Arbitration in the Fifth - March 2021

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In March 2021 the Fifth Circuit's Jones v. Michaels Stores, Inc. again considered and rejected "manifest disregard" as a nonstatutory ground to challenge an award and Polyflow, L.L.C. v. Specialty RTP, L.L.C. elaborated on "look through" jurisdiction and held the phrase "arising out of" is broad form.

Manifest disregard. Is it an independent ground to challenge an award or can it be used to establish a statutory objection?

Taking on the "murkiness" of the Fifth Circuit's manifest-disregard caselaw, *Jones v. Michaels Stores, Inc*., 20-30428, 2021 WL 960490 (5th Cir. Mar. 15, 2021) reemphasizes the direct holding that "manifest disregard of the law as an independent, nonstatutory ground for setting aside an award must be abandoned and rejected." *Citigroup Glob. Mkts., Inc. v. Bacon*, 562 F.3d 349, 358 (5th Cir. 2009).

Jones also chronicles the Fifth Circuit's manifest disregard caselaw since *Hall St. Assocs., L.L.C. v. Mattel, Inc*., 552 U.S. 576 (2008). Though *Hall Street* did not involve a manifest disregard challenge, it did reject the caselaw supporting manifest disregard as a nonstatutory vacatur ground. Shortly after *Hall Street*, the Fifth Circuit held that manifest disregard was no longer a basis for vacating awards under the Federal Arbitration Act ("FAA"). *Citigroup Global Mkts., Inc*., 562 F.3d at 358. The seeming clarity of *Hall Street* and *Citigroup Global Markets* was blurred by *Stolt-Nielsen S.A. v. AnimalFeeds Int'l Corp*., 559 U.S. 662 (2010), and its refusal to decide "whether 'manifest disregard' survives" *Hall Street* "as an independent ground for review or as a judicial gloss on the enumerated grounds for vacatur" in the FAA. The Supreme Court's abstention in *Stolt-Nielsen* did not overrule *Citigroup Global Markets*, so in the Fifth Circuit it remains the law that manifest disregard is not an independent ground on which to vacate an award.

The plaintiff in *Jones* did not argue that manifest disregard was support for an objection based on a statutory ground for vacatur, so that question was not considered by the court nor addressed in *Jones'* chronicle. Whether manifest disregard could be argued within a statutory objection is the "murkiest" of manifest disregard questions. A chronicle on that question might include *Quezada v. Bechtel OG & C Constr. Services, Inc*., 946 F.3d 837 (5th Cir. 2020) and its rejection of the argument "that an arbitrator exceeded his authority by misapplying Fifth Circuit law" as "nothing more than a freestanding claim of manifest disregard for the law, a ground for vacatur this court has squarely rejected."

Opinions of the Fifth Circuit

Northrop Grumman Ship Sys. V. The Ministry of Def. of the Repub. of Venez., 20-60347, 2021 WL 921298 (5th Cir. Mar. 10, 2021) (per curiam) (government contract/Panama Convention). Order confirming award affirmed. The district court and the tribunal relocated the arbitration from the contractually agreed location, Caracas, Venezuela. Severability of forum selection from the arbitration clause is a prerequisite for voiding an arbitral-forum clause. To avoid enforcement of the arbitral-forum clause, the movant must show that conditions in the selected forum make arbitration

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there impracticable in a way that was unforeseeable when the parties entered into their contract. Arbitrating in a forum can be impracticable if arbitration would be so gravely difficult and inconvenient that the party resisting the arbitral forum would be for all practicable purposes deprived of its day in court.

Jones v. Michaels Stores, Inc., 20-30428, 2021 WL 960490 (5th Cir. Mar. 15, 2021). Order confirming award affirmed.

Polyflow, L.L.C. v. Specialty RTP, L.L.C., 20-20416, 2021 WL 1184456 (5th Cir. Mar. 30, 2021) (settlement agreement/Lanham Act). Order denying motion to compel reversed with instructions to compel. When an arbitration demand is predicated on federal-question jurisdiction, the court may "look through" a FAA section 4 petition to determine federal question jurisdiction. The "look through" analysis does not depend upon the petition's strict language. If "looking through" to the claims shows that the dispute could have been brought in federal court, then federal jurisdiction lies over the FAA petition. Classification in *Pennzoil Exploration v. Ramco Energy*, 139 F.3d 1061, 1067 (5th Cir. 1998), distinguishing "broad" arbitration clauses from "arising out of" clauses is dicta and the decision "stands alone in [the] court's jurisprudence compared to [its] consistent 'broad' holdings both before and after." The phrase "any action arising out of this Agreement" is broad form.

Opinions of United States District Courts

Motions to Compel Arbitration

Scorpio Drilling Int'l Pte, Ltd. v. HLV Mighty Servant 3, CV 20-231, 2021 WL 1143689 (E.D. La. Mar. 25, 2021) (maritime). Dismissed for lack of jurisdiction. Defendant sought dismissal for lack of subject matter jurisdiction pursuant to Rule 12(b)(1). The court noted that "there has been discussion as to whether Rule 12(b)(1) or 12(b)(3) is the proper rule for motions to dismiss based on arbitration clauses." The documents comprising the parties' agreement incorporated by reference terms and conditions that contained an arbitration clause. Because the arbitration clause was binding, the court lacked jurisdiction.

Montgomery v. Comenity Bank, CV 20-235-SDD-RLB, 2021 WL 817885 (M.D. La. Mar. 3, 2021) (financial services/identify theft). Motion to compel denied without prejudice.

Aragon v. Westrock Servs., LLC, 3:19-CV-01674-X, 2021 WL 842120 (N.D. Tex. Mar. 5, 2021) (legal services). Motion to compel granted.

Gassaway v. Beacon Fabrication, LLC, 3:20-CV-983-L, 2021 WL 925800 (N.D. Tex. Mar. 11, 2021) (employment). Motion to compel granted. Issue before the court was whether the Magistrate Judge had recommended dismissal with or without prejudice. When all claims are subject to arbitration, the court may dismiss the action with prejudice. This is so because any post-arbitration remedies sought by the parties would be circumscribed to a judicial review of the arbitrator's award.

Freeman v. Am. Credit Acceptance, LLC, 4:20-CV-01211-P-BP, 2021 WL 1015956 (N.D. Tex. Mar. 17, 2021) (Fair Credit Reporting Act). Motion to compel granted and the Magistrate Judge's Findings, Conclusion, and Recommendation ("FCR") adopted. The FCR determined that plaintiff failed to make a sufficient showing to create a fact issue as to whether his signature was forged. To allege a forged signature on an agreement to arbitrate, the party disavowing the signature bears the initial burden of production to create a fact issue. The disavowing party cannot simply declare the agreement invalid and demand a jury trial, but instead must produce at least some evidence to

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substantiate the factual allegations. *Freeman v. Am. Credit Acceptance, LLC*, 4:20-CV-01211-P-BP, 2021 WL 1015956 (N.D. Tex. Dec. 31, 2020) (Ray, Mag. J.)

MCR Oil Tools, LLC v. Wireline Well Servs. Tunis., 3:19-CV-2536-E, 2021 WL 1086995 (N.D. Tex. Mar. 22, 2021) (license agreement). Motion to compel denied. Waiver will be found where the party seeking arbitration substantially invokes the judicial process to the detriment or prejudice of the other party. The first requirement of implied waiver is generally satisfied when considering whether a plaintiff waived arbitration. Plaintiff's complaint did not mention arbitration.

Maldonado v. FirstService Residential, Inc., CV H-20-1484, 2021 WL 966064 (S.D. Tex. Mar. 15, 2021) (residential deed restrictions). Motion to compel granted. In general, under Texas law a signatory's agent may enforce an arbitration agreement against other signatories. What constitutes waiver depends on the fact of each case. Filing a counterclaim was not a substantial invocation of the judicial process that triggered waiver. Seeking injunctive relief qualify was not substantial invocation as the arbitration clause allowed a party to seek injunctive relief while simultaneously pursuing a damages claim in arbitration. An unruled-on motion to dismiss typically does not qualify as substantial invocation.

McDaniel v. Crescent Drilling & Prod., Inc., SA-19-CV-01194-FB, 2021 WL 800601 (W.D. Tex. Mar. 1, 2021) (Chestney, Mag. J.) (FLSA). Motion to compel granted. For collective action notice purposes, defendants were ordered to provide a list of former workers who did not execute arbitration agreements. Defendants did not waive arbitration by mistaken inclusion of an individual on that list.

Carnegie Techs., LLC v. Triller, Inc., SA-20-CV-00271-FB, 2021 WL 848182 (W.D. Tex. Mar. 5, 2021) (Chestney, Mag. J.) (service agreement/promissory note/merger and acquisition). Motion to compel denied. Contracts containing the arbitration agreements were not signed by either party. The governing law and dispute resolution provisions in those agreements were not the same. The agreements signed by the parties did not contain arbitration agreements. Movant did not argue nonsignatory theories.

Fernandez v. Sierra Plastics, Inc., EP20CV00290DBATB, 2021 WL 1050047 (W.D. Tex. Mar. 16, 2021) (Berton, Mag. J.) (employment). Motion to compel granted. By signing the arbitration agreement, parties were presumed to have read it and grasped its contents and legal effects. As a die setter, plaintiff was not a transportation worker who was exempt from arbitration pursuant to the "transportation worker exception." Pretrial activity limited to removal, corporate disclosures and the motion to compel did not amount to waiver. Failure to substantively respond to pre-litigation letter was not waiver of arbitration. Complaints of the prohibitive costs of arbitration are grounded in substantive unconscionability.

Jaramillo v. TXU Energy, EP-20-CV-00115-DCG, 2021 WL 1177888 (W.D. Tex. Mar. 29, 2021) (consumer). Motion to lift stay denied. Party's failure to pay the required arbitration fees due to its attorney's sudden hospitalization for COVID-19 did not result in prejudice sufficient to constitute a "default" or "waiver" of arbitration.

Newman v. Plains All Amer. Pipeline, L.P., MO:19-CV-244-DC, 2021 WL 1245896 (W.D. Tex. Mar. 8, 2021) (FLSA). Nonsignatory's motion to compel denied. Where nonsignatory argues neither a "sufficient relationship" nor agency relationship, the court must determine whether the nonsignatory is entitled to enforce the arbitration clause in the agreement in ore to decide whether a delegation provision applies. Nonsignatory was not a third-party beneficiary nor did intertwined claims estoppel apply.

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Other Arbitration-Related Decisions

Hitchcock Indep. Sch. Dist. v. Arthur J. Gallagher & Co., 3:20-CV-00125, 2021 WL 1095320 (S.D. Tex. Feb. 26, 2021), report and recommendation adopted, 2021 WL 1092538 (Mar. 22, 2021) (Edison, Mag. J.) Claims against insurance broker by insured for alleged failure to advise insured that the insurance policy contained an arbitration and choice of law clause dismissed.

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