Arbitration in the Fifth - July 2020

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What July lacked in arbitration-related opinions, it made up for in noteworthy analysis. The Fifth Circuit considered objections to a Panama Convention award in Vantage Deepwater Co. v. Petrobras Am. The Northern District reconsidered Forby v. One Techs., LP and on the same day, different judges in the Western District of Texas addressed allegations of forgery. Banuelos v. Alorica, Inc. and Acosta v. Odle Mgmt. Group, LLC recite similar allegations, but reach very different results. Finally, the Southern District of Texas addressed a matter of topical interest - assessing the scope of a delegation clause – in J2 Res., LLC v. Wood River Pipe Lines, LLC.

Is it any less a cliffhanger if the show gets canceled?

In our March report, we suggested that the Fifth Circuit had given a clue to the outcome of the then recently filed appeal of *Forby v. One Techs., LP*, No. 3:16-CV-856-L, 2020 WL 132310 (N.D. Tex. Jan. 13, 2020). An issue in *Forby* was whether the plaintiff, with regard to whom the defendants had waived arbitration, could bring her claim on behalf of a class. We suggested that *Cruson v. Jackson Nat'l Life Ins. Co.*, 18-40605, 2020 WL 1443531(5th Cir. Mar. 25, 2020) foreshadowed the outcome of the *Forby* appeal. *Cruson* held that a defendant that had not asserted a personal jurisdiction defense in response to a named plaintiff's claim was not barred from asserting that defense to non-Texas class members. *Cruson's* relevance to the *Forby* appeal was its reliance on *In re Checking Account Overdraft Litigation*, 780 F.3d 1031 (11th Cir. 2015). That case addressed whether a defendant, who had waived arbitration against named plaintiffs prior to class certification, was precluded from compelling arbitration of claims by the unnamed putative class members. *In re Checking Account* held that there was no justiciable controversy between the defendant and the unnamed putative class members, who were not yet before the court.

Relying on *Cruson's* adoption of *In re Checking Account*, the district court reconsidered *Forby*, and granted defendants' motion to strike plaintiff's class action allegations. The court held: "[T]hat Defendants waived their right to compel Plaintiff to arbitrate her claims has no bearing on whether they can compel the absent class members. Further, the court determines that whether Defendants can compel arbitration as to the absent class members must be determined on a case-by-case basis." *Forby v. One Techs.*, LP, No. 3:16-CV-856-L, 2020 WL 4201604 * 8 (N.D. Tex. July 22, 2020).

Opinion of the Fifth Circuit

S J Associated Pathologists, P.L.L.C. v. Cigna Healthcare of Tex., Inc., 964 F.3d 369 (5th Cir. 2020). Order compelling arbitration vacated for lack of jurisdiction. In a case that had been removed from state court, the plaintiff voluntarily dismissed the claims that formed the basis for federal question jurisdiction. The remaining claims did not satisfy the requirements of supplemental jurisdiction. Therefore, the district court should have remanded the case, and its order compelling arbitration of the remaining claims was vacated.

Casey v. Reinhart Foodservice La. L.L.C., 19-60746, 2020 WL 370789 (5th Cir. July 6, 2020) (per curiam). Order compelling arbitration affirmed. Employee was required to sign an arbitration

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agreement after commencing employment. Allegations did not support plausible inference that the arbitration agreement was procured by fraud. Under Mississippi law unconscionability challenge goes to whether the arbitration agreement should be enforced and is for the arbitrator to decide. Constitutional due process argument that arbitrators have a financial incentive to decide in favor or arbitrability rejected.

Williams v. Cmty. Bank, 19-60595, 2020 WL 4036466 (5th Cir. July 16, 2020) (per curiam). Order compelling arbitration affirmed. Arbitration agreement is valid, irrevocable, and enforceable without mention of the validity of the contract in which it is contained except that the arbitration agreement may be invalidated by generally applicable contract defenses. Agreement entitling the victor in arbitration to recover fees from the losing party in not substantively unconscionable under Mississippi law.

Vantage Deepwater Co. v. Petrobras Am., *Inc.,* 19-20435, 2020 WL 4013358 (5th Cir. July 16, 2020). Order confirming award affirmed. Relying on Article V(2)(b) of the Panama Convention, appellant argued that the contract was procured through bribery and therefore enforcement would violate public policy. Ratification of the contract obviated the public policy concern, and the court would not question arbitrators' finding that the contract was ratified. Attempt to depose the dissenting arbitrator violated American Arbitration Association Rule 52(e). The Rules, once incorporated, "are treated the same as any other contractual provision." District court's refusal to allow leave to subpoena the American Arbitration Association also affirmed. Section 10(a)(4) objection that, as to one party, the award was not reasoned failed because the award, as to that party, satisfied the standard for a reasoned award – it was "more than a simple result."

Opinions by United States District Courts

Motions to Compel Arbitration

Hanna v. Ivy Funding Co., LLC, 3:20-CV-231-L, 2020 WL 4220445 (N.D. Tex. July 23, 2020). Motion to compel granted as to one party and denied as to another. Non-signatory had the contractual right to enforce the agreement but could not be compelled to arbitrate.

Banuelos v. Alorica, Inc., EP-20-CV-65-DB, 2020 WL 4060781 (W.D. Tex. July 20, 2020) (Briones, J.) Motion to compel granted. In order to disavow a signature on an arbitration agreement, the party resisting arbitration bears the initial burden to create a validity fact issue. Some evidence must be produced to substantiate the claim of forgery. Plaintiff's disavowal of his signature and claim that he was not present on the date the arbitration agreement was signed, without any corroborating evidence, is insufficient to create a fact issue. An employee who receives notice of an employer's arbitration policy and continues working with knowledge of the policy accepts the terms as a matter of law.

Acosta v. Odle Mgmt. Group, LLC, EP-19-CV-265-PRM, 2020 WL 4060782 (W.D. Tex. July 20, 2020) (Martinez, J.). Jury trial granted to determine fact issues of (1) the date plaintiff began his employment with defendant and (2) the authenticity of plaintiff's signature on the arbitration agreement. The arbitration agreement recited that the defendant's agreeing to consider the employment application was consideration for the agreement. Plaintiff argued that the arbitration agreement, dated April 3, 2017, was invalid because he started work a year earlier, agreement, lacked consideration and his signature was a forgery. Plaintiff's affidavit indicated that he started work on May 1, 2016, and that he did not sign the arbitration agreement. Defendant relied on an signed employment application dated on April 3, 2017, notes from an interview on April 10, 2017, and drug screening and background investigation forms signed by plaintiff on April 3, 2017. The

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court held: “Plaintiff's claim stands in contrast to the voluminous evidence submitted by Defendant that demonstrates Plaintiff began his employment on or about May 1, 2017. Nevertheless, the Court is of the opinion that Plaintiff's affidavit serves as ‘some evidence’ that supports Plaintiff's position that he began employment on May 1, 2016.”

Motion to Confirm/Vacate Award

Trogel v. Performance Energy Servs., LLC, CV 18-1051-JWD-EWD, 2020 WL 4370881(M.D. La. July 30, 2020). Motion to vacate denied and motion to confirm granted except that recovery of attorneys’ fees for the enforcement action were denied. Objections under section 10(a)(3) and 10(a)(4) rejected. Argument was framed as exceeding authority but was “in essence” an error of law objection. Though attorneys’ fees were not available under Louisiana law, award of fees was allowed based on Arbitration Association Rule 47(d). Motion to modify the award under section 11(a) rejected.

Taboada v. AmFirst Ins. Co., 3:18-CV-883-TSL-RHW, 2020 WL 4275823 (S.D. Miss. July 24, 2020). Motion to vacate denied and award confirmed. In reviewing whether an arbitrator has exceeded his authority, an arbitrator's decision must be sustained as long as the award draws its essence from the contract.

Other Arbitration-Related Issues

Charro Boring, Inc. v. Phila. Indem. Ins. Co., 4:19-CV-0653-KPJ, 2020 WL 4284928 (E.D. Tex. July 27, 2020). Motion for summary judgment on limitations defense granted. Filing of an arbitration demand does not toll the statute of limitations. Moderate participation toward a possible resolution of an arbitration was not active inducement to avoid limitations.

Pershing LLC v. Fulcrum Capital Holdings LLC, 1:20-CV-587-RP, 2020 WL 3883256 (W.D. Tex. July 9, 2020). Preliminary injunction prohibiting arbitration granted. Assignment agreement did not include an assignment of the assignors’ agreement that contained the arbitration clause.

J2 Res., LLC v. Wood River Pipe Lines, LLC, 4:20-CV-2161, 2020 WL 4227424 (S.D. Tex. July 23, 2020). Emergency motion for preliminary injunction and to stay arbitration granted. Court may determine the scope of a delegation clause. Delegation is shown by the parties’ clear and unmistakable intent. Delegation here was by virtue of incorporation of the American Arbitration Association Rules. However, the incorporation of the AAA’s Rules for some claims did not end the inquiry into whether the claims sought to be compelled to arbitration were covered by that delegation clause. The placement of language limiting the delegation clause can be dispositive in analyzing the clause’s scope.

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