

## Arbitration in the Fifth - June 2021

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July 13, 2021 Odean Volker

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**PRACTICES** Litigation, International Arbitration

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June 2021 saw an interesting collection of arbitration law issued addressed by the courts of the Fifth Circuit. Erdogan v. Nouvelle Shipmanagement Co. rejected an attempt to use direct-benefits estoppel to prevent a signatory relying on its agreement to arbitrate and Glad Tidings Assembly of God Church v. Indian Harbor Inc. reaffirmed the supremacy of the New York Convention over Louisiana's prohibition against arbitration clauses in insurance agreements. Also of note was the review of "evident partiality" in Shaffer, Chap. 7 Trustee for the Bankruptcy Estate of Debtors Danny and Judy Hall v. PriorityOne Bank and, importantly, the standard for waiver of that objection.

### Opinions of the Fifth Circuit

*IMA, Inc. v. Columbia Hosp. Med. City at Dallas, Subsidiary L.P.*, 20-20032, 2021 WL 2461193 (5th Cir. June 17, 2021) (preferred-provider network medical payments). Order denying motion to compel affirmed. Direct benefits estoppel applies to "non-signatories who, during the life of the contract, have embraced the contract despite their non-signatory status. Direct benefits estoppel requires knowledge of the existence of the contract and its "basic terms."

### Opinions of United States District Courts

#### Motions to Compel Arbitration

*Kikuchi v. Silver Bourbon, Inc.*, 20-CV-2764, 2021 WL 2210915 (E.D. La. June 1, 2021) (FLSA). Motion to dismiss granted based on arbitration agreement.

*Erdogan v. Nouvelle Shipmanagement Co.*, CV 19-11391, 2021 WL 2579796 (E.D. La. June 23, 2021) (maritime personal injury). Motion to compel granted. Plaintiff sued insurer of the vessel under La. Rev. Stat. § 12:1269. The insurance agreement was governed by the New York Convention. Nonsignatory plaintiff was subject to the arbitration clause that covered "any other person claiming under [the policy]." Direct-benefits estoppel operates only to compel a nonsignatory to arbitrate. A signatory cannot be estopped from enforcing the clause under a direct-benefits theory.

*Glad Tidings Assembly of God Church v. Indian Harbor Inc.*, 2:21-CV-01009, 2021 WL 2676963 (W.D. La. June 29, 2021) (insurance). Motion to compel granted. Louisiana prohibition against arbitration agreements in insurance policies (La. Rev. Stat. § 22:868(A)(2)) has no impact on agreements arising under the New York Convention. The insurance policy included at least one non-US party and otherwise satisfied the requirements of the Convention. Domestic insurers were parties to the arbitration agreement and were equally empowered to enforce the agreement. The arbitration agreement was not unconscionable or a contract of adhesion under Louisiana law.

*Pirzada v. AAA Tex., LLC*, CV H-21-0664, 2021 WL 2446193 (S.D. Tex. June 15, 2021) (religious discrimination and FMLA). Motion to compel granted. Arbitration agreement's limitations on discovery did not render the agreement substantively unconscionable.

*Noble Capital Fund Mgmt., LLC v. U.S Capital Global Investment Mgmt., LLC*, 1:20-CV-1247-RP, 2021 WL 2773015 (W.D. Tex. June 8, 2021) adopting report and recommendation 2021 WL 1940619 (May 14, 2021).

*Holsapple, v. Doggett Equip. Servs., Ltd.*, EP-20-CV-00296-DCG, 2021 WL 2210896 (W.D. Tex. June 1, 2021) (FLSA). Motion to compel granted. Under Texas law, excessive costs imposed by an arbitration agreement may render a contract substantively unconscionable. Based on the evidence submitted, the cost-splitting provision of the arbitration agreement was substantively unconscionable. The cost-splitting provision was severed pursuant to the agreement's severability clause, and the agreement to arbitrate was enforced. The former employee was ordered to pay the arbitration filing fee, and the employer ordered to pay all other arbitration costs, including arbitrator's fees. The selection of Harris County, Texas as place of arbitration was also severed as substantively unconscionable under the circumstances, and replaced with El Paso County.

## **Motions to Confirm or Vacate an Award**

*Shaffer, Chap. 7 Trustee for the Bankruptcy Estate of Debtors Danny and Judy Hall v. PriorityOne Bank*, 3:15-CV-304-HTW-LGI, 2021 WL 2386824 (S.D. Miss. June 10, 2021). Motion to vacate denied. Respondent bank moved to vacate under FAA section 10(a)(2). The arbitrator was a member of a limited liability company to which the bank had loaned funds, and the arbitrator had given a personal guaranty of the loan. The loan had been renewed once before the appointment as arbitrator and once after the appointment. The loan was refinanced with a different financial institution prior to issuance of the award. These and other findings were found to demonstrate "evident partiality." "[A] party waives its right to object based on an alleged conflict of interest if it had constructive knowledge of the conflict." The bank's records were sufficient to put it on notice of the arbitrator's potential conflict. The bank had a duty to conduct a reasonable investigation into whether the arbitrator manifested any disqualifying features.

*Brett-Andrew: House of Nelson v. Walzl*, 3:20-CV-02906-C (BT), 2021 WL 1877055 (N.D. Tex. Apr. 15, 2021), report and recommendation adopted 2021 WL 1876132 (May 10, 2021) (Sitcomm Arbitration Association). Motion to confirm dismissed for lack of subject matter jurisdiction. A district court has no authority to resolve a motion to confirm an arbitration award if the arbitration claims would not otherwise be subject to federal jurisdiction absent the arbitration agreement.

*Rodgers v. United Servs. Auto. Ass'n*, 5:19-CV-620-DAE, 2021 WL 2891307 (W.D. Tex. June 23, 2021) (employment/FMLA). Motion to confirm granted. For a "fraud and undue means" objection under Section 10(a)(1), a party must show that improper behavior was "(1) not discoverable by due diligence before or during the arbitration hearing; (2) materially related to an issue in the arbitration; and (3) established by clear and convincing evidence." The party must also show a nexus between the alleged fraud or undue means and the basis for the arbitrator's decision.