

Arbitration in the Fifth - September 2022

October 11, 2022 Odean Volker

PRACTICES Litigation

During September 2022, the courts of the Fifth Circuit saw a mix of motions to compel in employment-related cases. The Northern District of Texas considered a forum non conveniens challenge to a confirmation action and the Eastern District of Louisiana identified another use for “look through” jurisdiction – assessing personal jurisdiction in a proceeding to confirm a New York Convention Award.

Opinions of United States District Courts

Motions to Compel Arbitration

Ortiguerra v. Grand Isle Shipyard, LLC, No. CV 22-309, 2022 WL 4465511 (E.D. La. Sept. 26, 2022) (FLSA, Trafficking Victims Protection Act (TVPA) and Fair Housing Act (FHA)). Motion to compel granted as to FLSA claims only. Filipino workers’ employment contracts incorporated standard terms, including an agreement to arbitrate employment claims in the Philippines. The “narrow form” clause in the arbitration agreement covered claims “arising from” employment and did not cover the TVPA or FHA claims.

Dow v. Keller Williams Realty, Inc., No. 4:21-CV-1209-P, 2022 WL 4009047 (N.D. Tex. Sept. 2, 2022) (employment). Motion to compel granted as to signatory. In determining whether to compel arbitration, a court must decide (1) whether a valid arbitration agreement between the parties exists and, if so, (2) whether the dispute falls within the arbitration agreement’s scope. When a court decides the existence of an arbitration agreement, it necessarily decides its enforceability between parties. After the movant produces competent evidence showing the formation of an agreement to arbitrate, the party resisting arbitration must produce some contrary evidence to put the matter in issue. When a signatory movant seeks to bind nonsignatories, this first step is more involved. The court must determine whether a written arbitration provision exists that is made enforceable against, or for the benefit of, a third party under state contract law. If a valid arbitration agreement is found to exist and it has no delegation clause, courts proceed to the second step.

Noel v. Paul, No. 3:21-CV-2485-B, 2022 WL 4125216 (N.D. Tex. Sept. 9, 2022) (sports). Motion to compel granted. Deciding a motion to compel is a two-step process. First, the court asks whether there is a valid agreement to arbitrate and, second, whether the current dispute falls within the scope of a valid agreement. In the first step, the Court must decide whether, under applicable state law, there is any agreement to arbitrate any set of claims. Where a nonsignatory to an arbitration agreement seeks to compel arbitration, the court must also determine whether the arbitration provision is enforceable by the nonsignatory under state law.

Johnson v. Houston KP, LLC, No. 4:20-CV-663, 2022 WL 4543191 (S.D. Tex. Sept. 28, 2022) (FLSA). Motion to compel granted. Arbitration is a matter of contract. Courts must rigorously enforce arbitration agreements according to their terms. As with any other contract, the parties’ intentions control. Those intentions are generously construed in favor of arbitrability. The question of whether to compel arbitration does not involve subject matter jurisdiction. Unlike subject matter jurisdiction, a party can waive a right to compel arbitration.

Johnson v. Houston KP, LLC, No. 4:20-CV-663, 2022 WL 4543193 (S.D. Tex. Sept. 28, 2022) (FLSA). Motion to compel denied. Affidavit describing employer's hiring practice did not constitute clear and convincing evidence that the parties agreed to arbitrate.

Lynch v. Tesla, Inc., No. 1:22-CV-00597-RP, 2022 WL 4476783 (W.D. Tex. Sept. 26, 2022) (Hightower, Mag. J.) (Worker Adjustment and Retraining Notification (WARN) Act). Motion to compel granted. The incorporation of the JAMS rules was clear and unmistakable delegation. Unconscionability claims concerning enforceability were for the arbitrator to decide. In determining whether a challenge is to formation itself or to subsequent enforcement, courts should apply state law principles of contract.

Motion to Confirm or Vacate

Sprint Corp. v. Shichinin, LLC, No. 3:21-CV-2308-N, 2022 WL 4360872 (N.D. Tex. Sept. 20, 2022) (LLC member dispute). Award confirmed. Arbitration was conducted in Dallas, Texas. In a motion to compel arbitration filed in Hawaii state court, movant was alleged to have relied on the Hawaii Arbitration Act and it was argued it should not be allowed to rely on the Federal Arbitration Act in the post-arbitration litigation. The limited liability company agreement provided that the "arbitrators shall be governed by the United States Arbitration Act, 9 U.S.C. Sections 1-16." The court applied the Federal Arbitration Act. In assessing the public and private interest factors under the doctrine of *forum non conveniens*, the court considered the Texas-seated arbitration, and not the underlying dispute. Evident partiality was not shown by 1) JAMS's failure to state that it is for-profit; 2) multiple appearances by opposing counsel or its client in JAMS administers arbitrations; 3) a former attorney with opposing counsel's firm joining JAMS prior to the start of the arbitration; 4) judicial campaign contribution made in 2006 to tribunal chair. Claim that arbitrators lacked subject matter expertise "cannot amount to evident partiality."

Merrill, Lynch, Pierce, Fenner & Smith Inc. v. Palombo, No. 4:21-CV-4256, 2022 WL 4751258 (S.D. Tex. Sept. 30, 2022) (employment). Award confirmed. To succeed on an objection that the panel refused to postpone a hearing in violation of 9 U.S.C. § 10(a)(3), the movant must establish that there was no reasonable basis for the panel's refusal to postpone the hearing and that the movant suffered prejudice because of that refusal. An award of relief based on the parties' contract is not reviewable under Section 10(a)(4) if the panel at least arguably interpreted the contract. Describing a statement made in an opponent's pleadings as an undisputed fact is not "fraud" within the meaning of Section 10(a)(1).

Other Arbitration-Related Issues

Conti 11. Container Schiffarts-GmbH & Co. KG M.S. "MSC FLAMINIA" v. MSC Mediterranean Shipping Co. S.A., No. CV 22-1114, 2022 WL 4094155 (E.D. La. Sept. 7, 2022) (maritime). Motion to dismiss for lack of personal jurisdiction denied. A federal court, in determining whether it has personal jurisdiction to decide an application to confirm a New York Convention award, may "look through" the application to the underlying substantive controversy between the parties.

Lynch v. Tesla, Inc., No. 1:22-CV-00597-RP, 2022 WL 4295295 (W.D. Tex. Sept. 16, 2022) (Hightower, Mag. J.) (WARN Act). Based on its equitable powers to preserve the status quo, a district court can grant preliminary relief before deciding whether to compel arbitration where a request for preliminary injunction is filed before a motion to compel arbitration.