Arbitration in the Fifth - September 2020

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September was in important month for arbitration-related opinions in the Fifth Circuit Court of Appeals. The Court's opinion in OOGC Am., L.L.C. v. Chesapeake Exploration, L.L.C reemphasized the Court's "stern standard" for review of 10(a)(2) (evident partiality) objections. Similarly, in Badgerow v. Walters the Court gave a step-by-step guide on the application of "look-through" analysis for subject matter jurisdiction.

The "look-through" analysis for federal subject matter jurisdiction – what are you supposed to look at?

"Look-through" jurisdictional analysis examines the whole controversy underlying the dispute – not just an isolated piece before the court. In *Badgerow v. Walters*, 19-30766, 2020 WL 5524837 (5th Cir. Sept. 15, 2020), the Fifth Circuit reaffirmed its commitment to "look through" analysis and to its application beyond Section 4 to motions brought under Sections 9, 10, and 11 of the Federal Arbitration Act (FAA). Under this analysis, "a federal court should determine its jurisdiction by looking through [an FAA] petition to the parties underlying substantive controversy." *Vaden v. Discover Bank*, 556 U.S. 49, 62 (2009) (internal quotation marks omitted) (applying a look-through analysis to a Section 4 motion to compel). If "looking through" to the claims in the underlying dispute reveals that the dispute could have been brought in federal court, then federal jurisdiction lies over the FAA petition.

Underlying *Badgerow* was a Financial Industry Regulatory Authority (FINRA) arbitration involving multiple respondents. As to one set of respondents (the "Principals"), state law claims were asserted. As to another respondent, claimant sought a declaratory judgment predicated on federal employment law. The FINRA panel issued an award dismissing all claims. Claimant then filed a petition to vacate in Louisiana state court but only sought vacatur as to award dismissing the state law claims. The defendants in the action to vacate removed, and a dispute over subject matter jurisdiction ensued.

Badgerow determined that the district court was not deprived of subject matter jurisdiction simply because the plaintiff stripped-off a single state law and made that the focus of the attack on the award. *Badgerow* explained that under *Vaden*, the question considered by a "look-through" analysis is whether the whole controversy between the parties—not just a piece broken-off from that controversy—is one over which the federal courts would have jurisdiction. Since federal claims were asserted in the controversy underlying *Badgerow* and supplemental jurisdiction would have existed as to the state law claim, the district court had jurisdiction to decide the action to vacate the award as to the state law claims.

Opinions of the Fifth Circuit

Mendoza v. Fred Haas Motors, Ltd., 20-20123, 2020 WL 5223110 (5th Cir. Sept. 1, 2020) (per curiam) (Telephone Consumer Protection Act). Order denying motion to compel reversed. When delegation is an issue, the analysis of whether a claim is covered by the arbitration agreement shifts and the inquiry becomes whether there is in fact delegation. That is, if the delegation clause

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evinces an intent to have the arbitrator decide whether a given claim must be arbitrated. Courts should not assume that intent unless there is clear and unmistakable evidence. Incorporating the American Arbitration Association rules into the agreement presents clear and unmistakable evidence that the parties agreed to arbitrate arbitrability.

Imperial Indus. Supply Co. v. Thomas, 20-60121, 2020 WL 5249574 (5th Cir. Sept. 2, 2020) (per curiam) (SITCOMM arbitration). Order vacating award affirmed. The award was issued in a proceeding conducted by SITCOMM Arbitration Association. In light of the "utter lack of any evidence of any arbitration agreement in the first place" and lack of merit of any other challenge, vacatur of the award was affirmed.

OOGC Am., L.L.C. v. Chesapeake Exploration, L.L.C., 19-20002, 2020 WL 5511806 (5th Cir. Sept. 14, 2020). (oil and gas) Order vacating award vacated and case remanded with instructions to confirm. The district court vacated under 9 U.S.C. § 10(a)(2) (evident partiality). The test for evident partiality in nondisclosure cases requires that the nondisclosure must involve a "reasonable impression of bias" stemming from "a significant compromising connection to the parties." This "stern standard" requires "a concrete, not speculative impression of bias" and calls for "upholding arbitral awards unless bias was clearly evident in the decisionmakers." For an arbitration award to be vacated, the party challenging the award "must produce specific facts from which a reasonable person would have to conclude that the arbitrator was partial to" its opponent. Separately, the objection alleging that the arbitrator did not satisfy contractual qualifications to serve did not satisfy § 10(a)(4). No Fifth Circuit case was identified holding that a failure to satisfy contractually-specified qualifications warrants vacatur under § 10(a)(4).

Badgerow v. Walters, 19-30766, 2020 WL 5524837 (5th Cir. Sept. 15, 2020) (employment litigation). Order finding federal subject-matter jurisdiction affirmed. Applying "look-through" analysis federal subject matter jurisdiction existed for the district court's decision on a motion to vacate.

Diverse Enters. Ltd. Co., L.L.C. v. Beyond Int'l, Inc., 19-51121, 2020 WL 5580455 (5th Cir. Sept. 17, 2020) (per curiam). (distribution agreement) Order confirming award affirmed. Arbitrators exceed their power when they "act contrary to express contractual provisions." If a rational interpretation exists that supports the award, the award will be upheld, even if there is more than one interpretation on how the arbitrator arrived at a final award. The parties' agreement created no plain limitation on the authority of the arbitrators in awarding attorneys' fees greater than those incurred.

Allen v. Vaksman Law Offices, P.C., 19-60936, 2020 WL 5754536 (5th Cir. Sept. 25, 2020) (per curiam) (legal services). Order denying motion to compel affirmed, however the case was remanded to address fact issue related to formation of arbitration agreement.

Opinions of United States District Courts

Motions to Compel Arbitration

Woodard Design+Build, LLC v. Certain Underwriters at Lloyd's of London, CV 19-14017, 2020 WL 5793715 (E.D. La. Sept. 29, 2020) (insurance coverage dispute). Motion to remand denied and motion to compel granted. Louisiana statutory "bad faith" claim was related to claims governed by the parties' arbitration agreement for purposes of 9 U.S.C. § 205 jurisdiction. Contractual choice of New York law did not render arbitration agreement unenforceable on public policy grounds. Clauses that refer to "all other claims and disputes," "all matters in difference," or "any difference or dispute" as broad in scope. Therefore, the "bad faith" claim was covered by the arbitration clause.

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Gentex Pharma, LLC v. Glycobiosciences, Inc., 3:19-CV-645-DCB-RPM, 2020 WL 5821976 (S.D. Miss. Sept. 30, 2020) (contract and tort claims). Order to show cause why case should not be referred to arbitration. Gentex filed suit in U.S. court, and the Glyco moved to compel arbitration. After the US case was filed, Glyco filed suit in the Superior Justice Court of Ontario, Canada, and there Gentex sought to compel arbitration. Facts did not support the argument that Ontario action amounted to waiver. Since Gentex recognized the validity of the arbitration agreement in the Ontario action, the parties were ordered to show cause why the case should not be submitted to arbitration.

Hester v. Human Servs. of Se. Tex. Inc., 1:20-CV-48, 2020 WL 5652471 (E.D. Tex. Sept. 22, 2020) (employment claim). Motion to compel granted.

Harris v. Cont'l Rests., Inc., 4:19-CV-00685-RWS, 2020 WL 5709239 (E.D. Tex. Sept. 24, 2020) (putative employment class action). Motion to compel granted. Evidence supported Magistrate Judge's finding that all defendants were affiliates covered by the terms of the arbitration agreement. Plaintiffs' objection that arbitration was cost-prohibitive rendered unfounded by defendants' express agreement to cover arbitration costs.

Gallagher v. Vokey, 3:19-CV-02196-X, 2020 WL 5211065 (N.D. Tex. Sept. 1, 2020) (legal services). Motion to compel denied. Plaintiff questioned whether he had signed an attorney engagement letter that contained the arbitration agreement. Since there was a genuine dispute over the validity of the document, the court could not determine if the parties agreed to arbitrate.

Edinburg United Police Officers Ass'n v. City of Edinburg, 7:20-CV-00137, 2020 WL 5642197 (S.D. Tex. Sept. 22, 2020). (alleged breach of Union Meet and Confer Agreement). Motion to compel granted.

Carillo v. ROICOM USA, LLC, EP-20-CV-00147-PRM-ATB, 2020 WL 5517200 (W.D. Tex. Sept. 14, 2020) (Berton, Mag. J.) (retaliation action under False Claims Act). Motion to compel denied. Plaintiff spoke only Spanish. Plaintiff signed the English language version of a "Receipt and Arbitration Acknowledgment." Defendant argued that the other side of the form contained a Spanish version. Plaintiff was misled as to the content of the English version of the Acknowledgment and was not provided with a copy of the arbitration agreement. When taken alone, neither the affirmative misrepresentation to plaintiff nor plaintiff's inability to read the English-language Acknowledgement Form formed a basis for finding procedural unconscionability. The totality of the circumstances, however, supported the finding that the Acknowledgement Form is procedurally unconscionable.

Other Arbitration-Related Issues

Dahiya v. Talmidge Int'l Ltd., 20-1527, 2020 WL 5542864 (E.D. La. Sept. 16, 2020) (personal injury action by foreign seaman). Motion to remand denied. Section 205's requirement that a state court proceeding may be removed at any time before the trial did not prevent removal after a trial that had been vacated on appeal. Trial-court finality (and not necessarily the occurrence of a trial per se) is what terminates a case's removability under Section 205.

Neptune Shipmanagement Servs. (PTE), Ltd. v. Dahiya, 20-1525, 2020 WL 5545689 (E.D. La. Sept. 16, 2020) (personal injury action by foreign seaman). Motion to dismiss for lack of jurisdiction denied. The district court's 18-year-old remand order in a different case (removal of litigation prior to arbitration) did not preclude the court's evaluation of subject matter jurisdiction in this action for

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confirmation of the award. The current action involves the pursuit of a legitimate federal remedy that only recently became available, the judicial confirmation of a newly issued arbitral award.

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