Arbitration in the Fifth – May 2021

June 11, 2021 Odean Volker

PRACTICES Litigation, International Arbitration

May 2021 started slow with a relatively small number of arbitration-related opinions, but by month's end noteworthy things had happened. In Int'l Energy Ventures Mgmt., L.L.C. v. United Energy Group, the Fifth Circuit looked at "who decides" a question of "litigation-conduct waiver," and what is required to delegate that question to an arbitrator. Meanwhile, the U.S. Supreme Court granted certiorari in the Fifth Circuit's Quezada v. Bechtel OG & C Constr. Servs.

What does the future hold for "look-through" jurisdiction in Section 9 or 10 petitions?

On May 17, 2021, the U.S. Supreme Court granted certiorari to answer the question:

> Whether federal courts have subject-matter jurisdiction to confirm or vacate an arbitration award under Sections 9 and 10 of the FAA where the only basis for jurisdiction is that the underlying dispute involved a federal question.

In *Quezada v. Bechtel OG & C Constr. Servs., Inc.*, 946 F.3d 837 (5th Cir. 2020), a divided panel of the Fifth Circuit (acknowledging a split among federal courts of appeal) joined the "majority" view holding that the "look through" approach applies to petitions under Sections 9, 10 and 11. The "look through" approach allows a federal court to "look through" a petition to determine whether it is predicated on an action that arises under federal law. Thus, the court is not limited by the well-pleaded complaint rule in these arbitration-related petitions, and instead examines the underlying dispute to determine whether it presents a federal question. The U.S. Supreme Court had previously endorsed the "look through" analysis when considering a motion to compel under Section 4. *Vaden v. Discover Bank*, 556 U.S. 49 (2009). In doing so, Vaden relied, at least in part, on language in Section 4 that is not found in the other Sections.

Opinions of the Fifth Circuit

Int'l Energy Ventures Mgmt., L.L.C. v. United Energy Group, Ltd., 20-20221, 2021 WL 2177062 (5th Cir. May 28, 2021) (Consulting Services for acquisition of oil and gas assets). Order granting motion to compel reversed based on litigation-conduct waiver. Whether a party has waived arbitration by litigation-related conduct is a generally decided by the court. The American Arbitration Association's ICDR Rules authorizing arbitrators to decide questions of jurisdiction do not expressly give arbitrators the power to resolve questions of waiver through litigation conduct. Therefore, incorporation of those rules does not show a clear and unmistakable agreement that the arbitrator decide litigation-conduct waiver. Litigation-conduct exists "when the party seeking arbitration substantially invokes the judicial process to the detriment or prejudice of the other party." Substantial invocation occurs when a party performs an overt act in court that evinces a desire to resolve the arbitrable dispute through litigation rather than arbitration. Whether a party has been prejudiced is a fact-dependent inquiry that asks if the party suffered "delay, expense, or damage to its legal position because of an opposing party's pursuit of litigation."

Opinions of United States District Courts

Motions to Compel Arbitration

Coleman v. Affordable Care, LLC, CV 19-10707, 2021 WL 2042249 (E.D. La. May 21, 2021) (real property lease). Motion to compel granted. Filing of an answer to prevent default is not a substantial invocation of the judicial process for the purpose of waiver.

Nii-Moi v. McAllen Hospitalist Grp, PLLC, 6:21-CV-00001-JDK, 2021 WL 2139402 (E.D. Tex. May 26, 2021) (Nowak, Mag. J.) (employment). Motion to compel granted. Mediation as a condition precedent to arbitration can be waived. Questions relating to conditions precedent are to be decided by the arbitrator, not the Court. A fee-shifting provision may render an arbitration agreement unconscionable and unenforceable if it prevents a litigant from vindicating his statutory rights in the arbitral forum, however, more than "speculation about prohibitive costs" is required.

Johnson v. Conifer Health Solutions, 420CV00767SDJCAN, 2021 WL 2229734 (E.D. Tex. May 7, 2021), report and recommendation adopted 2021 WL 2224344 (June 2, 2021) (employment). Motion to compel granted. A court may dismiss with prejudice, rather than stay, an action where all the issues are properly subject to arbitration. Dismissal is appropriate when any post-arbitration remedies will not entail renewed consideration of the merits of the controversy but would be circumscribed to a review of the award.

Shaw v. Peraton, Inc., 7:21-CV-00045, 2021 WL 1910739 (S.D. Tex. May 12, 2021) (FLSA). Unopposed motion to compel granted.

Dean v. Biggs & Greenslade, P.C., CV H-21-0242, 2021 WL 2002440 (S.D. Tex. May 19, 2021) (Fair Debt Collection Practices). Motion to compel granted. An uncontroverted affidavit was sufficient to show that an arbitration agreement existed. Adoption of the American Arbitration Association rules presented clear and unmistakable evidence that the parties agreed to arbitrate arbitrability. Class arbitration is a "gateway" issue that must be decided by courts, not arbitrators (absent clear and unmistakable language to the contrary). Claims against nonsignatory were also referred to arbitration as they were "inextricably enmeshed and have a significant relationship to the terms of the" parties' agreement.

CDIC of NC Protected Cell A-600 LLC v. Gottlieb, 4:18-CV-04142, 2021 WL 2201311 (S.D. Tex. June 1, 2021) (Limited liability company operating agreement) Motion to compel denied due to litigation-conduct waiver. A party waives its right to arbitration by substantially invoking the judicial process, to the detriment or prejudice of the other party. A bright-line rule is inappropriate for deciding whether a party has waived its right to arbitration. What constitutes a waiver of the right of arbitration depends upon the facts of each case.

Burris v. Tractor Supply Co., 2:20-CV-00041, 2021 WL 2211779 (S.D. Tex. May 28, 2021) (work-injury claim). Motion to compel granted. The arbitration agreement was contained in an occupational injury benefit plan. The former employee had accessed a digital version of the plan using company software and was required to select "Agree" or "Disagree" with the indication that selecting Agree "will constitute your e-signature."

Noble Cap. Fund Mgmt., LLC v. US Capital Global Investment Mgmt., LLC, 1:20-CV-1247-RP, 2021 WL 1940619 (W.D. Tex. May 14, 2021) (Hightower, Mag. J.) (limited partnership agreement) Motion to compel denied. An arbitration was initiated, but administrative fees and expenses were not paid by respondent. Because no party agreed to pay for the fees and expenses, the panel terminated the arbitration. Claimant then filed this action, and defendant sought to compel arbitration. Section 3 of the FAA requires the court to "stay the trial of the action until such arbitration has been had in

accordance with the terms of the agreement." As a result of the panel's termination, arbitration had "been had". Section 3 also requires a stay provided that "the applicant for the stay is not in default in proceeding with such arbitration." Failure to pay arbitration fees constituted a default under Section 3.

Motion to Confirm or Vacate an Award

Edinburg United Police Officers Ass'n v. City of Edinburg, 7:20-CV-00137, 2021 WL 1795512 (S.D. Tex. May 5, 2021) (labor). Motion to confirm granted.

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.

Other Arbitration-Related Decisions

In re Amberson, 20-51324-CAG, 2021 WL 1845328 (Bankr. W.D. Tex. May 7, 2021) (bankruptcy). Arbitration award was given preclusive effect to some but not all claims.

DeMarquis v. Alorica, Inc., 1:20-CV-00634-LY, 2021 WL 1930303 (W.D. Tex. May 13, 2021) (Austin, Mag. J.) (Fair Debt Collection Practices Act). Collateral estoppel denied because issue in litigation with nonsignatory was not identical to the issue previously litigated during the arbitration among signatories to an arbitration agreement.