Arbitration in the Fifth – December 2021

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PRACTICES Litigation, China, International Arbitration

In December 2021, the Southern District of Texas considered employment arbitration agreements in two cases involving individuals working for customers of their employers, Doucet v. Boardwalk Pipelines LP and Ferron v. Precision Directional Services Inc. The Fifth Circuit considered its own jurisdiction in the context the Foreign Sovereign Immunities Act and an award arising from an "exotic and complicated" historical narrative and proceedings allegedly tainted by "shenanigans."

Al -Qarqani v. Saudi Arabian Oil Co. and Al-Qarqani v. Chevron Corp.: Assessing federal subject matter jurisdiction under the Foreign Sovereign Immunities Act ("FSIA") and the Federal Arbitration Act ("FAA"):

Al -Qarqani v. Saudi Arabian Oil Co. 19 F.4th 794, 800 (5th Cir. 2021) considered the denial of enforcement of a much-questioned award. The Ninth Circuit had denied enforcement of the award against Chevron Corporation while the Fifth Circuit case sought enforcement of the award against Saudi Arabian Oil Co. – a "foreign state" for purposes of the FSIA. Therefore, the courts undertook different approaches to their respective jurisdictional analyses.

Al-Qarqani v. Chevron Corp., 8 F.4th 1018 (9th Cir. 2021) relied on Chapter 2 of the FAA to determine that federal subject matter jurisdiction existed. The operative jurisdictional provision, 9 U.S.C. § 203, covers any "action or proceeding falling under the [New York Convention]." Under 9 U.S.C. § 202, an arbitration award "falls under the Convention" if it is one "arising out of a legal relationship, whether contractual or not, which is considered as commercial, including a transaction, contract, or [arbitration] agreement." *Al-Qarqani v. Chevron Corp.* determined that the court was not required to decide the merits of the award before exercising jurisdiction. So long as a party "makes a non-frivolous claim that an arbitral award is covered by the Convention, the court must assume subject matter jurisdiction and hear the merits of the case." Despite the lack of a binding agreement to arbitrate, federal subject matter jurisdiction was present to decide the merits of the enforcement action.

In contrast, to the Ninth Circuit's analysis under the FAA, the Fifth Circuit was faced with an action involving a "foreign state." The jurisdictional analysis in *Al -Qarqani v. Saudi Arabian Oil Co*. was therefore intertwined with the FSIA. After batting down the waiver, commercial activity and expropriation exceptions to sovereign immunity, the Fifth Circuit considered the FSIA's arbitration exception (28 U.S.C. § 1605(a)(6)):

> A foreign state shall not be immune ... in any case ... in which the action is brought, either to enforce an agreement made by the foreign state with or for the benefit of a private party to submit to arbitration all or any differences which have arisen or which may arise between the parties with respect to a defined legal relationship, whether contractual or not, concerning a subject matter capable of settlement by arbitration under the laws of the United States, or to confirm an award made pursuant to such an agreement to arbitrate, if ... (B) the agreement or award is or may be governed by a treaty or other international agreement in force for the United States calling for the recognition and enforcement of arbitral awards....

Al -Qarqani v. Saudi Arabian Oil Co found that no arbitration agreement existed, and plaintiffs' arguments to bind Saudi Aramco to an arbitration agreement were "totally unpersuasive." The court concluded: "Because there exists no agreement among the parties to arbitrate, this FSIA exception does not apply."

Though not mentioned by *Al -Qarqani v. Saudi Arabian Oil Co.*, the application in the FSIA context of the "non-frivolous" claim standard applied by the Ninth Circuit was likely foreclosed. *Bolivarian Republic of Venezuela v. Helmerich & Payne Intern. Drilling Co.*, 137 S. Ct. 1312, 1316 (2017) (a party's nonfrivolous, but ultimately incorrect, argument that property was taken in violation of international law is insufficient to confer jurisdiction). *Helmerich & Payne Intern. Drilling Co* (an expropriation case) explained that:

> the relevant factual allegations must make out a legally valid claim that a certain kind of right is at issue (property rights) and that the relevant property was taken in a certain way (in violation of international law). A good argument to that effect is not sufficient. But a court normally need not resolve, as a jurisdictional matter, disputes about whether a party actually held rights in that property; those questions remain for the merits phase of the litigation.

Id.

Opinions of the Fifth Circuit

Al -Qarqani v. Saudi Arabian Oil Co., 19 F.4th 794, 800 (5th Cir. 2021) (energy/real property). Appeal from denial of enforcement of an award dismissed for lack of jurisdiction.

Opinions of United States District Courts

Motions to Compel Arbitration

Corsaro v. Colombia Hosp. at Med. City Dallas Subsidiary LP., 3:21-CV-01748-N, 2021 WL 6135342 (N.D. Tex. Dec. 29, 2021) (employment/disability). Motion to compel granted. Federal Rules of Civil Procedure 12(b)(1) and 12(b)(6) are not proper vehicles to enforce arbitration clauses. Under Texas law, a party who signs a contract is presumed to have read and understood its terms, and an employee accepts an arbitration agreement even without a signature by continuing to work after receiving notice of its terms. Texas law presumes every party to a contract to have had sufficient mental capacity to understand the transaction involved. To overcome this legal presumption, the burden of proof rests upon the party asserting incapacity.

McCain v. Tier 1 Completions Sols., Inc., CV H-21-2109, 2021 WL 5632774 (S.D. Tex. Dec. 1, 2021) (FLSA). Motion to compel granted. Arbitration agreement was provided to employee by email using the DocuSign application. The evidence showed that the employee created a personal login account to access the documents, inaccessible to the employer; that the employee could not return the arbitration agreement until he signed; and the employer received the signed arbitration agreement. No evidence was offered that the employee did not electronically sign the agreement.

Doucet v. Boardwalk Pipelines LP, 4:20-CV-01793, 2021 WL 5865704 (S.D. Tex. Dec. 10, 2021) adopting report and recommendation 2021 WL 3674975 (Mar. 18, 2021) (FLSA). Motion to compel granted. Plaintiff's employer had assigned him to a team working on its customer's projects. Plaintiff sued the customer under the FLSA. The employer intervened and sought to compel arbitration pursuant to its agreement with the employee.

Ferron v. Precision Directional Services Inc., 4:20-CV-03123, 2021 WL 5905556 (S.D. Tex. Dec. 14, 2021) (FLSA). Motion to compel granted. Plaintiff alleged he was employed by defendants after being referred by "an oilfield service company that pairs workers in the oil industry with available jobs and facilitates payment for those utilizing their service." A valid arbitration agreement existed between plaintiff and the service company. Defendants were third-party beneficiaries of that agreement.

PetroChina Int'l (Am.), Inc. v. BCI Brasil China Importadora e Distribuidora S.A., CV H-20-3002, 2021 WL 6135303 (S.D. Tex. Dec. 29, 2021) (ethanol sale). Motion to compel granted. Forum-selection clauses are material terms that require clear acceptance. Long form contract delivered after the acceptance of the material terms and containing a different dispute resolution provision than the first 48 agreements between the parties had not been accepted by buyer.

Motion to Confirm or Vacate an Award

Refresco Beverages US Inc. v. Int'l Bhd. of Teamsters Local 997, 4:21-CV-00523-O, 2021 WL 5908988 (N.D. Tex. Dec. 14, 2021) (collective bargaining agreement). Motion to confirm granted.

Other Arbitration-Related Decisions

Garcia-Alvarez v. Fogo De Chao Churrascaria (Pittsburgh) LLC, 4:21-CV-00124, 2021 WL 5804289 (E.D. Tex. Dec. 7, 2021) (FLSA). Motion to invalidate arbitration agreement that was put in place after litigation filed was denied. While this putative FLSA collective action was pending, defendants sent a "Mutual Arbitration Agreement" to all employees (not just the potential class members). A two-part test is used to determine whether a court should issue an order impacting a party's speech with putative class members. First, the court determines "whether there is a need for a limitation on speech, and does so by determining whether the party's speech is misleading, coercive, or an attempt to undermine the collection action." Second, if a court finds a basis for restricting speech, "the court should then tailor appropriate injunctions and sanctions in light of First Amendment concerns." Despite concerns about the agreement, the motion to invalidate was denied.

In re Jet Homeloans Ventures, LLC, 3:21-CV-2214-D, 2021 WL 5908901 (N.D. Tex. Dec. 14, 2021). Motion to remand granted. Court determined that federal subject matter jurisdiction was not proven in this removed action involving state law claims to enforce a subpoena issued out of an arbitration.

Trmanini v. Ross Stores, Inc., SA-21-CV-00044-JKP, 2021 WL 5926128 (W.D. Tex. Dec. 15, 2021) (workplace personal injury). Motion to compel discovery granted in part. Defendants ordered to produce the native format and associated metadata for the training module pertaining to the arbitration policy, upon which defendants based their motion to compel arbitration.

Opinions of the United Stated Bankruptcy Courts

In re Highland Capital Mgmt., L.P., 19-34054-SGJ11, 2021 WL 5769320 (Bankr. N.D. Tex. Dec. 3, 2021) (promissory notes). Motion to compel denied. Reorganized debtor sued former related parties for various causes of action including a declaratory judgment as to provisions of the limited partnership agreement and fiduciary duty claims. The related parties invoked the arbitration clause in the limited partnership agreement. That agreement had been rejected as an executory contract. The limited partnership agreement was found to be an executory contract that was duly rejected, and that the arbitration clause should likewise be considered a separate executory agreement that was also rejected. Accordingly, the reorganized entity could not be forced to specifically perform under the arbitration clause.

In re Dean, 19-31232, 2021 WL 5762947 (Bankr. N.D. Tex. Dec. 3, 2021) (commercial). Interim award denied preclusive effect. The doctrine of judicial estoppel precluded plaintiff from arguing that the interim arbitration award had preclusive effect. Plaintiff's argument was inconsistent with its previous argument that had been accepted by the court. Res judicata was not available for an interim award.