Arbitration in the Fifth - May 2020

June 9, 2020 Odean Volker

PRACTICES Litigation

In May, the Fifth Circuit Court of Appeals addressed the question of sanctions in an arbitration appeal and the transportation workers exclusion. The district courts were busy penning opinions addressing nonsignatory issues. Of course, the most important recent nonsignatory case is the U.S. Supreme Court's *GE Energy Power Conversion Fr. SAS, Corp. v. Outokumpu Stainless USA, LLC*. Though it did not arise from the Fifth Circuit nor is it a May 2020 opinion, *GE Energy* is too important not to include and too interesting to wait for June's report.

Does the New York Convention conflict with domestic equitable estoppel doctrines that permit the enforcement of arbitration agreements by nonsignatories?

It does not. *GE Energy Power Conversion Fr. SAS, Corp. v. Outokumpu Stainless USA, LLC*, 18-1048, 2020 WL 2814297 (U.S. June 1, 2020) asks whether domestic equitable estoppel doctrines conflict with the Convention. It holds: [N]othing in the text of the Convention could be read to . . . prohibit the application of domestic equitable estoppel doctrines." *GE Energy* does not, however, explain whether the movant, GE Energy, can rely on equitable estoppel (that is to be decided on remand) and does "not address whether Article II(2) requires a signed agreement."

GE Energy is a curious vehicle for a sweeping statement regarding availability of domestic equitable estoppel doctrines in Convention matters. The facts underlying the case are that GE Energy was a party to the agreement, but it did not sign the agreement. The district court did not even address GE Energy's equitable estoppel argument, instead basing its opinion on the finding that GE Energy was a "party" to the relevant agreement. The Eleventh Circuit rejected consideration of estoppel, finding that the Convention "expressly restrict[s] arbitration to the specific parties to an agreement." By that, the Eleventh Circuit appears to have meant that the movant must be a party that also signed the agreement. A footnote to Justice Sotomayor's concurrence highlights this issue where she states: "[I] am skeptical that any domestic nonsignatory doctrines need come into play at all, because Outokumpu appears to have expressly agreed to arbitrate disputes . . . with subcontractors like GE Energy. The contract . . . specified that the seller in the contract 'shall be understood' to include '[s]ub-contractors.'"

Key to *GE Energy's* result seems to be the meaning of "parties" in Article II. Does that term mean parties to the agreement or parties to the lawsuit, and does the meaning vary even within Article II? *GE Energy* is clear that "only one provision of Article II addresses the enforcement of [arbitration agreements]—Article II(3)." GE Energy holds that "courts of a contracting state 'shall ... refer the parties to arbitration' when the parties to an action entered into a written agreement to arbitrate and one of the parties requests referral to arbitration." "Parties" who may request referral to arbitration therefore appears to mean the parties to the lawsuit. Article II(3) defines when arbitration agreements must be enforced, but it does not prevent the application of domestic laws that are more generous in enforcing arbitration agreements, and, in the absence of exclusionary language, Article II(3) does not prevent the application of domestic doctrines to a party's request.

When are sanctions available for an appeal of an order confirming an award?

As evidenced by this report and those for prior months, there is a lot of litigation over arbitration agreements and awards. A party might be justified in asking at what point might an arbitration-related appeal attract sanctions. The Fifth Circuit addressed that question in *Sun Coast Res., Inc. v. Conrad*, 958 F.3d 396 (5th Cir. 2020) (*Sun Coast II*). In April, the Court gave a harsh critique of an appeal challenging an arbitrator's "clause construction award." *Sun Coast Res., Inc. v. Conrad*, 956 F.3d 335 (5th Cir. 2020) (*Sun Coast I*). On the heels of that critique, the appellee sought sanctions under Fed. R. of App. P. 38. Rule 38 confers broad discretion to award sanctions for "inadvertently as well as intentionally frivolous and vexatious appeals." *Sun Coast II* explains that the case for Rule 38 sanctions is strongest in matters involving malice, and malice was not found in *Sun Coast I*. Reasoning that there "is a time for punishment and a time for grace," *Sun Coast II* concludes that this was a "time for grace, not punishment."

Other Opinion of the Fifth Circuit

Eastus v. ISS Facility Services, Inc., 19-20258, 2020 WL 2745545 (5th Cir. May 27, 2020). Order compelling arbitration confirmed. The exclusion from the FAA for transportation workers is limited to transportation workers actually engaged in the movement of goods in interstate commerce. Plaintiff's duties as an account manager supervising gate and ticketing agents did not satisfy the exclusion.

Opinions by United States District Courts

Motions to Compel Arbitration

Glover v. Regions Bank, CV 20-545, 2020 WL 2197915 (E.D. La. May 6, 2020). Motion to compel granted.

Brock Servs., LLC v. Rogillio, CV 18-867-JWD-EWD, 2020 WL 2529396 (M.D. La. May 18, 2020). Motions to compel granted and motions to compel by nonsignatory granted. Former employer compelled to arbitrate theft of trade secrets claim against former employees and their new employer. Litigating a dispute in ignorance of the right to arbitrate does not demonstrate a desire to litigate rather than arbitrate as required to find waiver.

Boxley v. Family Dollar Stores, Inc., 5:19-CV-00568, 2020 WL 2104945 (W.D. La. May 1, 2020). Motion to compel granted.

Bayco Prods., Inc. v. ProTorch, Co., Inc., 4:19-CV-00648-ALM, 2020 WL 2574626 (E.D. Tex. May 21, 2020) Motion to compel by nonsignatories granted. Determining whether to compel arbitration where the agreement falls under the New York Convention is a "very limited inquiry." The "any dispute" language in the arbitration clause makes the scope of the clause broad. Arbitration clause covered dispute arising from nonsignatory's action, and direct benefits estoppel and intertwined claims estoppel also supported motion to compel.

Parr v. Stevens Transp., Inc., 3:19-CV-2378-S, 2020 WL 2200858 (N.D. Tex. May 5, 2020). Motion to compel individual arbitration granted. Plaintiffs in this putative wage-and-hour class action had signed arbitration agreements with class action waivers. Challenges to the choice of law clause and unconscionability were delegated to the arbitrator.

Neukranz v. Conestoga Settlement Servs, LLC, 3:19-CV-1681-L, 2020 WL 2764204 (N.D. Tex. May 28, 2020) Motion to compel granted as to signatory and denied as to nonsignatory. Plaintiff sued in her individual capacity and as representative of the estate of decedent. The arbitration agreement

was signed individually. In deciding whether to compel the estate, the question was whether the estate or decedent entered into an arbitration agreement, not whether the individual entered such an agreement, unless the individual did so on behalf of the estate.

Tolliver v. Covington Credit, 3:19-CV-02655-M, 2020 WL 2841393 (N.D. Tex. May 31, 2020). Motion to compel granted. Arbitration clause containing the language "any dispute" is broadly construed, and thus included Fair Credit Reporting Act and the Texas Consumer Credit Reporting Act claims.

Living Steward Props, Ltd. v. Certain Underwriters at Lloyd's London, 2:20-CV-001, 2020 WL 2527468 (S.D. Tex. May 18, 2020). Motion to compel granted and motion to compel by nonsignatory granted. Equitable estoppel prevents a party from avoiding a contractual arbitration agreement with respect to claims against a nonsignatory where 1) the plaintiff relies on the existence of the contract in making its claims and 2) when the claims against the party to the contract and the non-party involve conduct that is inextricably intertwined.

Baugh v. A. H. D. Houston, Inc., CV H-20-0291, 2020 WL 2771251 (S.D. Tex. May 28, 2020). Motion to compel by signatory and nonsignatory granted. To oppose the enforcement of an agreement to arbitrate on the basis of unconscionability, a challenge must be directed specifically to the agreement to arbitrate. When another provision in the contract affects the arbitration agreement, the court may consider the validity of that provision as specifically applied to the arbitration agreement.

5556 Gasmer Mgmt. LLC v. Underwriters at Lloyd's, 19-CV-00974, 2020 WL 2813599 (S.D. Tex. May 29, 2020) Motion to compel by signatories granted and motion by nonsignatory insurance brokers denied. New York Convention "null and void" clause is limited to standard breach-of-contract defenses capable of being applied neutrally on an international scale. To compel arbitration with a nonsignatory under intertwined-claims estoppel, there must be 1) a sufficiently close relationship between the nonsignatory and a signatory, and 2) claims that are intimately founded in and intertwined with the underlying contract obligations. Direct-benefits estoppel does not apply simply because the claim refers to the contract. Compare to *Bhandara Family Living Tr. v. Underwriters at Lloyd's*, CV H-19-968, 2020 WL 1482559 (S.D. Tex. Feb. 20, 2020) addressing the same arbitration agreement, as well as similar theories against the same nonsignatories and compelling arbitration.

Castaneda v. Volt Mgmt. Corp., EP-19-CV-00338-FM, 2020 WL 2308699 (W.D. Tex. May 8, 2020). Motion to compel granted. The FAA requires an agreement to arbitrate be in writing, but it contains no requirement the writing be signed by the parties. Applying "Erie guess" that the Texas Supreme Court would adopt intertwined claims estoppel, nonsignatories also compelled to arbitrate.

Noble Capital Group, LLC v. US Capital Partners, Inc., A-19-CV-1255-LY, 2020 WL 2465721 (W.D. Tex. May 12, 2020) (Hightower, Mag J.). Motion to compel nonsignatory granted and motion to compel by nonsignatory granted. In the absence of a challenge specifically to a delegation clause, validity challenges must be sent to an arbitrator. Arbitration agreement signed by a party but binding on its "affiliates" allowed for nonsignatory affiliates to be compelled to arbitration. Nonsignatory corporate officers' motion to compel also granted.

CIBC Bank, USA v. ISI Sec. Group., Inc., SA-18-CV-00462-JKP, 2020 WL 2615758 (W.D. Tex. May 21, 2020). Motion to compel denied. Receiver sought to compel arbitration of claim by subcontractor for recovery under surety bonds issued in relation to the construction of a correctional facility in California. There was no claim against the receivership entities for review "to ascertain whether it falls within the scope of any arbitration agreement."

Motions to Confirm/Vacate Arbitration Award

Bogard v. Blackstone, SA-20-CV-80-XR, 2020 WL 2559958 (W.D. Tex. May 20, 2020). Motion to confirm dismissed for lack of jurisdiction. Defendant—a state official sued in her official capacity—is entitled to Eleventh Amendment immunity from claims in federal court. Such immunity divests the court of subject matter jurisdiction.