

Arbitration in the Fifth – July 2022

August 10, 2022 Odean Volker

PRACTICES Litigation, International Arbitration

July 2022 was a relatively slow month for arbitration-related opinions in the courts of the Fifth Circuit, though the Fifth Circuit's Preble-Rish Haiti, S.A. v. Republic of Haiti provides important guidance on arbitration agreements and sovereign immunity from attachment. Meanwhile, the Northern District of Texas decided yet another motion to compel arbitration in Forby v. One Techs., LP.

Opinions of the Fifth Circuit Court of Appeals

Rodgers v. United Services Auto. Ass'n, No. 21-50606, 2022 WL 2610234 (5th Cir. July 8, 2022) (labor). Order confirming award affirmed. When a district court with jurisdiction over a case refers the case to arbitration and orders it administratively closed, the court retains jurisdiction over the case; in turn, the Fifth Circuit has jurisdiction to review the district court's subsequent decision to vacate or confirm an arbitration award. A party alleging that an arbitration award was procured through undue means under Section 10(a)(1) "must demonstrate that the improper behavior was ... not discoverable by due diligence before or during the arbitration hearing." For an arbitrator to exceed her powers under Section 10(a)(4), it is not enough for the arbitrator to render an error in law or fact. "Rather, [the arbitrator] must exceed the powers granted to her by the arbitration agreement."

Preble-Rish Haiti, S.A. v. Republic of Haiti, 40 F.4th 368, 370 (5th Cir. 2022) (Rule B of the Supplemental Rules for Admiralty or Maritime Claims). Order of attachment vacated. 28 U.S.C. § 1610(d) provides a limited exception to the general rule that a foreign state and its property are entitled to sovereign immunity. That exception applies only when "the foreign state explicitly waived its immunity from attachment prior to judgment." The parties' arbitration clause was relevant to waiver of sovereign immunity from suit generally, "but a waiver of immunity from suit has 'no bearing upon the question of immunity from prejudgment attachment.'" Prior cases to which Section 1610(d) applied, relied on agreements that explicitly waived sovereign immunity "including any immunity from the jurisdiction of any court or from any execution or attachment in aid of execution prior to judgment or otherwise."

Opinions of United States District Courts

Motions to Compel Arbitration

Figear, LLC v. Velocity Risk Underwriters Claims, No. 22-CV-01094, 2022 WL 2812980 (E.D. La. July 18, 2022) (insurance). Motion to compel granted. Clause limiting the damages which an arbitrator might order was not clear and unequivocal waiver of the right to arbitrate any claim which might result in exemplary, punitive, multiple, or other damages of a similar nature.

TQ Delta, LLC v. CommScope Holding Co., Inc., No. 2:21-CV-00309-JRG, 2022 WL 2872988 (E.D. Tex. July 21, 2022) (third-party indemnification claim in patent infringement suit). Motion to compel granted. Incorporation of the ICC rules was clear and unmistakable evidence that the parties agreed to arbitrate arbitrability.

Kirlew v. Golden Nugget Lake Charles LLC, No. 2:22-CV-00309, 2022 WL 2990717 (W.D. La. July 28, 2022) (employment). Motion to compel granted. Plaintiff admitted that she was given notice of the arbitration policy in a pre-shift meeting. She therefore could not create a triable issue of fact over whether she had sufficient notice of the policy, and thus accepted it through her continued employment. An affidavit asserting that plaintiff “never saw the alleged arbitration agreement in [the company’s timekeeping application]” and that the software “did not work 75% of the time,” did not refute the employer’s evidence that notice of the policy and its essential terms were provided in the application during two different periods in which plaintiff was successfully clocking in and out on several different occasions.

First Cash, Inc. v. Sharpe, No. 4:20-CV-1247-P, 2022 WL 2392313 (N.D. Tex. July 1, 2022) (asset purchase agreement). Applying Texas law, as indicated in the parties’ agreement, the parties agreed to arbitrate. The choice of the American Arbitration Association rules “generally constitutes . . . ‘clear and unmistakable’ evidence” of delegation. Accordingly, it is for the arbitrator, not the court, to determine whether the dispute fell within the scope of the arbitration clauses. When alleged waiver of arbitration depends on conduct before the district court, the court, not the arbitrator, is in the best position to decide whether the conduct amounts to a waiver.

Forby v. One Techs., LP, No. 3:16-CV-856-L, 2022 WL 2871815 (N.D. Tex. July 21, 2022) (Credit Repair Organizations Act). Motion to compel denied. After the motion to compel was initially granted, plaintiff sought to arbitrate but was declined by the American Arbitration Association because defendant had not complied with the AAA’s rules and prerequisites for consumer arbitration. Therefore, plaintiff had not failed to arbitrate under Section 4 of the Federal Arbitration Act. Defendants request to appoint an arbitrator under Section 5 was denied as plaintiff did not “fail to avail” herself of arbitration.

Chlarson v. EK Real Estate Services of NY, LLC, No. 5-21-CV-01046-XR, 2022 WL 2392648 (W.D. Tex. July 1, 2022) (Farrer, Mag. J.) (residential property sale-leaseback). Motion to compel granted as to signatories and related non-signatory but denied as to unrelated non-signatory. Under Texas law, where a non-signatory has a close relationship with one of the signatories and the claims are “intimately founded in and intertwined with the underlying contract obligations,” the doctrine of intertwined estoppel permits the non-signatory to enforce the arbitration agreement. Plaintiff’s unconscionability arguments were mooted by defendants’ agreement to move the place of arbitration from New York to Texas.

Other Arbitration-Related Issues

In re Stephan K. Hann, No. BR 12-3256, 2022 WL 2527614 (S.D. Tex. July 7, 2022) (bankruptcy). The court relied on arbitration’s factual findings to determine dischargeability.