

Arbitration in the Fifth - November 2020

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PRACTICES Litigation

November saw a relatively small number of arbitration-related decisions in the courts of the Fifth Circuit, but those few offered some interesting perspective. The Fifth Circuit Court of Appeals rejected a “substantively unconscionable” objection to an arbitration clause in a mediated settlement agreement that designated a mediator as arbitrator. In the district courts, Wheeler v. Plano Arbor Hills LLC and Ferguson v. Weatherford Lamb Inc. offered contrasting approaches to the objection that employment arbitration agreements were illusory. Wheeler considered the substance of the objection, while Ferguson deemed the objection a challenge to the validity of the agreement and left the question for the arbitrator to decide.

Opinions of the Fifth Circuit

Ron v. Ron, 20-40248, 2020 WL 6494223 (5th Cir. Nov. 4, 2020) (per curiam) (family law). Order granting motion to compel affirmed. Arbitration clause in mediated settlement agreement that resolved the parties’ division of marital estates enforced. That the arbitration agreement named the mediator as arbitrator did not render it substantively unconscionable.

Fintech Fund, F.L.P. v. Horne, 18-20449, 2020 WL 6588619 (5th Cir. Nov. 10, 2020) (employment agreement). Dismissal for *forum non conveniens* affirmed. After finding personal jurisdiction, the district court *sua sponte* dismissed on *forum non conveniens*. The parties’ agreement contained an arbitration clause calling arbitration under London Court of International Arbitration rules. Applying English law, the parties’ agreement to submit to the “exclusive jurisdiction” of English courts was not irreconcilable with agreement to arbitrate.

Opinions of United States District Courts

Motions to Compel Arbitration

Wheeler v. Plano Arbor Hills LLC, 4:20-CV-00603, 2020 WL 6781609 (E.D. Tex. Nov. 18, 2020) (employment). Motion to compel denied. Arbitration agreement contained in employment handbook that could be amended or revised by employer and which was silent as to the possible retroactive application of amendments to the arbitration policy was illusory.

Sparks Connected, LLC v. Semtech Corp., 4:18-CV-748-KPJ, 2020 WL 6591458 (E.D. Tex. Nov. 10, 2020) (stock purchase agreement). Motion to compel granted. Claim seeking a determination of the validity of an arbitration agreement neither constitutes a substantial invocation of judicial process, nor does it constitute litigation of the arbitrable dispute such that waiver has occurred.

Ferguson v. Weatherford Lamb Inc., 4:19-CV-02086, 2020 WL 7024342 (S.D. Tex. Nov. 30, 2020) (employment). Motion to compel granted. Employee challenged the arbitration agreement as illusory, as the employment contract allowed the employer to “change any term or condition of your employment without your consent at any time.” Under Texas law, a claim that a provision of a contract is illusory is a validity challenge rather than a formation challenge, and therefore it is for the arbitrator to decide. The objection to the contract as a whole was for the arbitrator to decide.

Argument that there was no “meeting of the minds” as the employee “didn't intend to agree to arbitrate employment-related disputes” went to formation and were for the court to decide. Employee’s affirmative defense of unconscionability of arbitration agreement is typically a matter for the arbitrator, not the trial court. The incorporation of the International Chamber of Commerce arbitration rules was an implicit delegation clause.

ADT LLC v. Madison, 3:20-CV-1417-B, 2020 WL 7046850 (N.D. Tex. Nov. 30, 2020) (action to compel arbitration). Motion to compel denied for lack of subject matter jurisdiction. Plaintiff sought to compel arbitration, enjoin defendant from seeking discovery from plaintiff in a state court action to which plaintiff was not a party and enjoin the state court from enforcing any subpoena served on plaintiff by defendant. The Federal Arbitration Act does not create independent federal question jurisdiction. Evidence did not support a finding that the subpoena dispute satisfied the amount in controversy requirement for diversity jurisdiction. Evidence did not support a finding that a threat of litigation was sufficiently “specific and concrete” so as to give rise to a ripe controversy.

Jha v. Asuragen Inc., 1:19-CV-1070-RP, 2020 WL 7029157 (W.D. Tex. Nov. 30, 2020) (employment). Motion to compel granted. Circumstances of the delivery and execution of the arbitration agreement by the employee did not support claim of fraud or coercion. The failure of the employer to sign the agreement was not dispositive as to the existence of an agreement.

Motions to Confirm/Vacate

Al-Qarqani v. Arab Am. Oil Co., 4:18-CV-1807, 2020 WL 6748031 (S.D. Tex. Nov. 17, 2020) (Saudi Arabian concession and deed). Motion to confirm denied. The absence of a valid agreement to arbitrate is a ground for refusing to confirm an award under New York Convention Article V(2). Texas law did not support nonsignatories’ reliance on incorporation by reference, equitable estoppel or third-party beneficiary status as a basis to validate an arbitration agreement. Confirmation also refused under Articles V(1)(c) and V(1)(d).