

# LITIGATING ALTERNATIVE DISPUTE RESOLUTION IN THE FIFTH CIRCUIT

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Arbitration and mediation continue to operate as mainstream alternatives to litigation.<sup>1</sup> Mediation has become pervasive, and arbitration, especially under the Federal Arbitration Act (FAA), has expanded to most forms of contracts, including consumer and employment relationships, building and lease contracts, and lending and banking agreements.<sup>2</sup> The enforceability of those arbitration agreements (especially when made pre-dispute) and the availability of post-arbitration judicial review continue to present a variety of issues to the federal courts and Congress.<sup>3</sup> Unsurprisingly then, the Supreme Court and the Fifth Circuit addressed a

1. See Will Pryor, *Alternative Dispute Resolution*, 61 SMU L. REV. 519, 519 (2008).

2. *Id.* at 520, 522-28. Although mediation has become pervasive and routine, little is written about it by courts. *Id.* at 519 n.3 (“Mediation has become so routine—many jurisdictions require [mediation] in virtually every case before to [sic] trial . . .”). The U.S. Supreme Court simply made passing reference to an “unsuccessful try at mediating the indemnification claim” in *Mattel, Hall St. Assocs., L.L.C. v. Mattel, Inc.*, 128 S. Ct. 1396, 1400 (2008).

3. See Arbitration Fairness Act of 2007, S. 1782, H.R. 3010, 110th Cong. § 2 (2007), available at [http://frwebgate.access.gpo.gov/cgi-bin/getdoc.cgi?dbname=110\\_cong\\_bills&docid=f:s1782is.txt.pdf](http://frwebgate.access.gpo.gov/cgi-bin/getdoc.cgi?dbname=110_cong_bills&docid=f:s1782is.txt.pdf). Other arbitration-related bills are pending in Congress. See, e.g., H.R. 243, 111th Cong. (2009), available at [http://frwebgate.access.gpo.gov/cgi-bin/getdoc.cgi?dbname=111\\_cong\\_bills&docid=f:h243ih.txt.pdf](http://frwebgate.access.gpo.gov/cgi-bin/getdoc.cgi?dbname=111_cong_bills&docid=f:h243ih.txt.pdf).

number of arbitration issues during this Survey period (June 1, 2007 to May 31, 2008).<sup>4</sup>

Judge Alex Ferrer may have been the highest-profile Supreme Court litigant,<sup>5</sup> but *Hall Street Associates, L.L.C. v. Mattel, Inc.* colored more circuit opinions.<sup>6</sup> Ferrer, who arbitrates small cases on Fox television, sought to void his fee agreement and its arbitration clause with his entertainment attorney, Arnold Preston.<sup>7</sup> On the basis of a state statute regulating talent agents, Ferrer responded to Preston's arbitration demand with a plea that the California Labor Commissioner should determine whether the attorney was an unlicensed talent agent who could not then collect the fee.<sup>8</sup> Because the parties had agreed to arbitration and Ferrer had not specifically attacked that severable clause, the question was simply who decides the talent agent issue.<sup>9</sup> Cautioning that "*Buckeye* largely, if not entirely, resolves the dispute," the Supreme Court held the issue to be in the arbitrator's ken: "state laws lodging primary jurisdiction in another forum, whether judicial or administrative, are superseded by the FAA."<sup>10</sup>

But *Mattel* addressed one of the chief complaints about arbitration—the lack of meaningful judicial review.<sup>11</sup> This complaint permeates several of the Fifth Circuit's 2008 opinions, which continue for the most part to compel arbitration and reject vacatur challenges to the resulting awards.<sup>12</sup> The Fifth Circuit also wrestled with jurisdictional issues and international arbitration awards during the Survey period.<sup>13</sup> The theme from years past—arbitration awards are subject to very limited judicial review—cut across substantive topics again this year.

This Article tracks arbitration challenges as they would appear in a lawsuit by dealing first with opinions regarding jurisdiction and arbitrability, and then addressing judicial review of subsequent awards.

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4. In the 2008 term, the Supreme Court decided two arbitration cases and granted certiorari in two more. See *Mattel*, 128 S. Ct. 1396 (2008); *Preston v. Ferrer*, 128 S. Ct. 978 (2008); *Vaden v. Discover Bank*, 128 S. Ct. 1651 (2008) (order granting certiorari); *14 Penn Plaza, L.L.C. v. Pyett*, 128 S. Ct. 1223 (2008) (order granting certiorari). The Court also summarily granted certiorari and vacated a Ninth Circuit judgment for reconsideration in light of *Mattel* and granted certiorari to consider FAA appellate jurisdiction. See *Arthur Anderson v. Carlisle*, 129 S. Ct. 529 (2008) (granting certiorari); *Improv W. Assocs. v. Comedy Club, Inc.*, 129 S. Ct. 45 (2008) (granting certiorari and remanding to Ninth Circuit). To put these grants in perspective, the Court averaged sixty-eight signed opinions during the 2005 and 2006 Terms. JOHN G. ROBERTS, 2007 YEAR-END REPORT ON THE FEDERAL JUDICIARY, app. at 9 (2008), <http://www.supremecourtus.gov/publicinfo/year-end/2007year-endreport.pdf>. This article necessarily trails the fast pace of opinions in the area. For current developments, please see *Disputing*, a blog written by Karl Bayer and Victoria VanBuren at <http://www.karlbayer.com/blog>.

5. See *Ferrer*, 128 S. Ct. 978.

6. See *Mattel*, 128 S. Ct. 1396.

7. *Ferrer*, 128 S. Ct. at 981-83.

8. *Id.* at 982.

9. *Id.* at 983-84.

10. *Id.* at 981, 984 (referencing *Buckeye Check Cashing, Inc. v. Cardegna*, 546 U.S. 440 (2006)).

11. See *Mattel*, 128 S. Ct. at 1405-08.

12. See discussion *infra* Parts III-VI; *infra* Tables I-II, pp. 766-75.

13. See discussion *infra* Parts II, III.E.

Because *Mattel* has been so influential to the issue of judicial review, particularly in a circuit that followed a different rule for a decade,<sup>14</sup> a significant portion of this Article is dedicated to that issue.<sup>15</sup> As in our 2007 review,<sup>16</sup> we draw on earlier cases and the history of arbitration in the United States to provide context to the discussion.

#### I. MATTEL: FAA PROVIDES EXCLUSIVE GROUNDS FOR REVIEW— WHAT DOES THAT MEAN FOR ‘MANIFEST DISREGARD’?

The holding in *Mattel* is easier to state than it has been for the courts to apply.<sup>17</sup> After toy manufacturer Mattel was sued by its landlord for cleanup of an old Oregon plant, both parties agreed to submit an indemnification issue to arbitration.<sup>18</sup> In doing so, their post-dispute arbitration agreement, which was approved by the trial court, expanded judicial review to include awards “where the arbitrator’s conclusions of law are erroneous.”<sup>19</sup>

After the arbitrator rendered an award in Mattel’s favor, Hall Street sought vacatur to reverse legal error.<sup>20</sup> The trial court vacated the award and remanded the case to the arbitrator for further consideration.<sup>21</sup> When the arbitrator followed the trial court’s opinion, each party appealed.<sup>22</sup> At this time, the Ninth Circuit’s precedent was aligned with the Fifth Circuit’s *Gateway* opinion,<sup>23</sup> and the question became, “Can a federal court enforce an arbitration agreement that provides for more expansive judicial review of an arbitration award than the narrow standard of review provided for in the Federal Arbitration Act?”<sup>24</sup>

The Supreme Court’s answer was “no”: the FAA provides the exclusive grounds for vacating awards.<sup>25</sup> The case was then remanded to the trial court to explore whether other sources of authority might allow

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14. See *Gateway Techs., Inc. v. MCI Telecomms. Corp.*, 64 F.3d 993, 997 (5th Cir. 1995), *abrogated by Mattel*, 128 S. Ct. 1396. Since 1995, the Fifth Circuit has held that parties may contract for expanded judicial review. *Id.*

15. See *infra* Part VI (discussing judicial review of arbitration awards).

16. Donald R. Philbin, Jr. & Audrey Lynn Maness, *Alternative Dispute Resolution*, 40 TEX. TECH L. REV. 445 (2008).

17. See Gray H. Miller & Emily Buchanan Buckles, *Reviewing Arbitration Awards in Texas*, 45 HOUS. L. REV. 939, 945-48 (2008) (discussing the equivocal aspects of the *Mattel* decision).

18. *Mattel*, 128 S. Ct. at 1400.

19. *Id.* at 1400-01.

20. *Id.* at 1401.

21. *Id.*

22. *Id.*

23. See *LaPine Tech. Corp. v. Kyocera Corp.*, 130 F.3d 884, 888-89 (9th Cir. 1997) (citing *Gateway Techs., Inc. v. MCI Telecomms. Corp.*, 64 F.3d 993, 996-97 (5th Cir. 1995)).

24. The Oyez Project, *Hall St. Assocs., LLC v. Mattel Inc.*, [http://www.oyez.org/cases/2000-2009/2007/2007\\_06\\_989](http://www.oyez.org/cases/2000-2009/2007/2007_06_989) (last visited Jan. 18, 2009) (discussing the issue presented in *Mattel* and the Court’s decision).

25. *Mattel*, 128 S. Ct. at 1403.

enforcement of the corrected award under the court-approved, post-dispute arbitration clause.<sup>26</sup> But the circuit courts were left with a lingering question of whether manifest disregard of the law challenges survive *Mattel*.<sup>27</sup> Some believe the standard evolved from dicta in *Wilko*, while others argue that it is rooted in the FAA.<sup>28</sup> The Fifth Circuit has simply noted that its pre-*Mattel* decisions have been called into doubt, without resolving the issue.<sup>29</sup> Others have continued to wrestle with such challenges without expressing an opinion.<sup>30</sup> The Supreme Court's summary remand of *Improv West* for reconsideration by the Ninth Circuit in light of *Mattel* may help clarify the issue in time.<sup>31</sup>

## II. FEDERAL COURT JURISDICTION

The Fifth Circuit has repeatedly held, consistent with other circuits, that the FAA does not create federal subject matter jurisdiction.<sup>32</sup> Rather, litigants must establish some independent ground for jurisdiction, such as diversity among the parties.<sup>33</sup> When a party fails to plead a basis for federal jurisdiction, a district court may allow an amendment to the complaint.<sup>34</sup> When federal subject matter jurisdiction is raised on appeal, however, the court can only remand the case with directions to dismiss without prejudice.<sup>35</sup>

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26. Hall St. Assocs., L.L.C. v. Mattel, Inc., 531 F.3d 1019, 1019-20 (9th Cir. 2008).

27. See *Rogers v. KBR Technical Servs., Inc.*, No. 08-20036, 2008 WL 2337184, at \*2-3 (5th Cir. June 9, 2008) (noting the ambiguity of *Mattel*).

28. Compare William H. Hardie, Jr., *Judicial Review of Arbitration Awards in the Alabama Courts*, 69 ALA. LAW. 434, 435 (2008) (attributing the standard to *Wilko v. Swann*, 346 U.S. 427, 436 (1953)), with *Mitsubishi Motor Corp. v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614, 656 (suggesting the standard is rooted in the FAA).

29. *Rogers*, 2008 WL 2337184, at \*2; see also *Nat'l Resort Mgmt. Corp. v. Cortez*, 278 F. App'x 377, 377 (5th Cir. Apr. 2008) (per curiam) (remanding the case for reconsideration in light of *Mattel*, in which the Court held "that, regardless of the parties' agreement to the contrary, district courts must review an arbitrator's findings of fact and conclusions of law under the highly deferential standard set forth in" the FAA).

30. *Esso Exploration & Prod. Chad, Inc. v. Taylors Int'l Servs., Ltd.*, 293 F. App'x 34, 35 (2d Cir. 2008); see Gibson, Dunn & Crutcher LLP, *Recent Decisions Cast Substantial Doubt on Whether "Manifest Disregard of the Law" Constitutes a Valid Independent Ground for the Judicial Vacatur of Arbitration Awards Under the United States Federal Arbitration Act*, Oct. 7, 2008, <http://www.gibsondunn.com/Publications/Pages/RecentDecisionsCastSubstantialDoubtonManifestDisreard.aspx>.

31. *Improv W. Assocs. v. Comedy Club, Inc.*, 129 S. Ct. 45 (2008) (remanding without opinion to the Ninth Circuit for reconsideration in light of *Mattel*).

32. *Oteeva, LP v. X-Concepts LLC*, 253 F. App'x 349, 350 (5th Cir. Nov. 2007) (per curiam) (citing *Smith v. Rush Retail Ctrs., Inc.*, 360 F.3d 504, 506 (5th Cir. 2004)).

33. See *id.*

34. See *id.* at 351 (citing 28 U.S.C. § 1653 (2000)).

35. See *id.* at 351 n.2.

## III. THRESHOLD ISSUES OF ARBITRABILITY

The threshold inquiry in any arbitration dispute is whether arbitration is proper.<sup>36</sup> In making this determination, courts look at the parties' intent, which is often expressed through the terms of the contract.<sup>37</sup> But this determination is limited: after deciding that the parties have a valid agreement to arbitrate and that the subject matter of the dispute is covered by the arbitration clause, the court is required to compel arbitration by a strong "national policy favoring arbitration when the parties contract for that mode of dispute resolution."<sup>38</sup>

Of course, a party can challenge an arbitration agreement in a number of ways. A party may argue that the agreement to arbitrate is illusory or not supported by consideration.<sup>39</sup> Additionally, a party may claim that the other side waived its right to arbitrate by substantially participating in the litigation process.<sup>40</sup> Finally, a party may assert the perennial claim of fraud in the inducement, which was the Supreme Court's focus in the 2006 *Buckeye* case.<sup>41</sup> These claims were less prevalent in the past year, which may be due to their limited past success.<sup>42</sup>

In some limited situations, a third party may be compelled to arbitrate under the arbitration clause at issue. Arbitration in these cases often depends on the status of the third party and the language in the arbitration clause.<sup>43</sup>

The following discussion begins with the question of whether there is a valid agreement to arbitrate between the parties. Though there is a federal policy in favor of arbitration, it "does not apply to the determination of whether there is a valid agreement . . . between the parties."<sup>44</sup> As discussed in more detail below, that "determination is generally made on the basis of 'ordinary state-law principles that govern the formation of contracts.'"<sup>45</sup>

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36. See *Preston v. Ferrer*, 128 S. Ct. 978, 982 (2008).

37. See *id.*

38. *Id.* at 983.

39. See, e.g., *In re Halliburton Co.*, 80 S.W.3d 566, 569 (Tex. 2002).

40. See *Republic Ins. Co. v. PAICO Receivables, LLC*, 383 F.3d 341, 342 (5th Cir. 2004).

41. See *Buckeye Check Cashing, Inc. v. Cardenga*, 546 U.S. 440 (2006) (addressing fraud claim in the context of an agreement to arbitrate).

42. See cases cited *supra* notes 39-41.

43. See *Fleetwood Enters., Inc. v. Gaskamp*, 280 F.3d 1069, 1075 (5th Cir. 2002) (holding third parties bound to arbitration agreements if (1) they sue on the contract or (2) they are a beneficiary of the contract).

44. *Id.* at 1073.

45. *Id.* (quoting *First Options of Chi., Inc. v. Kaplan*, 514 U.S. 938, 944 (1995)).

A. *Valid Agreement To Arbitrate: Armstrong v. Associates International Holdings Corp.*

Before sending a case to arbitration, courts are often called upon to decide (1) whether a valid agreement to arbitrate exists between the parties and (2) whether the subject matter of the dispute falls within the scope of the arbitration agreement.<sup>46</sup> In *Armstrong*, the plaintiff argued that he did not have a valid agreement to arbitrate with his employer.<sup>47</sup> Although the plaintiff had been given updates to the employee handbook and notices of the arbitration agreement from the employer, he believed that the arbitration agreement did not apply to employees, and he argued that the arbitration agreement was void for lack of sufficient consideration.<sup>48</sup> The court rejected these arguments, noting that Armstrong's acknowledgment that he had received a copy of the arbitration agreement was enough to bind him to the agreement because under Texas law, "[a]n employee's continued employment with knowledge of a change in the at-will employment relationship constitutes acceptance of the change as a matter of law."<sup>49</sup> Whether the employee thought the agreement applied to him did not sway the court after finding that "[u]nder Texas law, . . . the unilaterally mistaken party must bear responsibility for his error."<sup>50</sup>

The court also rejected Armstrong's argument that the agreement was void for lack of consideration.<sup>51</sup> In Texas, sufficient consideration exists through the parties' obligation to arbitrate with one another.<sup>52</sup> Texas law also allows an employer to unilaterally amend and modify an agreement when the amendments do not take effect until thirty days after notice to the employee.<sup>53</sup> Thus, the agreement was determined to be valid and binding on Armstrong, and the court dismissed his appeal.<sup>54</sup>

B. *Valid Agreement To Arbitrate: Morrison v. Amway Corp.*

*Morrison v. Amway Corp.* also addressed whether there was a valid agreement to arbitrate.<sup>55</sup> In that case, distributors of Amway products

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46. *Armstrong v. Assocs. Int'l Holdings Corp.*, 242 F. App'x 955, 957 (5th Cir. July 2007) (per curiam).

47. *See id.* at 956.

48. *See id.* at 956-58.

49. *Id.* at 958 (citing *In re Halliburton Co.*, 80 S.W.3d 566, 568 (Tex. 2002)). State law is used to determine whether the parties have a valid contract to arbitrate and to ascertain the scope of that contract. *Wash. Mut. Fin. Co. v. Bailey*, 364 F.3d 260, 264 (5th Cir. 2004).

50. *Armstrong*, 242 F. App'x at 958 (citing *Wentwood Woodside I, LP v. GMAC Commercial Mortgage Group*, 419 F.3d 310, 316 (5th Cir. 2005)).

51. *Id.*

52. *Id.*

53. *Id.*

54. *Id.* at 959.

55. *Morrison v. Amway Corp.*, 517 F.3d 248, 253 (5th Cir. Feb. 2008).

challenged Amway's means of calculating profits from certain sales.<sup>56</sup> The distributor agreement and the company's rules of conduct in place at the time of the alleged misconduct did not contain an arbitration agreement, but the distributor agreement did bind the distributors to the rules of conduct, which Amway was allowed to modify or amend at any time.<sup>57</sup> Pursuant to this provision, Amway amended the rules in September 1997 to include an arbitration provision.<sup>58</sup> When the distributors sued in January 1998, Amway invoked this new arbitration provision, and the court granted Amway's motion to compel arbitration over the distributors' objections.<sup>59</sup>

The distributors appealed the court's decision to compel arbitration.<sup>60</sup> The distributors conceded that there was an arbitration provision in place at the time the suit was filed, but they argued that the clause was illusory because Amway could unilaterally repeal it at any time.<sup>61</sup>

Starting with the premise that the "federal policy favoring arbitration does not apply to the determination of whether there is a valid agreement to arbitrate between the parties," the court looked at the provision allowing Amway to unilaterally modify or amend the distributor agreement.<sup>62</sup> The court distinguished the Amway agreement from others upheld in the past, noting that, unlike the provision in *In re Halliburton Co.*, the provision here allowed Amway to make its amendments retroactive, thereby allowing it to release itself from an obligation to arbitrate at any time, even when the arbitration was already underway.<sup>63</sup> This, the court held, was critical because without any sort of savings clause, Amway had no obligation to arbitrate, even in proceedings that had already commenced.<sup>64</sup> Finding the arbitration clause to be illusory, the court reversed the district court's decisions to compel arbitration and confirm the resulting award.<sup>65</sup>

### C. *Valid Agreement To Arbitrate: Moran v. Ceiling Fans Direct, Inc.*

Like *Armstrong* and *Morrison*, *Moran v. Ceiling Fans Direct Inc.* assessed whether a valid agreement to arbitrate existed after one of the parties notified the other of changes in the agreement.<sup>66</sup> In *Moran*, several employees of Ceiling Fans Direct (CFD) sued the company in federal court

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56. *Id.* at 251.

57. *Id.* at 253-54, 257.

58. *Id.* at 251.

59. *Id.*

60. *Id.* at 253.

61. *Id.* at 253-54.

62. *Id.* at 254 (quoting *Fleetwood Enters. Inc. v. Gaskamp*, 280 F.3d 1069, 1073 (5th Cir. 2002)).

63. *Id.*; see *In re Halliburton Co.*, 80 S.W.3d 566, 567-70 (Tex. 2002) ("Halliburton cannot avoid its promise to arbitrate by amending the provision or terminating it altogether.").

64. *Morrison*, 517 F.3d at 255-57.

65. *Id.* at 257-58.

66. *Moran v. Ceiling Fans Direct, Inc.*, 239 F. App'x 931, 933-34 (5th Cir. Sept. 2007) (per curiam).



for overtime compensation.<sup>67</sup> The suit eventually settled.<sup>68</sup> A few months later, CFD announced at a meeting that it had adopted a new arbitration policy.<sup>69</sup> Employees were invited to take a copy of the new policy, but many did not, and the employees were never required to acknowledge that they had read and understood the new policy.<sup>70</sup> When a second group of employees sued, CFD moved to compel arbitration, but the district court denied the motion, reasoning that the company did not give employees adequate notice of the new provision, and even if it had, the employees did not accept it.<sup>71</sup> CFD appealed, and the appellate court affirmed.<sup>72</sup>

The Fifth Circuit explained that adequate notice must be unequivocal, which requires that the employee have knowledge of both the change and the certainty of its imposition.<sup>73</sup> The court held the notice to be insufficient because the manager who had announced the notice failed to read the new policy, did not explain it, and failed to mention that continued employment would constitute acceptance.<sup>74</sup> The court explained that the company's practices were not suggestive of unequivocal notice because the company required its employees to sign its drug and alcohol use policy but not the arbitration agreement, and the manager told at least one employee who refused to sign the arbitration policy not to worry about it.<sup>75</sup> The contradictions between the policy and the oral and written communications were enough to render any notice insufficient.<sup>76</sup> As a result, the court affirmed the district court's decision denying the motion to compel arbitration.<sup>77</sup>

*D. Valid Agreement To Arbitrate: Ameriprise Financial Services, Inc. v. Etheredge*

The final agreement to arbitrate case decided during the Survey period is *Ameriprise Financial Services, Inc. v. Etheredge*. In that case, Alfred Etheredge filed suit in Mississippi state court against his securities broker account manager, Ameriprise Financial, by asserting multiple claims of negligence, fraud, and breach of contract.<sup>78</sup> Ameriprise responded by filing a complaint in federal court, asking the court to compel Etheredge to submit

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67. *Id.* at 933.

68. *Id.*

69. *Id.*

70. *Id.* at 934.

71. *Id.*

72. *Id.*

73. *Id.* at 936.

74. *Id.* at 937.

75. *Id.*

76. *See id.*

77. *Id.*

78. *Ameriprise Fin. Servs., Inc. v. Etheredge*, 277 F. App'x 447, 447-48 (5th Cir. May 2008) (*per curiam*).

the state court claims to arbitration.<sup>79</sup> Ameriprise's suit was based on the arbitration clauses in Etheredge's IRA application and service agreement.<sup>80</sup> Etheredge claimed that the arbitration clause was invalid and unenforceable, and argued that he should be permitted to conduct discovery on the authenticity of the signature on the agreements.<sup>81</sup> The district court denied Etheredge's request for discovery and ultimately compelled arbitration.<sup>82</sup>

Etheredge appealed, arguing that the district court abused its discretion in denying him the right to conduct limited discovery.<sup>83</sup> He claimed that discovery "was necessary to prove the existence of a valid agreement to arbitrate between himself and Ameriprise."<sup>84</sup> The court disagreed.<sup>85</sup>

The court explained that although Etheredge alleged that he did not recall signing the documents in question, he never alleged any reason or claim, such as forgery by Ameriprise employees, that would suggest the signatures were not his own.<sup>86</sup> And because Etheredge had copies of the documents during the two months before his response to the motion to compel was due, he could have commenced with the handwriting analysis on his own.<sup>87</sup> Given these circumstances, the court found no abuse of discretion by the district court.<sup>88</sup>

*E. Preemption: Safety National Casualty Corp. v. Certain Underwriters at Lloyd's, London*

Louisiana Safety Association of Timbermen-Self Insurers Fund (LSAT) provides insurance to its members and contracted with Lloyd's for excess insurance coverage.<sup>89</sup> LSAT later assigned its rights under the reinsurance agreement with Lloyd's to Safety National, but Lloyd's refused to recognize the assignment.<sup>90</sup> Lloyd's and Safety National entered arbitration, but they could not agree on a process to select the arbitrator; therefore, Lloyd's eventually returned to the district court to join LSAT as a party.<sup>91</sup> LSAT then moved to quash arbitration, arguing that the agreements were unenforceable under state law.<sup>92</sup> The district court agreed and granted

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79. *Id.* at 448.

80. *See id.*

81. *Id.*

82. *Id.* at 449.

83. *Id.*

84. *Id.*

85. *Id.*

86. *Id.*

87. *Id.* at 449-50.

88. *Id.* at 450.

89. *Safety Nat'l Cas. Corp. v. Certain Underwriters at Lloyd's, London*, 543 F.3d 744, 746 (5th Cir. Sept. 2008).

90. *Id.*

91. *Id.*

92. *Id.* at 747.

the motion to quash.<sup>93</sup> The court held that a Louisiana law prohibiting arbitration clauses in insurance agreements reverse-preempted federal law and, more importantly, the international convention providing for the recognition and enforcement of arbitration awards.<sup>94</sup>

On appeal, the Fifth Circuit considered reverse-preemption under the McCarran-Ferguson Act, which provides that “[n]o Act of Congress shall be construed to invalidate, impair, or supersede any law enacted by any State for the purpose of regulating the business of insurance.”<sup>95</sup> Lloyd’s did not argue that the Louisiana statute was enacted for the purpose of regulating insurance, but Lloyd’s questioned whether the international convention could be treated as an Act of Congress.<sup>96</sup> This required the court to evaluate the text and import of the treaty, which was no easy task.<sup>97</sup> The court sidestepped the issue of whether the treaty was self-executing and determined that this did not matter.<sup>98</sup> The court acknowledged that non-self-executing treaties do stand on equal footing with Acts of Congress after they are ratified, but the court explained that such equality does not cause treaties to lose their unique identities.<sup>99</sup> Rather, a

treaty remains something more than an act of Congress. It is an international agreement or contract negotiated by the Executive Branch and ratified by the Senate, not Congress. The fact that a treaty stands on equal footing with legislation when implemented by Congress does not mean that it ceases to be a treaty and becomes an Act of Congress.<sup>100</sup>

The Fifth Circuit ultimately concluded that had Congress intended to include non-self-executing treaties under the McCarran-Ferguson Act, Congress would have done so in the text.<sup>101</sup> Because Congress was silent, there could be no reverse-preemption here; therefore, the Fifth Circuit reversed the district court’s denial of the motion to compel arbitration.<sup>102</sup>

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93. *Id.*

94. *Id.* Of course, for disputes falling outside of the reach of the McCarran-Ferguson Act, the FAA will normally preempt any conflicting state laws. *See Preston v. Ferrer*, 128 S. Ct. 978, 981 (2008).

95. *Safety Nat’l Cas. Corp.*, 543 F.3d at 748 (quoting 15 U.S.C. § 1012(b) (2006)).

96. *Id.* at 749.

97. *See id.*

98. *Id.* at 750.

99. *Id.* at 749.

100. *Id.* at 750-51 (footnotes and internal quotation marks omitted).

101. *Id.* at 751-52.

102. *Id.* at 755. Preemption appeared less frequently in this Survey period when compared to years past, but it was addressed in at least one other case. *See Lester v. Advanced Env’tl. Recycling Techs., Inc.*, 248 F. App’x 492, 493-94, 496 (5th Cir. July 2007) (per curiam). In *Lester*, the court echoed earlier opinions when it explained that the FAA preempts state arbitration statutes that are inconsistent. *Id.* at 497. Thus, the Texas Arbitration Act’s requirement that an agreement to arbitrate a personal injury claim is valid only when signed by both parties and their counsel is preempted if the FAA is applicable. *Id.* at 496-97 (citing *Freudensprung v. Offshore Technical Servs., Inc.*, 379 F.3d 327, 338 n.7 (5th Cir. 2004)).

F. *Scope: Galey v. World Marketing Alliance*

After a court determines that the parties have a valid agreement to arbitrate, it must then evaluate whether the subject matter of the dispute falls within the scope of the arbitration provision. When dealing with issues of scope, courts are instructed to resolve all uncertainties in favor of arbitration.<sup>103</sup>

Even though the presumption in favor of arbitration applies to scope issues, the Fifth Circuit upheld the district court's decision to deny a motion to compel arbitration in *Galey v. World Marketing Alliance*.<sup>104</sup> The agreement in that case required "arbitration in accordance with the rules then in effect of the National Association of Securities Dealers, Inc. (NASD)."<sup>105</sup> The court adopted the approach of the Second, Sixth, and Eleventh Circuits and held that "absent state law to the contrary, the language of the arbitration agreement . . . constitutes a forum selection."<sup>106</sup>

Because the parties had limited themselves to this forum and the court could only order arbitration if it were permitted under the NASD rules (which the court held were incorporated into the contract by reference), the court's focus centered on the NASD rules themselves.<sup>107</sup> "NASD Rule 10301 provides that a claim involving a member whose membership has been terminated, suspended, cancelled, or revoked shall be ineligible for arbitration under the NASD Code of Arbitration Procedure."<sup>108</sup> The defendant acknowledged that it was no longer a NASD member but argued that evidence of its membership was barred by the parol evidence rule.<sup>109</sup> The court disagreed, concluding that the defendant's membership status did nothing to vary the terms of the agreement; rather, it allowed for a meaningful application of those terms.<sup>110</sup> Because the parties had limited themselves to arbitration before the NASD and the NASD rule precluded arbitration, the Fifth Circuit affirmed the district court's decision denying the defendant's motion to compel arbitration.<sup>111</sup>

G. *Scope: Davis v. EGL Eagle Global Logistics LP*

In another scope case, Rufus Davis entered into a lease contract with EGL, in which EGL agreed to provide Davis with a delivery truck and

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103. *See Safer v. Nelson Fin. Group, Inc.*, 422 F.3d 289, 294 (5th Cir. 2005).

104. *Galey v. World Mktg. Alliance*, 510 F.3d 529, 530 (5th Cir. Dec. 2007).

105. *Id.* at 532.

106. *Id.*

107. *Id.* at 532-33.

108. *Id.* at 532.

109. *Id.* at 532-33.

110. *Id.* at 533.

111. *Id.* at 533-34.

Davis agreed to provide delivery services.<sup>112</sup> Davis received sixty percent of the payment for each delivery.<sup>113</sup> After the contract was terminated in December 2004, Davis, alleging that he had been underpaid, brought a putative class action in Louisiana state court against EGL.<sup>114</sup> EGL removed the case to federal court and sought to compel arbitration under the arbitration clause contained within the contract.<sup>115</sup> Davis acknowledged that the contract contained a valid arbitration clause, but he argued that he was not covered by the clause because he was an EGL employee and not an independent contractor.<sup>116</sup> The district court disagreed, and Davis appealed.<sup>117</sup>

On appeal, Davis pointed to § 1 of the FAA, which excludes employment contracts of transportation workers from its purview.<sup>118</sup> The Fifth Circuit acknowledged this exemption but sidestepped the issue of employee versus independent contractor due to procedural errors in the district court.<sup>119</sup> The Fifth Circuit affirmed the decision, however, determining that, even if Davis were exempt under the FAA, the Texas Arbitration Act (TAA) would apply.<sup>120</sup> The court disagreed with Davis's argument that the contract was ambiguous and rejected his unconscionability argument.<sup>121</sup> Because the arbitration agreement was valid and Davis could be required to arbitrate at least under the TAA, the court affirmed the district court's decision.<sup>122</sup>

#### H. Scope: *Downer v. Siegel*

In *Downer v. Siegel*, the district court took the unusual approach of waiting to address the issue of arbitrability until after the arbitration had occurred.<sup>123</sup> The defendant, a stock broker at Dain Rauscher, Inc. (DR), was sued in his individual capacity for poor investment advice that he had allegedly given to the plaintiffs.<sup>124</sup> The plaintiffs had executed an investment agreement with DR that contained an arbitration clause; however, the plaintiffs argued that the dispute with Siegel was not covered by the clause because (1) DR, not Siegel, was a party to the agreement and

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112. *Davis v. EGL Eagle Global Logistics LP*, 243 F. App'x 39, 41 (5th Cir. July 2007) (per curiam).

113. *Id.*

114. *Id.* at 42.

115. *Id.*

116. *Id.*

117. *Id.*

118. *Id.* at 43.

119. *Id.*

120. *Id.* at 43-44.

121. *Id.* at 44.

122. *Id.*

123. *Downer v. Siegel*, 489 F.3d 623, 625 (5th Cir. June 2007).

124. *Id.*

(2) Siegel's advice fell outside the scope of his employment with DR.<sup>125</sup> Despite the plaintiffs' efforts to proceed in court, the district court ordered the parties to arbitration without deciding the issue of arbitrability.<sup>126</sup>

The plaintiffs again challenged arbitrability after arbitration concluded.<sup>127</sup> The district court held the dispute to be arbitrable, and the Fifth Circuit affirmed, recognizing that the language of the arbitration clause determines whether a particular dispute would be covered.<sup>128</sup> Because the broadly worded clause covered all controversies between the plaintiffs and current or former DR employees that concerned any DR account maintained by the plaintiff, the court reasoned that Siegel's advice to move the funds to a separate investment account was covered by the clause.<sup>129</sup> In doing so, the court employed the established presumption in favor of arbitrability, noting that a court is required to "decide in favor of arbitration when 'the scope of an arbitration clause is fairly debatable or reasonably in doubt.'"<sup>130</sup>

*I. Binding Non-Signatories: Rice Co. (Suisse), S.A. v. Precious Flowers Ltd.*

The Fifth Circuit did not extend the obligation to arbitrate to a non-signatory in *Rice Co. (Suisse), S.A. v. Precious Flowers Ltd.*<sup>131</sup> In that case, Rice Co. chartered a boat from IBN and later sued IBN and the owner of the vessel, Precious Flowers, by alleging that the vessel's unseaworthiness caused damage to its shipment.<sup>132</sup> The charter contract contained a New York arbitration clause, which Rice Co. tried to invoke against Precious Flowers.<sup>133</sup> The charter contract would have been incorporated into the bill of lading had the bill been executed.<sup>134</sup> Because IBN was authorized to

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125. *Id.*

126. *Id.*

127. *Id.* at 626.

128. *Id.*

129. *Id.*; see also *Omni Pinnacle, LLC v. ECC Operating Servs., Inc.*, 255 F. App'x 24, 25-26 (5th Cir. Oct. 2007) (per curiam) (holding that the dispute fell within the scope of the arbitration clause because the plaintiffs' claim that they were entitled to return to work under the sub-contract could not be evaluated without reference to that contract); *Tittle v. Enron Corp.*, 463 F.3d 410, 422 (5th Cir. 2006) ("A dispute 'arises out of or relates to' a contract if the legal claim underlying the dispute could not be maintained without reference to the contract." (quoting *Ford v. Nylcare Health Plans of the Gulf Coast*, 141 F.3d 243, 250 (5th Cir. 1998))).

130. *Downer*, 489 F.3d at 626 (quoting *Mar-Len of La., Inc. v. Parsons-Gilbane*, 773 F.2d 633, 635 (5th Cir. 1985)). This presumption stems from Supreme Court precedent, which explains that "in order to arbitrate the particular grievance should not be denied unless it may be said with positive assurance that the arbitration clause is not susceptible of an interpretation that covers the asserted dispute." *AT & T Techs., Inc. v. Commc'ns Workers of Am.*, 475 U.S. 643, 650 (1986) (quoting *United Steelworkers of Am. v. Warrior & Gulf Navigation Co.*, 363 U.S. 547, 582-83 (1960)).

131. *Rice Co. (Suisse), S.A. v. Precious Flowers, Ltd.*, 523 F.3d 528, 528 (5th Cir. Apr. 2008).

132. *Id.* at 530-31.

133. *Id.* at 530.

134. *Id.* at 530-31.

sign bills of lading as Precious Flowers's agent, Rice Co. argued that IBN would have signed on behalf of Precious Flowers, thereby incorporating the arbitration clause and obligating Precious Flowers to arbitrate.<sup>135</sup> Precious Flowers argued that there was no evidence that IBN would have signed as its agent; rather, Precious Flowers may have just signed for itself as charterer and owner.<sup>136</sup> It also argued that in any event, its agency agreement with IBN only allows IBN to sign on behalf of Precious Flowers when the signing is without prejudice to the principal.<sup>137</sup>

The district court denied the motion to arbitrate, and the Fifth Circuit affirmed.<sup>138</sup> The circuit court reasoned that even if IBN had signed on behalf of Precious Flowers, it was unlikely that the New York arbitration clause would apply to Precious Flowers because it was limited by its language to disputes between disponent owners (IBN, in this case) and charterers (Rice Co.).<sup>139</sup> Focusing on the "without prejudice" language and the fact that Precious Flowers had rejected a New York arbitration clause in a separate contract with Rice Co., the court determined that the vessel owner could not be bound by the provisions in the bill of lading.<sup>140</sup> The grant of agency was limited, and it precluded the agent from signing the principal into a contract that could be prejudicial to the principal's interests.<sup>141</sup>

*J. Binding Non-Signatories: Palmer Ventures LLC v. Deutsche Bank AG*

The Fifth Circuit again refused to bind a non-signatory in *Palmer Ventures LLC v. Deutsche Bank AG*.<sup>142</sup> In *Palmer*, a group of customers sued the defendant bank after the IRS ruled that one of the bank's investment tools was an abusive tax shelter.<sup>143</sup> The bank sought to invoke the arbitration clause contained in the customer agreement between the customers and a bank subsidiary.<sup>144</sup> Although the bank was not a signatory to the agreement, it argued that it should be allowed to invoke the clause because (1) the signing subsidiary was an agent for the bank and (2) its case falls within the equitable estoppel principles outlined in *Grigson v. Creative Artists Agency L.L.C.*<sup>145</sup>

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135. *Id.* at 533.

136. *Id.* at 535.

137. *Id.*

138. *Id.* at 531, 541.

139. *Id.* at 536.

140. *Id.* at 538.

141. *Id.* at 537.

142. *Palmer Ventures LLC v. Deutsche Bank AG*, 254 F. App'x 426, 427 (5th Cir. Nov. 2007) (per curiam).

143. *Id.* at 427.

144. *Id.* at 428-29.

145. *Id.* at 429 (citing *Grigson v. Creative Artists Agency L.L.C.*, 210 F.3d 524, 527-28 (5th Cir. 2000)).

The Fifth Circuit addressed the bank's equitable estoppel argument first. The bank claimed that it met both tests for equitable estoppel because (1) the customers (who were signatories to the arbitration clause) would have to rely on the terms of the written agreement in asserting their claims against the bank non-signatory and (2) the customers had raised allegations of "substantially interdependent and concerted misconduct by both the nonsignatory and one or more of the signatories to the contract."<sup>146</sup> The district court disagreed, finding that the plaintiffs were not relying on the agreement with the bank's subsidiary to establish a cause of action.<sup>147</sup> Though the plaintiffs did mention the agreement twice in their complaint, they did so in anticipation of the bank's defenses, not in an effort to support their own claims.<sup>148</sup> The Fifth Circuit affirmed the district court on this ground, holding there was no abuse of discretion.<sup>149</sup>

The Fifth Circuit also agreed with the district court that the bank had failed to prove that the customers' claims against the bank could not be considered without analyzing the tortious acts of the signatories (i.e., the bank's subsidiary).<sup>150</sup> The plaintiffs argued that the subsidiary did nothing more than hold the investment account, and the bank provided no evidence to refute that claim.<sup>151</sup> The court held that this evidence was not enough to show that "the district court abused its discretion in concluding that Deutsche Bank failed to meet the second *Grigson* test."<sup>152</sup>

The bank also argued that agency principles allowed it to invoke the arbitration agreement, but the court rejected this argument as well.<sup>153</sup> The court acknowledged that the subsidiary could be considered an agent of the bank but noted that an agency relationship alone is not enough to allow a non-signatory to bind a signatory to an arbitration clause.<sup>154</sup> Rather, the non-signatory must satisfy the more rigorous test set forth in *Grigson*, which Deutsche Bank failed to do.<sup>155</sup>

The court concluded that "although the instant lawsuit may go against the prevailing trend, it is with good reason."<sup>156</sup> The facts of the case did not support a claim of estoppel nor did they meet the agency rule set forth in Fifth Circuit case law.<sup>157</sup> Thus, the court found that the district court did not abuse its discretion in refusing to compel arbitration.<sup>158</sup>

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146. *Id.* at 429-30 (internal quotations omitted).

147. *Id.* at 431-32.

148. *Id.*

149. *Id.* at 432.

150. *Id.*

151. *Id.*

152. *Id.*

153. *Id.* at 433.

154. *Id.*

155. *Id.*

156. *Id.* at 434.

157. *Id.* at 429-33.

158. *Id.* at 434. The court is not always adverse to binding non-signatories; however, many times it



*K. Binding Non-Signatories: JP Morgan Chase & Co. v. Conegie  
ex rel. Lee*

Unlike *Precious Flowers* and *Palmer Ventures*, the Fifth Circuit did bind a third party non-signatory in *JP Morgan Chase & Co. v. Conegie ex rel. Lee*. Delores Conegie was admitted to a nursing home in Greenville, Mississippi with Huntington's chorea, a disease which causes severe physical and neurological problems.<sup>159</sup> Conegie's mother signed the nursing home agreement on Conegie's behalf.<sup>160</sup> In a later personal injury suit, Conegie argued that she could not be compelled to arbitrate pursuant to the agreement because her mother did not have authority to sign on her behalf.<sup>161</sup> The district court agreed, and the nursing home appealed.<sup>162</sup>

The Fifth Circuit began its analysis by noting that the court has been inconsistent in applying federal or state law to the question of whether a non-signatory is bound by an arbitration clause.<sup>163</sup> Unfortunately for practitioners, the court sidestepped the issue in this case, finding that Conegie's mother would have had authority under both the state and federal law.<sup>164</sup> Under Mississippi law, Conegie lacked capacity to sign the agreement, but Conegie's mother was an appropriate surrogate.<sup>165</sup> Under federal law, the parties clearly intended at the time the contract was executed to make Conegie a third party beneficiary—she was expressly listed as the patient and resident in the contract.<sup>166</sup> Thus, Conegie was bound to arbitrate any dispute arising from the contract, and the district court erred in determining otherwise.<sup>167</sup> The case was reversed and remanded.<sup>168</sup>

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depends on the unique facts of the case. *See, e.g., Stinger v. Chase Bank, USA, NA*, 265 F. App'x 224, 227-28 (5th Cir. Feb. 2008) (per curiam). For example, the court agreed that when one credit card company transfers a credit card agreement to a second company, the second company, a non-signatory, may compel arbitration under the agreement. *Id.*

159. *JP Morgan Chase & Co. v. Conegie ex rel. Lee*, 492 F.3d 596, 598 (5th Cir. July 2007).

160. *Id.*

161. *Id.*

162. *Id.*

163. *Id.*

164. *Id.*

165. *Id.* at 599.

166. *Id.* at 600.

167. *Id.*

168. *Id.*

## IV. DEFENSES

A. *Waiver: Trafigura Beheer B.V. v. M/T Probo Elk*

As the Fifth Circuit has previously noted, a party may waive its right to arbitrate by substantially participating in the litigation process.<sup>169</sup> The bar is high, however, and courts are reluctant to find waiver.<sup>170</sup> The Fifth Circuit is no exception, and the court reminded litigants of this in *Trafigura*, explaining that a “defendant’s . . . minimal participation in discovery did not result in a waiver of arbitrability.”<sup>171</sup>

B. *Waiver: Joseph Chris Personnel Services, Inc. v. Rossi*

But waiver was a closer question in *Joseph Chris Personnel Services, Inc. v. Rossi*.<sup>172</sup> Defendants Donna Rossi and Albert Marco left Joseph Chris Personnel Services in 2003 to start their own recruiting firm.<sup>173</sup> Both of their employment contracts included an arbitration clause and a safe-harbor provision “that allowed a party the right to sue in court ‘for the purpose of obtaining injunctive relief without waiver of the right to arbitrate,’” which mirrors a similar provision found in the Texas Arbitration Act.<sup>174</sup> Joseph Chris brought suit in state court against Rossi and Marco for violating the noncompete provisions in their employment contracts, and when Rossi and Marco removed the case to federal court, Joseph Chris attempted to move the case to arbitration.<sup>175</sup> On Rossi’s and Marco’s motion, the district court enjoined Joseph Chris from pursuing arbitration, finding that the company had waived its right to arbitrate by engaging in litigation.<sup>176</sup> After Rossi and Marco recovered on their counterclaim for unpaid commissions and prevailed on their summary judgment motions, Joseph Chris appealed.<sup>177</sup>

The Fifth Circuit first addressed Rossi and Marco’s argument that Joseph Chris waived its right to arbitrate the moment it requested a jury

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169. See *EZ Pawn Corp. v. Mancias*, 934 S.W.2d 87, 89 (Tex. 1996) (noting waiver of arbitration rights when litigation has begun will only be found when the party seeking to enforce the agreement substantially invokes the judicial process to the other party’s detriment).

170. See *Sw. Indus. Import & Export, Inc. v. Wilmod Co.*, 524 F.2d 468, 470 (5th Cir. 1975) (per curiam); *Gen. Guar. Ins. Co. v. New Orleans Gen. Agency Inc.*, 427 F.2d 924, 928 (5th Cir. 1970).

171. *Trafigura Beheer B.V. v. M/T Probo Elk*, 266 F. App’x 309, 313 (5th Cir. July 2007) (per curiam) (citing *Valero Ref., Inc. v. M/T Lauberhorn*, 813 F.2d 60, 66 (5th Cir. 1987)).

172. See *Joseph Chris Pers. Servs., Inc. v. Rossi*, 249 F. App’x 988, 990-93 (5th Cir. Oct. 2007) (per curiam).

173. *Id.* at 989.

174. *Id.*

175. *Id.* at 989-90.

176. *Id.* at 990.

177. *Id.*

trial.<sup>178</sup> The court rejected this argument, explaining that such a holding “would mean that anytime a plaintiff filed suit and asked for a jury trial, the defendant would be precluded from requesting arbitration because allowing arbitration would ‘prejudice’ the plaintiff by waiving its right to a jury. That is clearly not the law.”<sup>179</sup>

The court then turned its focus to “whether Joseph Chris’s decision to file suit, and the related fees and delay caused by that decision, resulted in a waiver of its right to arbitrate.”<sup>180</sup> In finding no waiver, the court explained that “[w]hile typically the decision to file suit will indicate a ‘disinclination’ to arbitrate, Texas state law expressly permitted Joseph Chris to file suit to, among other things, obtain an injunction,” and that the parties had agreed to allow certain lawsuits without waiver of the right to arbitrate.<sup>181</sup> The court also held that the prejudice to Rossi and Marco—the delay and costs—was minimal and that the court’s previous holdings supported its decision.<sup>182</sup> As a result, the Fifth Circuit reversed the district court’s grant of summary judgment and the district court’s findings in favor of Rossi and Marco.<sup>183</sup>

### C. *Waiver: Unity Communications Corp. v. Cingular Wireless*

Despite the high bar for finding waiver, waiver was found in *Cingular*.<sup>184</sup> In that case, the defendant waited three years after Unity commenced the suit and the parties had engaged in extensive pretrial activity to file a motion to compel arbitration.<sup>185</sup> The district court found waiver, and the Fifth Circuit agreed, determining that the parties had been substantially involved in the litigation process and that the discovery on arbitrable issues had prejudiced the non-moving party.<sup>186</sup> The court also dismissed Cingular’s argument that the three-year delay was due to issues largely outside of its control, including the effects Hurricane Katrina had on the Southern District of Mississippi.<sup>187</sup> In doing so, the circuit court

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178. *See id.* at 991.

179. *Id.*

180. *Id.*

181. *Id.* (citing *Miller Brewing Co. v. Fort Worth Distribution Co.*, 781 F.2d 494, 497 (5th Cir. 1986); *Menna v. Romero*, 48 S.W.3d 247, 251 (Tex. App.—San Antonio 2001, pet. dism’d w.o.j.).

182. *Id.* at 992 (citing *Cargill Ferrous Int’l v. Sea Phoenix MV*, 325 F.3d 695, 700-01 (5th Cir. 2003); *Tenneco Resins, Inc. v. Davy Int’l, AG*, 770 F.2d 416, 421 (5th Cir. 1985)). The court did note, however, that the Seventh Circuit “has charted a different path” than the Fifth Circuit on this subject. *Id.* at 993 (citing *Cabinetree of Wis., Inc. v. Kraftmaid Cabinetry, Inc.*, 50 F.3d 388, 390 (7th Cir. 1995)).

183. *Id.* The court did suggest that waiver might result if a party waited “until the district court had made a number of rulings to test the waters before filing for arbitration.” *Id.* This was not the case here. *See id.*

184. *See Unity Commc’ns Corp. v. Cingular Wireless*, 256 F. App’x 679, 680 (5th Cir. Dec. 2007) (per curiam).

185. *See id.*

186. *See id.* at 680-82 (“Although there is a heavy presumption against waiver, here it has been overcome by Cingular’s full participation in this lawsuit.”).

187. *See id.* at 682.

reminded practitioners that it is the content of the delay, and not necessarily the time, that matters.<sup>188</sup>

*D. Unconscionability: Preston v. Ferrer*

In *Preston*, the Supreme Court once again addressed who determines unconscionability—the arbitrator or the courts.<sup>189</sup> And again, the Court held that when a party claims that the contract as a whole is unconscionable, as opposed to just the arbitration clause, unconscionability is an issue for the arbitrator.<sup>190</sup>

*E. Unconscionability: Stinger v. Chase Bank*

Plaintiff Stinger filed suit against Chase Bank in state court after the bank allegedly reduced Stinger's credit limits on his two credit cards and refused to honor a cash advance check that Stinger had deposited with his bank.<sup>191</sup> Chase removed the suit to federal court and filed a motion to compel arbitration, which was granted.<sup>192</sup> Stinger appealed.<sup>193</sup>

Stinger first argued that he did not receive the letters notifying him that his contract terms had been changed, and thus no valid agreement to arbitrate existed between the two parties.<sup>194</sup> Chase's records, however, suggested that the letter had been sent and received because no note of returned mail appeared on Stinger's account records.<sup>195</sup> Because Stinger's claim that he had not received the notices was not supported by the evidence, the Fifth Circuit determined that the district court's decision to discredit Stinger's claim was not clearly erroneous.<sup>196</sup>

188. *See id.*

189. *See Preston v. Ferrer*, 128 S. Ct. 978, 981 (2008).

190. *See id.* at 983-84 (“In *Prima Paint Corp. v. Flood & Conklin Mfg. Co.*, we held that attacks on the validity of an entire contract, as distinct from attacks aimed at the arbitration clause, are within the arbitrator’s ken. . . . The litigation in *Prima Paint* originated in federal court, but the same rule, we held in *Buckeye*, applies in state court. . . . *Buckeye* largely, if not entirely, resolves the dispute before us.” (internal citation omitted)).

191. *Stinger v. Chase Bank*, 265 F. App’x 224, 224-25 (5th Cir. Feb. 2008) (per curiam).

192. *Id.* at 226.

193. *Id.* Though neither party contested jurisdiction on appeal, there is some question regarding whether the case was properly before the Fifth Circuit. The appellate court stated that it had jurisdiction under 9 U.S.C. § 16(a)(3) (2006), which allows for appeals from “a final decision with respect to an arbitration which is subject to this title.” This statutory provision arguably could apply to a motion compelling arbitration and dismissing the case, but it seems to conflict with 9 U.S.C. § 16(b)(3) (2006), which expressly disallows appeals from orders “compelling arbitration under section 206 of this title.” And the court never mentions whether the case was actually dismissed after arbitration was compelled, making jurisdiction even more suspect. *See Stinger*, 265 F. App’x at 226.

194. *Stinger*, 265 F. App’x at 227.

195. *Id.* at 226.

196. *See id.* at 227-28. As noted in past cases, the party’s receipt of a notice changing contract terms and its continued use of the product or service—in this case, credit cards—indicate acceptance of those changed terms. *Id.* at 227. In other words, no signature is needed. *Id.*

Stinger also argued that the arbitration clauses were void for unconscionability.<sup>197</sup> The thrust of Stinger's argument was that the clauses were contracts of adhesion that had resulted from unequal bargaining power.<sup>198</sup> The court rejected this argument, explaining that arbitration clauses are not unconscionable just because they have resulted from unequal bargaining power.<sup>199</sup> The court noted that courts applying Delaware law (the state law used in this case to evaluate the unconscionability claim) "have consistently rejected claims that arbitration clauses in credit card agreements are unconscionable."<sup>200</sup> The Fifth Circuit affirmed the district court's decision.<sup>201</sup>

*F. Unconscionability: Boniaby v. Securitas Security Services USA, Inc.*

Marilyn Boniaby argued that her arbitration agreement with Securitas was void due to procedural unconscionability.<sup>202</sup> Under Texas law (as applied by the Fifth Circuit), this requires a showing of the "defendant's 'overreaching or sharp practices' combined with the plaintiff's 'ignorance or experience.'"<sup>203</sup> The court found nothing in the record reflecting either of these circumstances and agreed that the district court properly compelled arbitration.<sup>204</sup>

*G. Duress: Lester v. Advanced Environmental Recycling Technologies, Inc.*

Plaintiff Rector Lester injured his knee at work and sued his employer and the administrator of his benefits plan, Advanced Environmental Technologies, Inc. (AERT).<sup>205</sup> In the district court, AERT demonstrated that a valid arbitration agreement existed by showing that (1) the plan's contract contained an express arbitration provision, (2) Lester had twice acknowledged receipt of the plan, (3) he continued to work for his employer after receiving the plan, and (4) he had accepted the plan's benefits after his injury.<sup>206</sup> The court compelled arbitration, and Lester appealed.<sup>207</sup>

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197. *See id.* at 228-29.

198. *Id.*

199. *Id.* at 229.

200. *Id.*

201. *Id.*

202. *Boniaby v. Securitas Sec. Servs. USA, Inc.*, 249 F. App'x 331, 332 (5th Cir. Sept. 2007) (per curiam).

203. *Id.* at 331 (quoting *Fleetwood Enters., Inc. v. Gaskamp*, 280 F.3d 1069, 1077 (5th Cir. 2002)).

204. *Id.*

205. *Lester v. Advanced Env'tl. Recycling Techs., Inc.*, 248 F. App'x 492, 493 (5th Cir. July 2007) (per curiam).

206. *Id.* at 494.

207. *Id.*

Lester's first argument was that he was entitled to a jury trial to determine the validity of the arbitration agreement.<sup>208</sup> The Fifth Circuit rejected this argument, explaining that while 9 U.S.C. § 4 permits a party "to demand a jury trial to resolve factual issues surrounding the making of an arbitration agreement," a party seeking a trial must produce some evidence to substantiate the party's allegations.<sup>209</sup> The court held that Lester had not produced evidence of duress even though he argued that AERT forced him to sign the acknowledgement form in order to receive benefits.<sup>210</sup> Even if true, AERT lawfully could refuse to compensate an injured employee who did not agree to the terms of the plan.<sup>211</sup> Because Lester could not show that "AERT obtained his consent by threatening to do something that it had no legal right to do," he was not entitled to a jury trial on the validity of the agreement to arbitrate.<sup>212</sup>

#### V. DISMISSALS VS. STAYS

After determining that a dispute is entirely arbitrable, courts in the Fifth Circuit are encouraged to dismiss, rather than stay, the case.<sup>213</sup>

#### VI. JUDICIAL REVIEW OF ARBITRATION AWARDS

##### A. *Confirmation: Wartsila Finland OY v. Duke Capital LLC*

After an arbitration resulted in an award for Wartsila, the company sought payment.<sup>214</sup> Defendant Duke refused to pay, claiming that the company was withholding payment to protect itself against unfinished or defective work provided by Wartsila.<sup>215</sup> Wartsila filed a motion with the district court to affirm the award.<sup>216</sup> Duke agreed that the award should be confirmed but moved to stay enforcement of the award.<sup>217</sup> The district court rejected Duke's argument and confirmed the award, and Duke appealed.<sup>218</sup>

The Fifth Circuit addressed Duke's two arguments on appeal, determining first whether the district court's decision was consistent with the award itself and second whether the district court abused its discretion

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208. *Id.*

209. *Id.* at 494-95 (quoting *Am. Heritage Life Ins. Co. v. Orr*, 294 F.3d 702, 710 (5th Cir. 2002)).

210. *Id.* at 495.

211. *Id.*

212. *Id.*

213. *Alford v. Dean Witter Reynolds, Inc.*, 975 F.2d 1161, 1164 (5th Cir. 1992).

214. *Wartsila Fin. OY v. Duke Capital LLC*, 518 F.3d 287, 290 (5th Cir. Feb. 2008).

215. *Id.* at 290-91.

216. *Id.* at 291.

217. *Id.*

218. *Id.*

in refusing to stay enforcement of the award.<sup>219</sup> The court agreed that the district court's requirement of immediate payment was consistent with the award because the arbitration tribunal had already accounted for offsets for defective or unremedied work by Wartsila.<sup>220</sup> Finding no special circumstances that would have warranted a discretionary stay, the court determined that the district court had not abused its discretion in requiring immediate payment.<sup>221</sup>

*B. Vacatur: Rogers v. KBR Technical Services, Inc.*

Recognizing that *Mattel* may have limited the grounds on which an arbitration award can be vacated or modified, the Fifth Circuit confirmed the award in *Rogers*, concluding that Rogers was unable to show that vacatur was warranted under either statutory or non-statutory grounds.<sup>222</sup>

*C. Challenging the Arbitrator's Authority: HCC Aviation Insurance Group, Inc. v. Employers Reinsurance Corp.*

The Fifth Circuit looks critically at cases in which the district court vacates an arbitration award on the grounds that the arbitrator exceeded his authority. This was the situation in *HCC Aviation Insurance Group, Inc. v. Employers Reinsurance Corp.*, in which an arbitrator decided whether a non-party to an insurance agreement could invoke the protections of that agreement.<sup>223</sup> The insurer-appellee argued that the district court had already decided this issue prior to arbitration and dismissed the protection claims by the third party against the insurer.<sup>224</sup> The Fifth Circuit disagreed and decided that the district court's order dismissing some of the claims did not extend to protection claims brought by the non-party against the insurer, and that because the district court sent all remaining claims to binding arbitration, those surviving claims of the non-party were included in the arbitration order.<sup>225</sup>

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219. *Id.*

220. *Id.* at 294.

221. *Id.* at 294-95. Such circumstances, the court noted, might include insolvency of the prevailing party at arbitration combined with the existence of pending claims by the non-prevailing party against the prevailing party. *See id.* at 295.

222. *Rogers v. KBR Technical Servs., Inc.*, No. 08-20036, 2008 WL 2337184, at \*2-\*6 (5th Cir. June 9, 2008) (citing *Hall St. Assocs., L.L.C v. Mattel Inc.*, 128 S. Ct. 1396, 1403 (2008)). Notably, the court did not fully address the issue because it found that none of the non-statutory grounds for vacatur were met. *Id.* ("However, because we affirm the district court and hold that the arbitration award is confirmed, there is no need in the instant case to determine whether those non-statutory grounds for vacatur of an arbitration award remain good law after *Mattel*.").

223. *HCC Aviation Ins. Group, Inc. v. Employers Reinsurance Corp.*, 243 F. App'x 838, 840-43 (5th Cir. June 2007).

224. *Id.* at 843.

225. *Id.* at 843-44.

D. *Severability of Arbitration Clauses and Confidentiality of Resulting Awards: ITT Educational Services, Inc. v. Arce*

The issue was judicial review with a twist in *ITT Educational Services, Inc. v. Arce*.<sup>226</sup> In *Arce*, a group of students sought arbitration against ITT pursuant to an arbitration clause in their enrollment agreements.<sup>227</sup> The arbitrator found in favor of the students in June 2006.<sup>228</sup> In July 2006, Joel Rodriguez, who had not participated in the first round of arbitration, demanded arbitration against ITT.<sup>229</sup> Rodriguez's attorney had represented the students in the first arbitration, and she informed ITT that she intended to use the evidence from the first arbitration in Rodriguez's case.<sup>230</sup> ITT filed a suit for declaratory relief and sought to enjoin Rodriguez's attorney from filing an unredacted copy of the arbitrator's finding with the district court.<sup>231</sup> The district court granted a permanent injunction, and after Rodriguez's motion for a new trial was denied, Rodriguez appealed.<sup>232</sup>

Courts review an appeal from the grant of a permanent injunction for an abuse of discretion, and the Fifth Circuit held there was none in this case.<sup>233</sup> Rodriguez argued that the entire enrollment agreement, including the confidentiality provision, was void under Texas law because the arbitrator found fraudulent inducement.<sup>234</sup> ITT disputed this characterization and argued that even if the arbitrator had made such a finding, the district court correctly found that the confidentiality provision was part of the arbitration clause and that the clause was severable and separately enforceable from the enrollment agreement.<sup>235</sup>

The Fifth Circuit agreed with ITT, citing *Prima Paint* and *Buckeye* for the proposition that an arbitration provision is severable from the remainder of a contract.<sup>236</sup> The court also agreed with ITT that the confidentiality provision, contained in a subparagraph under the arbitration clause, was part of the arbitration agreement and also severable.<sup>237</sup> Because the arbitration clause had not been specifically targeted with the fraudulent inducement argument, it was presumed valid; therefore, the confidentiality provision applied to the first arbitrator's award.<sup>238</sup>

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226. ITT Educ. Servs., Inc. v. Arce, 533 F.3d 342 (5th Cir. June 2008).

227. *Id.* at 344-45.

228. *Id.* at 344.

229. *Id.*

230. *Id.*

231. *Id.*

232. *Id.*

233. *Id.*

234. *Id.*

235. *Id.*

236. *Id.* (citing *Buckeye Check Cashing, Inc. v. Cardegna*, 546 U.S. 440, 445-46 (2006); *Prima Paint Corp. v. Flood & Conklin Mfg. Co.*, 388 U.S. 395, 402 (1967)).

237. *Id.* at 345.

238. *Id.* at 346.



*E. Res Judicata: Jamison v. Drive Time Sales & Finance Corp.*

After being fired from Drive Time, Leland Jamison instituted arbitration against his former employer and ultimately recovered \$25,000 for discrimination-based claims.<sup>239</sup> Unhappy with the award, he sued Drive Time in federal court on similar claims.<sup>240</sup> The district court recognized the similarity in the claims and held that the claims were, or should have been, arbitrated in the earlier proceeding and were thus barred by *res judicata*.<sup>241</sup> The court explained that even if *res judicata* did not bar the claims, they would be subject to the arbitration requirement between the parties.<sup>242</sup> The Fifth Circuit agreed and affirmed the district court's dismissal of the claims.<sup>243</sup>

*F. Res Judicata: Fuentes v. DIRECTV, Inc.*

Plaintiff Robi Fuentes filed a putative class action relating to a \$4.20 late fee assessed by her satellite television provider.<sup>244</sup> The district court granted the defendant's motion to compel arbitration, and the arbitrator determined that plaintiff's claim was moot because the fee had been removed and credited to her account.<sup>245</sup> Not easily dissuaded, Fuentes then filed a claim relating to the same late fee in small claims court and in the district court.<sup>246</sup> The district court enjoined the plaintiff from pursuing her small claims case and compelled arbitration once again.<sup>247</sup> The arbitrator dismissed the case, and Fuentes moved in state court to have the award vacated.<sup>248</sup> Meanwhile, the district court confirmed the award, dismissed the case, and imposed over \$10,000 in sanctions against Fuentes's attorney.<sup>249</sup>

Fuentes appealed the district court's order enjoining her from pursuing the small claims case.<sup>250</sup> The Fifth Circuit affirmed, holding that the injunction was necessary to effectuate one of the FAA's primary purposes—preventing multiple litigations in the same action—and to prevent the arbitration from being undermined.<sup>251</sup>

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239. *Jamison v. Drive Time Sales & Fin. Corp.*, 261 F. App'x 713, 713 (5th Cir. Jan. 2008) (*per curiam*).

240. *Id.*

241. *Id.*

242. *Id.*

243. *Id.* at 713-14.

244. *Fuentes v. DIRECTV Inc.*, 245 F. App'x 408, 409 (5th Cir. Aug. 2007) (*per curiam*).

245. *Id.*

246. *Id.*

247. *Id.*

248. *Id.*

249. *Id.*

250. *Id.* at 410.

251. *Id.*

*G. Collateral Attacks on Foreign Arbitral Awards: Gulf Petro Trading Co. v. Nigerian National Petroleum Corp.*

This suit resulted from an arbitration award in favor of Nigerian National Petroleum Corp. (NNPC), which found that Gulf Petro did not have standing to pursue claims against NNPC.<sup>252</sup> Gulf Petro challenged the award in Swiss courts, but the award was affirmed.<sup>253</sup> Unsatisfied, Gulf Petro filed another suit in the Northern District of Texas, but this suit was dismissed.<sup>254</sup> In September 2005, Gulf Petro filed a second action—this time in the Eastern District of Texas—claiming that the final arbitration award was procured by fraud and bribery.<sup>255</sup> NNPC moved to dismiss the suit, arguing that the court lacked subject matter and personal jurisdiction.<sup>256</sup> The district court agreed that under the New York Convention, it lacked jurisdiction to vacate the award and that several of the defendants were entitled to foreign sovereign immunity.<sup>257</sup>

On appeal in the Fifth Circuit, Gulf Petro agreed that the court did not have jurisdiction to vacate the international award, but it argued that its RICO and state law claims were independent of its request for vacatur.<sup>258</sup> The court disagreed, determining “that the claims asserted by Gulf Petro are no more, in substance, than a collateral attack on the Final Award itself.”<sup>259</sup> In doing so, the court adopted the reasoning of a series of Sixth Circuit cases that

examined the relationship between the alleged wrongdoing, purported harm, and arbitration award, and concluded that because the harm was not caused by the wrongdoing in and of itself, but rather by the impact of the acts complained of on the award, the claims were no more than collateral attacks on the award.<sup>260</sup>

Gulf Petro’s RICO and state law claims stemmed from its allegations that NNPC had bribed one of the arbitrators.<sup>261</sup> The Fifth Circuit recognized these claims as being separate.<sup>262</sup> But because Gulf Petro sought, as damages, the favorable award it believed it should have received

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252. *Gulf Petro Trading Co. v. Nigerian Nat’l Petrol. Corp.*, 512 F.3d 742, 744 (5th Cir. Jan. 2008).

253. *Id.*

254. *Id.* at 744-45 (citing *Gulf Petro Trading Co. v. Nigerian Nat’l Petrol. Corp.*, 288 F. Supp. 2d 783, 785 (N.D. Tex. 2003)).

255. *Id.* at 745.

256. *Id.*

257. *Id.*

258. *Id.* at 747.

259. *Id.*

260. *Id.* at 749 (citing *Decker v. Merrill Lynch, Pierce, Fenner & Smith, Inc.*, 205 F.3d 906, 907 (6th Cir. 2000); *Corey v. N.Y. Stock Exch.*, 691 F.2d 1205, 1207 (6th Cir. 1982)).

261. *Id.*

262. *Id.* at 749-50.

from arbitration, the court concluded that Gulf Petro was in fact trying to relitigate certain issues.<sup>263</sup> Employing the reasoning of the Sixth Circuit, the court explained that

[t]he harm in this case did not result when the arbitrators failed to disclose business dealings, engaged in *ex parte* communications with NNPC, or were bribed. Rather, it resulted from the impact that these acts had on the Final Award. The relief Gulf Petro seeks—the award it believes it should have received, as well as costs, expenses, and consequential damages stemming from the unfavorable award it did receive—shows that its true objective in this suit is to rectify the harm it suffered in receiving the unfavorable Final Award. . . . Though cloaked in a variety of federal and state law claims, Gulf Petro’s complaint amounts to more than a collateral attack on the Final Award itself.<sup>264</sup>

And because collateral attacks on foreign arbitral awards are barred by the New York Convention, the court concluded that dismissal of the complaint for lack of subject matter jurisdiction was proper.<sup>265</sup>

## VII. CONCLUSION

Mediation enjoys wide-spread adoption with infrequent court intervention. Arbitration, on the other hand, remains one of the most litigated areas in civil law. The Supreme Court has written five opinions in two terms and those decisions continue to impact the Fifth and other circuits. At least two dozen bills are pending in Congress that would impact if not attempt to repeal many of those decisions. These federal bills often have state counterparts that are working their way through legislative processes in the statehouses. By the time this Article reviewing the period ending May 31, 2008 can reach print, a new review period will have produced another active year. All this is to say that litigating arbitration in the Fifth Circuit and other jurisdictions remains a very dynamic area of practice.

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263. *Id.*

264. *Id.* at 750.

265. *Id.* at 751-53.

TABLE I: PRE-ARBITRATION CHALLENGES

	Case Name	Case Summary	Compel Arbitration?			
			Trial Court		Fifth Circuit	
			Yes	No	Yes	No
preemption	<i>Preston v. Ferrer</i> , 128 S. Ct. 978 (2008).	U.S. Supreme Court held that when parties agree to arbitrate all questions arising under a contract, the FAA supersedes state judicial or administrative laws lodging primary jurisdiction in another forum.		√	US	
	<i>Safety National Casualty Corp. v. Certain Underwriters at Lloyd's, London</i> , 543 F.3d 744 (5th Cir. Sept. 2008).	McCarran-Ferguson Act does not elevate a Louisiana statute prohibiting arbitration of insurance contracts above the Convention on the Recognition and Enforcement of Foreign Arbitral Awards.		√	√	
severability	<i>ITT Educational Services, Inc. v. Arce</i> , 533 F.3d 342 (5th Cir. June 2008).	ITT student sought to rely on evidence and findings from a previous arbitration against ITT by other students. ITT sought and obtained declaratory and injunctive relief preventing the first group from revealing any aspect of their arbitration. Court found that the arbitration confidentiality provision severed with the arbitration clause, which was enforceable under <i>Prima Paint</i> and its progeny.	√		√	
agreement	<i>Ameriprise Financial Services Inc. v. Etheredge</i> , 277 F. App'x 447 (5th Cir. May 2008).	When brokerage company moved to compel based on the arbitration clause seemingly signed in an IRA application, investor sought discovery relating to the authenticity of the signature but failed to deny having signed the agreement.	√		√	

	Case Name	Case Summary	Compel Arbitration?			
			Trial Court		Fifth Circuit	
			Yes	No	Yes	No
	<i>Gulfside Casino Partnership v. Mississippi Riverboat Council</i> , 282 F. App'x 328 (5th Cir. June 2008).	In the aftermath of Hurricane Katrina, company ceased riverboat operations. Union sought to compel arbitration with buyer who claimed not to be bound by the collective bargaining agreement containing the arbitration clause.		√		√
	<i>Moran v. Ceiling Fans Direct, Inc.</i> , 239 F. App'x 931 (5th Cir. Sept. 2007).	Employer unable to enforce arbitration policy when there was no evidence that employees received or read it, or were otherwise informed that they were deemed to accept the policy by continuing their employment.		√		√
agreement (cont.)	<i>Weinberg v. National Football League Players Ass'n</i> , 286 F. App'x 215 (5th Cir. Aug. 2008).	Player suit compelled to arbitration under NFLPA Regulations.	√		√	
	<i>Beverly Enterprises-Mississippi Inc. v. Powell</i> , 244 F. App'x 577 (5th Cir. Aug. 2007).	Issue of whether illiterate nursing home decedent consented to arbitration was remanded and the order denying the motion to compel was vacated.		√	?	
	<i>Davis v. EGL Eagle Global Logistics, L.P.</i> , 243 F. App'x. 39 (5th Cir. July 2007).	Truck driver was compelled to arbitrate his putative class action, which alleged that he and other drivers were underpaid.	√		√	
non-signatory	<i>Rice Co. (Suisse), S.A. v. Precious Flowers Ltd.</i> , 523 F.3d 528 (5th Cir. Apr. 2008).	After a rice shipment was damaged at sea, the rice owner sued the ship owner. Because the ship owner had not signed the voyage charter that would have incorporated the arbitration clause, arbitrability turned on whether the signatory was an agent of the owner. While that question was compounded by niceties of admiralty law, both courts concluded that the signatory was not an agent, and therefore, arbitration could not be compelled.		√		√

	Case Name	Case Summary	Compel Arbitration?			
			Trial Court		Fifth Circuit	
			Yes	No	Yes	No
non-signatory (continued)	<i>Palmer Ventures LLC v. Deutsche Bank AG</i> , 254 F. App'x 426 (5th Cir. Nov. 2007).	Deutsche Bank sought to compel arbitration of claims relating to a tax strategy gone awry. Unlike other suits arising from the same failed strategy, Deutsche Bank had not signed the agreement containing the alleged arbitration provision, though an indirect brokerage subsidiary had, and failed to satisfy estoppel tests that might otherwise have bridged that gap.		√		√
	<i>JP Morgan Chase &amp; Co. v. Conegie ex rel. Lee</i> , 492 F.3d 596 (5th Cir. July 2007).	Mother of nursing home resident had authority to sign agreement containing arbitration clause, and the resident was bound to that agreement as a third-party beneficiary.		√	√	
	<i>Omni Pinnacle, LLC v. ECC Operating Services, Inc.</i> , 255 F. App'x 24 (5th Cir. Oct. 2007).	Subcontractor clearing debris after Hurricane Katrina sued its contractor. Though there was a prior settlement agreement, the courts found that the claims arose under the contract, and therefore, the arbitration clause in that contract applied.	√		√	
	<i>Johnson v. Provident Bank/PCFS</i> , No. 07-60324, 2008 U.S. App. LEXIS 10234 (5th Cir. May 2008).	After compelling arbitration on loan documents containing an arbitration provision (unsigned by one party), the trial court vacated that order <i>sua sponte</i> . The circuit court vacated the second order on procedural grounds.	√		√	
	<i>Vinewood Capital, LLC v. Dar Al-Maal Al-Islami Trust</i> , 294 F. App'x 89 (5th Cir. Sept. 2008).	Parties were unable to bootstrap a series of documents, some containing arbitration clauses, together to bind non-signatory who was involved in business dealings with others in the group.		√		√

	Case Name	Case Summary	Compel Arbitration?			
			Trial Court		Fifth Circuit	
			Yes	No	Yes	No
	<i>MAPP Construction, LLC v. M&amp;R Drywall, Inc.</i> , No. 08-30420, 2008 WL 4344953 (5th Cir. Sept. 2008).	Louisiana trial court denied motion to compel subcontractor to arbitrate dispute. Fifth Circuit declined the invitation to disturb the final judgment of a state court.		√		√
scope	<i>Galey v. World Marketing Alliance</i> , 510 F.3d 529 (5th Cir. Dec. 2007).	Undisputed arbitration provision provided one administrator—NASD. Parol evidence showed that the party moving to compel arbitration before NASD was no longer a member. In the absence of that exclusive forum, there was no place for the court to compel the parties to arbitrate.		√		√
duress	<i>Lester v. Advanced Environmental Recycling Technologies, Inc.</i> , 248 F. App'x 492 (5th Cir. July 2007).	In rejecting a duress challenge alleging that the defendant would have denied care if plaintiff did not agree to Plan terms, including an arbitration clause, the courts compelled arbitration.	√		√	
unconscionable	<i>Stinger v. Chase Bank, USA, NA</i> , 265 F. App'x 224 (5th Cir. Feb. 2008).	Consumer filed state court suit against bank that it removed on diversity. Plaintiff claimed that the arbitration clause, if it existed, applied only to disputes exceeding \$25K. The Court dismissed that argument in the face of a \$75K diversity limit.	√		√	
unconscionable	<i>Boniaby v. Securitas Security Services USA, Inc.</i> , 249 F. App'x 331 (5th Cir. Sept. 2007).	Finding nothing in the <i>pro se</i> record reflecting the sort of sharp practices courts have required for parties to establish unconscionability, the court compelled arbitration.	√		√	

	Case Name	Case Summary	Compel Arbitration?			
			Trial Court		Fifth Circuit	
			Yes	No	Yes	No
illusory	<i>Morrison v. Amway Corp.</i> , 517 F.3d 248 (5th Cir. Feb. 2008).	Decade-long Amway distributorship dispute resulting in an adverse award to plaintiffs is vacated, and the motion that compelled arbitration is reversed after an appellate finding that the underlying arbitration policy was illusory because Amway retained the right to unilaterally abolish or modify the program.	√			√
	<i>Retractable Technologies Inc. v. Abbott Laboratories Inc.</i> , 281 F. App'x 275 (5th Cir. June 2008).	Clause providing that disputes "may" be resolved by arbitration was permissive rather than mandatory; therefore, the trial court was correct in not compelling arbitration.		√		√
	<i>Armstrong v. Associates International Holdings Corp.</i> , 242 F. App'x 955 (5th Cir. July 2007).	Employee was compelled to arbitration over his objection that the employer's reserved right to alter employment arbitration policy rendered the agreement illusory.	√		√	
waiver	<i>Phillips Staffing Services Inc. v. Tempay Inc.</i> , 268 F. App'x 308 (5th Cir. Mar. 2008).	Courts found that Tempay waived its right to arbitrate under a funding agreement.		√		√
	<i>Unity Communications Corp. v. Cingular Wireless</i> , 256 F. App'x 679 (5th Cir. Dec. 2007).	After filing motions to extend the time to answer, moving for summary judgment, and seeking an interlocutory appeal thereof, Cingular sought to compel arbitration. The courts held that arbitration had been waived.		√		√



	Case Name	Case Summary	Compel Arbitration?			
			Trial Court		Fifth Circuit	
			Yes	No	Yes	No
	<i>Joseph Chris Personnel Services, Inc. v. Rossi</i> , 249 F. App'x 988 (5th Cir. Oct. 2007).	Former employees claimed Joseph Chris's suit seeking injunctive relief waived employer's right to later compel arbitration. The trial court agreed and later granted summary judgment against employer. The Fifth Circuit reversed, holding that the parties had agreed to a safe-harbor for such suits and noting its split with the Seventh Circuit.		✓	✓	
res judicata	<i>Jamison v. Drive Time Sales &amp; Finance Corp.</i> , 261 F. App'x 713 (5th Cir. Jan. 2008).	Unhappy with partial victory in arbitration, employee files suit in federal court. Finding that it arose out of the same nucleus of operative facts, the court dismissed the case and compelled arbitration.	✓		✓	
	<i>Fuentes v. DIRECTV, Inc.</i> , 245 F. App'x 408 (5th Cir. Aug. 2007).	Injunction against small claims court suit filed after the trial court compelled arbitration was affirmed.	✓		✓	
jurisdiction	<i>McAteer v. Silverleaf Resorts, Inc.</i> , 514 F.3d 411 (5th Cir. Jan. 2008).	After trial court compelled arbitration, the question on appeal was whether the court had jurisdiction under ERISA (no independent jurisdiction in FAA). The panel concluded that there was no ERISA preemption so the trial court had no jurisdiction, including jurisdiction to compel arbitration.	✓			✓

TABLE II: POST-ARBITRATION CHALLENGES

	Case Name	Case Summary	Vacate Arbitral Award?			
			Trial Court		Fifth Circuit	
			No	Yes	No	Yes
expanded judicial review – manifest disregard	<i>Hall Street Associates, L.L.C. v. Mattel, Inc.</i> , 128 S. Ct. 1396 (2008).	U.S. Supreme Court holds that the grounds stated in the FAA for vacating, or for modifying or correcting, an arbitration award constitute the exclusive grounds. Since 1995, Fifth Circuit precedent had permitted parties to expand these threshold provisions by agreement.		√	US	
	<i>Improv West Associates, v. Comedy Club, Inc.</i> , 129 S. Ct. 45 (2008).	U.S. Supreme Court summarily granted certiorari and remanded a Ninth Circuit decision with instructions to reconsider an arbitration vacatur in light of <i>Hall Street</i> . Interestingly, the petitioners cited <i>Moore v. Potter</i> as creating a split between the First and Fifth Circuits on non-FAA vacatur grounds post- <i>Hall Street</i> .		√	US	
	<i>National Resort Management Corp. v. Cortez</i> , 278 F. App'x 377 (5th Cir. May 2008).	After the Fifth Circuit summarily remanded a vacated discrimination award for reconsideration in light of <i>Mattel</i> , the trial court determined that it had no alternative other than to deny the motions to vacate.		√	√	
	<i>Moore v. Potter</i> , 275 F. App'x 405 (5th Cir. Apr. 2008).	Postal employee sued postmaster and union seeking vacatur of adverse arbitration award under a collective bargaining agreement. In confirming the award, the panel wrote “that an arbitration award may be vacated when an arbitrator manifestly disregards the law, which ‘is an extremely narrow, judicially-created rule with limited applicability.’” The same panel later indicated that <i>Mattel</i> called the non-statutory grounds into question. <i>See Rogers</i> .	√		√	

	Case Name	Case Summary	Vacate Arbitral Award?			
			Trial Court		Fifth Circuit	
			No	Yes	No	Yes
	<i>Rogers v. KBR Technical Services, Inc.</i> , No. 08-20036, 2008 WL 2337184 (5th Cir. June 2008).	Unsatisfied with a \$252.84 arbitration award for employment claims arising out of an assignment at Camp Eggers in Afghanistan, former employee acting pro se sought to vacate on a variety of grounds. The courts denied vacatur and confirmed the award— noting that <i>Mattel</i> “calls into doubt the non-statutory grounds [for vacatur] which have been recognized by this Circuit.”	√		√	
illusory	<i>Morrison v. Amway Corp.</i> , 517 F.3d 248 (5th Cir. Feb. 2008).	Decade long Amway distributorship dispute resulting in an adverse award to plaintiffs is vacated and the motion that compelled arbitration is reversed after an appellate finding that the underlying arbitration policy was illusory because Amway retained the right to unilaterally abolish or modify the program.	√			√
confirmation	<i>Wartsila Finland OY v. Duke Capital LLC</i> , 518 F.3d 287 (5th Cir. Feb. 2008).	Duke Energy attempted to vacate an adverse award arising from the construction of a Guatemalan power plant or stay its effect pending project completion and offset or arbitration of final phase claims. Despite the separate, pending claims, the court read the award to be final and found that the trial court did not abuse its discretion in denying a stay pending resolution of the separate claims.	√		√	

	Case Name	Case Summary	Vacate Arbitral Award?			
			Trial Court		Fifth Circuit	
			No	Yes	No	Yes
collateral attack	<i>Gulf Petro Trading Co. v. Nigerian National Petroleum Corp.</i> , 512 F.3d 742 (5th Cir. Jan. 2008).	Texas-based oil services provider arbitrated claims against a Nigerian government-owned company in Switzerland, where it later challenged the award on a number of grounds. When that effort failed, it filed suit alleging federal and Texas state law claims—many relating to an alleged \$25M bribe to the arbitrators. The court concluded that the claims amounted to a collateral attack on the award and that it could not entertain sitting in secondary jurisdiction under the New York Convention.	✓		✓	
jurisdiction	<i>Oteeva, LP v. X-Concepts LLC</i> , 253 F. App'x 349 (5th Cir. Nov. 2007).	Party losing an arbitration in Arizona sought vacatur in the Northern District of Texas based on diversity (FAA provides no independent jurisdiction). After the district court dismissed for improper venue, the plaintiff sought transfer in its motion for new trial. Finding a lack of jurisdiction, the circuit court vacated those rulings and remanded the case with instructions to dismiss.	✓		✓	
exceed authority	<i>In re U.S. Brass Corp.</i> , 295 F. App'x 660 (5th Cir. Oct. 2008).	Unsuccessful party to an arbitration award made pursuant to the ADR provisions of a bankruptcy reorganization plan sought to vacate the award because of the arbitrator's "loose" use of "jurisdictional," which they claimed limited its subject matter jurisdiction. The trial court and panel made short work of those arguments, leaving the award intact.	✓		✓	

	Case Name	Case Summary	Vacate Arbitral Award?			
			Trial Court		Fifth Circuit	
			No	Yes	No	Yes
	<i>Netknowledge Technologies LLC v. Rapid Transmit Technologies</i> , 269 F. App'x 443 (5th Cir. Mar. 2008).	On cross motions to confirm and vacate an award arising out of a telecom equipment purchase agreement, the panel concluded that the arbitrator did not exceed his authority.	√		√	
	<i>Ellison Steel Inc. v. Greystar Construction West, LLC</i> , 261 F. App'x 777 (5th Cir. Jan. 2008).	In this second appeal, the panel again confirmed the arbitration award and affirmed the award of additional fees by the trial court arising from the challenges.	√		√	
	<i>Torch &amp; E&amp;P Co. v. J.M. Huber Corp.</i> , 234 F. App'x 231 (5th Cir. July 2007).	Court construed parties' contractual grant of authority to arbitrator to be broad enough to interpret the contract at issue and denied the challenge to the award.	√		√	