

## Arbitration in the Fifth – May 2023

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**PRACTICES** International Arbitration, Litigation

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*In May 2023, the courts within the Fifth Circuit considered motions to compel in some unusual factual situations. In Jackson v. World Wrestling Entm't, Inc., the Northern District of Texas considered whether an arbitration clause in an agreement to purchase a ticket to an event was binding on a person that received the ticket as a gift, and the Eastern District of Louisiana finely parsed multiple claims by foreign workers in deciding which should go to arbitration in Ortiguerra v. Grand Isle Shipyard, LLC.*

### Opinions of the Fifth Circuit Court of Appeals

*Comm. Workers of Am. AFL-CIO v. Dex Media, Inc.*, No. 22-10371, 2023 WL 3193603 (5th Cir. May 2, 2023) (labor). Order confirming award affirmed. Even if the arbitrator seriously erred in finding facts or interpreting the collective bargaining agreement courts will uphold a decision that is rationally inferable from the purpose of the collective bargaining agreement.

*Affordable Care, L.L.C. v. McIntyre*, No. 22-60245, 2023 WL 3620755 (5th Cir. May 24, 2023) (per curiam) (non-clinical services for dental practice). Order confirming award affirmed. The standard for establishing evident partiality is “stern.” The challenger must show “a concrete, not speculative impression of bias that stems from a significant, not trivial, compromising connection.” The party challenging the award “must produce specific facts from which a reasonable person would have to conclude that the arbitrator was partial to” its opponent. Professional intersections that one might expect to find between any two attorneys working in the same geographical location do not alone justify vacatur. A party seeking post-arbitration discovery bears the burden of showing its necessity. As there was no compelling evidence of impropriety that might demonstrate the need for further discovery, permitting discovery would have needlessly undermined the efficacy of the arbitral process.

### Opinions of United States District Courts

#### Motions to Compel Arbitration

*Alacrity Sols. Group, LLC v. La. Citizens Prop. Ins. Co.*, No. CV 23-74-SDD-EWD, 2023 WL 3260531 (M.D. La. May 4, 2023) (insurance claims administration). Motion to compel granted. Insurer brought claims administrator into a state court action as a third party defendant. The claims administrator filed this action under the Federal Arbitration Act (“FAA”) seeking to enforce an arbitration clause. Abstention pursuant to *Colo. River Water Conservation Dist. v. U.S.*, 424 U.S. 800 (1976) was rejected. The *McCarran-Ferguson Act* allows state laws such as Louisiana Revised Statute section 22:868(A)(2) to “reverse-preempt” the FAA's provisions on the enforceability of an arbitration agreement. However, the contract for claims administration was not an “insurance contract” and the indemnity provision in the contract was not an “insurance contract.” The state court action was ordered stayed.

*Jackson v. World Wrestling Entm't, Inc.*, No. 4:23-CV-0172-P, 2023 WL 3326115 (N.D. Tex. May 9, 2023) (personal injury). Motion to compel granted. Plaintiff received a ticket to an event as a gift,

and alleged that he suffered hearing loss from the sounds at the event. The process of purchasing the ticket involved multiple click-wrap type acknowledgments of an arbitration agreement. The court held that the purchaser of the ticket “acted as [plaintiff’s] agent in acquiring the ticket” and by attending the event using the ticket the plaintiff was “legally chargeable with notice of the Arbitration Agreement.”

*Amcrest Glob. Holdings Ltd. v. Bona Fide Masks Corp.*, No. CV H-22-3786, 2023 WL 3292896 (S.D. Tex. May 5, 2023) (trademark/Lanham Act). Motion to compel granted in part and denied in part. Motions to compel arbitration under Rule 12(b)(1) and 12(b)(3) were denied since the motions did not challenge the court’s subject matter jurisdiction or assert that venue was wrong or improper. A narrow arbitration clause covers disputes that arise out of the contract and relate to the parties’ performance of the contract. A broad provision “embrace[s] all disputes between the parties having a significant relationship to the contract regardless of the label attached to the dispute.” An agreement that provided that “any disputes will be resolved by arbitration” was a “broad” provision.

*Sonnier v. Tri Pointe Homes Tex. Inc.*, No. CV H-22-4489, 2023 WL 3587546 (S.D. Tex. May 22, 2023) (Americans with Disabilities Act). Motion to compel granted. The court stayed, rather than dismissed, the action as arbitrability was delegated to the arbitrator and the plaintiff claimed that some issues were not arbitrable.

*McClairne v. TitleMax of Texas, Inc.*, No. 4:22-CV-03334, 2023 WL 3739085 (S.D. Tex. May 30, 2023) (lending). Motion to compel granted. Claims of fraud in the inducement of the contract generally must be resolved by an arbitrator. Federal courts are permitted to hear claims regarding fraud in the inducement of the arbitration clause itself.

*Stephenson v. Rackspace Tech., Inc.*, No. SA-22-CV-01296-XR, 2023 WL 3551016 (W.D. Tex. May 18, 2023) (cloud services). Motion to compel individual arbitration granted. Under Texas law, continuation of use of the services before and through the alleged ransomware event was sufficient evidence of the user’s intent to be bound by previously modified contract terms. Arguments that the arbitration clause was procedurally and substantively unconscionable were rejected. When a party seeks to invalidate an arbitration agreement on the ground that arbitration would be prohibitively expensive, “that party bears the burden of showing the likelihood of incurring such costs.”

## **Motion to Confirm or Vacate**

*Hester v. Human Servs of SE Tex. Inc.*, No. 1:20-CV-048, 2023 WL 3564929 (E.D. Tex. May 19, 2023) (employment). Award confirmed. Contention that pro se plaintiff did not understand that her claims would be resolved in arbitration was inconsistent with the record. Complaints about the discovery process leading up to arbitration needed to be addressed to, and decided by, the arbitrator. A party’s disagreement with the outcome of an arbitration is not a basis for vacating an arbitrator’s decision.

## **Other Arbitration-Related Issues**

*Ortiguerra v. Grand Isle Shipyard, LLC*, No. CV 22-309, 2023 WL 3676793 (E.D. La. May 25, 2023) (Rosby, Mag. J.) (employment). Motion for leave to amend granted. Plaintiffs asserted claims under the Trafficking Victims Protection Act, Fair Housing Act and Fair Labor Standards Act (“FLSA”). The arbitration clause at issue required arbitration for a “claim and dispute arising from this employment.” The plaintiffs’ initial FLSA claim related to wages and overtime, and was order to arbitration in a prior decision. Plaintiffs sought to amend their petition and assert a new claim for post-employment FLSA retaliation based on a counterclaim filed by defendants. Since plaintiffs

were no longer employees when the counterclaim was filed, the court ruled that “the FLSA retaliation claim does not fall within ‘claims and disputes arising from this employment’” and is not a claim that requires arbitration. The amendment was not futile and leave was granted to file.

*Antione’s Restaurant, LLC v. Certain Underwriters of Lloyds*, No. CV 23-229, 2023 WL 3751509 (E.D. La. June 1, 2023) (insurance). Motion for reconsideration of order compelling arbitration denied. Standing alone, the fact that an order of one court conflicts with that of another court in the district does not justify reconsideration. That another court might have reached the opposite conclusion demonstrates only a difference in opinion, not a manifest error of law warranting reconsideration. Although Louisiana law ordinarily prohibits enforcement of arbitration clauses in cases involving insurance disputes, the New York Convention supersedes state law. Thus, when an insurer-defendant is a foreign entity, the New York Convention applies and Louisiana law does not bar the enforcement of arbitration provisions.