Arbitration in the Fifth - January 2022

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January 2022 saw the Fifth Circuit observe in Newman v. Plains All Am. Pipeline, L.P that parties cannot delegate disputes over "the very existence of an arbitration agreement." Meanwhile in Phillips v. Weatherford US, LP the Western District of Texas lamented as "poor public policy" the application of the mailbox rule to notices imposing an arbitration requirement on an employer's current employees.

Opinion of the Fifth Circuit

Newman v. Plains All Am. Pipeline, L.P., 21-50253, 2022 WL 72075 (5th Cir. Jan. 7, 2022) (FLSA). Denial of non-signatory's motion to compel confirmed. A pipeline-inspection firm hired inspectors using an employment agreement with an arbitration provision. The inspection firm sent the inspectors to work for a client of the firm. The inspectors sued the client, and not the inspection firm, for alleged Fair Labor Standards Act violations. When a court decides whether an arbitration agreement exists, it necessarily decides its enforceability between parties. The parties cannot delegate disputes over "the very existence of an arbitration agreement." Deciding enforceability between the parties and an arbitration agreement's existence are two sides of the same coin. In this case, it was for the court—not an arbitrator—to decide whether the client could enforce the inspectors' arbitration agreements with their employer. Based on the contract terms, the client was not a third-party beneficiary of the arbitration agreements. The inspection firm and the client did not have a "close relationship" as is required for intertwined-claims estoppel. Artful-pleading estoppel did not apply.

Opinions of United States District Courts

Motions to Compel Arbitration

F*ranco's Athletic Club, LLC v. Davis*, No. CV 21-1647, 2022 WL 229343 (E.D. La. Jan. 26, 2022) (alleged embezzlement scheme). Motion to compel granted. Insurers, including foreign insurers, were added by supplemental petition. Under the New York Convention, a court should compel arbitration if (1) there is an agreement in writing to arbitrate the dispute, (2) the agreement provides for arbitration in the territory of a Convention signatory, (3) the agreement arises out of a commercial legal relationship, and (4) a party to the agreement is not an American citizen. Once these requirements are met, the Convention requires the district court to order arbitration.

Suretec Ins. Co. v. C.R. Crawford Constr., LLC., 6:21-CV-00398-JDK, 2021 WL 6280376 (E.D. Tex. Dec. 15, 2021), report and recommendation adopted 2022 WL 45056 (Jan. 4, 2022) (surety bond). Motion to compel granted. Subcontract and bond incorporated the terms of the primary contract that contained an arbitration clause. The court venue provision in the subcontract was voided under Tex. Bus. & Com. Code §272.001. Further, venue provision was not inconsistent with the arbitration clause. The venue provision provided "the exclusive venue for the litigation of any and all disputes" while the arbitration clause provided that "[a]ny claim arising out of or related to the Contract...be subject to arbitration." The venue provision contemplated disputes related to proceedings in aid of

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arbitration or an award. As a result, there was no inherent inconsistency between the arbitration clause and the venue provision.

Gibson v. E. Energy Services, Inc., 621CV00417JCBKNM, 2022 WL 214755 (E.D. Tex. Jan. 6, 2022) (Mitchell, Mag. J.), report and recommendation adopted 2022 WL 211250 (Jan. 24, 2022) (FLSA). Unopposed motion to compel granted.

Sanchez v. Hertz Car Sales, 4:21-CV-00691-O-BP, 2022 WL 35743 (N.D. Tex. Jan. 4, 2022) accepting report and recommendation 2021 WL 6274591 (N.D. Tex. Dec. 6, 2021) (Ray, Mag. J.) (auto sales/debt collection). Motion to compel granted.

Trinh Vinh Binh v. King & Spalding LLP, 4:21-CV-02234, 2022 WL 130879 (S.D. Tex. Jan. 10, 2022) (legal services). Motion to compel granted. The dispute resolution clause contained in plaintiff's agreement with his litigation funder included within its scope any claim arising out of his agreement with the law firm.

Bedeschi Am., Inc. v. Machine Repair Int'l, LLC, No. 2:21-CV-00141, 2022 WL 267878 (S.D. Tex. Jan. 28, 2022) (construction). Motion to compel granted. Because the parties did not negotiate a formal subcontract as had been contemplated, their letter of intent and proposal together formed their contract The arbitration clause provided in part: "Client and Contractor may commence litigation in a court of competent jurisdiction [sic] Contractor has the absolute and exclusive right to bring its claims in arbitration and to compel any claims brought by Client into arbitration, if Contractor elects[.]" The clause was not ambiguous under Texas law nor was it unenforceable due to lack of procedural details. Clause was not illusory considering the entire contract.

Roberson v. Experian Info. Sols., Inc., SA-21-CV-00316-JKP, 2022 WL 62270 (W.D. Tex. Jan. 5, 2022) (Fair Credit Reporting Act). Motion to compel granted. A party may compel arbitration even where the party is not a signatory, so long as the contract binds that party.

Phillips v. Weatherford US, LP, 1:20-CV-1104-RP, 2022 WL 118954 (W.D. Tex. Jan. 12, 2022) (employment). Motion to compel granted. Former employee denied receiving the notice of an arbitration program put in place during his employment. A bench trial was held to resolve the question. Direct testimony that a letter was properly addressed, stamped, and mailed to the addressee raised a presumption that the letter was received by the addressee in due course. "The presumption of receipt is overcome conclusively only when the evidence tending to support the contrary inference is conclusive, or so clear, positive, and disinterested that it would be unreasonable not to give effect to it as conclusive." A "witness's interest in the outcome of the case can weigh against their ability to rebut the presumption of receipt." Expressing sympathy for the result, the court added:

> Finally, while the Court seeks to apply the mailbox rule doctrine as it is conveyed in binding Fifth Circuit precedent and applicable Texas case law, the Court believes the mailbox rule promotes poor public policy. By implementing a presumption of receipt that is nearly impossible to rebut at trial, the law of this Circuit allows employers to fundamentally change the rights of their employees without ensuring that employees actually receive notice of these changes. It is the hope of this Court that this power imbalance will, at some point, be rectified and employees . . . will be afforded an honest chance to challenge the presumption that they received notice of such significant changes of their rights as employees.

Motion to Confirm or Vacate an Award

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Mahyari v. Wal-Mart Stores, Inc., 3:21-CV-1653-N, 2022 WL 117772 (N.D. Tex. Jan. 12, 2022) (on-the-job injury). Award confirmed. Absent a determination that a statutory basis to vacate the arbitral award exists, the FAA stipulates that the district court must confirm the award. Section 10(a)(4) allows vacatur of an award only if the arbitrator acts outside the scope of his or her contractual authority. Arbitrator's award of noneconomic damages in excess of what was requested by plaintiff was determined not be a breach the arbitration agreement's prohibition on "making any award merely on the basis of what [the arbitrator] determines to be just or fair."

Symank Bus. Sys. v. FedEx Ground Package Sys., Inc., No. 3:21-CV-0936-B, 2022 WL 270868 (N.D. Tex. Jan. 28, 2022) (package delivery service). Motion to vacate denied. Party objecting pursuant to §10(a)(3) that the arbitrator "was guilty of misconduct by refusing to postpone the hearing "must establish that there was no reasonable basis for the . . . refusal to postpone the hearing" and that the misconduct resulted in "serious prejudice to the party." A court's review of an award under §10(a)(4) is limited to the "sole question of whether the arbitrator (even arguably) interpreted the parties' contract."

Other Arbitration-Related Decisions

Franco's Athletic Club, LLC v. Davis, No. CV 21-1647, 2022 WL 225449 (E.D. La. Jan. 26, 2022) (alleged embezzlement scheme). Motion to remand denied. Insurers were added by supplemental petition. After their exceptions were denied in the state court, the insurers' removed arguing the action was covered by the New York Convention. Plaintiffs argued that the right to remove had been waived. The court "will give effect only to explicit waivers of Convention...removal rights". 9 U.S.C. 205's removal language is intentionally broad and permits removal "at any time before the trial."

Williams v. Bankers Life & Cas. Co., CV 21-293-SDD-SDJ, 2022 WL 187809 (M.D. La. Jan. 20, 2022) (Johnson, Mag. J.). Discovery stayed and protective order granted. Written discovery served after the motion to compel arbitration was filed, but before the motion was decided, was premature. Good cause existed to quash a deposition until resolution of the motion to compel.

Preble-Rish Haiti, S.A. v. Republic of Haiti, 4:21-CV-01953, 2022 WL 35824 (S.D. Tex. Jan. 4, 2022) (garnishment). Motion to dismiss based on the Foreign Sovereign Immunities Act denied. Garnishee had standing to assert FSIA defense. New York arbitration "policy dictates that incidental tort claims which are integrally linked to an arbitrable dispute be submitted for resolution in arbitration." The arbitration provisions were not limited to literal interpretation or performance of the contracts. Therefore, the maritime tort claims alleged were subject to arbitration under the contracts.

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