The Arbitration Newsletter

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(John Allen Chalk, Sr., Editor)

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The Arbitration Newsletter is published periodically by Whitaker Chalk Swindle & Schwartz PLLC, Fort Worth, Texas, to explore the rapidly developing law and practice of commercial arbitration both in the U.S. and other countries.[1]

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KEEP THE MOTION TO CONFIRM SIMPLE

EASLEY v. WLCC II
2021 U.S. Dist. LEXIS 176232 (S.D. Ala. Sept. 16, 2021)

An Alabama resident ("Easley") executed "10 individual small loans online" with separate payday loan contracts for each loan from a lender owned by the Oglala Sioux Native American tribe located in North Dakota ("WLCC").[2] Each loan contract contained an arbitration clause that called for application of "any applicable Oglala Sioux tribal law."[3] The arbitration clause contained a detailed, extended, board-form definition of "Dispute," including a delegation provision.[4]

Easley filed an arbitration demand with American Arbitration Association ("AAA") claiming her loan contracts with WLCC violated the Alabama Small Loans Act ("ASLA") "and were void *ab initio*."[5] WLCC answered and participated in the arbitration.[6] The AAA arbitrator entered a final award finding (i) WLCC waived its sovereign immunity claim, (ii) WLCC did not have a license as required by ASLA, and, therefore, (iii) "the loan contracts were void in their entirety and *ab inito* (sic)."[7] WLCC took no action "to vacate or appeal the award."[8]

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[1] Nothing in The Arbitration Newsletter is presented as or should be relied on as legal advice to clients or prospective clients. The sole purpose of *The Arbitration Newsletter* is to inform generally. The application of the comments in *The Arbitration Newsletter* to specific questions and cases should be discussed with the reader's independent legal counsel. My thanks to Madeline Bergstrom, a third-year law student at Texas A&M University School of Law, for her research and drafting assistance.

[2] Easley v. WLCC II, 2021 U.S. Dist. LEXIS 176232, *1-2 (S.D. Ala., September 16, 2021).

[3] *Id.* at *2.

[4] *Id.* at *2-4 ("A Dispute includes … any issue concerning the validity, enforceability, or scope of this loan or the Agreement to Arbitrate.").

[5] *Id.* at *5.

[6] *Id.* at *5-6.

[7] *Id.*

[8] *Id.* at *6.

Easley filed an Alabama State Court Complaint against WLCC shortly after the arbitration award was issued that contained two counts.[9] Count I asked for the certification of a class of Alabama consumers to declare WLCC violated the ASLA in making loans to this class without a license and the loans were void ab initio.[10] Count II requested confirmation of the arbitration award.[11] WLCC removed the lawsuit to the U.S. District Court for the Southern District of Alabama and moved to dismiss both counts for "improper venue and to compel arbitration."[12] WLCC did not object to confirmation of the arbitration award.[13]

The District Court confirmed Easley's arbitration award (Count II).[14] But the District Court granted WLCC's motion to dismiss Easley's Count I and compelled Count I to arbitration.[15] The Court recognized "the court must grant" award confirmation as described in 9 U.S.C. §9 and cited cases that impose "a heavy presumption in favor of confirming arbitration awards."[16] The Court also relied on "the four 'very unusual circumstances'" in 9 U.S.C. §10(a) that permit vacatur of an arbitration award.[17] None of these "unusual circumstances" were established and both sides sought confirmation of the award in this case thereby creating the court's extremely limited power to vacate an award and observing that "a court's confirmation of an arbitration award is usually routine or summary."[18]

The Court explained its grant of WLCC's motion to dismiss Count I by comparing FRCP rule 12(b)(3) ("choice of forum clause") motion with a FRCP rule 12(b)(6) ("motion for summary judgment")[19] regarding what evidence can be considered in each motion. An arbitration agreement is "in effect, a specialized kind of forum-selection clause" and the Court chose to analyze WLCC's motion as a FRCP rule 12(b)(3) motion that allowed the Court to "consider materials outside the pleadings."[20] Easley urged on the one hand that the confirmed arbitration award rendered the arbitration clause void *ab initio* (in the Court's grant of Count II) but on the other hand requested the court not compel arbitration of Easley's Count I (as requested by WLCC).[21] Easley did not establish that the arbitration clause was void *ab initio* and, therefore, the "severability" doctrine not only protected the continued enforceability of the arbitration clause but also delegated the arbitrability of Easley's Count I to the arbitrator and not the Court.[22] The broad-form "dispute" definition in the arbitration clause, the "severability" doctrine, the delegation clause, and the FAA

[9] *Id. at *6.*
[10] *Id.* at *6.
[11] *Id.*
[12] *Id.* at *7.
[13] *Id.* at *8.
[14] *Id.* at *8; *8-13 (Explaining in detail the FAA "presumption" that arbitration award confirmation "is usually routine or summary" and that this FAA "presumption" is "a heavy presumption," citing numerous U.S. Supreme and Eleventh Court of Appeals decisions.).
[15] *Id.* at *21-22.
[16] *Id.* at *9.
[17] *Id.*
[18] *Id.* at *12.
[19] *Id.* at *13.
[20] *Id.*
[21] *Id.* at *17 ("For Easley to now seek to confirm the arbitration decision, yet simultaneously challenge the applicability of the arbitration agreement, is incongruous.").
[22] *Id.* at *14-22.

presumption in favor of arbitration confirmation supported the Court's grant of WLCC's motion to dismiss the litigation and to compel the arbitration of Easley's Count I.[23]

OBSERVATIONS

1. The motion "for an order confirming the award" **must** be granted "unless the award is vacated, modified, or corrected as prescribed in [FAA] sections 10 and 11 of this title [9 USCS §§ 10, 11]."[24]

2. The motion "for an order confirming the award" should be treated as an "application to the court hereunder [to] be made and heard in the manner provided by law for the making and hearing of motions."[25]

3. Easley chose to seek class action relief "via the vehicle of confirmation of her arbitration award."[26]

4. Easley's class action claim strategy (including the Count II motion to confirm the arbitration award with the Count I class action request) triggered a removal from Alabama State Court of both the confirmation request (Count II) and the class action request (Count I).

5. WLCC never contested confirmation of the arbitration award but WLCC's response to Easley's Count I (class action request) triggered a District Court examination of the arbitration clause in the loan agreements thus creating additional risk that the "routine" or "summary"[27] confirmation request might become subject to a FRCP Rule 12(b)(6) analysis requiring Easley to meet summary judgment standards versus FRCP Rule 12(b)(3) standards to get the award confirmation granted.[28]

6. Easley's claim strategy unnecessarily exposed a "routine" or "summary" motion for award confirmation to the risk of possible further review in the new arbitration ordered by the Court for Easley's Count I "class action" scrutiny and decision because of the delegation clause in the parties' arbitration clause.

7. Keep the motion for confirmation limited to the award. Save other claims for a different proceeding.

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[23] *Id. at *13-21*.
[24] 9 U.S.C. §9.
[25] 9 U.S.C. §6.
[26] 2021 U.S. Dist. LEXIS 176232 at *7.
[27] *Id. at *12*.
[28] Unsophisticated advocates occasionally use a motion for summary judgment rather than a 9 U.S.C. §9 motion for confirmation thereby increasing the standard of review for a summary judgment motion for confirmation rather than a 9 U.S.C. §9 motion for confirmation.