Arbitration in the Fifth – March 2022

April 13, 2022 Odean Volker

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In March 2022, the courts within the Fifth Circuit decided a usual mix of matters including the explanation of the procedure and burden for challenging an arbitration agreement in Dickson v. Continuum Glob. Sols. and the analysis of alleged partiality in Affordable Care, LLC v. McIntyre and McGee v. MRC Energy Co. Of course, the opinion with the most impact arose out of a dispute in the Fifth Circuit, but was delivered in Washington, D.C. – Badgerow v. Walters.

***Badgerow v. Walters*: In Section 9 and 10 cases, its "look through" no more.**

In *Badgerow v. Walters*, __ S.Ct. __, 2022 WL 959675 (U.S. Mar. 31, 2022), the Court decidedly rejected the application of "look-through" jurisdiction in cases brought under Sections 9 and 10 of the Federal Arbitration Act. In *Vaden v. Discover Bank*, 556 U.S. 49, 129 S.Ct. 1262 (2009), the Court had reasoned that the text of Section 4, instructed a federal court to "look through" the Section 4 petition to the "underlying substantive controversy" between the parties - even though that controversy was not before the court – to determine subject matter jurisdiction. After *Vaden*, the Fifth Circuit and other circuit courts of appeal had applied the "look through" approach in cases brought under Sections 9 and 10. *Badgerow* rejected that use of "look through" jurisdiction. Considering the text of Sections 9 and 10, the Court reasoned that those provisions did not authorize a federal court to "look through."

Opinions of United States District Courts

Motions to Compel Arbitration

Egan v. PJ Louisiana, LLC, No. 21-CV-3681, 2022 WL 789007 (W.D. La. Mar. 14, 2022) (FSLA). Plaintiffs did not dispute that arbitration agreements barred the litigation. The matter was stayed to allow access to the court in the event settlement approval was needed following mediation.

Abbey Bridges Constr. Co., LLC. V. Kroger Ltd. P'ship I, No. 3:21-CV-63-NBB-RP, 2022 WL 989146 (N.D. Miss. Mar. 31, 2022) (construction). The construction subcontract required arbitration "unless Contractor in its sole discretion demand binding litigation." Under Mississippi law, an arbitration agreement is not voided simply because it is one-sided. As long as the underlying contract was supported by consideration, the agreement to arbitrate is not substantively unconscionable.

Dickson v. Continuum Glob. Sols., LLC, No. 3:21-CV-01528-K, 2022 WL 847215 (N.D. Tex. Mar. 22, 2022) (FSLA). Motion to compel granted. "[A] district court must hold a trial on the existence of an arbitration agreement if a motion to compel arbitration is filed and 'the making of the arbitration agreement ... [is] in issue.'" The burden on the party resisting arbitration to "unequivocally deny that [it] agreed to arbitrate and produce some evidence supporting [that] position." Even though arbitration agreements were not signed by certain plaintiffs, the agreements were enforceable since defendant's evidence showed that each plaintiff agreed to the terms of the arbitration agreement by submitting their employment applications through the employer's online

application system. Plaintiffs' declarations that the did "not recall" seeing, signing or agreeing to arbitrate were not "sufficient unequivocal denials" to put the making of the arbitration agreement in issue.

Vuoncino v. Forterra, Inc., No. 3:21-CV-01046-K, 2022 WL 868274 (N.D. Tex. Feb. 28, 2022), report and recommendation adopted, 2022 WL 865893 (N.D. Tex. March 22, 2022) (employment). Motion to compel granted. Arguments about applicability of an arbitration agreement the dispute go to enforceability, and not the existence of an arbitration agreement. Plaintiff also asserted Sarbanes–Oxley whistleblowing retaliation claims which were statutorily exempted from a pre-dispute arbitration agreement. Those claims were allowed to proceed in court concurrently with the arbitration

Johnson v. Houston KP, LLC, No. 4:20-CV-663, 2022 WL 605802 (S.D. Tex. Mar. 1, 2022) (FLSA). Motion to compel granted. The contractual designation as independent contractor did not control the parties' relationship. The arbitration provision was, however, enforceable.

Wallace v. SoFi Lending Corp., No. CV H-21-3560, 2022 WL 658825 (S.D. Tex. Mar. 4, 2022). Unopposed motion to compel granted.

Black v. Experian Info. Sols., Inc., No. CV H-21-04231, 2022 WL 818927 (S.D. Tex. Mar. 17, 2022) (credit card). Unopposed motion to compel granted.

Motions to Confirm/Vacate

Affordable Care, LLC v. McIntyre, No. 1:21-CV-85-TBM-RPM, 2022 WL 989147 (S.D. Miss. Mar. 31, 2022) (management services). Motion to vacate denied. Under Section 10(a)(1), "a party who alleges that an arbitration award was procured by fraud must demonstrate: (1) that the fraud occurred by clear and convincing evidence; (2) that the fraud was not discoverable by due diligence before or during the arbitration hearing; and (3) the fraud materially related to an issue in the arbitration." A nexus between the alleged fraud and the basis for the award is required. To obtain vacatuer under Section 10(a)(2), a party "must produce specific facts from which a reasonable person would have to conclude that the arbitrator was partial to" to the other party. The existence of a "few professional connections, the existence of which were readily discoverable to anyone who chose to look" did not support finding evident partiality. Motion to take discovery related to the alleged partiality was denied.

Comm. Workers of Am. AFIL-CIO v. Dex Media, Inc., No. 3:20-CV-3295-L, 2022 WL 865889 (N.D. Tex. Mar. 23, 2022) (labor). Motion to confirm granted. The arbitrator's award was rationally inferable from the language and purpose of the collective bargaining agreement ("CBA"). That one party disagrees with the arbitrator's interpretation of the CBA does mean that the arbitrator ignored the plain language of the agreement. Decisions of arbitrators in other cases that have not been appealed to, and are not pending before, the court have no bearing on or relevance to the determination of whether the arbitration award should be vacated or confirmed.

McGee v. MRC Energy Co., No. 3:21-CV-2159-S, 2022 WL 865895 (N.D. Tex. Mar. 22, 2022) (employment). Motion to vacate denied. To vacate an award under 9 U.S.C. § 10(a)(3), the arbitrator's determinations must have deprived the moving party of a fair hearing. It is not enough for the arbitrator simply to have made an error of law. Evident partiality under 9 U.S.C. § 10(a)(2) requires more than a mere appearance of bias; it requires a concrete, not speculative impression of bias. The arbitrator's alleged partiality must be direct, definite, and capable of demonstration rather

than remote, uncertain, or speculative. Evidence of partisan political Twitter posts or re-tweets were not enough to overcome the significant deference afforded an arbitration award.

Other Arbitration-Related Issues

Woodmen of the World Life Ins. Soc. v. Mayo, No. 3:21-CV-322 HTW-LGI, 2022 WL 894246 (S.D. Miss. Mar. 25, 2022) (insurance). Court had jurisdiction to hear Section 4 action to compel arbitration. Plaintiff had standing and requirements for diversity jurisdiction were met.

In re: JMV Holdings LLC; Ruff v. Ruff, No. 18-42552, 2022 WL 996372 (Bankr. E.D. Tex. Mar. 31, 2022). Under Texas law, to establish res judicata three elements must be satisfied: (1) a prior final judgment on the merits by a court of competent jurisdiction; (2) identity of parties or those in privity with them; and (3) a second action based on the same claims as were raised or could have been raised in the first action. An arbitration award may have preclusive effect for purposes of res judicata. Husband and wife were found to “share an identity of interests with respect to the judgment such that res judicata applies” in this case.