

## Arbitration in the Fifth - January 2020

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PRACTICES Litigation

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In January, significant opinions by the Fifth Circuit Court of Appeals considered jurisdictional questions and whether “manifest disregard for the law” is a viable challenge to an arbitration award. District Courts within the Fifth Circuit addressed a variety of arbitration-related topics. With most of the cases arising from employment arbitration, the courts considered challenges to awards and motions to stay. Significant questions answered by the Fifth Circuit and the opinions of the District Courts are summarized below:

### Fifth Circuit Court of Appeals

#### ***Does relief granted in an arbitration award impact diversity jurisdiction?***

In *Soaring Wind Energy, L.L.C. v. Catic USA Inc.*, No. 18-11192, 2020 WL 63296 (5th Cir. Jan. 7, 2020), the Fifth Circuit was faced with an arbitration award that divested a member of a limited liability company of its interest in the LLC. An LLC’s citizenship is determined with reference to its members, so diversity does not exist in a dispute between a member and the LLC. Where, however, a member of an LLC is divested of its interest in an arbitration award, should that member be taken into consideration in determining diversity in an action to confirm the award. Deciding that the divested member must be considered, *Soaring Wind Energy* explained that awards are not self-effectuating, and the divestment award did not alter the diversity analysis.

#### ***What “legal relationship,” as the term is used in 9 U.S.C. 202, is considered when determining whether an award falls under the New York Convention and as a consequence federal subject matter exists?***

Section 9 U.S. C. 202 provides, in part:

An arbitration agreement or arbitral award arising out of a legal relationship . . . falls under the Convention. An agreement or award arising out of such a relationship which is entirely between citizens of the United States shall be deemed not to fall under the Convention unless that relationship involves property located abroad, envisages performance or enforcement abroad, or has some other reasonable relation with one or more foreign states.

Section 202 “concerns not the ‘parties’ relationship’ but the ‘legal relationship’ whence arbitral award arose.” *Soaring Wind Energy*, 464 F.3d at 752. Therefore, the relationship of the parties external to their agreement is not part of the section 202 analysis. In *Soaring Wind Energy*, however, a foreign parties’ conduct could trigger a breach and the award itself held that it was enforceable against non-signatory foreign affiliates. Therefore, the award was determined to “fall under the Convention.”

#### ***Is “manifest disregard for the law” a valid challenge to an arbitral award?***

This question was answered by the Fifth Circuit in *Citigroup Glob. Markets, Inc. v. Bacon*, 562 F.3d 349 (5th Cir. 2009):

In the light of the Supreme Court's clear language that, under the FAA, the statutory provisions are the exclusive grounds for vacatur, manifest disregard of the law as an independent, nonstatutory ground for setting aside an award must be abandoned and rejected.

In opinions issued less than one week apart, the Fifth Circuit first cast doubt on Citigroup, and then reinforced, and possibly extended, *Citigroup*. In *DynaColor, Inc. v. Razberi Techs., Inc.*, No. 19-10720, 2020 WL 115978 (5th Cir. Jan. 9, 2020) (per curiam), the Court explained “We have previously declined to take a side on this split [as to viability of manifest disregard] and need not do so here . . .” Less than a week later, *Quezada v. Bechtel OG & C Constr. Servs., Inc.*, No. 19-20042, 2020 WL 205951 (5th Cir. Jan. 14, 2020) rejected a challenge to an award under section 10(a)(4) holding that the party’s argument “amounts to nothing more than a freestanding claim of manifest disregard for the law, a ground for vacatur this court has squarely rejected.”

### Other Opinions by the Fifth Circuit

*Psara Energy, Ltd. v. Advantage Arrow Shipping, L.L.C.*, No. 19-40071, 2020 WL 104348 (5th Cir. Jan. 9, 2020) Appeal of order compelling arbitration. Appeal dismissed for lack of appellate jurisdiction. An order compelling arbitration, and entering a stay, is not appealable.

*Kemper Corp. Servs., Inc. v. Computer Scis. Corp.*, No. 18-11276, 2020 WL 113985 (5th Cir. Jan. 10, 2020). Appeal of order confirming arbitration award. Affirmed and objection under 10(a)(4) rejected. While the parties’ agreement prohibited the award of consequential damages, the agreement conferred authority to carry out such categorization. The agreement authorized the arbitrator to decide “all disputes arising out of or related to” the parties’ agreement, “make a decision having regard to the intentions of the parties,” and “render an award.”

*Quezada v. Bechtel OG & C Constr. Servs., Inc.*, No. 19-20042, 2020 WL 205951 (5th Cir. Jan. 14, 2020). Appeal of order confirming arbitration award. Affirmed. Joining the majority view, the Fifth Circuit concluded that motions brought under FAA sections 9, 10, and 11 are subject to the look-through approach endorsed in *Vaden v. Discover Bank*, 556 U.S. 49 (2009).

### Opinions by United States District Courts

#### Jurisdiction

*Cajun Serv. Unlimited, LLC v. Benton Energy Serv. Co.*, No. CV 17-491, 2020 WL 375596 (E.D. La. Jan. 23, 2020). Following a jury trial and during post-verdict/prejudgment motions, a parties motion to compel arbitration was denied and an interlocutory appeal taken; however, the court was not divested of jurisdiction.

#### Motion to Compel Arbitration

*Sewell v. Waitr Holdings, Inc.*, No. 2:19-CV-00698, 2020 WL 208929 (W.D. La. Jan. 13, 2020). Motion to compel arbitration granted. An arbitration clause circulated by an employer by email and other electronic methods was enforceable. Under Louisiana law, continued employment was sufficient to constitute acceptance of the agreement to arbitrate.

*Byars v. Asbury Mgmt. Servs., LLC*, No. 3:19-CV-660-DCB-JCG, 2020 WL 127989 (S.D. Miss. Jan. 10, 2020). Motion to stay litigation and motion for discovery. Stay and limited discovery granted. When the making of an arbitration agreement is in issue, an evidentiary hearing is needed. While arbitration-related discovery is generally denied, plaintiff claimed that she never received or signed

the arbitration clause. A dispute over the existence of an agreement to arbitrate may be sufficiently compelling to require limited discovery.

*Stamper v. Bluebonnet Trails Comm. Serv.*, No. 1:19-CV-649-SH, 2020 WL 495574 (W.D. Tex. Jan. 30, 2020). Motion to compel arbitration. granted. Speculative arguments regarding a potential modification are insufficient to create an issue of material fact regarding the existence or validity of an arbitration agreement.

## **Motion to Confirm/Vacate Arbitration Award**

*Nichols v. U.S. Bank, Nat'l Ass'n*, No. 2:19-MC-162-KS-MTP, 2020 WL 61049 (S.D. Miss. Jan. 6, 2020). Motion to confirm purported arbitration award denied. Pro se plaintiffs sought confirmation of a purported arbitration award involving "Sitcomm Arbitration Association." The Court ordered plaintiffs to show cause why they should not be sanctioned for seeking confirmation of a purported award when there was no valid underlying arbitration agreement.

*Teverbaugh v Lima One Capital, LLC*, No. 2:19-mc-159-KS-MTP, 2020 WL 448259 (S.D. Miss Jan. 28, 2020). Motion for Default. Motion denied as such, but treated as a motion to confirm award. Where a party seeks to have an arbitration award confirmed but the opposing party fails to respond, the mechanism for resolution of the matter is by resolution of the motion to confirm and not by default. The Court noted "a rash of cases involving arbitration awards issued by arbitrators with the [Sitcomm Arbitration Association]," and advised pro se plaintiff of the risk of sanctions if she submitted documents similar to those found to be invalid in other cases.

*Forby v. One Techs., LP*, No. 3:16-CV-856-L, 2020 WL 132310 (N.D. Tex. Jan. 13, 2020). Motion to compel arbitration denied and motion to strike class allegations denied.

*Credit Suisse Sec. (USA) LLC v. Carlson*, No. CV H-19-1470, 2020 WL 32339, (S.D. Tex. Jan. 2, 2020) (Miller, J.). Motion to confirm arbitration award granted and motion to vacate arbitration award denied. Claimant sought to vacate, in part, under 10(a)(2) based on the arbitrator's failure to disclose an ongoing representation of an adversary to a client of Claimant's counsel's law firm. In denying vacatur, the Court found the "nondisclosure troubling" and "believe[d] that it present[ed] an appearance of bias," but Claimant did "not meet his burden of a 'concrete, not speculative impression of bias'" under *Positive Software Sols., Inc. v. New Century Mortg. Corp.*, 476 F.3d 278, 281 (5th Cir. 2007) and its progeny.

## **Motion to Stay**

*LeJeune v. Cobra Acquisitions LLC*, No. 5:19-CV-0286-JKP, 2020 WL 250560 (W.D. Tex. Jan. 16, 2020). Motion to stay (9 U.S.C. §§ 3 and 208) until resolution of pending arbitration. Motion denied.