

Arbitration in the Fifth - April 2020

May 8, 2020 Odean Volker

PRACTICES Litigation

The Fifth Circuit Court of Appeals was busy in April releasing arbitration-related opinions with something for almost everyone. Opinions included guidance on removal, a reminder on drafting a defensible award and discussion of arbitrator liability. The Fifth Circuit also issued OJSC Ukrnafta v. Carpatsky Petroleum Corp. which includes consideration of New York Convention Article V(1)(a), likely the least often addressed of any Article V objections.

“Snap removal” and Section 205 removal: Guidance on removal of cases to federal court.

Texas Brine Co., L.L.C. v. Am. Arbitration Ass’n, Inc., 955 F.3d 482 (5th Cir. 2020), addressed arbitrator liability (see below), but also endorsed “snap removal.” Snap removal occurs when a non-resident (a/k/a non-forum) defendant removes a case in which a forum defendant has been named, but not yet served. In diversity cases, the forum-defendant rule prevents removal of an action that is otherwise removable solely on the basis of diversity jurisdiction if any of the properly joined and served defendants is a citizen of the state in which such action is brought. Left open was the question of whether the forum-defendant rule prohibits a non-forum defendant from removing an action before the forum defendant is served. Under *Texas Brine*, the rule does not prohibit such a “snap removal.” *Texas Brine*, 955 F.3d at 485-87.

Of course, where an action “relates to an arbitration agreement or award” falling under the New York Convention, the substantive and procedural requirements of diversity removal do not control. In *OJSC Ukrnafta v. Carpatsky Petroleum Corp.*, 19-20011, 2020 WL 2027817 (5th Cir. April 27, 2020), the court reminded parties that the “relates to” standard of Section 205 of the FAA is a low bar. A conceivable connection to an arbitration agreement is sufficient. The jurisdictional and merits inquiries separated, so removal to federal court may thus be proper even when it turns out there is no arbitration agreement. *OJSC Ukrnafta*, 2020 WL 2027817 at *3.

Arbitrator Liability: The Federal Arbitration Act as the exclusive remedy for matters it is intended to address.

In *Texas Brine*, a party sued two arbitrators and an arbitral institution seeking recovery for alleged “intentional and wrongful fraudulent conduct in connection with the arbitration proceedings.” The party had been unsuccessful in seeking removal of two arbitrators, one of whom was later removed. The party renewed the motion to remove one arbitrator, and a day later both remaining arbitrators resigned. A Louisiana state court vacated all of the disbanded panel’s rulings on contested issues pursuant to 9 U.S.C. 10(a)(2). *Texas Brine* affirmed the dismissal of the claims against the arbitrators and institution on the basis that the claims sought to remedy an alleged wrongdoing that Section 10 of the FAA was meant to address and for which Section 10 is the exclusive remedy. *Texas Brine*, however, declined to reach the question of the legitimacy of arbitral immunity. *Texas Brine*, 955 F.3d at 487-99.

OJCS Ukrnafta v. Carpatsky Petroleum Corp., New York Convention Article V(1)(a) and notable other observations.

Our survey of U.S. federal court opinions from 2010 to 2015 found Article V(1)(a) to be the least often addressed Article V objection during that period. *OJCS Ukrnafta* adds to that sparse jurisprudence in its consideration of a Swedish award arising from a Ukrainian law agreement and involving Delaware corporate law. The Swedish courts confirmed the award, but the Ukrainian courts determined that there was no agreement due to capacity issues related to a change of corporate domicile by Carpatsky Petroleum. Recognizing the primary and secondary jurisdictional framework of the New York Convention, *OJCS Ukrnafta* limited its inquiry to the Article V objections. Article V(1)(a), allows a court to deny recognition when the parties to the arbitration agreement were, “under the law applicable to them, under some incapacity, or the said agreement is not valid under the law to which the parties have subjected it or, failing any indication thereon, under the law of the country where the award was made.” Article V(1)(a) extends to issues related to capacity, existence, and validity of the arbitration agreement. The “law applicable to the party” on a capacity question is the law of its domicile. *OJSC Ukrnafta*’s objections related to the use of a corporate seal and re-domicile of Carpatsky Petroleum were rejected applying Delaware law. Equally important, *OJCS Ukrnafta* shows that an Article V(1)(a) objection is relatively easy to waive. *OJSC Ukrnafta v. Carpatsky Petroleum Corp.*, 19-20011, 2020 WL 2027817, *5-6 (5th Cir. Apr. 27, 2020) (relying heavily on GARY B. BORN, *INTERNATIONAL COMMERCIAL ARBITRATION* (2d ed. 2014).

Other notable observations from *OJSC Ukrnafta* include:

- A factfinder is not limited to the parties’ damages calculations. It does not violate due process for a factfinder to calculate its own damages. Whether a damages ruling should stand is a merits question, not a process one. Objection under Article V(1)(b) rejected.
- Arbitral decisions may have preclusive effect as long as the proceeding affords basic elements of adjudicatory procedure. State law claims that could have been asserted in the arbitration dismissed.
- Manifest disregard rejected as a nonstatutory basis for nonrecognition of international arbitration awards including for the reason that a secondary jurisdiction may not second guess the merits ruling of a tribunal.

Other Opinions of the Fifth Circuit

Bowles v. OneMain Fin. Group, L.L.C., 954 F.3d 722 (5th Cir. 2020). Order granting motion to compel arbitration affirmed. The delegation clause that provided: “any legal dispute ... arising out of, relating to, or concerning the validity, enforceability or breach of this Agreement, shall be resolved by final and binding arbitration” was sufficient to require that the arbitrator decide the unconscionability challenge.

OJSC Ukrnafta v. Carpatsky Petroleum Corp., 19-20011, 2020 WL 2027817 (5th Cir. Apr. 27, 2020) superseding 955 F.3d 465. Order confirming award affirmed. Objections under Articles V(1)(a), (b), (c), (d), (2)(b) and manifest disregard also rejected.

Texas Brine Co., L.L.C. v. Am. Arbitration Ass’n, Inc., 955 F.3d 482 (5th Cir. 2020). Dismissal of claim against arbitral institution and arbitrators affirmed. Claim alleging wrongdoing that would justify vacatur is a sign of a collateral attack on an arbitration award.

Sun Coast Res., Inc. v. Conrad, 956 F.3d 335 (5th Cir. 2020). Order confirming “clause construction award” affirmed. Refusal to vacate the award under Section 10(a)(4) is proper if the award has some basis in the arbitration agreement. The correctness of the arbitrator’s interpretation is irrelevant so long as it was an interpretation.

Patel v. Regions Bank, 19-30582, 2020 WL 1933949 (5th Cir. Apr. 21, 2020) (per curiam). Order denying motion to compel as to non-signatory affirmed. Neither Alabama's equitable estoppel theory nor its third-party beneficiary status theory applied to compel the non-signatory.

O'Shaughnessy v. Young Living Essential Oils, L.C., 19-51169, 2020 WL 2078368 (5th Cir. Apr. 28, 2020) (per curiam). Order denying motion to compel arbitration affirmed. As there were multiple agreements with conflicting provisions that could not be harmonized, there was no meeting of the minds with respect to arbitration.

Opinions by United States District Courts

Motion to Compel Arbitration

Dunn v. JPMorgan Chase Bank, N.A., CV 20-483, 2020 WL 1984328 (E.D. La. Apr. 27, 2020). Motion to compel granted. Under Louisiana law, the incorporation of an arbitration clause by reference to another written contract may evidence the parties' intent to arbitrate as long as the clause in the contract referred to has a reasonably clear and ascertainable meaning.

BLW Motors, LLC v. Vicksburg Ford Lincoln Mercury, Inc., 3:19-CV-577-DPJ-FKB, 2020 WL 1584402 (S.D. Miss. Apr. 1, 2020). Motion to compel granted as to signatory's claims against a signatory and denied as to non-signatory's claim against a non-signatory.

Insight Inv., LLC v. Icon Constr., Inc., 418CV00531ALMKPJ, 2020 WL 1872383 (E.D. Tex. Apr. 15, 2020). Motion to compel non-signatory denied. Though non-signatory had taken assignment of a contract containing the arbitration agreement, it did not assert claims under that contract.

Home Care Providers v. Blue Cross & Blue Shield, 3:19-CV-1680-N, 2020 WL 1819984 (N.D. Tex. Apr. 10, 2020). Motion to compel granted. Clause requiring mediation as a condition precedent to arbitration does not undermine a mandatory arbitration provision. It is for the arbitrator to determine whether the condition has been satisfied.

Parrott v. D.C.G., Inc., 3:19-CV-1718-N, 2020 WL 1876096 (N.D. Tex. Apr. 14, 2020). Motion to compel granted. Arbitration agreement as written violated the statutory provision for an award of attorneys' fees under the FLSA. The attorneys' fees provision was severed from the contract as non-essential. Arbitration agreement may be unconscionable if it imposes substantial costs on one of the parties such that it prevents vindicating statutory rights; however, the contesting party must prove the likelihood that it will incur prohibitive costs.

ExxonMobil Canada Holdings ULC v. Lasco Dev. LLC, CV H-19-1471, 2020 WL 1667319 (S.D. Tex. Apr. 3, 2020). Motion to compel granted. Non-signatory cannot claim an interest under a contract, but then deny being bound by the contract's arbitration clause. Personal jurisdiction over a party exists where it agreed to arbitrate in the forum.

Almoudheji v. Automobiles of Sw. Houston, LP, 4:19-CV-01425, 2020 WL 1987492 (S.D. Tex. Apr. 24, 2020). Motion to compel granted. Provision of arbitration agreement that violated FLSA provision regarding award of attorneys' fees severed. Defendant's agreement to pay arbitration costs mooted plaintiff's claim that arbitration agreement imposed prohibitive costs.

Williams v. Fidelity Warranty Serv., Inc., H-19-1537, 2020 WL 2086655 (S.D. Tex. Apr. 30, 2020). Motion to compel granted. Defendant did not waive arbitration.

Trujillo v. Volt Mgmt. Corp., EP-19-CV-00337-DCG, 2020 WL 1906097 (W.D. Tex. Apr. 17, 2020). Motion to compel granted. All parties ordered to arbitration based on the Fifth Circuit's *Erie* guess that Texas would adopt the intertwined claims estoppel theory.

Motion to Confirm/Vacate Arbitration Award

Elder v. Albertson's, LLC, 3:19-CV-2464-K, 2020 WL 2042343 (N.D. Tex. Apr. 28, 2020). Motion to confirm granted and motion to vacate denied. Arbitrator drew his decision from the “essence of the contract” and reached a decision “grounded in fact and reason” and therefore did not exceed his powers.

Alvarez v. Rosas, CV H-18-4646, 2020 WL 2061491 (S.D. Tex. Apr. 29, 2020). Motion to vacate denied. Plaintiff lacked standing to bring this claim as plaintiff was not the party against whom the award was entered.

Motions in Litigation Related to Prior Arbitration

John C. Nelson Constr., LLC v. Britt, Peters & Assoc., Inc., 2:18-CV-222-KS-MTP, 2020 WL 2027218 (S.D. Miss. Apr. 27, 2020). Motion for summary judgment relying on preclusive effect of arbitration award denied. Arbitral proceedings can have preclusive effect, though the district court has broad discretion to decide whether to apply the doctrine.