awarded damages or attorneys’ fees. Section 11 allows a court to modify an award where: (a) “there was an evident material miscalculation;” (b) “the arbitrators have awarded upon a matter not submitted to them;” or (c) “the award is imperfect in matter or form not affecting the merits of the controversy.” Under Section 12, the motion to modify must be served “as prescribed by law for service of notice of motion” within three months. Service of the motion to modify by email (without the consent of the recipient) did not comply the Section 12’s procedural requirements. Federal Rule of Civil Procedure 6 provides the controlling protocol for calculating Section 12’s three-month deadline. In this case, the three-month period began to run from the final award and not the arbitrator’s decision on a motion for reconsideration. Further, modification was not warranted under 11(a) or 11(c).

Etheridge v. AT&T, Inc., No. 4:21-CV-03002, 2022 WL 1185174 (S.D. Tex. Apr. 19, 2022) (Edison, Mag. J.) (wireless services). Motion to compel granted. Arbitration agreement was contained in the providers terms of service. “A person who signs a contract must be held to have known what words were used in the contract and to have known their meaning, and he must be held to have known and fully comprehended the legal effect of the contract.” Under Texas law, unconscionability includes two aspects: (1) procedural unconscionability, which refers to the circumstances surrounding the adoption of the arbitration provision, and (2) substantive unconscionability, which refers to the fairness of the arbitration provision itself. Both procedural and substantive unconscionability of an arbitration clause may be considered in evaluating the validity of an arbitration provision.

Burstein v. AutoLotto, Inc., No. A-21-CV-793-LY, 2022 WL 1229291 (W.D. Tex. Apr. 26, 2022) (Hightower, Mag. J.) (securities/investment). Motion to compel granted. Plaintiff’s contention that the Subscription Agreement was invalid because there was no meeting of the minds was attack on the agreement as a whole, and not an attack on the arbitration clause. A challenge to the validity of the contract as a whole, and not specifically to the arbitration clause, must go to the arbitrator. Incorporation of the American Arbitration Association rules was clear and unmistakable evidence that the parties agreed to arbitrate arbitrability.

Motions to Confirm/Vacate

LALO, LLC v. Hawk Apparel, Inc., No. 3:18-CV-2502-L, 2022 WL 1173801 (N.D. Tex. Apr. 20, 2022). Motion to confirm granted. An arbitrator exceeds her authority when she acts contrary to express contractual provisions. If the parties’ agreement gives an arbitrator authority to interpret and apply a contract, the arbitrator’s construction of that contract must be enforced so long as it is rationally inferable from the letter or purpose of the underlying agreement. Arbitrators have authority to specify the rate of post-award interest. Arbitrators do not have authority to specify the rate of

post-judgment interest, unless that authority is granted by the parties. Arbitration agreement was not made procedurally unconscionable by not attaching the arbitration rules.

Other Arbitration-Related Issues

Farmers Rice Milling Co., LLC v. Certain Underwriters at Lloyd's London, No. CV 21-503-SDD-SDJ, 2022 WL 1284744 (M.D. La. Apr. 12, 2022) (Johnson, Mag. J.) (insurance). Motion to remand denied. The case was removed under 9 U.S.C. § 205. To determine whether the court has subject matter jurisdiction, it must determine first whether the arbitration provision falls under the New York Convention. If it does, then the second step is to determine whether the arbitration clause relates to the cause of action.