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Fifth Circuit Rules in *OMG, L.P. v. Heritage Auctions*

In *OMG, L.P. v. Heritage Auctions, Inc.*, No. 14-10403, 2015 WL 2151779 (5th Cir. May 8, 2015), *petition for cert. filed*, (U.S. Sept. 9, 2015) (No. 15-298), the Fifth Circuit held that two parties agreed to arbitrate the issue of contract formation of two contracts by actually arbitrating that issue. It reached this conclusion despite the arbitrator's finding that the contracts—which contained arbitration provisions putting the parties in arbitration in the first place—were never formed.

OMG involved a dispute between an auction house (Heritage) and a supplier (OMG). 2015 WL 2151779, at *1. The parties entered into two contracts containing identical arbitration clauses. *Id.* at *1–2. After a dispute arose, the parties submitted it to arbitration. *Id.* During the arbitration, Heritage argued that the parties had not reached a meeting of the minds on a key contractual term and, thus, the contracts were unenforceable and should be rescinded. *Id.* at *2. Heritage prevailed on this issue, and the arbitrator found that a contract never existed. *Id.*

OMG then filed suit in federal court to vacate the arbitration award. *Id.* Its position was straightforward: if the arbitrator found that no contract existed between OMG and Heritage, then they never agreed to arbitrate, and the arbitrator lacked authority to determine the contract formation issue in the first instance. The district court agreed with OMG and vacated the arbitration award.

The Fifth Circuit, however, reversed. Its analysis began with the adage that arbitrations are creatures of contract and the maxim that parties can agree to arbitrate issues that they were not otherwise contractually bound to arbitrate. *Id.* at *3. Addressing the parties' arbitration conduct, the Fifth Circuit found persuasive that OMG and Heritage addressed contract formation issues in their arbitration pleadings, in their pre-hearing briefs, at the hearing, and in their post-hearing briefs. *Id.* at *3–4. Moreover, OMG argued the merits of the contract formation issue at each of those stages and never challenged the arbitrator's authority to decide it by, for example, objecting in the arbitration or seeking judicial intervention. *Id.* at *4–5. Consequently, the parties' submission of the contract formation issue to the arbitrator supplied the arbitrator with authority to decide that issue such that the issue of whether the parties' contracts supplied that authority was moot. *Id.* at *1, *5 & n.3. The Fifth Circuit went even further, holding that, had OMG wanted to preserve its right to object to arbitrability, then "it should have refused to arbitrate, leaving a court to decide whether the arbitrator could decide the contract formation issue." *Id.* at *5.

The Fifth Circuit's ruling sends a clear message: if a party maintains that an issue is not arbitrable, then the party must refuse to arbitrate its merits and instead seek judicial intervention. Left unclear by the Fifth Circuit's ruling is whether judicial intervention should or could be sought before, during, or after the arbitration. The ruling also appears to erode the FAA's grounds for vacatur based on the arbitrator exceeding his or her powers, which the Fifth Circuit's opinion referenced, but did not substantively address.

It will be interesting to see whether the Supreme Court grants certiorari and, if so, whether the Fifth Circuit's opinion will be affirmed. It also will be interesting to follow further development in Fifth Circuit as trial courts evolve the procedural paths by which arbitrations may be enjoined or vacated when one party claims issues are not arbitrable.

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