Arbitration in the Fifth – March 2025

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PRACTICES Litigation, International Arbitration

March 2025 was a busy month in the courts of the Fifth Circuit. The Court of Appeals addressed many issues arising from the complicated history of *Sullivan v. Feldman*. Both the Middle District of Louisiana and the Southern District of Texas considered whether "may" is permissive in an arbitration agreement. Finally, the Eastern District of Louisiana continued to grapple with the interplay of insurance arbitration, the New York Convention and Louisiana law, and rejected application of Louisiana law in *Parish of LaFourche v. Indian Harbor Ins. Co.* and *Arrive Nola Hotel, LLC v. Certain Underwriters at Lloyds, London*.

Opinion of the Fifth Circuit Court of Appeals

Sullivan v. Feldman, No. 23-20140, 2025 WL 758029 (5th Cir. Mar. 11, 2025). Order confirming awards affirmed in part, reversed in part, vacated in part and remanded. At issue were four separate awards issued by four arbitrators that had been confirmed by the district court. The awards resulted from a single evidentiary hearing to resolve the four arbitrations and presided over by the four arbitrators.

One award allowed for class arbitration. In the Fifth Circuit, "class arbitrability is a gateway issue that courts leave to arbitrators only when the agreement evinces that the parties 'clearly and unmistakably' intended that result." As with other gateway questions, "when a court determines that the delegation of class arbitrability to the arbitrator was clear and unmistakable, then the arbitrator's determination as to whether to certify a class is reviewed deferentially pursuant to the [Federal Arbitration Act]." Here, the court found that Fifth Circuit precedent provided that the "incorporation of the AAA Commercial Arbitration Rules constitutes sufficiently clear and unmistakable evidence that the parties intended to delegate class-wide arbitrability to the arbitrator."

The arbitration agreement contained a four-month "jurisdictional" deadline for completion of the arbitration process. Enforceability of the deadline was "delegated to the arbitrators." The arbitrators found the deadline "inconsistent with due process" and "unconscionable." Considering an objection to this determination under the standard of "whether the arbitrators (even arguably) interpreted the parties' contract," the court did not "upend the arbitrators' rejection . . . of the four-month provision."

"The arbitrators who concluded that multiple arbitrations could proceed simultaneously did so because they considered each arbitration to be a different "dispute" under the [the parties' agreement]. "All four confirmed awards differ in total amounts." "Inconsistency among awards, without more, is not among the exclusive grounds for judicial vacatur."

The stay of further arbitrations entered by the district court entered on March 22, 2021, was found to be "no longer viable to prevent the parties . . . from exercising their contractual right to engage in further arbitration." The district court had previously recognized that the parties' agreement gave the right to "pursue arbitration to resolve any conflicting awards, with any new arbitrator 'determin[ing] whether and when earlier decisions or awards have preclusive effects.'"

Award against a non-signatory individual for joint and several liability was found to be not supported by estoppel or other principles. The award was modified to exclude the non-signatory individual and was not vacated in its entirety.

Opinions of United States District Courts

Motions to Compel Arbitration

Par. of LaFourche v. Indian Harbor Ins. Co., No. CV 23-3472, 2025 WL 754333 (E.D. La. Mar. 10, 2025) (insurance). Motion to lift stay denied. The Louisiana Supreme Court's interpretation of La. R.S. § 22:868 in *Police Jury of Calcasieu Parish v. Indian Harbor Insurance Co.* did not alter the court's determination that federal common law estoppel is applicable under the New York Convention. The order required plaintiff to arbitrate with domestic as well as foreign insurers. The "application of equitable estoppel to enforce arbitration under the [New York] Convention is a matter of federal common law."

Hayes v. Deery Valley Homebuilders, No. 5:24-CV-46-DCB-ASH, 2025 WL 818293 (S.D. Miss. Mar. 14, 2025) (manufactured housing). Motion to compel granted. Because the plaintiffs' claims allege that the signatory defendant, and the non-signatory defendant manufacturer engaged in "substantially interdependent and concerted misconduct" which caused plaintiffs' damages, the non-signatory defendant was allowed to compel arbitration

Goldsberry v. Barrington Bank & Tr. Co., NA, No. 4:23-CV-00993-ALM-AGD, 2025 WL 699357 (E.D. Tex. Feb. 10, 2025) (Durrett, Mag. J.), report and recommendation adopted, 2025 WL 693252 (Mar. 4, 2025) (Fair Credit Reporting Act). Motion to compel granted. "Texas courts have repeatedly upheld the validity of "clickwrap" agreements." The failure to review the agreement prior to creating an account did not allow the plaintiff to avoid the arbitration provision. The defendant's website contained language "directly above the 'Create Your Account' button that read 'By clicking 'Create Your Account' I accept and agree to your Terms of Use Agreement, as well as acknowledge receipt of your Privacy Policy.'" Non-signatory mortgage servicer did not have a sufficiently "close relationship with one of the signatories" to sustain intertwined claims estoppel under Texas law.

Arrive Nola Hotel, LLC v. Certain Underwriters at Lloyds, London, No. CV 24-1585, 2025 WL 871608 (E.D. La. Mar. 20, 2025) (insurance). Motion to compel granted. A unique federal interest exists in faithfully applying the rules of the New York Convention in cases that involve foreign insurers. This includes abiding by arbitration clauses. "Applying the Louisiana statute banning arbitration, therefore, stands to frustrate the purposes of the Convention—to provide for the arbitral resolution of disputes and for the United States to faithfully live up to that obligation." "[F]ederal equitable estoppel principles allow domestic insurers to compel arbitration when their foreign counterparts compel arbitration under the Convention and there exists allegations of concerted and interdependent conduct."

CSRS, LLC v. Element 25 Ltd., No. CV C24-358-RLB, 2025 WL 850013 (M.D. La. Mar. 18, 2025) (construction). Motion to compel granted. Arbitration provision that provided, in part: "If a Dispute is not resolved ..., either party may submit the Dispute to arbitration" was not permissive. Under controlling Fifth Circuit precedent, "'may' should be construed to give either aggrieved party the option to require arbitration." Louisiana statute the rendered null and void an arbitration agreement requiring the proceeding to be brought outside of Louisiana was preempted by the New York Convention and the Federal Arbitration Act (FAA).

Nida v. Tactical Force, LLC, No. 1:23-CV-365-TBM-RPM, 2025 WL 969247 (S.D. Miss. Mar. 31, 2025) (FLSA). Motion to compel denied. "When a company wishes to bind its employees to arbitrate disputes, it should do so in a contract—one that, perhaps more importantly, also binds itself. Instead, when an arbitration agreement is buried in an employee handbook alongside illusory language allowing the employer to revoke all the terms contained in the handbook and to interpret those terms at its whim, no one is bound." Illusory language renders an arbitration provision unenforceable, unless the employer is in some way restricted in their unilateral ability to change and interpret it.

Shaik v. Charles Schwab & Co. Inc., No. 4:24-CV-00817-P, 2025 WL 750686 (N.D. Tex. Mar. 10, 2025) (Investment Advisor Service Agreement). Motion to compel granted. Under California law, to avoid an arbitration agreement on unconscionability grounds, the party must show that either the whole contract or a part of it is both procedurally and substantively unconscionable. "The defense applies only to terms that 'impair the integrity of the bargaining process or otherwise contravene the public interest or public policy' or 'attempt to alter in an impermissible manner fundamental duties otherwise imposed by the law, fine-print terms, or provisions that seek to negate the reasonable expectations of the nondrafting party, or unreasonably and unexpectedly harsh terms ....'" Adhesive nature of the agreement alone was not proof of unconscionability under California law

RTAE Holdings, LLC v. FOCUS Inv. Banking LLC, No. 3:24-CV-1829-S, 2025 WL 776194 (N.D. Tex. Mar. 10, 2025) (financial advisory agreement). Motion to compel granted in part and denied in part. Where a "forum-selection clause is an important part of the arbitration agreement," courts need not compel arbitration in a substitute forum if the designated forum is unavailable. Here, the designated arbitral institution confirmed it was available in the designated seat. Under Texas law, "a non-signatory plaintiff seeking the benefits of a contract is estopped from simultaneously attempting to avoid the contract's burdens, such as the obligation to arbitrate disputes."

Hebei Viroad Biotechnology Co., LTD. v. Phippy LLC, No. 4:24-CV-00555, 2025 WL 918540 (S.D. Tex. Mar. 26, 2025) (purchase of goods). Motion to compel granted. Arbitration provisions using the language "may" are sometimes held to be mandatory. Here, the arbitration provisions at issue stated that "both parties may apply for international arbitration" and that "both of parties can apply for international arbitration." The court found that the plain language demonstrated an intent to arbitrate upon the election to do so by either party.

Kodiak Gas Services LLC v. Legend Energy Advisors LLC, No. 4:24-CV-01333, 2025 WL 963585 (S.D. Tex. Mar. 31, 2025) (settlement agreement). Motion to compel granted. So long as a valid agreement to arbitrate exists, "there is a presumption that their disputes will be deemed arbitrable unless it is clear that the arbitration clause has not included them." The arbitration agreement was not clearly limited to issues related to payment terms and return of equipment.

Motions to Confirm/Vacate

Kingman Holdings, LLC v. Blackboard Ins. Co., No. 24-875, 2025 WL 932774 (E.D. La. Mar. 27, 2025). Award confirmed. "[T]he Fifth Circuit has abandoned and rejected 'manifest disregard of the law' as an independent, non-statutory ground for setting aside an arbitration award." Vacatur under Section 10(a)(4) is only available where the arbitrator has acted outside the scope of the contractually delegated authority by issuing an award that 'simply reflects his own notions of economic justice rather than drawing its essence from the contract.'"

Gupta v. Louisiana Health Services & Indem. Co., No. CV 24-404-JWD-SDJ, 2025 WL 817989 (M.D. La. Mar. 13, 2025). Dismissed for lack of subject matter jurisdiction. The court may not use

the “look-through” approach to find jurisdiction. The “look-through” approach looks to the underlying controversy for jurisdictional grounds.

Williams v. Bankers Life & Cas. Co., No. CV 21-293-SDD-SDJ, 2025 WL 899949 (M.D. La. Mar. 24, 2025) (employment). Motion to vacate denied. “An arbitrator is not bound to hear all of the evidence tendered by the parties; however, she must give each of the parties to the dispute an adequate opportunity to present its evidence and argument. The arbitrator has ‘broad discretion to make evidentiary decisions.’” An evidentiary error must be one that is not simply an error of law, but which so affects the rights of a party that it may be said that he was deprived of a fair hearing. (citations omitted).

Garland Symphony Orchestra Ass'n Inc v. Dallas-Fort Worth Prof'l Musicians Ass'n, No. 4:24-CV-00739-O, 2025 WL 746143 (N.D. Tex. Mar. 7, 2025) (labor agreement). Award modified. “A court's review of arbitral awards interpreting labor agreements is ‘exceedingly deferential.’” If a contract provides a limitation on the authority of an arbitrator, a court will vacate an award that ignores the limitation. The agreement at issue provided on “[o]nly a single grievance may be head by the arbitrator at one time.” The court determined that the arbitrator “unilaterally ruled on numerous unrelated issues.” “[V]acation or modification of an arbitration award is clearly proper where the arbitrator has exceeded his authority.” The award was vacated as to all issues other than the single grievance.

CFE Int'l LLC v. WWM Logistics LLC, No. 4:24-CV-2069, 2025 WL 816717 (S.D. Tex. Mar. 13, 2025). Motion to confirm denied. Respondent argued that the award had been fully satisfied and that the court lacked jurisdiction to decide the petition to confirm. “Article III of the Constitution provides that the ‘judicial power shall extend to all Cases’ and ‘Controversies.’” The case or controversy requirement of Article Ill applies to actions governed by the FAA. “Here, there is no prospective relief or unfulfilled obligation for the Court to potentially enforce in the future. This being the case, the Court's confirmation of the Award would not provide additional certainty or finality to the Award as a matter of law.”

Other Arbitration-related Opinions

Crescent City Surgical Operating Co. v. Certain Underwriters at Lloyd's, London, No. CV 22-2625, 2025 WL 915865 (E.D. La. Mar. 26, 2025) (insurance). Motion to dismiss foreign insurers denied. Plaintiff obtained reconsideration of an order compelling foreign and domestic insurers to arbitration. The new order directing arbitration as to foreign insurers and not as to domestic insurers is now on appeal. Plaintiff sought to dismiss with prejudice it claims against the foreign insurers. Relying on the reasoning of *Smith v. Spizzirri*, 601 U.S. 472 (2024), the court denied dismissal.

Davis v. Keller Williams Realty Inc., No. 4:23-CV-01223-O, 2025 WL 951262 (N.D. Tex. Mar. 13, 2025) (Ray, Mag. J.), report and recommendation adopted, 2025 WL 949337 (Mar. 28, 2025). Motion to appoint arbitrator. The FAA authorizes a court to “intervene to select an arbitrator upon application of a party in three instances: (1) if the arbitration agreement does not provide a method for selecting arbitrators; (2) if the arbitration agreement provides a method for selecting arbitrators but any party to the agreement has failed to ‘avail himself of such method;’ or (3) if there is ‘a lapse in the naming of an arbitrator or arbitrators.’”

VariChem Int'l, Inc. v. Riddle's Delhi & Chem. Serv. Co., Inc., No. 4:24-CV-1784, 2025 WL 816740 (S.D. Tex. Mar. 14, 2025). “Under ordinary principles of contract and agency law, an individual defendant's status as an officer or agent of the defendant corporations is insufficient to personally bind them to the arbitration agreements.”

Franklin v. Wells Fargo Bank, N.A., No. 6:23-CV-00689-ADA-DTG, 2025 WL 890185 (W.D. Tex. Mar. 14, 2025) (banking). Motion to compel granted. Plaintiff's declaration stated that he had "never seen this purported arbitration agreement" and that "I do not believe I recieved [sic] this purported arbitration agreement by mail, online, at a Wells Fargo branch, or in any other manner or format." He concluded "I dispute that I signed or agreed to this arbitration agreement, and I dispute that I signed or agreed to any other documents that would make me a party to this arbitration agreement." These statements were not sufficient to overcome evidence of the signed agreement. Defendant waited more than a year to move for arbitration. Defendant responded to discovery, filed an answer and mediated the case, but did not substantially invoke the judicial process. The court found that arbitration was not waived.