Arbitration in the Fifth - December 2020

January 11, 2021 Odean Volker

PRACTICES Litigation

As a consequence of the global COVID-19 pandemic, remote arbitration hearings have become the norm. In December 2020, the Southern District of Texas had two occasions to recognize remote hearings. Bonita Fils v. Internet Referral Servs, LLC discounted the argument that out-of-state arbitration would be cost prohibitive because the proceeding likely would be conducted by submission or by remote hearing. Taking remote hearings on directly, Sullivan v. Feldman considered whether the requirement that an arbitration be "conducted in Houston" was satisfied when the arbitrator was sitting in Louisiana but virtually appearing in Houston.

> **Remote hearings? Does an arbitration agreement's selection of a place where the arbitration will be conducted require the arbitrators to be physically present in that city?**

Sullivan v. Feldman, CV H-20-2236, 2020 WL 7129879 (S.D. Tex. Dec. 4, 2020) is one of the first COVID-19 era decisions within the Fifth Circuit to consider the impact of technology on the place of arbitration. Rather than giving a one-size-fits-all answer, *Sullivan* explains who decides and what guides that decision.

Sullivan was confronted with a dispute involving 21 parties across six different arbitrations in front six different arbitrators. The arbitrators in two of the arbitrations are located in Houston, Texas, and in the other three they are located in New Orleans, Louisiana. In relevant part, the parties' arbitration agreement provided that all arbitrations "shall be conducted in Houston, Texas applying Texas substantive law pursuant to the Commercial Arbitration Rules ... of the American Arbitration Association." Among the motions decided in *Sullivan* was a motion to stay the arbitrations before Louisiana arbitrators because, it was argued, those proceedings are in an improper venue.

In taking on the question of where to arbitrate, *Sullivan* acknowledged that there are examples of courts enjoining arbitral proceedings that were being conducted in a location clearly foreclosed by the parties' forum selection clause. The general rule, however, is that determining the place of the arbitration is procedural and therefore to be decided by the arbitrator. Consistent with the general rule, the American Arbitration Association Commercial Rules applicable to the *Sullivan* parties' dispute authorize the arbitrator to determine locale when an arbitration agreement is ambiguous. *Sullivan* also found that the application of the forum-selection language in the parties' agreement was a dispute arising under that agreement and therefore within the scope of the arbitration clause.

The arbitration clause in *Sullivan* was clear that the arbitration should be "conducted in Houston," but the court determine that it was unclear as to whether that meant all interim hearings or only the final hearing. Likewise, the agreement was unclear whether and how the arbitrators could use technology to meet that forum requirement. In *Sullivan*, both questions, the scope of the forum selection and manner of appearing in Houston, were procedural questions for the arbitrator. *Sullivan* reasoned that the arbitrations pending before Louisiana arbitrators were not necessarily "taking place outside Houston, Texas." While interim orders had been issued "from Louisiana," the orders required document inspection in Houston. The arbitrators had not required the parties to

© 2026 Haynes Boone

travel to Louisiana, but instead they had heard disputes virtually. Finally, in a holding germane to current practices in arbitration, *Sullivan* held that the parties' arbitration agreement "does not appear to prohibit arbitrators from sitting in Louisiana but virtually appearing in Houston."

Opinions of the Fifth Circuit

Union Pac. R.R. Co. v. Am. Ry. & Airway Supervisors' Ass'n, 18-50110, 2020 WL 7391894 (5th Cir. Dec. 16, 2020) (per curiam) (labor arbitration). Order vacating arbitration reversed. Exceedingly narrow, judicially created exception for public policy concerns may justify vacating an award arising from collective bargaining agreement arbitration. Public policy must be well defined and dominant and is to be ascertained by reference to the laws and legal precedents. The relevant point of inquiry is whether the ultimate arbitration award violates public policy. Courts should be particularly chary when divining public policy where two political branches have created a detailed regulatory regime in a specific field.

Opinions of United States District Courts

Motions to Compel Arbitration

Morel v. U.S. Xpress, Inc., CV 20-1348-WBV-JVM, 2020 WL 7318081 (E.D. La. Dec. 11, 2020) (employment). Motion to compel granted.

1010 Common, LLC v. Certain Underwriters at Lloyd's, London, CV 20-2326, 2020 WL 7342752 (E.D. La. Dec. 14, 2020) (insurance). Motion to compel granted. Citizenship of Names under a Lloyds insurance policy who are not made parties to a suit should not be considered to determine removability under 9 U.S.C. § 202. Where at least one party is not a U.S. citizen, arbitration clause falls under the New York Convention. McCarran-Ferguson Act's delegation of insurance regulation to a state does not apply to insurance contracts subject to the New York Convention. Service of suit endorsement did not waive removal rights or override the arbitration agreement.

Executive Strategies Corp. v. Sabre Indus. Inc., CV 20-1067, 2020 WL 7213002 (W.D. La. Dec. 7, 2020) (contract). Motion to compel granted. Agreement contained forum selection and arbitration clauses. Clauses were not in conflict as their differing scopes suggested the parties intended the forum selection clause to apply only in the event of a non-arbitrable dispute. Incorporation of American Arbitration Association rules is generally clear an unmistakable evidence of a delegation clause. clearly delegated the question of arbitrability to the arbitrator.

Byars v. Asbury Mgmt. Servs., LLC, 3:19-CV-660-CWR-JCG, 2020 WL 7205356 (S.D. Miss. Dec. 7, 2020) (employment). Motion to compel denied. Employee signed the arbitration agreement. but not employer did not. The agreement contained "express language clearly indicat[ing] an intent for the parties to be bound to the arbitration agreement by signing."

Berry v. PreCC, Inc., 3:19-CV-00440-X, 2020 WL 7259277 (N.D. Tex. Dec. 9, 2020) (FLSA). Motion to compel granted as some plaintiffs, denied as to some and others require a trial to determine whether others and jury trial required to determine whether other set for jury trial to determine existence of an agreement. Under Illinois and Texas law, notice of an arbitration policy and continued work is acceptance of that agreement. A court must hold a trial on the existence of an arbitration agreement if a party unequivocally denies that the party agreed to arbitrate and produces some evidence supporting that position. Unless the contracts choice of law provision expressly references state arbitration law, it does not supplant the application of the Federal Arbitration Act in favor of state arbitration law.

© 2026 Haynes Boone

Kalenga v. Irving Holdings, Inc., 3:19-CV-1969-S, 2020 WL 7496208 (N.D. Tex. Dec. 20, 2020) (FLSA). Motion to compel granted. Initial plaintiffs did not enter arbitration agreements. Motion to compel was filed as to opt-in plaintiffs. Arbitration agreements purported to amend an agreement that had been superseded by another agreement. Parties' intentions indicated they intended to modify the superseding agreement. An amendment of the superseding agreement was required to be in writing and signed. Employer did not sign but manifested its intent to be bound by its actions. Failure to include commencement date in agreement did not make it indefinite. The arbitration agreements signed by the opt-in plaintiffs were valid notwithstanding that they were executed after plaintiffs initiated the lawsuit.

Freeman v. Am. Credit Acceptance, LLC, 4:20-CV-01211-P-BP, 2020 WL 7974294 (N.D. Tex. Dec. 31, 2020) (Ray, Mag. J.) (Fair Credit Reporting Act). Motion to compel granted. The party claiming forgery on an arbitration agreement "bears the initial burden of production" to create a fact issue on the validity of the agreement. It cannot simply declare the agreement invalid and demand a jury trial

Townley v. Brunel Energy, Inc., 4:20-CV-03115, 2020 WL 7342677 (S.D. Tex. Dec. 14, 2020) (FLSA). Motion to compel granted. Argument that an arbitration agreement is illusory is a challenge to the validity, not the formation or existence, of the arbitration agreement. Express adoption of American Arbitration Association presents clear and unmistakable evidence that the parties agreed to arbitrate arbitrability.

Bonita Fils v. Internet Referral Servs, LLC, 4:20-CV-2134, 2020 WL 7770935 (S.D. Tex. Dec. 29, 2020) (online ticket sales). Motion to compel granted. Illinois law allows parties to retain a right to unilaterally modify an arbitration agreement. Arbitration agreement was not invalid under Illinois law because it was contained in terms and conditions acknowledged by ticking a box on seller's website. Claim that arbitration in Chicago was cost prohibitive discounted by likelihood arbitration would be conducted remotely or by submission.

Motions to Confirm/Vacate

Illinois Cent. R.R. Co. v. Bhd. of Locomotive Engineers & Trainmen, CV 20-1717, 2020 WL 7129883, (E.D. La. Dec. 4, 2020) (labor arbitration). Award confirmed. Court may refuse to enforce an arbitration award under a collective-bargaining agreement if the award runs contrary to public policy.

Haljohn – San Antonio, Inc. v. Ramos, 3:20-CV-01140-X, 2020 WL 7495098 (N.D. Tex. Dec. 21, 2020) (employee personal injury). Motion to confirm granted and to vacate denied. The claim was initially filed in Bexar County state court where it was referred to arbitration and stayed. The arbitration took place in Dallas, Texas, and the confirmation proceeding was filed in the Northern District of Texas. After considering the *Colorado River Water Conservation Dist. v. United States*, 424 U.S. 800, 818–19 (1976) factors, the court exercised jurisdiction over the confirmation proceeding. The motion to vacate was time barred.

Sullivan v. Feldman, CV H-20-2236, 2020 WL 7129879 (S.D. Tex. Dec. 4, 2020) (alleged legal malpractice). Motion to confirm award denied for lack of jurisdiction. A district court may not stay an arbitration simply to prevent piecemeal resolution of the dispute. Court declined to exercise jurisdiction over motion to confirm award as the court's prior order related to arbitrator's appointment was on appeal.

Miniex v. The Law Office of E. Sharon Thorton, LLC, CV H-20-1477, 2020 WL 7386368 (S.D. Tex. Dec. 16, 2020) (attorney fees dispute). Motion to vacate denied and award confirmed. Movant

© 2026 Haynes Boone

failed to demonstrate that the failure to disclosed email communication between arbitrator and movant was evidence of partiality. Communications preceded the arbitration and movant waived the partiality argument by failing to raise it during the arbitration. Evidence did not support suggestion of *ex parte* communication between the opposing party and arbitrator.

Shirley v. FMC Techs., Inc., 1:20-CV-261-RP, 2020 WL 7055900 (W.D. Tex. Dec. 2, 2020) (adopting report and recommendation 2020 WL 5995695 (Oct. 9, 2020)). Award confirmed.

Other Arbitration-related Decisions

Ortiz v. Trinidad Drilling, LLC, SA-20-CV-00503-OLG, 2020 WL 7055903 (W.D. Tex. Dec. 2, 2020) (Chestney, Mag. J.) (FLSA collection action notice). It is error for a district court to order notice of an FLSA collective action to an employee who has agreed to arbitrate FLSA claims and waived the right to participate in a collective action. Arbitration agreements executed by putative class members included clear class and representative action waivers. Defendants allowed to withhold the names and contact information of the employees that signed the agreements.

© 2026 Haynes Boone