

Arbitration in the Fifth - October 2022

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PRACTICES Litigation, International Arbitration

While October 2022 was a relatively slow month for arbitration-related opinions in the Fifth Circuit, some unusual situations were considered. In *Doe v. Tonti Mgmt. Co., LLC*, the Eastern District of Louisiana considered a motion to stay state court litigation under the All Writs Act and in *Kronlage Family Ltd. Partnerships v. Indep. Specialty Ins. Co.* the same court considered a request to dismiss foreign insurers that would have impact the court's jurisdiction under the New York Convention. In *Vollmering v. Assaggio Honolulu, LLC*, the Southern District of Texas addressed another staffing company motion to compel.

Opinion of the Fifth Circuit

Franlink Inc. v. BACE Services, Inc., 50 F.4th 432, 441 (5th Cir. 2022) (franchise). While not strictly an arbitration opinion, the “case presents one primary question: whether non-signatories to a franchise agreement may be bound to the contract's choice of forum provision under the equitable doctrine that binds non-signatories who are ‘closely-related’ to the contract.” The “closely related” doctrine has been recognized in other circuits, but had not been recognized by the Fifth Circuit until this opinion. The doctrine “permit[s] non-signatories to an agreement to be bound by, and to enforce, forum selection clauses where, under the circumstances, the non-signatories enjoyed a sufficiently close nexus to the dispute or to another signatory such that it was foreseeable that they would be bound.” Application of the doctrine is context specific and is determined only after weighing the significance of the facts relevant to the particular case at hand. Thus, the court did not set out a rigid test for applying the “closely-related” doctrine. A few fundamental factors considered were: (1) common ownership between the signatory and the non-signatory, (2) direct benefits obtained from the contract at issue, (3) knowledge of the agreement generally and (4) awareness of the forum selection clause particularly.

Opinions of United States District Courts

Motions to Compel Arbitration

Wilson v. Kemper Corp. Services, Inc., No. 5:22-CV-62-DCB-LGI, 2022 WL 7501355 (S.D. Miss. Oct. 13, 2022) (insurance). Motion to compel granted. The application for insurance signed by plaintiff did not contain an arbitration clause. Because plaintiff paid the premiums on the insurance policy that contained the arbitration agreement, the lack of a signature on that term is immaterial as it was accepted by performance. The arbitration agreement in the insurance policy was not substantively or procedurally unconscionable under Mississippi law.

Lowery v. Republic Fin., LLC, No. 3:22-CV-578-DPJ-FKB, 2022 WL 15321217 (S.D. Miss. Oct. 26, 2022) (insurance). Motion to compel granted.

Vollmering v. Assaggio Honolulu, LLC, No. 2:22-CV-00002, 2022 WL 6246881 (S.D. Tex. Sept. 17, 2022) (Neurock, Mag. J.), report and recommendation adopted, 2022 WL 6250679 (Oct. 6, 2022) (FLSA). Motion to compel granted in part and denied in part. Staffing company was entitled to enforce arbitration agreement even though the agreement identified it by its tradename. Client of

the staffing company was entitled to enforce the arbitration agreement as a third-party beneficiary. The agreement provided for arbitration of disputes between [the staffing company] and/or your assigned client company.” The motion to compel was denied as to a member of the client, a limited liability company, as she was not a third-party beneficiary and had waived intertwined claims estoppel.

Michael v. Opportunity Fin., LLC, No. 1:22-CV-00529-LY, 2022 WL 14049645 (W.D. Tex. Oct. 24, 2022) (Hightower, Mag. J.) (lending). Motion to compel granted. Under Texas law, an arbitration agreement that prohibits statutory remedies is substantively unconscionable and therefore void. An arbitration agreement covering statutory claims is valid so long as the arbitration agreement does not waive the substantive rights and remedies the statute affords and the arbitration procedures are fair, such that the party may effectively vindicate the statutory rights.

Other Arbitration-Related Issues

Doe v. Tonti Mgmt. Co., LLC, No. CV 20-2466, 2022 WL 16529537, (E.D. La. Oct. 28, 2022) (Louisiana Equal Housing Opportunity Act). Injunctive relief denied. Plaintiff’s action against her landlord had been ordered to arbitration. Subsequently, the State of Louisiana brought an action against the landlord. An order compelling arbitration is a final decision that qualifies as a ‘judgment’ under the Anti-Injunction Act.” A federal court may enjoin state litigation clearly in violation of an order compelling arbitration. The court would not prevent the State from proceeding with a lawsuit on the basis of an arbitration agreement that the State never signed.

Kronlage Family Ltd. Partnerships v. Indep. Specialty Ins. Co., No. CV 22-1013, 2022 WL 10453007 (E.D. La. Oct. 18, 2022) (insurance). Defendants removed this matter from state court arguing that the insurance policy was covered by the New York Convention and that argument was sustained by the court in denying a motion to remand. The court also denied a motion to invalidate the arbitration clause. Plaintiff then sought to dismiss the foreign underwriters and planned to seek reconsideration of the motion to remand. The court denied the motion to dismiss the foreign underwriters holding: “[T]his is an effort ‘purposefully designed to prejudice [the domestic underwriter]’ by depriving it of the benefits of an arbitration provision to which Plaintiff agreed. The Court cannot grant a motion for voluntary dismissal driven by such transparently improper motives.”

Anders Constr., Inc. v. Westfield Ins. Co., No. 1:22-CV-56-DMB-DAS, 2022 WL 11902190 (N.D. Miss. Oct. 20, 2022) (construction). Litigation stayed pending resolution of related arbitration. Because the outcome of the arbitration between subcontractor and contractor would determine payment bond issuer’s liability to the subcontractor, it was judicially efficient to stay the litigation pending the outcome of the arbitration.