The Litigation of Arbitration

FIVE from the 5th Circuit in Early 2020

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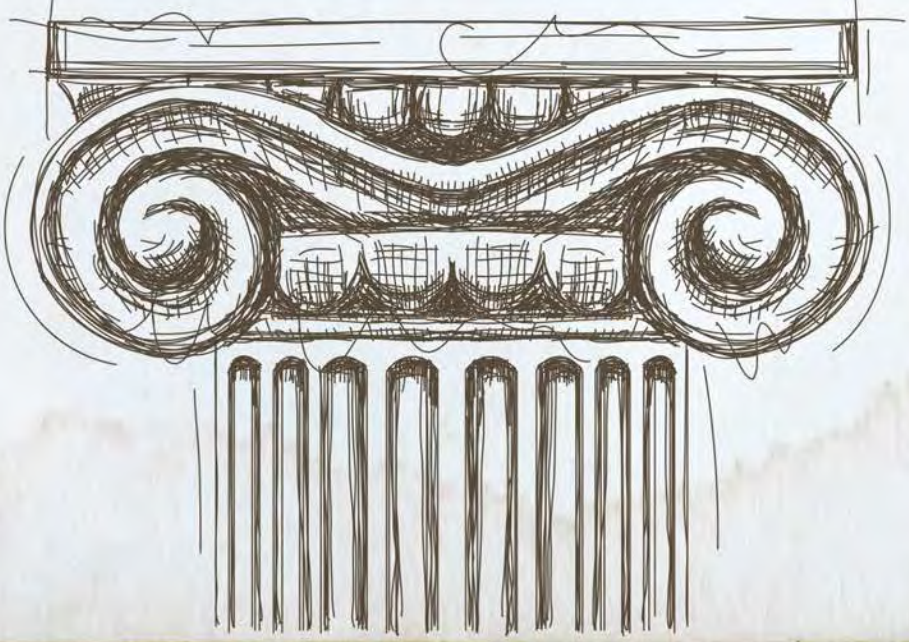

Despite nearly a century having passed since the adoption of the Federal Arbitration Act (FAA) to ensure the enforcement of arbitration agreements, the enforcement of arbitration provisions continues to be frequently litigated. Since 2015, the Supreme Court has decided at least six cases regarding the interpretation of the FAA.[1] In the first half of 2020 alone, the U.S. 5th Circuit Court of Appeals issued a number of opinions enforcing arbitration awards and provisions. Why arbitration provisions are frequently litigated remains unclear. Is it because large dollar amounts are involved that fuel the dispute, is it a tactical step of the settlement process, does it reflect the parties' perception as to differences in enforceability between courts, does it reflect the parties' dissatisfaction with the arbitration process itself or is it just what lawyers and clients do? Still, the challenges to arbitration are rarely successful, subjecting parties to additional costs and delay. As a result of these frequent decisions addressing more rarefied issues, the law regarding litigation of arbitration itself takes on a new level of specialized knowledge for parties and arbitrators.

The Five Cases

Confirming that consistent enforcement, several decisions in 2020 reflect the 5th Circuit's narrow interpretation of "exceeding powers" as a reason to vacate an award under Section 10 of the FAA, including its great deference to arbitrators' interpretations of contracts and its continued rejection of arguments seeking vacatur for manifest disregard of the law since *Hall Street Associates, L.L.C. v. Mattel, Inc.*, 552 U.S. 576 (2008).

Commc'ns Workers of Am., AFL-CIO v. Sw. Bell Tel. Co., 953 F.3d 822 (5 Cir. 2020).

The 5th Circuit illustrated its limited review of arbitration awards, upholding an award where the arbitrator originally found in favor of the moving party, but reconsidered that award and issued a new one favoring the respondent. Communications Workers of America (CWA) filed a grievance under a collective bargaining agreement against Southwestern Bell Telephone Co. The arbitrator originally found that Southwestern Bell violated the collective bargaining agreement by requiring the employees to perform work that was contrary to a summary of the collective bargaining agreement (but not the agreement itself). Southwestern Bell filed a motion to reconsider, showing that the summary was actually a summary of a different (and not controlling) collective bargaining agreement, and the arbitrator changed the ruling to no violation. In federal court, CWA filed a motion to vacate the second award favoring Southwestern Bell, arguing that the second award violated American Arbitration Association (AAA) Rule 40 and the common law doctrine of *functus officio* — both of which preclude an arbitrator from reconsidering the merits of a decision, but allow an arbitrator "to correct any clerical, typographical, technical, or computational errors in the award."[2] The district court and the 5th Circuit confirmed the award. "Guided by the 'extraordinarily narrow' standard of review that applies to [its] consideration of arbitration awards," the 5th Circuit held that because the arbitrator considered Rule 40 and considered his modification the correction of a "clerical, typographical, technical, or computational error," there was no grounds for vacatur. The court deferred to the arbitrator's characterization of his reconsideration.

Kemper Corp. Servs., Inc. v. Computer Scis. Corp., 946 F.3d 817 (5 Cir. 2020).

The 5th Circuit again rejected the manifest disregard standard when reviewing a motion to vacate challenging an arbitrator's interpretation of a contract. The losing party argued that the arbitrator exceeded his authority by awarding consequential damages contrary to the parties' agreement that only allowed for direct damages. The court described its limited role as the court "must sustain an arbitration award even if we disagree with the arbitrator's interpretation of the underlying contract as long as the arbitrator's decision draws its essence from the contract. . . . Therefore, the sole question for [the court] is whether the arbitrator (even arguably) interpreted the parties' contract, not whether he got its meaning right or wrong." Because the arbitration provision of the contract "expressly authorized the arbitrator to decide 'all disputes arising out of or related to' the [ ] Agreement, 'make a decision having regard to the intentions of the parties,' and 'render an award,'" the court deferred to the arbitrator's interpretation that the damages it awarded were allowed under the contract as direct (instead of consequential) damages.

Quezada v. Bechtel OG & C Constr. Servs., Inc., 946 F.3d 837 (5 Cir. 2020).

Illustrating an even more deferential standard, the court refused to entertain the argument that the arbitrator misapplied 5th Circuit law, holding the "contention that the arbitrator failed to follow the law of this Circuit amounts to nothing more than a freestanding claim of manifest disregard for the law, a ground for vacatur this court has squarely rejected." The arbitrator had awarded Quezada damages for back and front pay in an employment dispute under the Americans with Disabilities Act, after finding that the employer failed to accommodate Quezada by denying overtime, but that the termination at issue *did not* violate the statute. The employer — not surprisingly — argued that the issuance of such damages, despite a finding of no actionable termination, violated 5th Circuit law. But as noted, the 5th Circuit deferred to the arbitrator's determination.

OJSC Ukrnafta v. Carpatsky Petroleum Corp., 957 F.3d 487 (5 Cir. 2020).

Relatedly, the court reviewed an international arbitration award under the Convention (9 U.S.C. §§ 201-208). Part of the challenge to the award was that the arbitrator "manifestly disregarded" the arguably applicable statute of limitations. But the 5th Circuit again rejected the manifest disregard standard, recognizing that the Convention allows for the vacatur of an international award only for the grounds provided in Article V of the FAA and that manifest disregard of the law was not a standard for vacatur under Article V.

Sun Coast Res., Inc. v. Conrad, 956 F.3d 335 (5 Cir. 2020).

Perhaps most interestingly, the 5th Circuit upheld a class action arbitration, despite an arbitration agreement that was arguably ambiguous as to whether class action arbitration was allowed. The arbitrator interpreted an arbitration agreement to allow for class action arbitration of a Fair Labor Standards Act claim against Sun Coast. The agreement covered "any claim that could be asserted in court or before an administrative agency" and "any controversy or claim" arising out of the employment relationship. The agreement also incorporated the AAA rules which allowed for class arbitration. The 5th Circuit first held that Sun Coast waived any argument that whether the contract allowed for class arbitration was for the court to determine by consenting to arbitration and not raising this argument in arbitration or until its Rule 59 motion in the district court.[3] The court then reiterated its limited role in reviewing an arbitration award interpreting a contract: "[t]he correctness of the arbitrator's interpretation is irrelevant so long as it was an interpretation." The court deferred to the arbitrator's interpretation of the arbitration agreement as allowing for class arbitration. At first glance, this case seems hard to square with *Lamps Plus, Inc. v. Varela*, 139 S.Ct. 1407 (2019), in which the Supreme Court held that class arbitration was not authorized when an arbitration agreement was ambiguous as to whether it was allowed — the crucial difference being that the court made the decision in *Lamps Plus*, not an arbitrator. This case — as do all of these cases illustrating great deference to an arbitrator's ruling — serves as an important affirmation of the importance of delegation clauses.

Other Appellate Guidance

Supporting that backdrop of appellate decisions affirming the enforcement of arbitration rulings, the 5th Circuit has also recently issued several opinions that provide guidance to lower courts regarding the procedures as to compelling arbitration — including jurisdictional disputes, waiver, and the application of substantive federal arbitration law.[4]

Notably, the Supreme Court recently granted certiorari to review a case it remanded to the 5th Circuit — to interpret whether a carve out for injunctive relief applied to a delegation clause.[5] In *Henry Schein, Inc. v. Archer & White Sales, Inc.*, 139 S.Ct. 524 (2019), the Supreme Court rejected the "wholly groundless" standard, which courts had applied to bypass a delegation clause if the argument for arbitration was meritless. Applying this standard meant even if the parties agreed that an arbitrator was to determine a gateway issue, such as whether the arbitration agreement governed the dispute, the court could make that determination if there was no real determination to make. In *Henry Schein I*, the 5th Circuit had denied a motion to compel a claim for injunctive relief because such claims were explicitly excluded from the governing arbitration clause, despite the incorporation of the AAA rules — which the 5th Circuit recognized was a delegation clause.[6] The Supreme Court vacated that decision, holding that the court could not make this determination if the parties clearly and manifestly agreed that the arbitrator would determine such gateway issues by adopting a delegation clause.[7] On remand, the 5th Circuit again upheld the denial of the motion to compel arbitration — holding that the carve out of injunctive relief applied to the application of the delegation clause (the incorporation of the AAA rules) as well as to the arbitration agreement itself.[8] Accordingly, it held that the parties did not clearly and manifestly agree that the arbitrator should determine whether the carve out was met. But now, the Supreme Court has decided to review that ruling — suggesting it may be short-lived.[9]

In *Matter of Willis*, 944 F.3d 577 (5 Cir. 2019), a divided panel of the 5th Circuit addressed whether there is a meeting of the minds when two governing arbitration agreements contain conflicting provisions. The court reviewed the denial of a motion to compel arbitration based on two conflicting arbitration provisions — one governing a loan agreement, and the other an insurance policy. Both agreements delegated gateway arbitrability issues to the arbitrator, but the "agreements conflict[ed] over several procedural aspects of the arbitration, relating mainly to the selection and number of arbitrators, time to respond, location, and fee-shifting." Before compelling arbitration for the arbitrator to determine whether the claim at issue was arbitrable, the court held that the parties entered into a valid agreement to arbitrate because although Mississippi law required definiteness for there to be a meeting of the minds, the inconsistencies here were "non-essential" and did not change that the parties reached an agreement "to arbitrate." In dissent, Judge Dennis argued that the seven conflicting terms — most egregiously the conflict as to who pays for the arbitration — "were so copious and of such considerable import that there was no meeting of the minds."[10]

Relatedly, in *Bowles v. OneMain Fin. Grp., L.L.C.*, 954 F.3d 722, 727 (5 Cir. 2020), the 5th Circuit addressed what defenses to an arbitration agreement are to be decided by the court instead of the arbitrator. The court confirmed that the question of whether there was a meeting of the minds under Mississippi law as to formation of a contract (as compared to enforceability) was for the court to determine because it goes to the formation of the arbitration agreement. But the court held that the plaintiff's procedural unconscionability challenge (based on an argument that there was not equal bargaining power) was for the arbitrator to decide. Applying Mississippi law on unconscionability, the court held that the unconscionability issue was an issue of contract enforcement and not contract formation, and accordingly, because the arbitration agreement contained a delegation clause, the issue was for the arbitrator to determine.

In *Psara Energy, Ltd. v. Advantage Arrow Shipping, L.L.C.*, 946 F.3d 803 (5 Cir. 2020), the 5th Circuit held that a district court order compelling arbitration, but not dismissing the case, is not a

final appealable order. The district court granted the motion to compel arbitration and administratively closed the case but maintained jurisdiction to enforce any arbitration award. Psara Energy appealed (or attempted to), and the 5th Circuit held that administratively closing a case (as opposed to dismissing it) is the equivalent to staying a case, which it had previously held was not a final appealable order under FAA, 9 U.S.C. § 16(a)(3). The court also rejected the application of the collateral order doctrine — which makes some interlocutory orders reviewable — holding that it does not apply to cases governed by the FAA. Accordingly, the court dismissed the appeal for lack of jurisdiction.

In *Eastus v. ISS Facility Servs., Inc.*, ____ F.3d ____, No. 19-20258, 2020 WL 2745545, at *1 (5 Cir. May 27, 2020), the plaintiff argued that she was not bound by the arbitration provision found in her employment contract because she fell under the transportation workers exemption: "nothing herein contained shall apply to contracts of employment of seamen, railroad employees, or any other class of workers engaged in foreign or interstate commerce," 9 U.S.C. § 1. The plaintiff "supervised 25 part-time and 2 full-time ticketing and gate agents" at the George Bush Intercontinental Airport in Houston, Texas, and occasionally handled luggage. The 5th Circuit enforced the arbitration agreement because under *Circuit City Stores, Inc. v. Adams*, 532 U.S. 105 (2001), "[s]he was not engaged in an aircraft's actual movement in interstate commerce."

Finally, in *Vantage Deepwater Company v. Petrobras America, Inc.*, ____ F.3d ____, No.19–20435 (5 Cir. July 16, 2020), the court upheld a $622 million arbitration award rendered by two of three arbitrators, despite allegations that one of the arbitrators "improperly advocated" for one of the parties, was biased, and was either "intentionally ignoring other evidence" or "intentionally misstating the evidence," and that he "frequently dozed off during the hearing;" and, where the third arbitrator dissented to the award stating that the majority of the arbitrators denied "fundamental fairness and due process." The court further noted Rule 52(e) of the AAA rules provide that parties may not call the arbitrator as a witness in litigation or any other proceeding. The trial court refused to allow the deposition of an arbitrator and the AAA; and, through the appellate court, declined to "be the first" to find that such was an abuse of discretion.

Conclusion

The number and variety of these cases illustrate how frequently parties challenge the enforcement of arbitration agreements and awards, though success is infrequent. This process may ultimately defeat a purpose of arbitration — quick and binding resolution of disputes outside of court — especially when the losing party challenges the enforcement of the agreement to the highest court.

FOOTNOTES

1. Most recently, the Supreme Court decided *GE Energy Power Conversion France SAS, Corp. v. Outokumpu Stainless USA, L.L.C.*, No. 18-1048, 2020 WL 2814297, at *5 (U.S. June 1, 2020). Confirming this trend, the Court held that nonsignatories can enforce arbitration provisions under a theory of equitable estoppel, even if the agreement falls under the Convention (9 U.S.C. §§ 201-208) because there is no conflict between this domestic doctrine and the Convention. A recent decision from the Louisiana 4th Circuit Court of Appeal also illustrates that nonsignatories may be bound by an arbitration provision, particularly when the nonsignatory seeks to enforce a provision of the contract — known in Louisiana as "direct benefit estoppel." Under Louisiana law (like most states), a party may not "file[] suit to enforce and benefit from the Agreement, but . . . seek[] to avoid the binding arbitration provision." *ERG Enterprises, L.L.C. v. Green Coast Enterprises, L.L.C.*, 2019-1104 (La. App. 4 Cir. 5/13/20).

2. In footnote 3, the 5th Circuit held that AAA Rule 40 codified the doctrine of *functus officio*. *Commc'ns Workers of Am.*, 953 F.3d at 829 n.3.

3. The court hinted that this issue would typically be for the arbitrator because the parties, by incorporating the AAA rules, delegated this determination to the arbitrator. *Sun Coast*, 956 F.3d at 338.

4. For example, federal trial courts in Louisiana have upheld arbitration in favor of nonsignors. *See, Brock Services, L.L.C. v. Rogillio*, CV-18-867-JWD-EWD, 2020 WL 2529396 (M.D. La., May 18, 2020), motion to compel by nonsignatory granted; and *Holts v. TNT Cable Contractors, Inc.*, CV-19-13546, 2020 WL 1046337 (E.D. La., March 4, 2020), motion to compel by nonsignatory granted where the plaintiff alleged interdependent claims between a signatory employer and a nonsignatory employer. And in *Llagas v. Sealift Holdings, Inc.*, 2:17-CV-00472, 2020 WL 1243313 (W.D. La., March 13, 2020), plaintiff failed to comply with the order compelling arbitration and section 5 of the FAA "comes into play which permits the court to appoint an arbitrator."

5. *Archer & White Sales, Inc. v. Henry Schein, Inc.*, 935 F.3d 274, 281 (5 Cir. 2019), *cert. granted*, No. 19-963, 2020 WL 3146679 (U.S. June 15, 2020).

6. *Archer & White Sales, Inc. v. Henry Schein, Inc.*, 878 F.3d 488, 491 (5 Cir. 2017), *vacated and remanded*, 139 S.Ct. 524 (2019).

7. *Henry Schein, Inc. v. Archer & White Sales, Inc.*, 139 S.Ct. 524 (2019).

8. *Archer & White Sales, Inc. v. Henry Schein, Inc.*, 935 F.3d 274, 281 (5 Cir. 2019), *cert. granted*, No. 19-963, 2020 WL 3146679 (U.S. June 15, 2020).

9. The Court denied Archer & White Sales, Inc.'s petition to review whether incorporation of the AAA rules actually shows clear and manifest agreement for the arbitrator to determine such gateway issues in the first place. *Archer & White Sales, Inc. v. Henry Schein, Inc.*, No. 19-1080, 2020 WL 3146709, at *1 (U.S. June 15, 2020).

10. *Matter of Willis*, 944 F.3d 577, 586 (5 Cir. 2019) (Dennis, J. dissenting).

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