Arbitration in the Fifth – February 2022

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PRACTICES International Arbitration, Litigation

In February 2022, the courts of the Fifth Circuit issued a relatively small number of arbitration-related opinions addressing a fairly typical mix of issues. Meanwhile in Washington, D.C., the Senate passed the "Ending Forced Arbitration of Sexual Assault and Sexual Harassment Act of 2021." The bill was signed by the President on March 3.

What is the Ending Forced Arbitration of Sexual Assault and Sexual Harassment Act of 2021 (the "Act")?

As the title suggests, the Act, now Chapter 4 of the Federal Arbitration Act (the "FAA"), is designed to end arbitration or "sexual harassment disputes" and "sexual assault disputes" unless the claimant agrees to arbitration after the dispute arises. In the words of the Act:

> "[A]t the election of the person alleging conduct constituting a sexual harassment dispute or sexual assault dispute, or the named representative of a class or in a collective action alleging such conduct, no predispute arbitration agreement or predispute joint-action waiver shall be valid or enforceable with respect to a case which is filed under Federal, Tribal, or State law and relates to the sexual assault dispute or the sexual harassment dispute.

A "sexual harassment dispute" is a dispute relating to conduct that is alleged to constitute sexual harassment under applicable Federal, Tribal or State law. A "sexual assault dispute" is a dispute involving a nonconsensual sexual act or sexual contact, as those terms are defined in 18 USC §2246 or similar Tribal or State law.

A "predispute arbitration agreement" is, as the name indicates, an agreement to arbitrate a dispute that had not yet arisen at the time of the making of the agreement. The term "predispute joint-action waiver" means an agreement, whether or not part of a predispute arbitration agreement, that would prohibit or waive participation in a joint, class or collective action concerning a dispute that has not yet arisen at the time of the making of the agreement.

Whether the Act applies to a dispute "shall be determined under Federal law" and decided by a court and not an arbitrator irrespective of any agreement to delegate the determination to an arbitrator.

The Act also appears to apply to arbitration agreements that fall under FAA Chapters 2 and 3. New FAA sections 208 and 307 provide: "This chapter applies to the extent that this chapter is not in conflict with chapter 4."

Opinions of the Fifth Circuit

Doe v. Tonti Mgmt. Co., L.L.C., 24 F.4th 1005 (5th Cir. 2022) (Fair Housing Act). Case dismissed for lack of jurisdiction. The district court's order declining to re-open the case which had been stayed

and administratively closed was an unappealable interlocutory order.

Ball Metal Beverage Container Corp. v. Local 129, United Auto. Aerospace and Agric. Implement Workers of Am., No. 21-10755, 2022 WL 340573 (5th Cir. Feb. 4, 2022) (per curiam) (collective bargaining agreement). Order vacating award reversed. An arbitral decision even arguably construing or applying the contract must stand, "regardless of a court's view of its (de)merits." The arbitrator's interpretation was an arguable reading, "not that it is the best or even a good one." Given that arbitrators need not explain their reasoning at all, an ambiguity in reasoning generally will not disturb an award.

Opinions of United States District Courts

Motions to Compel Arbitration

City of Kenner v. Certain Underwriters at Lloyd's, No. CV 21-2064, 2022 WL 307295 (E.D. La. Feb. 2, 2022) (insurance). Motion to compel granted. Louisiana's prohibition on arbitration clauses in insurance contracts, La. Stat. Ann. § 22:868, was preempted by the New York Convention. Based on the language of the insurance documents, the arrangement was determined to be several agreements bound together for convenience and by commonality and was not a single contract. Therefore, New York Convention preemption was applied only to the foreign insurers. Plaintiff's allegations of interdependent and concerted misconduct warranted the application of equitable estoppel to compel arbitration as to all insurers. The choice of law and consent to jurisdiction clauses did not create ambiguity.

Williams v. Bankers Life & Cas. Co., No. CV 21-293-SDD-SDJ, 2022 WL 304657 (M.D. La. Feb. 1, 2022) (employment). Motion to compel granted. Insurance agency agreement entered into between an independent contractor and the insurance company required arbitration of disputes "concerning the relationship between the Parties." The language was broad enough to cover claims even if the independent contractor status morphed into a different relationship. The agreement required arbitration of claims against non-signatory "parent, subsidiary, affiliate, sister and predecessor entities." Language was a "stipulation pour autrui" under Louisiana law and enforceable by the non-signatory third party beneficiaries.

Myers v. Solais Lighting, LLC, No. 421CV00343SDJCAN, 2022 WL 441612 (E.D. Tex. Jan. 3, 2022)) (Nowak, Mag. J.), report and recommendation adopted, WL 433128 (Feb. 11, 2022) (employment/FMLA). Motion to compel granted. To demonstrate a modification of at-will employment, the proponent of the modification must demonstrate that the other party (1) received notice of the change and (2) accepted the change. Continued employment following notice that an arbitration policy would take effect is enough to satisfy both requirements. A separate arbitration agreement was not made illusory because an employee manual stated that the employer could revoke, change, or supplement guidelines at any time without notice.

Espinoza v. Careerstaff Unlimited Inc., No. 3:21-CV-0878-E, 2022 WL 313434 (N.D. Tex. Feb. 2, 2022) (FMLA). Motion to compel granted. Movant, the plaintiff's employer, was not identified by name in the arbitration agreement, though the arbitration agreement was between the employee and "employer." The agreement defined "employer" as "the business entity that employs." The identity of the "employer," was not apparent from the face of the agreement. Relying on parol evidence, the signer was determined to be the agent of the employer. Where an agent signs a contract requiring arbitration, the principal is bound by the arbitration agreement.

Scutt v. Thomas J. Henry Law PLLC, No. SA-21-CV-00934-XR, 2022 WL 315025 (W.D. Tex. Feb. 1, 2022) (FMLA). Unopposed motion to compel granted. Non-signatory defendant consented to arbitration of claims.

Motions to Confirm/Vacate

Begole v. N. Miss. Med. Ctr, Inc., No. 1:17-CV-33-SA-DAS, 2022 WL 601024 (N.D. Miss. Feb. 28, 2022) (employment). Motion to vacate denied. Arbitrator was not guilty of misconduct simply by utilizing a summary judgment procedure. Movant participated fully in the summary judgment process, submitted both a response and a surreply, and no evidence indicated that movant objected to the arbitrator proceeding with a summary determination. An objection to the lack of "in-person" hearing was rejected as being another way to attack the summary procedure.

Savage v. Wal-Mart Stores, Inc., No. 3:21-CV-1523-E, 2022 WL 541782 (N.D. Tex. Feb. 23, 2022) (employee personal injury). Motion to vacate denied. Challenge to award based on 9 U.S.C. § 10(a)(4) was rejected. Courts "may not reconsider an award based on alleged errors of fact or law or misinterpretation of the contract."

Other Arbitration-Related Issues

Ellis v. C.R. England, Inc., No. CV H-21-1172, 2022 WL 379954 (S.D. Tex. Jan. 11, 2022) (Stacy, Mag. J.), report and recommendation adopted, 2022 WL 377408 (Feb. 8, 2022) (employment). Motion to transfer venue granted. The parties' agreements contained forum selection clauses identifying Utah courts for litigation, though the forum clause did not apply if the parties entered into an arbitration agreement, nor did it apply to claims that were required to be arbitrated. The parties executed an arbitration agreement (though plaintiff contended it was invalid and/or unenforceable). Harmonizing these provisions, the court explained that "[t]he forum selection and venue provisions set forth in the parties' agreement(s) intend that for any claim brought or filed in any court . . . the courts of Utah are to preside. In contrast, for any claim brought in an arbitration proceeding, the forum selection and venue provisions in the agreements would not apply, meaning, quite necessarily, that there would be no court proceeding at all – in the Utah courts or anywhere else." (emphasis in original).