

**AFFIRMATIVE DEFENSES TO ARBITRAL AWARD:
FIA CARD SERVS., N.A. v. WEAVER, 62 So. 3d 709 (La. 2011)**

The Supreme Court of Louisiana granted writs to resolve a split between circuits on whether affirmative defenses to an arbitral award are waived if a party does not file a motion to vacate within the three month statute of limitations. On examining whether Louisiana or Federal law should be applied, Louisiana courts recognize Louisiana law and federal law governing arbitration are almost identical in substance.

The Supreme Court of Louisiana found that Louisiana law specifically lists four grounds for judicial review when challenging the confirmation of an arbitral award in the form of a motion to vacate, modify, or correct an arbitral award, including corruption, fraud, arbitrator corruption or misconduct, and an arbitrator exceeding their statutory power. La. R.S. § 9:4210-4211; see also 9 U.S.C. § 10. The law requires any motion to vacate, modify, or correct an award be served within three months of notice. However, the non-existence of an arbitration agreement is not one of the grounds listed for judicial review.

In this case, the plaintiff argued that the defendant waived his rights to the affirmative defenses statutorily granted by failing to file a motion to vacate within the three months of the award. Essentially, the plaintiff argued that the courts are legally required to confirm arbitral awards as a purely ministerial act after the statutorily prescribed deadline. The Louisiana Supreme Court disagreed. An arbitral award must be confirmed by a court to be made enforceable by law. The plain language of Section 9 of the Federal Arbitration Act presupposes an arbitration agreement as a necessary condition to confirm an arbitral award, therefore, the crucial first step in deciding whether to confirm an arbitral award is to determine whether there is a valid arbitration agreement between the parties. This requirement is independent of the statutory defenses.

The Louisiana Supreme Court found that lower courts have a duty to confirm the existence of a valid arbitration agreement. This decision is not left to the discretion of the arbitrator. Thus, challenging the existence of a valid arbitration agreement is appropriate at any time after the award, and is not barred by the three month statute of limitations.

The burden is on the plaintiff to provide prima facie evidence establishing that the parties entered a valid arbitration agreement. The plaintiff in the present case only provided evidence of two unsigned documents containing additional terms, each including an arbitration clause sent to the defendant. This alone did not provide the court with enough evidence to determine whether the defendant consented to the arbitration agreement. While black letter law states that consent to additional terms in a credit card agreement is evidenced by continued use, the burden is on the plaintiff to provide evidence that the customer continued to use the credit card post notice. By not providing this evidence, the plaintiff did not meet the burden of proving the existence of an enforceable arbitration agreement.

Thus, the confirmation of the arbitral award was reversed. *FIA Card Servs., N.A. v. Weaver*, 62 So. 3d 709 (La. 2011).

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