Circuits Split On A Court's Authority To Compel Arbitration In Other Districts

Article contributed by: Howard S. Suskin and Kathryn C. Newman, Jenner & Block LLP

The Tenth Circuit's recent decision in *Ansari v. Qwest Communications Corp.*, 414 F.3d 1214 (10th Cir. 2005), solidifies the rift between the federal circuit courts on whether a district court may compel arbitration where the parties have agreed to arbitrate outside that district. In the *Ansari* case, the Tenth Circuit affirmed the Colorado District Court's denial of the defendant's motion to compel arbitration based on a forum selection clause in the parties' agreement that designated Washington, D.C. as the location for any arbitration proceedings. The Tenth Circuit held that the district court lacked authority under the Federal Arbitration Act ("FAA"), 9 U.S.C. § 1 *et seq.* (2005), to order the parties to arbitration outside of Colorado, its home district. *See id.* at 1219-20. By doing so, the Tenth Circuit joined the majority of circuits -- including the Third, Sixth and Seventh Circuits -- in holding that where the arbitration agreement specifies that proceedings shall take place in another district, courts do not have the authority under the FAA to order the parties to arbitrate outside the district in which the court is sitting. *See Inland Bulk Transfer Co. v. Cummins Engine Co.*, 332 F.3d 1007 (6th Cir. 2003); *Merrill Lynch, Pierce, Fenner & Smith, Inc. v. Lauer*, 49 F.3d 323 (7th Cir. 1995); *Econo-Car Int'l Inc. v. Antilles Car Rentals, Inc.*, 499 F.2d 1391, 1394 (3d Cir. 1974); *see also Continental Grain Co. v. Dant & Russeu, Inc.*, 118 F.2d 967, 968-9 (9th Cir. 1941); *Sea Spray Holdings Ltd. v. Pali Fin. Group, Inc.*, 269 F. Supp. 2d 356 (S.D.N.Y. 2003); *Homestake Lead Co. v. Doe Run Res. Corp.*, 282 F. Supp. 2d 1131, 1143-44 (N.D. Cal. 2003). The majority has adopted the corollary -- a district court may not ignore a forum selection clause and order the parties to arbitrate a dispute within its own district -- both explicitly and implicitly. *See Lauer*, 49 F.3d at 328 ("a district court cannot compel arbitration in another district or its own district in the face of an adverse forum selection clause"); *see also Ansari*, 414 F.3d at 1215 (district court concluded it could not compel arbitration in Colorado). The Fifth Circuit, on the other hand, has adopted the position explicitly rejected by the majority and allows a district court to order the parties to arbitrate pursuant to the terms of the arbitration clause, regardless of the location. *See Dupuy-Busching Gen. Agency, Inc. v. Ambassador Ins. Co.*, 524 F.2d 1275 (5th Cir. 1975).

This split arises from an attempt to reconcile two contradictory provisions presented by the plain language of Section 4 of the FAA. Under the FAA, a court, once satisfied that there are no issues regarding formation of the arbitration agreement, "shall make an order directing the parties to proceed to arbitration *in accordance with the terms of the agreement*. The hearing and *proceedings*, under such agreement, *shall be within the district in which the petition for an order directing such arbitration is filed*." 9 U.S.C. § 4 (emphasis added). The plain language of the FAA presents a dilemma to a district court "[i]n a case such as this, where the suit is brought in a district other than the one in which the contract states that arbitration is to be held. [T]here is a conflict between the provision as to ordering arbitration 'in accordance with the terms of the contract,' while having the proceedings take place in 'the district in which the petition is filed.'" *Dupuy-Bushing,* 524 F.2d at 1277 (citing 9 U.S.C. § 4).

For its part, the Supreme Court has provided the circuits with little guidance on how to reconcile these competing concerns. Moreover, the issue places two well-established principles governing arbitration directly in conflict. According to the Supreme Court, the FAA represents a "liberal federal policy favoring arbitration agreements." *EEOC v. Waffle House, Inc.*, 534 U.S. 279, 289, 151 L. Ed. 2d 755, 122 S. Ct. 754 (2002) (quoting *Moses H. Cone Mem'l Hosp. v. Mercury*

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Constr. Corp., 460 U.S. 1, 24, 74 L. Ed. 2d 765, 103 S. Ct. 927 (1983)). And, "[i]n deference to this strong federal policy [in favor of arbitration], courts must construe arbitration agreements as broadly as possible." *Sea Spray*, 269 F. Supp. 2d at 361. Yet, arbitration is a creature of contract. Therefore, a district court's authority is limited to the terms of the parties' agreement. *See AT&T Techs., Inc. v. Commc'ns Workers*, 475 U.S. 643, 89 L. Ed. 2d 648, 106 S. Ct. 1415 (1986) (citing *United Steelworkers v. Warrior & Gulf Navigation Co.*, 363 U.S. 574, 4 L. Ed. 2d 1409, 80 S. Ct. 1347 (1960) ("arbitration is a matter of contract and a party cannot be required to submit to arbitration any dispute which he has not agreed to submit")). The FAA "leaves no place for the exercise of discretion by a district court, but instead mandates that district courts shall direct the parties to proceed to arbitration on issues as to which an arbitration agreement has been signed." *Dean Witter Reynolds Inc v. Byrd*, 470 U.S. 213, 218, 84 L. Ed. 2d 158, 105 S. Ct. 1238 (1985).

The majority of circuits read the plain language of Section 4 and "conclude[] that a district court lacks the authority to compel arbitration in other districts or in its own district if another has been specified for arbitration." *Lauer*, 49 F.3d at 328; *see also Inland Bulk*, 332 F.3d at 1018 ("the Federal Arbitration Act prevents federal courts from compelling arbitration outside their own district"); *Management Recruiters Int'l Inc. v. Bloor*, 129 F.3d 851, 854 (6th Cir. 1997) ("where the parties have agreed to arbitrate in a particular forum, only a district court in that forum has jurisdiction to compel arbitration pursuant to Section 4").

In contrast, the Fifth Circuit does not read Section 4 literally. It allows a district court to order the parties to arbitration as specified in their agreement, even if the arbitration is to be conducted outside the sitting court's district. *See Dupuy-Busching*, 524 F.2d at 1278. In *Dupuy*, Ambassador Insurance served a demand for arbitration on Dupuy-Busching to be held in New Jersey as provided in the parties' insurance contract. In response, Dupuy filed suit in Mississippi state court seeking to enjoin the arbitration. The suit was then removed to the United States District Court for the Southern District of Mississippi. The district court ordered "the arbitration [to] proceed in the manner and at the place [North Bergen, New Jersey] provided for in the agreement." *Id.* at 1276. The Fifth Circuit upheld the order and acknowledged the limited grant of authority under Section 4 of the FAA, but found the procedural posture of the parties significant. *See id.* at 1277. Here, the party seeking to avoid arbitration brought suit outside the selected venue. If Ambassador did not move to compel arbitration, a compulsive counterclaim, it would be precluded from raising this claim in a subsequent suit in New Jersey. Rather than endorse the "procedural trap" Dupuy set by filing suit in Mississippi, the Fifth Circuit reasoned that the federal policies underlying the Federal Arbitration Act expanded the language of Section 4, providing the district court with authority to order the parties to arbitration in New Jersey in accordance with the terms of their agreement. *See id.* at 1277-78. "Thus, [the Fifth Circuit] suggests that the language of Section 4 need not be applied literally, that there may be some cases in which district courts are empowered to compel arbitration notwithstanding the parties' contractually established forum or outside of the district in which the courts sit." *National Iranian Oil Co. v. Ashland Oil Co.*, 817 F.2d 326, 331 (5th Cir. 1987). Two years later, the Fifth Circuit articulated the circumstances under which a court could do so. "[A] district court has the authority to order arbitration outside the district if the party seeking such a result has not waived his choice of forum [by initiating litigation outside the district selected for arbitration]." *Purdey v. Monex Int'l Ltd.*, 867 F.2d 1521, 1523 (5th Cir. 1989).

Despite the liberties taken by the Fifth Circuit with Section 4, no circuit has gone so far as to allow a district court to ignore the parties' choice of location entirely and order them to arbitration within the court's own district. It has been suggested that the Ninth Circuit "permits a district court to compel arbitration in its own district and ignore the forum specified in the arbitration clause." *Ansari*, 414 F.3d at 1219 (citing *Textile Unlimited, Inc. v. A. BMH & Co.*, 240

F.3d 781 (9th Cir. 2001)). However, a close reading of the Ninth Circuit's opinion in *Textile Unlimited* reveals that while dicta indicates that the Ninth Circuit might approve of such a ruling, the circuit court in *Textile Unlimited* did not allow the district court to disregard the parties' forum selection clause. Rather, the Ninth Circuit upheld a district court's preliminary injunction against further arbitration proceedings in Atlanta, Georgia until a determination was made as to arbitrability, specifically whether the arbitration clause had become part of the parties' contract. In *Textile Unlimited*, the appellee contested that an arbitration clause, which was contained in an invoice and designated Atlanta, Georgia as the location for an arbitration, was part of the parties' contract. *See id.* at 784. When a dispute arose under the contract, the appellant began arbitration proceedings in Atlanta. *See id.* In response, the appellee filed suit in the Central District of California to enjoin the arbitration proceedings pending a determination on arbitrability. *See id.* The district court issued a preliminary injunction, which was upheld by the Ninth Circuit on appeal. Applying federal arbitration principles, the Ninth Circuit held that "requiring a party to contest the very existence of an arbitration agreement in a forum dictated by the disputed arbitration clause would run counter to [the] fundamental principle[s of arbitration]." *Id.* at 786.

As such, the Ninth Circuit's opinion is not an outlier. Rather, it stands for a different proposition, that a district court's authority to enjoin arbitration proceedings does not arise under Section 4 of the FAA, but under the general venue provisions of Section 3. *See id.* at 785; *see also Homestake Lead*, 282 F. Supp. 2d at 1144 (explaining the holding in *Textile Unlimited*). In comparison, this is a relatively uncontroversial proposition. In fact, some of the courts sitting with the majority have approved the use of injunctions under Section 3 of the FAA, "thereby leaving the parties free to pursue their contractual rights and remedies in the appropriate venue." *Sea Spray*, 269 F. Supp. 2d at 363; *see, e.g., Lauer*, 49 F.3d at 328, n.9 (distinguishing a stay of the proceeding before it from an order directing the parties to arbitrate).

In light of the growing prevalence of arbitration clauses within the securities industry and in other sectors, and the inevitable disputes in the district courts relating to their enforceability and applicability, it seems simply to be a matter of time before the Supreme Court will weigh in and resolve the split among the circuit courts on this issue.

Howard S. Suskin is a partner in Jenner & Block's Chicago office, and is Co-Chair of the Firm's Class Action Litigation and Securities Litigation Law Practices. He has substantial experience counseling and representing clients in arbitrations, and is an arbitrator with the AAA, NYSE, NASD, CBOE, and NFA. Kathryn C. Newman is a member of Jenner & Block's Securities Litigation Law Practice.