Arbitration in the Fifth - December 2022

By Odean L. Volker | January 10, 2023

RELATED PRACTICES International Arbitration, Litigation

December 2022 was a busy month for the courts of the Fifth Circuit. In Tra-dor, Inc. v. Certain Underwriters at Lloyds London, the Fifth Circuit Court of Appeals addressed another "finality" obstacle in a case that had been stayed after an order compelling arbitration. In the Eastern District of Louisiana, Diversified Maint. Sys., Inc. v. J. Star Enterprises, Inc. and Bankston v. Imagine Pools Mfg. N. Am., Inc. (issued on the same day but by different judges) appear to state conflicting holdings on the use of Fed. R. Proc. 12(b)(3) as a means to enforce an arbitration clause.

Opinion of the Fifth Circuit

Winn v. Brunswich Corp., No. 22-20150, 2022 WL 17716385 (5th Cir. Dec. 14, 2022) (per curiam) (42 U.S.C. § 1981). Order compelling arbitration affirmed. The court applies a two-step approach in deciding whether to require arbitration. The first step is to determine whether the parties agreed to arbitrate the dispute in question. At step one, the court looks to: (1) whether there is a valid agreement to arbitrate between the parties; and (2) whether the dispute in question falls within the scope of that arbitration agreement. The second step is to determine whether legal constraints external to the parties' agreement foreclosed the arbitration of those claims. Step two requires the court to evaluate the scope of the arbitration clause and the nature of the dispute. The fee-shifting provision in the arbitration agreement did not violate the Civil Rights Act.

Tra-dor, Inc. v. Certain Underwriters at Lloyds London, No. 22-30372, 2022 WL 17691569 (5th Cir. Dec. 14, 2022) (per curiam) (insurance). Appeal dismissed for lack of jurisdiction. Orders compelling arbitration that stayed a civil action pending completion of the arbitration was interlocutory and unappealable and lacked the finality of an outright dismissal. Consequently, to be appealable an order (in a stayed case) under Rule 12(b)(6) dismissing other defendants had to be certified as "final" by the district court under Rule 54(b) or as appealable under 28 U.S.C. § 1292(b).

Opinions of United States District Courts

Motions to Compel Arbitration

White-Mosley v. Seasons Apartments, LLC, No. 222CV03794EEFDMD, 2022 WL 17481977 (E.D. La. Dec. 6, 2022) (Fair Housing Act). Motion to compel granted. Because the arbitration agreement contained a delegation clause, objection that the arbitrations agreement's terms were unconscionable and that the agreement did not conform to state law requirements were issues for the arbitrators.

Diversified Maint. Sys., Inc. v. J. Star Enterprises, Inc., No. CV 22-959, 2022 WL 17476950 (E.D. La. Dec. 6, 2022) (government contracting). Motion to compel denied. The court explain: "Defendant's motion to dismiss pursuant to Rule 12(b)(3) must be denied because it is the improper vehicle for addressing Plaintiff's failure to arbitrate." The Court reasoned that: Rule 12(b)(3) "requires a district court to determine whether venue is supported by 28 U.S.C. § 1391. A court's analysis on motions to dismiss pursuant to Rule 12(b)(3) is limited to whether venue is wrong or improper based upon a failure to satisfy any of the categories listed in § 1391. Where a party

© 2026 Haynes and Boone, LLP

moves to dismiss claims pursuant to an arbitration clause, it has not argued that venue is improper pursuant to § 1391."

Bankston v. Imagine Pools Mfg. N. Am., Inc., No. CV 22-01289, 2022 WL 17814244 (E.D. La. Dec. 6, 2022) (swimming pool construction). The court explained: "The Fifth Circuit has endorsed Rule 12(b)(3) as the proper vehicle to seek dismissal based on an arbitration clause." An arbitration agreement was contained in a warranty that buyers alleged was not provided at the time the construction contract was signed. The arbitration agreement was enforced where buyers received the warranty after work began, but continued to communicate with seller after receiving the warranty, buyers sought repairs pursuant to the warranty and buyers brought a claim for failure to honor the warranty. Buyers were not allowed to avail themselves of the benefits of the warranty and reject the arbitration agreement in the warranty.

Upper Room Bible Church, Inc. v. Sedgwick Delegated Authority, No. CV 22-3490, 2022 WL 17735546, (E.D. La. Dec. 16, 2022) (insurance). Motion to compel granted. Insurance policy endorsement and service of suit clause did not nullify the arbitration clause. The service-of-suit provision was construed as complementing the arbitration clause by providing a judicial forum for compelling or enforcing arbitration. The New York Convention supersedes state law including Louisiana's prohibition on arbitration agreements in domestic insurance policies.

Hair v. RCJD Motors, LLC, No. 3:22-CV-1098-N, 2022 WL 17631546 (N.D. Tex. Dec. 12, 2022) (automobile sales). Motion to compel granted. Subsequent behavior did not impact the elements of contract formation; the allegations did not touch on the existence of an offer, acceptance, a meeting of the minds, each party's consent, or execution and delivery of the contract. The arbitration agreement satisfied the elements of a contract under Texas law.

Sitzman v. EK Real Estate Servs. of NY LLC, No. 3:21-CV-2666-E, 2022 WL 17853214 (N.D. Tex. Dec. 21, 2022) (real estate sale-leaseback). Motion to compel granted in part and denied in part. Under Texas law, the doctrine of intertwined estoppel permits a non-signatory to enforce an arbitration agreement where the non-signatory 1) has a close relationship with one of the signatories, and 2) the claims against the non-signatory are intimately founded in and intertwined with the underlying contract obligations. When a plaintiff treats multiple defendants as a single unit in their pleadings, raising virtually indistinguishable factual allegations against the defendants, then that cuts in favor of a close relationship. Arguments that arbitration should not be compelled because 1) the arbitration clause is unenforceable under the Truth in Lending Act; 2) the entire transaction itself was procedurally unconscionable; 3) the arbitration clause was substantively unconscionable; and (4) the arbitration clause violated Texas public policy were delegated to the arbitrator.

Whitaker v. Enbridge (U.S.) Inc., No. CV H-22-2354, 2022 WL 17405833 (S.D. Tex. Dec. 2, 2022) (FLSA). Motion to compel granted. Pipeline inspectors have "only an indirect 'role in the free flow of goods across borders.'" Therefore FAA Section 1 did not prohibit enforcement of the arbitration agreement.

Motions to Confirm/Vacate Award

Scott v. Youth Villages, Inc., No. 3:22-CV-33-DPJ-FKB, 2022 WL 17742619 (S.D. Miss. Dec. 16, 2022) (employment). Motion to vacate denied. A court is not allowed to review the arbitrator's rulings on the weight and credibility of evidence. Determination that employment was at-will and the employee terminated did not deprive the arbitrator of authority to decide the balance of the claims. The arbitration agreement by its terms survived termination of employment.

© 2026 Haynes and Boone, LLP

Richards v. Int'l Bus. Machines Corp., No. 3:22-CV-758-N, 2022 WL 17637460 (N.D. Tex. Dec. 12, 2022) (Age Discrimination in Employment Act). Motion to vacate denied. The FAA requires that "[n]otice of a motion to vacate, modify, or correct an award must be served upon the adverse party or his attorney within three months after the award is filed or delivered." Parties who fail to comply with the notice provision forfeit their right to seek judicial review of the arbitration award. In this case, the court began the three-month period, on the date the final award was issued and not on the later date that the arbitrator denied the last post-award motion.

Sullivan v. Feldman, No. CV H-20-2236, 2022 WL 17822451 (S.D. Tex. Dec. 20, 2022) (legal services). Motions to confirm granted. Styled by the court (in a prior opinion) as "the Bleak House of arbitration," nine arbitrations before nine different arbitrators were commenced resulting in five awards. The court addressed two motions to confirm (granting both) and four motions to vacate (denying all four). A non-diverse party included in an award for which confirmation was sought did not destroy diversity jurisdiction since "plaintiffs have not sought to confirm any arbitration award against [the non-diverse party]" who was not a party to the confirmation proceeding. In reviewing an award, a court looks only to the result reached. The single question is whether the award, however arrived at, is rationally inferable from the contract. An arbitrator's factual findings are unreviewable and must be accepted as true. To constitute misconduct requiring vacation of an award, an error in the arbitrators' 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. The arbitration agreement's four-month time frame to complete arbitration was determined in four of the awards to be unconscionable and inconsistent with due process giving the arbitrators jurisdiction beyond four-month period. Receipt of two tickets to a football game from "someone who happened to be a work colleague of a non-party witness" did not demonstrate partiality.

Other Arbitration-Related Issues

St. Luke #2, LLC v. Hermes Health All., LLC, No. CV 22-1723, 2022 WL 17495965 (E.D. La. Dec. 8, 2022) (insurance). Motion to remand granted. FAA section 205, authorizing removal of New York Convention cases, did not authorize removal by a third-party defendant. Third-party defendants "are not the 'defendant or defendants' in the 'action or proceeding.'" The statute tethers the term "defendant" to the "action," and not to a claim. Therefore, the proper reading of Section 205 was that "defendant" means only those parties sued by the original plaintiffs."

Stonewater Roofing Ltd. Co., LLC v. Merryton Bossier, LLC, No. 22-CV-1048, 2022 WL 17580659 (W.D. La. Oct. 19, 2022) (Hornsby, Mag. J.), report and recommendation adopted, 2022 WL 17580658 (Nov. 17, 2022) (construction). Motion to stay pending arbitration denied. The parties' arbitration agreement required mediation prior to arbitration. The mediation was unsuccessful and plaintiff filed a lawsuit. The complaint did not mention the arbitration clause, a desire to arbitrate any claim, or the need to file suit to obtain an injunction or otherwise preserve any rights while an arbitration was held. After filing the lawsuit, plaintiff filed an arbitration and sought a stay of the litigation.

© 2026 Haynes and Boone, LLP