Arbitration in the Fifth - February 2021

March 9, 2021 Odean Volker

PRACTICES International Arbitration, Litigation

February 2021 saw a strong uptick in the number of arbitration-related opinions in the courts of the Fifth Circuit. Among those Axiall Canada, Inc. v. MECS Inc. considered a motion to compel in a "classic battle of forms scenario." Georgetown Homeowners Ass'n, Inc. v. Certain Underwriters at Lloyd's London reaffirmed the position that McCarran-Ferguson Act does not permit state laws to reverse-preempt the New York Convention and LPL Fin. LLC v. Rodriguez considered the application of the Anti-Injunction Act to an arbitration ordered by a state court.

Opinion of the Fifth Circuit

Trujillo v. Volt Mgmt. Corp., 20-50526, 2021 WL 742660 (5th Cir. Feb. 25, 2021) (per curiam) (employment). Order compelling arbitration affirmed. A signature is not required to bind the parties to a contract unless the parties intended to require a signature. Under Texas law, a signature block by itself is insufficient to establish the parties' intent to require signatures. Evidence supporting the motion to compel, like evidence at the summary judgment stage of case, need not be authenticated so long as it is capable of being presented in an admissible form.

Opinions of United States District Courts

Motions to Compel Arbitration

Pelsia v. Supreme Offshore Servs., Inc., CV 19-12295, 2021 WL 411450 (E.D. La. Feb. 5, 2021) (indemnity claim among offshore oilfield service companies). Motion to compel granted. Federal law applied to determine whether a nonsignatory was bound by an arbitration clause. Direct-benefits estoppel bound plaintiffs to arbitration clause as they sought to enforce terms of the contract containing the clause or asserted claims that must be determined by reference to that contract.

Centurum Info. Tech. Inc. v. Geocent, LLC, CV 21-0082, 2021 WL 533707 (E.D. La. Feb. 12, 2021) (teaming agreement for government contracting). Arbitration and forum selection in various agreements among the parties were not the same. Each agreement was reviewed and enforced on its own terms.

Clean Pro Carpet & Upholstery Care, Inc. v. Upper Pontalba of Old Metairie Condo. Ass'n, Inc., CV 20-1550, 2021 WL 638117 (E.D. La. Feb. 18, 2021) (insurance). Motion to compel granted. State law contract principles apply to agreements arising under the New York Convention. Claimant appointed its paid expert witness as arbitrator. A claim concerning the appropriateness of an appointed arbitrator falls within the ambit of a procedural challenge. Any claim that essentially goes to the procedure is best left for the arbitration panel itself, not a court. FAA provides only for "potential vacatur of any award."

Georgetown Homeowners Ass'n, Inc. v. Certain Underwriters at Lloyd's London, CV 20-102-JWD-SDJ, 2021 WL 359735 (M.D. La. Feb. 2, 2021) (insurance coverage). Motion to compel granted. Insurance policy that included among its subscribers London syndicates was subject to the New York Convention. The McCarran-Ferguson Act does not permit state laws to reverse-preempt the

New York Convention. Requirement that arbitrators be “persons employed or engaged in a senior position in Insurance underwriting or claims” did not render arbitration agreement unenforceable.

Axiall Canada, Inc. v. MECS Inc., 2:20-CV-01535, 2021 WL 416804 (W.D. La. Feb. 5, 2021) (equipment purchase). Motion to compel denied. A “classic battle of forms scenario.” Seller’s terms and conditions contained in its proposal and order acknowledgment required arbitration and New York law. Buyer’s purchase order provided for venue in either Lake Charles, Louisiana, or Calvert City, Kentucky and chose Kentucky or Louisiana law. Both parties had expressly conditioned acceptance on the other's agreement to their terms. Under Louisiana law, in the event that the order acknowledgment (the last of the forms exchanged) was the acceptance, then the arbitration clause contained therein materially altered the terms of the agreement and no contract was formed with respect to that term.

Terrell v. Regions Bank, 4:20-CV-167-DMB-DAS, 2021 WL 473760 (N.D. Miss. Feb. 9, 2021) (personal injury/account agreement). Motion to compel granted. When the party seeking arbitration argues that there is a delegation clause, the only question decided by the court, after finding that there is in fact a valid agreement, is whether the purported delegation clause is in fact a delegation clause. Court would not consider procedural unconscionability objection as it went to the entire contract and not just the arbitration agreement. Under Mississippi law, if both parties are guaranteed the same rights by an arbitration agreement, the agreement is not substantively unconscionable.

Gentex Pharma, LLC v. GlycoBioSciences, Inc., 3:19-CV-645-DCB-RPM, 2021 WL 440838 (S.D. Miss. Feb. 8, 2021) (product purchase and distribution). Motion to compel granted. Waiver of arbitration is not favored, and there is a presumption against it. To determine whether there was a waiver, the court must determine whether the party seeking arbitration substantially invoked the judicial process to the detriment or prejudice of the other party.

Regions Bank v. Antoine, 3:21-CV-40-DPJ-FKB, 2021 WL 684515 (S.D. Miss. Feb. 22, 2021) (petition to compel arbitration/financial services). Motion to compel granted. Defendants in the federal court petition to compel were plaintiff’s in a state court action. No factors favored abstention. The state court proceedings were enjoined.

Predmore v. Nick's Mgmt., Inc., 3:20-CV-00513-X, 2021 WL 409736 (N.D. Tex. Feb. 4, 2021) (FLSA). Motion to compel granted. Incorporation of American Arbitration Association rules evinced clear and unmistakable intent to delegate arbitrability. Unconscionability claim as to contract as a whole was for the arbitrator to decide as was the contention that a claim was outside the scope of the arbitration clause. Whether non-signatories were covered by the arbitration clause involved interpretation of term “parties” in the contract. Contract interpretation, as opposed to formation, was for the arbitrator.

Johnson v. The CMI Grp., 3:19-CV-2361-N, 2021 WL 424279 (N.D. Tex. Feb. 8, 2021). Motion to compel granted.

Butler v. Z&H Foods, Inc., 4:19-CV-02759, 2021 WL 630942 (S.D. Tex. Jan. 29, 2021) (notice of appeal filed Feb. 17, 2021) (employment). Motion to compel granted. The party contesting the making of an arbitration agreement must make at least some showing that the party would be relieved of the obligation to arbitrate if her allegations proved to be true and must produce some evidence to substantiate her factual allegations. Self-serving affidavits and lack of corroborating evidence insufficient in light of employer’s evidence of electronic application process.

Simpson v. Synergenx Health Kingwood LLC, 4:20-CV-1860, 2021 WL 765410 (S.D. Tex. Feb. 25, 2021) (employment). Motion to compel denied. Delegation clause was illusory since a modification clause allowed employer to modify the agreement without advance notice. The arbitration agreement was illusory for the same reason.

Motions to Confirm/Vacate

Brett-Andrew: House of Nelson v. Jackson, 1:20-CV-00069-H-BU, 2020 WL 8458834 (N.D. Tex. Dec. 4, 2020), report and recommendation adopted, 2021 WL 409999 (Feb. 5, 2021) (Sitcomm arbitration award). Dismissed for lack of jurisdiction and motion to confirm terminated.

LPL Fin. LLC v. Rodriguez, H-20-3483, 2021 WL 640019 (S.D. Tex. Feb. 18, 2021) (financial services). Award confirmed. Party against whom FINRA arbitration award had been issued paid the award, and subsequently filed to confirm the award. The award had not been vacated, modified, or corrected, so was subject to being confirmed. (see discussion of Anti-Injunction Act below)

Other Arbitration-related Decisions

LPL Fin. LLC v. Rodriguez, H-20-3483, 2021 WL 640019 (S.D. Tex. Feb. 18, 2021) (financial services). Petition to enjoin arbitration denied. Claimants obtained an award in their first arbitration and initiated a second arbitration against affiliates of the respondent named in the first case. That respondent sought to enjoin the second arbitration. An arbitration is a "state proceeding" for purposes of the Anti-Injunction Act if the arbitration was ordered by a state court in a state court proceeding. A federal court generally lacks the authority to interrupt an arbitration proceeding by enjoining what the state court has commanded. The federal court had not entered any judgments that would be protected or effectuated by an injunction against the second arbitration.

Carter v. C R England Inc., 6:20-CV-01108, 2021 WL 669264 (W.D. La. Feb. 4, 2021) (Whitehurst, Mag. J.), report and recommendation adopted, 2021 WL 666862 (Feb. 19, 2021) (FLSA). Motion to transfer venue granted with transferee court to decide the motion to compel arbitration. The forum selection clause and arbitration agreement were reconcilable and reasonably co-existed. The parties' contract provided for exclusive venue in the courts Salt Lake City, Utah, but also provided that "[n]otwithstanding any other provision of this Contract, if you have executed an arbitration agreement" the arbitration agreement governs.