Arbitration in the Fifth – January 2023

February 13, 2023 Odean Volker

PRACTICES Litigation, International Arbitration

In January 2023, the Eastern District of Louisiana was busy reviewing motions to compel arbitration of insurance-related claims and the various arguments and strategies employed to try and avoid the application of the New York Convention to domestic insurers that, along with foreign underwriters, had subscribed to the insurance policies.

Opinion of the Fifth Circuit

In the Matter of Amberson, 57 F.4th 205 (5th Cir. 2023) (per curiam opinion denying rehearing) (legal services). In a post-arbitration review of the arbitrability of a particular claim and the validity of an award, the court was not limited to deciding how those questions should have been answered before the record was developed through the arbitration. Instead, the court considers the entire record.

Opinions of United States District Courts

Motions to Compel Arbitration

Certain Underwriters at Lloyd's, London v. Belmont Commons L.L.C., No. 2:22-CV-3874, 2023 WL 105337 (E.D. La. Jan. 4, 2023) (insurance). Motion to compel granted. Eleven insurers jointly subscribed to the insurance policy with each covering a percentage of the single insurance policy. Plaintiff sued nine of the insurers, all domestic companies, in state court. The insurers, including the international insurers, sued in federal court to compel arbitration. Plaintiffs' attempt to "dissect the international insurers from their suit and thereby thwart federal policy in favor of arbitration" was rejected. Plaintiffs' petition for damages in state court alleged identical, interrelated misconduct by all insurers. Equitable estoppel applied. Proceeding in court against the domestic insurers while simultaneously proceeding in arbitration against the foreign insurers would "render meaningless the arbitration clause and thwart the intentions of the New York Convention and the federal policy in favor of arbitration."

419 Carondelet, LLC v. Certain Underwriters at Lloyd's, London, No. CV 22-4311, 2023 WL 143318 (E.D. La. Jan. 10, 2023) (insurance). Motion to compel granted. The New York Convention supersedes the Louisiana prohibition on enforcement of arbitration clauses concerning insurance disputes.

Kronlage Family Ltd. P'ship v. Indep. Specialty Ins. Co., No. CV 22-1013, 2023 WL 246847 (E.D. La. Jan. 18, 2023) (insurance). Motion to compel granted. Voiding the arbitration clause would unjustly injure the defendants who were not responsible for the alleged failure to delete the arbitration clause. Plaintiff was equitably estopped from objecting to application of the arbitration agreement to a domestic insurer where plaintiff's allegations did not differentiate between the domestic insurer and international underwriters.

Acad. of Sacred Heart of New Orleans v. Certain Underwriters at Lloyd's London, No. CV 22-4401, 2023 WL 246832 (E.D. La. Jan. 18, 2023) (insurance). Motion to compel granted. Endorsement and

service of suit clause did not negate the arbitration agreement. Instead, the clause was construed as complementing the arbitration clause by providing a judicial forum for compelling arbitration. The New York Convention supersedes La. Stat. Ann. § 22:868 (generally prohibiting arbitration agreements in domestic insurance policies). While the insurance policy stated that plaintiff had separate contracts with each insurer, there was one insurance policy. Equitable estoppel applied. Plaintiff did not differentiate between defendant insurers and its argument that the arbitration clause sought to avoid Louisiana's statutory bad faith damages scheme was speculative.

Le Place of Jefferson v. Certain Underwriters at Lloyd's London, No. CV 22-4559, 2023 WL 346084 (E.D. La. Jan. 20, 2023) (insurance). Motion to compel granted. Plaintiff's argument that the situs of arbitration, New York, was unreasonable and its request to move the arbitration to Louisiana were rejected. The court applied a "heightened standard to assess whether the arbitration-forum clause was valid." A clause establishing the situs of arbitration must be enforced unless it conflicts with an explicit provision of the Federal Arbitration Act (the "FAA"). Under the FAA "a party seeking to avoid arbitration must allege and prove that the arbitration clause itself was a product of fraud, coercion, or such grounds as exist at law or in equity for the revocation of the contract." The party also "must not have had reason to know about the complained-of conditions at the time of the contract."

AJ's Shoes Outlet, LLC v. Indep. Specialty Ins. Co., No. CV 22-1148, 2023 WL 358779 (E.D. La. Jan. 23, 2023) (insurance). Motion to compel granted. Defendants did not waive arbitration by submitting two sets of initial disclosures, deposing plaintiff's owner, serving ten subpoenas for depositions, propounding written discovery requests, and responding to requests for admission. Defendants had reserved the right to seek arbitration in their notice of removal from state court and had not initiated any dispositive motion practice. To determine the citizenship of "Lloyd's of London" and whether an arbitration clause is analyzed under the New York Convention, the citizenship of each syndicate participating in the policy is considered.

Olsen Sec. Corp. v. Certain Underwriters at Lloyd's London, No. CV 22-3120, 2023 WL 405437 (E.D. La. Jan. 25, 2023) (insurance). Motion to compel granted. Insurance policy's service of suit clause did not supersede the arbitration clause. Agreement to arbitrate all claims and disputes related to the insurance policy included state law bad faith claims. Those claims derive directly from the policy and therefore were subject to the arbitration clause.

Par. of St. Charles v. HDI Glob. Specialty SE, No. CV 22-3404, 2023 WL 1419937 (E.D. La. Jan. 31, 2023) (insurance). Motion to compel granted. Plaintiff filed eleven separate suits in state court (one against each insurer). The allegations in each suit were nearly identical. All eleven were removed based on the New York Convention, and were consolidated by the federal court. Defendant insurers subscribed to surplus lines coverage. Each insurer's policy document was a separate contract of insurance. The arbitration clause in the overarching policy document should be read as between the insured and the insurers, separately. Intertwined-claims estoppel applied to compel arbitration as to the domestic insurers. Also, Louisiana's prohibition on arbitration agreements in domestic insurance policies did not apply to the surplus lines coverage.

Randall v. Volvo Car USA, No. 3:22-CV-414-CWR-FKB, 2023 WL 1073703 (S.D. Miss. Jan. 27, 2023) (notice of appeal filed) (auto repair/personal injury). Motion to compel denied. Defendant moved to compel arbitration nine days after filing an answer. Waiver found where defendant "stalled its pursuit of arbitration to gain access to discovery through the litigation process." The court explained: "[f]or example, while plaintiff's counsel discusses moving forward with mediation or arbitration, [defendant's] counsel states that they 'want to inspect the car and see what ... can be determined from it before moving forward with mediation.'"

Spirit of Giving Org. v. Boss Exotics, LLC, No. 3:21-CV-1316-E, 2023 WL 1415606 (N.D. Tex. Jan. 31, 2023 (automobile least). Motion to compel granted, but denied as to the non-signatory. Plaintiff contended that because the movant had not signed the agreement, it did not manifest assent to be bound by the automobile lease. "Signatures are not required as long as the parties give their consent to the terms of the contract, and there is no evidence of an intent to require both signatures as a condition precedent to it becoming effective as a contract." Plaintiff's unconscionability arguments attacked the enforceability of the arbitration clause not the validity of the delegation provision in particular. Therefore, plaintiff raised issues for the arbitrator, not the court, decide. The arbitration clause did not manifest an intent to cover the non-signatory, however, claims against the non-signatory were stayed pending arbitration between the signatories.

Griffith v. Cinepolis USA, Inc., No. 3:20-CV-3455-G-BN, 2023 WL 1421563 (N.D. Tex. Jan. 18, 2023) (Horan, Mag. J.), report and recommendation, 2023 WL 1415609 (Jan. 31, 2023) (employment). Motion to compel granted. To put an arbitration agreement's existence in issue, the party resisting arbitration must make at least some showing that under prevailing law, it would be relieved of its contractual obligations to arbitrate and produce some evidence to substantiate its factual allegations.

Sain v. TransCanada USA Services, Inc., No. CV H-22-2921, 2023 WL 417476 (S.D. Tex. Jan. 25, 2023) (FLSA). Motion to compel granted. The applicability of Section 1 of the FAA is for the court to decide. Oil pipeline inspectors are not a class of transportation workers engaged in interstate commerce under Section 1. An agreement that the FAA applies to an arbitration clause does not necessarily exclude the application of other law. A court may interpret an arbitration agreement under state law "even when the court is not sitting in diversity." "There is no foreign or interstate commerce exemption in the [Texas Arbitration Act] . . . A federal court may compel arbitration under the TAA."

Clearwater Benefits, LLC v. Planstin Admin., Inc., No. A-22-CV-802-RP, 2023 WL 130415 (W.D. Tex. Jan. 9, 2023) (Hightower, Mag. J.) (health benefits administration). Motion to compel granted. Incorporation of the American Arbitration Association ("AAA") rules is clear and unmistakable evidence that the parties agreed to arbitrate arbitrability.

Motions to Confirm/Vacate Award

Freshwadda v. Villas at Green Valley, No. 3:22-CV-1637-K-BN, 2022 WL 18396017 (N.D. Tex. Dec. 30, 2022) (Horan, Mag. J.), report and recommendation adopted, 2023 WL 319952 (Jan. 19, 2023) (landlord tenant). Dismissed for lack of federal jurisdiction. Plaintiff obtained an award in a proceeding administered by the "Stratford Arbitration & Mediation Corporation." Plaintiff's lease agreement did not have an arbitration clause. Plaintiff failed to sufficiently allege either diversity or federal question jurisdiction.

Carlton Energy Group, LLC v. Cliveden Petroleum Co. Ltd., No. CV H-22-170, 2023 WL 168754 (S.D. Tex. Jan. 12, 2023) (oil and gas). Award confirmed as to signatory and modified as to non-signatories. Payment of an award does not render a confirmation proceeding non-justiciable. The court may modify an award if the award decides an issue not submitted that affects the merits of the award. While the arbitrators had the power to award pre-award interest to the contract signatory (the only party against whom compensatory damages were assessed), the arbitrators exceeded their authority in assessing pre-award interest against the non-signatories. The arbitrators did not exceed their authority in awarding attorneys' fees and costs against the non-signatories as the authority to do so existed under the Texas International Arbitration Act and the AAA International Arbitration Rules. The arbitrator's refusal to hear evidence raised for the first time in a motion to

correct an award was not misconduct. A proceeding to compel arbitration "did not involve a contract claim per se" so the petitioner was not entitled to pre-arbitration attorneys' fees under Chapter 38 of the Texas Civil Practice and Remedies Code.

Other Arbitration-Related Issues

Hudnall v. Smith, No. EP-21-CV-00106-FM, 2023 WL 157788 (W.D. Tex. Jan. 10, 2023) (construction). A district court lacks subject matter jurisdiction over a case and should dismiss it pursuant to Rule 12(b)(1) when the parties' dispute is subject to binding arbitration.