APPENDIX A

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 16-50317

United States Court of Appeals
Fifth Circuit
FILED
May 31, 2017
Lyle W. Cayce
Clerk

LOWER COLORADO RIVER AUTHORITY,

Plaintiff - Appellee

v.

PAPALOTE CREEK II, L.L.C., formerly known as
Papalote Creek Wind Farm II, L.L.C.,

Defendant - Appellant

Appeal from the United States District Court
for the Western District of Texas

Before KING, JOLLY, and PRADO, Circuit Judges.
KING, Circuit Judge:

This appeal concerns the District Court's grant of a petition to compel arbitration. Defendant-Appellant Papalote Creek II, L.L.C. argues that that the district court did not have jurisdiction to compel arbitration because the underlying dispute between the parties was not ripe, and even if the district court did have jurisdiction, the underlying dispute was outside the scope of the arbitration provision. Because we conclude that the district court lacked jurisdiction to compel arbitration, we VACATE and REMAND.

I. FACTUAL AND PROCEDURAL BACKGROUND

A. The Power Purchase Agreement

Plaintiff–Appellee Lower Colorado River Authority (LCRA) is a conservation and reclamation district based in Austin, Texas, and a political subdivision of the State of Texas. LCRA sells wholesale electric power to municipal-owned utilities and electric cooperatives in Texas. In December 2009, LCRA entered into a Power Purchase Agreement (PPA) with Defendant–Appellant Papalote Creek II, L.L.C. (Papalote), a Delaware limited liability company that builds and operates wind farms. Papalote planned to build an 87-turbine wind farm in Texas (the Project), and under the PPA, LCRA agreed to purchase all of the energy generated by the Project at a fixed price for an 18-year term.

Relevant to this appeal are four sections of the PPA: § 4.3, § 9.3, § 13.1, and § 13.2. First, § 4.3, which is entitled "Liquidated Damages Due to [LCRA's] Failure to Take," provides a formula for how to calculate the liquidated damages that LCRA would owe to Papalote in the event that LCRA failed to take all of the Project's energy. As noted above, LCRA is required to take all of

the energy generated by the Project. However, should LCRA fail to do so, § 4.3 details how to calculate Papalote's "exclusive remedy" of liquidated damages. This liquidated damages calculation would depend in part on the difference between the PPA's fixed price and the price that Papalote is otherwise able to obtain in selling the energy.

Second, § 9.3, which is entitled "Limitation on Damages for Certain Types of Failures," provides the following:

> Notwithstanding anything to the contrary in [the PPA], [Papalote's] aggregate *liability* for (i) failure of [Papalote] to construct the Project and/or (ii) failure of one hundred percent (100%) of the Project's Turbines to achieve the Commercial Operation Date on the Scheduled COD and/or (iii) failure of one hundred percent (100%) of the Project's Turbines to achieve the Commercial Operation Date on June 1, 2011 and/or (iv) a Termination Payment, shall be limited in the aggregate to sixty million dollars ($60,000,000). [LCRA's] *damages* for failure to perform its material obligations under [the PPA] shall likewise be limited in the aggregate to sixty million dollars ($60,000,000).

(Emphasis added.) Notably, § 9.3 refers to Papalote's "liability" and LCRA's "damages," and the parties' underlying dispute is based, in part, on this word choice.

Finally, § 13.1 and § 13.2 provide a two-step arbitration procedure. The first step, as dictated in § 13.1, requires, *inter alia*, that "[i]f any dispute arises with respect to either Party's performance hereunder," the senior officers of LCRA and Papalote meet in an attempt to resolve the dispute. Under the second step, as

outlined in § 13.2, if the dispute is not resolved through the first step within a certain timeframe, either party may submit that dispute "to binding arbitration in accordance with the Commercial Arbitration Rules of the American Arbitration Association . . . effective at the time of the dispute." Section 13.2 also provides additional details on the arbitration, including that the arbitrator shall use a "baseball" procedure (in which each party puts forth an offer and the arbitrator is limited to choosing one of the two offers).

B. Negotiations and Petition to Compel Arbitration

Papalote completed construction of the Project in 2010, and in the ensuing years, LCRA complied with its obligations under the PPA by purchasing all of the energy generated by the Project. In April 2015, however, LCRA initiated discussions with Papalote regarding the PPA. Although the parties dispute the precise nature of these discussions,[1] neither party appears to have threatened to breach the PPA. Ultimately, in June 2015, LCRA sent Papalote a letter stating that, pursuant to § 13.2, LCRA was "initiat[ing] the arbitration process to resolve the dispute between LCRA and Papalote regarding LCRA's limitation of liability under the PPA and its impact on LCRA's performance obligations." LCRA also noted that it "intends to continue to fully perform its obligations under the PPA during this arbitration process." After Papalote requested more information about the purported dispute, LCRA sent another letter explaining that the dispute was "whether LCRA's liability is limited to $60,000,000

[1] LCRA claims that these discussions centered on whether § 9.3 capped its aggregate liability at $60 million. Conversely, Papalote claims that these discussions were on a more general level, such as exploring alternative pricing options.

under the PPA." Papalote rejected LCRA's request to proceed to arbitration, reasoning that "[a]n academic question about the damages LCRA might owe for a hypothetical breach simply does not constitute a 'dispute' that is proper for arbitration under the PPA." Papalote also argued that a dispute over LCRA's potential liability limitation was not covered by the arbitration provision in the PPA, which was limited to disputes regarding performance obligations.

Following Papalote's refusal to arbitrate, LCRA filed a petition to compel arbitration in Texas state court on June 30, 2015. Papalote timely removed the petition to federal district court on the basis of diversity jurisdiction. In the district court, Papalote opposed the petition to compel by arguing that the dispute at issue did not fall within the scope of the arbitration provision. According to Papalote, the arbitration provision only includes disputes related to the parties' performance obligations, and LCRA's dispute regarding whether its liability is capped under § 9.3 is not a performance obligation. Papalote also challenged the ripeness of the dispute in passing, arguing that, "if the Court would prefer to deny the [petition to compel] based on the lack of a ripe dispute, it may do so consistent with the facts presented and without running afoul of any binding authority."

In February 2016, the district court granted LCRA's petition to compel arbitration. As an initial matter, the district court noted that both parties agreed that the PPA's arbitration provision was valid and enforceable, and thus, the only question was whether the dispute fell within the scope of the arbitration provision. The district court then rejected LCRA's argument that the arbitration provision covered any dispute arising under the PPA. Instead, the district court found that, under

§ 13.1, the parties had agreed to arbitrate only disputes that "arise[] with respect to either Party's performance." (Alteration in original.) Thus, the district court framed the question as "whether the dispute LCRA seeks to arbitrate—whether or not LCRA's liability would be capped at $60 million in the event it elected to purchase from Papalote less than the total amount of energy it contracted to buy—qualifies as a dispute 'with respect to either Party's performance' under the PPA." In answering that question, the district court recognized that, "in a certain sense, one could understand 'performance' to concern only those promises which were the essence of the PPA—the sale and production of wind energy—and conceptualize the buyer's obligation to pay for failing to take as compensation for its failure to perform, rather than as an independent performance obligation." The district court reasoned, however, that "the better view here . . . is that LCRA's bargained-for obligation to pay Papalote a specified sum if LCRA takes less than all of the energy produced is itself a performance obligation under the PPA." According to the district court, LCRA's failure to take all of the Project's energy was not necessarily itself a breach giving Papalote the right to terminate the PPA. Instead, the PPA allows the parties' obligations to continue so long as LCRA pays liquidated damages, and if LCRA fails to make the necessary liquidated damages payment, only then would "that failure . . . constitute an 'Event of Default' permitting Papalote to suspend its performance and terminate the [PPA]." As for Papalote's ripeness argument, the district court recognized that "ripeness questions plainly loom." However, the district court declined to further address whether ripeness should be decided by the arbitrator or the court because the parties

had failed to adequately brief the issue. Papalote timely appealed.[2]

C. Arbitration and Subsequent Developments

Following the district court's order compelling arbitration, the parties proceeded through arbitration. Besides its arguments on the merits, Papalote also argued that the arbitrator should dismiss the claim because it was not ripe. On June 28, 2016, the arbitrator issued a decision in favor of LCRA. Specifically, the arbitrator found that, "[u]nder [§] 9.3 of the . . . [PPA], LCRA's liability for liquidated damages and/or a Termination Payment for its failure to take power under the agreement is limited to $60,000,000." The arbitrator did not directly address Papalote's ripeness argument.

On October 10, 2016, LCRA notified Papalote that it would cease taking energy under the PPA beginning on October 12, 2016, and that its resulting liquidated damages would be capped at $60 million per § 9.3.

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[2] Papalote also filed a motion to stay arbitration pending appeal, arguing that it was likely to prevail on appeal because the dispute was not ripe. In opposition, LCRA contended that Papalote's appeal was not likely to succeed because ripeness was an issue for the arbitrator to decide. Moreover, LCRA contended that Papalote had failed to show that it would suffer an irreparable injury, in part, because the effect of any arbitration award would ultimately depend on "a myriad of uncertainties," including whether LCRA would decide to stop taking energy under the PPA. The district court denied the motion to stay, reasoning, *inter alia*, that Papalote had not shown that it was likely to succeed on its ripeness argument because "the weight of authority on the topic states ripeness is a question for the arbitrator to decide." However, the district court noted that there was "ample room for disagreement on the question [of] whether courts or arbitrators should decide ripeness issues," but it concluded that the potential for disagreement "does not affect the Court's conclusion that a stay is not warranted in this case."

II. RIPENESS

Papalote argues that the district court erred in compelling arbitration because the issue was not ripe, and thus, the district court lacked jurisdiction to compel arbitration. We first address whether the underlying dispute between the parties must be ripe in order for the district court to have jurisdiction to compel arbitration. Finding that the answer is yes, we next turn to whether the underlying dispute was ripe. We review the jurisdictional issue of ripeness de novo. *See Choice Inc. of Tex. v. Greenstein*, 691 F.3d 710, 714 (5th Cir. 2012). "As the party asserting federal jurisdiction," LCRA has "the burden of demonstrating that jurisdiction is proper." *See Stockman v. FEC*, 138 F.3d 144, 151 (5th Cir. 1998).

A. Jurisdiction to Compel Arbitration

Although the district court recognized that "ripeness questions plainly loom," the district court declined to address whether the underlying dispute was ripe because the parties had failed to adequately brief whether ripeness should be determined by the district court or the arbitrator. Papalote's purported failure to adequately brief the ripeness issue, however, does not result in waiver here. Even assuming that Papalote had failed to adequately raise the ripeness issue in the district court, we still must consider whether the district court had jurisdiction to compel arbitration: "[E]very federal appellate court has a special obligation to 'satisfy itself not only of its own jurisdiction, but also that of the lower courts in a cause under review,' even though the parties are prepared to concede it." *United Transp. Union v. Foster*, 205 F.3d 851, 857 (5th Cir. 2000) (alteration in original) (quoting *Steel Co. v. Citizens for a Better Env't*, 523 U.S. 83, 95 (1998)). Under Article III of the Constitution, federal courts are confined to adjudicating

"cases" and "controversies." *Id.* And to be a case or controversy for Article III jurisdictional purposes, the litigation "must be ripe for decision, meaning that it must not be premature or speculative." *See Shields v. Norton*, 289 F.3d 832, 835 (5th Cir. 2002); *see also Choice Inc. of Tex.*, 691 F.3d at 715 ("The justiciability doctrines of standing, mootness, political question, and ripeness 'all originate in Article III's case or controversy language . . . .'" (omission in original) (quoting *DaimlerChrysler Corp. v. Cuno*, 547 U.S. 332, 352 (2006))). In other words, "ripeness is a constitutional prerequisite to the exercise of jurisdiction." *Shields*, 289 F.3d at 835.

Thus, we must confront the question that the district court declined to address: Was there a ripe controversy between LCRA and Papalote such that the district court had jurisdiction over the petition to compel arbitration? But this question raises another question that must be answered first: Which dispute matters for the purpose of determining whether there is a ripe controversy? In this context, there are effectively two potential disputes that a court could consider in determining whether there is a sufficiently ripe controversy. On the one hand, LCRA argues that the dispute should be viewed as whether arbitration should be compelled under the Federal Arbitration Act (FAA). In this sense, the dispute was almost certainly a ripe controversy because LCRA was seeking to compel arbitration immediately, not at some hypothetical future date. On the other hand, Papalote contends that the dispute should be viewed as whether the underlying dispute presents a ripe controversy. Put another way, Papalote's position is that a court must "look through" the petition to compel arbitration in order to determine whether the underlying dispute—in this

caps LCRA's liability at $60 million—presents a sufficiently ripe controversy.

Under the Supreme Court's decision in *Vaden v. Discover Bank*, 556 U.S. 49 (2009), we must follow the second approach—*i.e.*, we must "look through" the petition to compel arbitration in order to determine whether the underlying dispute presents a sufficiently ripe controversy to establish federal jurisdiction. At issue in *Vaden*, as in this case, was § 4 of the FAA, which "provides for United States district court enforcement of arbitration agreements." *Id.* at 58. Under § 4, a petition to compel arbitration may be brought before "any United States district court which, save for [the arbitration] agreement, would have jurisdiction under Title 28 . . . of the subject matter of a suit arising out of the controversy between the parties." U.S.C. § 4; *see also Vaden*, 556 U.S. at 58. In *Vaden*, the Supreme Court addressed how a district court should determine if it has jurisdiction over a § 4 petition to compel arbitration. *Vaden*, 556 U.S. at 53, 62–65; *see also Volvo Trucks N. Am., Inc. v. Crescent Ford Truck Sales, Inc.*, 666 F.3d 932, 936 (5th Cir. 2012). In answering this question, the Supreme Court first emphasized that the FAA is "'something of an anomaly' in the realm of federal legislation: It 'bestow[s] no federal jurisdiction but rather requir[es] [for access to a federal forum] an independent jurisdictional basis' over the parties' dispute." *Vaden*, 556 U.S. at 59 (alterations in original) (quoting *Hall Street Assocs., L.L.C. v. Mattel, Inc.*, 552 U.S. 576, 581–82 (2008)). Turning to the statutory language of § 4, the Supreme Court reasoned that "[t]he phrase 'save for [the arbitration] agreement' indicates that the district court should assume the absence of the arbitration agreement and determine whether it 'would have jurisdiction under title 28' without

it." *Id.* at 62 (second alteration in original). And the Supreme Court held that § 4's reference to "the controversy between the parties" means the underlying substantive conflict between the parties. *Id.* In other words, the Supreme Court held that a district court must "look through" a § 4 petition to determine whether the district court would have jurisdiction over the underlying substantive controversy. *See id.* at 53, 62.

Although *Vaden* concerned whether there was federal question jurisdiction, we see no reason that the holding is limited to only that specific jurisdictional issue. For example, the Supreme Court summed up its holding by stating that "§ 4 of the FAA does not enlarge federal-court jurisdiction; rather, it confines federal courts to the jurisdiction they would have 'save for [the arbitration] agreement,'" and "[m]indful of that limitation, we read § 4 to convey that a party seeking to compel arbitration may gain a federal court's assistance only if, 'save for' the agreement, the entire, actual 'controversy between the parties,' as they have framed it, could be litigated in federal court." *Id.* at 66 (first alteration in original). Accordingly, *Vaden*'s holding necessarily implies that any of the reasons that a federal court may lack subject matter jurisdiction over the underlying dispute—*e.g.*, ripeness—would similarly prevent a district court from having jurisdiction to compel arbitration. Put another way, given *Vaden*'s holding that the district court should assume the absence of an arbitration agreement in determining whether there is jurisdiction over the underlying dispute, it necessarily follows that, if the underlying dispute is not ripe, then the district court would not have jurisdiction to compel arbitration.

In response, LCRA largely fails to address Papalote's jurisdictional argument, and indeed, LCRA (appellee

here) does not address *Vaden* at all in its brief. Instead, LCRA makes a series of arguments that skip the threshold question of whether the district court had jurisdiction to compel arbitration. For example, LCRA contends that whether an arbitration provision requires a claim to be ripe is a question for the arbitrator, not the district court. Specifically, LCRA contends that, under *Howsam v. Dean Witter Reynolds, Inc.*, 537 U.S. 79 (2002), ripeness is a question of procedural arbitrability to be resolved by the arbitrator, and even if ripeness is a question of substantive arbitrability, there is clear and unmistakable evidence here that the parties agreed to delegate the issue to the arbitrator. But we need not reach that issue because it does not change the fact that the district court must have jurisdiction in the first instance to compel arbitration, and a ripe controversy is a necessary component of subject matter jurisdiction.[3] *See, e.g.*, *Lopez v. City of Houston*, 617 F.3d 336, 341 (5th Cir. 2010) ("Ripeness is a component of subject matter

[3] LCRA points to district court cases holding that ripeness is a question for the arbitrator, not the district court. However, many of these cases predate *Vaden*. *See, e.g., Albritton v. W.S. Badcock Corp.,* No. 1:02-CV378, 2003 WL 21018636, at *4 (N.D. Miss. Apr. 7, 2003) (citing *Howsam* for the proposition that "procedural questions such as ripeness are for an arbitrator, not the court, to decide"). Regarding the district court cases decided after *Vaden*, we disagree with their holdings. *See, e.g., Transp. Workers Union of Am. v. Veolia Transp. Servs., Inc.,* 24 F. Supp. 3d 223, 229–30 (E.D.N.Y. 2014) (holding that ripeness argument was a question for the arbitrator). Indeed, none of the district court cases relied on by LCRA for this proposition even cites *Vaden*. *See id.; Grant v. Brown*, No. 4:14CV01395, 2014 WL 6389577, at *2 (E.D. Mo. Nov. 14, 2014); *Local Union No. 13417 of the United Steel Workers v. Kan. Gas Serv. Co.,* No. 12-1003, 2012 WL 1435305, at *7 n.3 (D. Kan. Apr. 25, 2012); *Milliman, Inc. v. Health Medicare Ultra, Inc.,* 641 F. Supp. 2d 113, 119 (D.P.R. 2009).

jurisdiction, because a court has no power to decide disputes that are not yet justiciable."). Additionally, LCRA argues that the arbitration provision does not require a dispute to be ripe. Once again, however, whether an arbitration provision requires a ripe dispute does not change the fact that the district court still must have jurisdiction to compel arbitration.

B. Ripeness of the Underlying Dispute

Having established that the district court should have determined whether the underlying dispute was ripe, we now turn to the merits of the ripeness issue. As discussed above, a claim must be ripe for a federal court to have jurisdiction, *see, e.g.*, *Shields*, 289 F.3d at 835, and "[a] court should dismiss a case for lack of 'ripeness' when the case is abstract or hypothetical," *Orix Credit All., Inc. v. Wolfe*, 212 F.3d 891, 895 (5th Cir. 2000) (quoting *New Orleans Pub. Serv., Inc. v. Council of New Orleans*, 833 F.2d 583, 586 (5th Cir. 1987)). In determining whether a case is ripe, there are two key considerations: "the fitness of the issues for judicial decision and the hardship to the parties of withholding court consideration." *Id.* (quoting *New Orleans Pub. Serv.*, 833 F.2d at 896).

At the outset, it is helpful to frame the underlying dispute. Although neither party was in breach of the PPA, the parties disagreed about whether § 9.3 capped LCRA's aggregate liability at $60 million. Thus, the underlying claim that LCRA sought to arbitrate is effectively one for a declaratory judgment that its interpretation of § 9.3 is correct. "In the declaratory judgment context, whether a particular dispute is ripe for adjudication turns on whether a substantial controversy of sufficient immediacy and reality exists between parties having adverse legal interests." *Venator Grp. Specialty,*

Inc. v. Matthew/Muniot Family, LLC, 322 F.3d 835, 838 (5th Cir. 2003). "Whether particular facts are sufficiently immediate to establish an actual controversy is a question that must be addressed on a case-by-case basis." *Orix*, 212 F.3d at 896. Notably, "[t]he threat of litigation, if specific and concrete, can indeed establish a controversy upon which declaratory judgment can be based." *Id.* at 897. The fact that future litigation may be contingent upon certain factors occurring does not necessarily defeat jurisdiction over a declaratory judgment action, but "a district court must take into account the likelihood that these contingencies will occur." *See id.* Accordingly, we have described the ripeness inquiry as "focus[ing] on whether an injury that has not yet occurred is sufficiently likely to happen to justify judicial intervention." *See id.* (quoting *Chevron U.S.A., Inc. v. Traillour Oil Co.*, 987 F.2d 1138, 1153 (5th Cir. 1993)); *see also Shields*, 289 F.3d at 835 ("We look to the practical likelihood that a controversy will become real.").

Here, LCRA has failed to show that its claim was ripe at the time the district court compelled arbitration. The sole dispute between the parties centered on their differing interpretations of whether § 9.3 capped LCRA's liability at $60 million, but as relevant to this appeal, the differing interpretations of § 9.3 would not need to be resolved unless LCRA first decided to stop taking energy. LCRA argues that this dispute was sufficiently ripe because it was a purely legal issue and LCRA "had a direct and immediate dilemma" because it could not determine, without knowing if its liquidated damages would be capped by § 9.3, whether it should continue to take all of the Project's energy or opt instead to pay liquidated damages. We disagree. LCRA was fully

performing under the PPA at the time the district court compelled arbitration. Although it is not an absolute prerequisite for ripeness for there to be a contractual breach, there is no evidence that LCRA threatened to stop taking energy or that such a decision was even likely. To the contrary, LCRA appears to have consistently maintained that, even if it received a favorable ruling, there was only a possibility that it would opt to stop taking energy. *See Orix*, 212 F.3d at 896 ("Such unasserted, unthreatened, and unknown claims do not present an immediate or real threat to [the plaintiff] such that declaratory relief is proper."). For example, in opposing Papalote's motion to stay arbitration pending appeal, LCRA argued that any harm to Papalote absent a stay was only a "mere *possibilit[y]*" that depended on "a myriad of uncertainties," one of which was whether LCRA would decide to stop taking energy. LCRA may have been able to establish that the issue was ripe, but on this record, it has failed to do so.[4] LCRA simply points to no other evidence or allegations that would support the idea that it was sufficiently likely to decide to stop taking energy, nor does it point to anything that would contradict its own statements to the contrary. *See id.* at 897 ("[The plaintiff] simply fails to allege facts that show that these contingencies are likely to occur."); *see also Texas v. United States*, 523 U.S. 296, 300 (1998) ("A claim is not ripe for adjudication if it rests upon 'contingent future events that may not occur as anticipated, or indeed may not occur at all.'" (quoting *Thomas v. Union Carbide*

[4] Presumably the prices of other sources of energy were among the primary factors affecting whether LCRA would decide to stop taking the Project's energy in the event that it received a favorable ruling.

Agric. Prods. Co., 473 U.S. 568, 580–81 (1985))).[5]

LCRA's reliance on *Venator Group Specialty* is misplaced. In *Venator Group Specialty*, we held that a declaratory judgment action was ripe even though it sought a ruling on the effect of terms in a commercial lease that had not yet been triggered. 322 F.3d at 839–40. Whether one of the terms would ever be triggered depended on a specific contingency occurring in the future—the lessor invoking a certain right in the lease. *Id.* Despite this contingency, we found that, based on the facts of that case, the lessor was "very likely" to invoke the right at issue, and thus, the dispute was ripe. *Id.* Unlike the circumstances in *Venator Group Specialty*, however, the circumstances in this case, on the record before us, do not demonstrate that the contingency at issue—*i.e.*, LCRA deciding to stop taking energy from the Project and paying liquidated damages instead—was likely to occur at the time the district court compelled arbitration. As discussed above, LCRA itself described this decision as merely an uncertainty.

However, this case presents a unique circumstance: LCRA prevailed in arbitration and, several months later, decided to cease taking energy under the PPA. If the district court were deciding the ripeness issue today, the underlying dispute would be ripe given that LCRA has, in fact, stopped taking energy. The contingency at the

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[5] LCRA's hardship argument is also unavailing. LCRA claims that it faced the difficult decision of continuing to take all of the Project's energy or opting instead to breach the PPA and risk a damages award exceeding $60 million. Moreover, according to LCRA, the PPA required it to continue performing while the dispute was being resolved. But this overstates the steps that LCRA was required to take in order to make the underlying dispute ripe. As highlighted above, LCRA was not required to breach the PPA to make the dispute ripe.

time the district court compelled arbitration—*i.e.*, whether LCRA would ultimately decide to stop taking energy—has occurred. Thus, LCRA argues that, in light of the recent developments, this court should affirm the order compelling arbitration because the underlying dispute is now ripe. LCRA's argument has some initial appeal. Indeed, there are a number of cases discussing how, "[i]n weighing a ripeness claim, an appellate court may properly consider events occurring after the trial court's decision." *New Orleans Pub. Serv.*, 833 F.2d at 586 n.2; *see also, e.g.*, *Blanchette v. Conn. Gen. Ins.*, 419 U.S. 102, 140 (1974) ("[S]ince ripeness is peculiarly a question of timing, it is the situation now rather than the situation at the time of the District Court's decision that must govern.").

But the fact that an appellate court may consider subsequent events when assessing ripeness does not necessarily dictate the result in this case. Instead, the unique procedural context here is fundamentally different from the typical situation in which an appellate court considers subsequent events when assessing ripeness. In the typical situation in which subsequent events support a ripeness finding, the underlying merits are part of the case, and the appellate court (or the district court on remand) can evaluate the merits in light of the fact that the case is now ripe. *See, e.g.*, *Skull Valley Band of Goshute Indians v. Nielson*, 376 F.3d 1223, 1238 & n.2 (10th Cir. 2004); *Syron v. ReliaStar Life Ins.*, 506 F. App'x 500, 503–05 (6th Cir. 2012). Here, however, the underlying merits are not part of this appeal. Instead, the "merits" of this case are unique in that they concern whether the district court properly compelled arbitration (whereas the underlying merits were addressed in the actual arbitration). This

distinction is key because the order compelling arbitration has already completed its intended effect in a way that a typical merits ruling would not—arbitration has already occurred. This case would be similar to the typical ripeness cases addressing subsequent events if we (or the district court) compelled arbitration now in light of the fact that the underlying dispute is now ripe, but that is not the situation given that arbitration has already occurred. And if we (or the district court) were to compel arbitration now, it does not necessarily have the same effect as affirming the district court's order compelling arbitration because a new arbitration could conceivably result in a different outcome.

To frame the issue more concretely, we must decide whether we can affirm the prior order compelling arbitration, which was made without jurisdiction at the time, because the dispute has since become ripe or whether we must vacate the prior order compelling arbitration and reconsider the petition to compel now. This question hinges on whether the subsequent developments here can somehow retroactively bestow jurisdiction on the district court's prior order compelling arbitration. We hold that they cannot. Although this appears to be a matter of first impression, we find most applicable the general rule that judgments made by a district court without subject matter jurisdiction are void. *See, e.g.*, *Brumfield v. La. State Bd. of Educ.*, 806 F.3d 289, 298 (5th Cir. 2015) ("An order 'is void only if the court that rendered it lacked jurisdiction of the subject matter, or of the parties . . . .'" (quoting *Williams v. New Orleans Pub. Serv., Inc.*, 728 F.2d 730, 735 (5th Cir. 1984))); *Hill v. McDermott, Inc.*, 827 F.2d 1040, 1043 (5th Cir. 1987) ("A judgment is void on jurisdictional grounds if the [district] court lacked jurisdiction over the subject

matter or over the parties."); *cf. United Student Aid Funds, Inc. v. Espinosa*, 559 U.S. 260, 270 (2010) ("A void judgment is a legal nullity."). Under this reasoning, although subsequent events have made it such that the district court would now have jurisdiction to compel arbitration, these events do not retroactively cure the void order compelling Papalote to an arbitration that it should not have been forced to attend at the time. We recognize that the parties have already fully arbitrated the underlying dispute once while this appeal was pending. However, we cannot evade the fact that the district court lacked jurisdiction when it compelled arbitration, and the fact that a court would have jurisdiction now to compel arbitration does not retroactively bestow jurisdiction on the prior order.

III. CONCLUSION

In sum, we have made clear that a district court must have subject matter jurisdiction over the underlying dispute in order to compel arbitration under 9 U.S.C. § 4. Because the matter was not ripe—*i.e.*, there was no Article III "case" or "controversy"—at the time the district court entered judgment in this case, the district court's judgment is void for lack of subject matter jurisdiction and is vacated.[6] Even though subsequent intervening events have created a controversy that is now ripe, we cannot retroactively resurrect the district court's void judgment under the facts of this case. Nevertheless, because the basic underlying controversy, originally raised and pursued by these same parties, is now ripe, we remand the case to the district court for such orders and proceedings as the district court deems

[6] We therefore do not reach Papalote's argument that the underlying dispute was outside the scope of the arbitration provision.

necessary and appropriate. We leave to the discretion of the district court whether it should consider anew the petition to compel arbitration or conduct other proceedings.

For the foregoing reasons, we VACATE the judgment of the district court and REMAND the case for further proceedings consistent with this opinion.

APPENDIX B

IN THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF TEXAS AUSTIN DIVISION

Case No. A-15-CA-656-SS

FILED
February 24, 2016
Clerk, U.S. District Court
Western District of Texas

LOWER COLORADO RIVER AUTHORITY,

Plaintiff,

vs.

PAPALOTE CREEK II, L.L.C., f/k/a Papalote Creek Wind Farm II, LLC,

Defendant.

ORDER

BE IT REMEMBERED on the 16th day of December 2015, the Court held a hearing in the above-styled cause, and the parties appeared by and through counsel. Before the Court is·Plaintiff Lower Colorado River Authority' s Opposed Motion to Compel Arbitration [#8], Defendant

Papalote Creek II, LLC f/k/a Papalote Creek Wind Farm II, LLC's Response [#20] in opposition, Plaintiff's Reply [#27] in support, Defendant's Objections to the Affidavit of Richard Williams [#19],[1] and Plaintiff's Response [#28] thereto. Having reviewed the documents, the governing law, the arguments of the parties at hearing, and the file as a whole, the Court how enters the following opinion and orders.

Background

Plaintiff Lower Colorado River Authority (LCRA), a conservation district and political subdivision of the State of Texas, brings this action against Defendant Papalote Creek II, LLC (Papalote), a wind energy company, seeking to compel Papalote to arbitrate a contract dispute. As set forth below, the Court finds LCRA's motion to compel arbitration should be granted, as the dispute articulated by LCRA falls within the scope of the parties' valid agreement to arbitrate. Furthermore, although it appears there is a substantial question whether the parties' underlying dispute is ripe for adjudication, the Court leaves that issue for the arbitrator, lacking sufficient briefing not only on ripeness but also on the question whether ripeness issues in the context of a motion to compel arbitration should be decided by courts or by arbitrators.

On December 18, 2009, LCRA and Papalote executed a Power Purchase Agreement (the PPA) under which LCRA agreed to buy all of the energy produced by Papalote's wind farm, the Papalote Creek II Wind Project (the Project), at a fixed rate and through the year 2028. *See* Second Am. Pet. [#13] Ex. A (PPA) §§ 2.1, 3.1.

[1] As the Court considered none of the objected-to portions of the Affidavit of Richard Williams in reaching its decision, Papalote's objections are DISMISSED AS MOOT.

Neither LCRA nor Papalote is presently in breach of the PPA; LCRA has, thus far, purchased all of the energy it contracted to buy, Papalote has produced all of the energy it contracted to produce, and all monies have been duly paid. Although no breach has occurred, a dispute has arisen between LCRA and Papalote concerning the proper interpretation of a clause in the PPA. It is this dispute LCRA seeks to arbitrate.

The dispute is a simple one. Under the PPA, in the event LCRA fails to purchase any of the energy produced by Papalote, LCRA is required to pay what the PPA terms "Liquidated Damages Due to Buyer's Failure to Take" in the amount specified by that provision. *See* PPA § 4.3. The PPA further contains a "Limitation on Damages" clause which provides that "Buyer's damages for failure to perform its material obligations under [the PPA] . . . shall . . . be limited in the aggregate to sixty million dollars." *Id.* § 9.3. Reading these two provisions together, LCRA, the buyer, claims that were it to purchase, over time, less than 100% of the energy produced by the Project, under the Limitation on Damages clause, it would be obligated to pay Papalote for the failure to take only until the total amount paid reached $60 million. Papalote disagrees with this interpretation.[2]

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[2] Curiously, a straightforward statement of the legal basis for Papalote's disagreement is conspicuously absent from the pleadings. The affidavit of Richard Williams, LCRA's Chief Financial Officer, however, provides a clue. Williams states that on June 10, 2015, during a phone call with Papalote representatives, "[Papalote's Chief Financial Officer] stated that LCRA would be very unhappy once LCRA looked at the Consent to Assignment of Rights with the Sumitomo M[i]tsui Banking Corporation . . . which Papalote said would prevent LCRA from taking the position that its liability was capped at $60 million." Mot. Compel [#8-1] Ex. A (Williams Aff.)

Throughout April, May, and June 2015, LCRA and Papalote held a number of telephonic and in-person conferences in an attempt to resolve their differences regarding interpretation of the PPA's damages provision. Their efforts included a May 26, 2015 in-person meeting, held in LCRA's Austin office, attended by senior representatives from both entities. Unable to reach agreement, LCRA now seeks to invoke the PPA's arbitration provisions, found in Article 13 of the PPA:

> **13.1 Consultation.** If any dispute arises with respect to either Party's performance hereunder, the senior officers or executives of Buyer and senior officers or executives of Seller shall meet to attempt to resolve such dispute, either in person or by telephone, within five (5) Business Days after the written request of either Party. If such senior officers or executives are unable to resolve such dispute within ten (10) Days after their initial meeting (in person or by telephone), either Party may refer the dispute to the procedures outlined in the remainder of this Article 13.
>
> **13.2 Arbitration.** After the expiration of the ten (10) Day period described in Section 13.1 hereunder, either Party may submit any disputes arising under this Agreement, which cannot be resolved by the Parties to binding arbitration in accordance with the Commercial Arbitration Rules of the American Arbitration Association . . . and the

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¶7(j). Sumitomo became involved with Papalote and LCRA when, several years after the PPA was executed, Sumitomo served as collateral agent for a group of financial institutions which provided Papalote with financing to build the Project. *See* Mot. Disqualify [#17-1] Ex. 1 (Fried Decl.) ¶ 9.

> terms of this Section 13.2[.] . . . .
>
> The process shall be initiated by either Party delivering to the other a written notice requesting arbitration, with the other Party to respond to such request within ten (10) Business Days. . . .

PPA §§ 13.1, 13.2.

LCRA made written demand for arbitration on Papalote on June 19, 2015. *See* Resp. Mot. Compel [#20-3] Ex. C (Demand Letter). Papalote responded on June 24, 2015, stating the demand "is premature, violates Article 13, and does not constitute a proper and valid notice of arbitration under the PPA." *Id.* [#20-4] Ex. D (Demand Letter Resp.).

On June 30, 2015, LCRA filed its original petition to compel arbitration against Papalote. *See* Notice Removal [#1-1] Ex. A-2 (Pet. Compel Arbitration). Papalote removed the suit to this Court on August 3, 2015; invoking the Court's diversity jurisdiction. *See id.* [#1] ¶4. LCRA filed the instant motion to compel arbitration on August 28, 2015, and Papalote responded on October 9, 2015. *See* Mot. Compel [#8]. Before turning to the motion to compel arbitration, however, the Court first took up intervenor Sumitomo Mitsui Banking Corporation's motions to intervene and to disqualify,[3] and held a hearing on those matters on November 6, 2015. Following that hearing, LCRA's former counsel, Jackson Walker LLP, moved to withdraw and for substitution of counsel. *See* Mot. Withdraw [#35]. The Court granted that motion. *See* Order of Nov. 20, 2015 [#37].

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[3] Sumitomo's Motion to Intervene for the Limited Purpose of Resolving Its Motion to Disqualify Plaintiff's Counsel [#17], which remains pending on the docket, is DISMISSED AS MOOT.

On December 16, 2015, with the intervention and disqualification issues resolved, the Court held a hearing on the motion to compel arbitration. The motion is now ripe for decision.

Analysis

I. Legal Standard

In determining the arbitrability of a dispute, this Court is guided by "four general principles" enunciated by the United States Supreme Court. *Tittle v. Enron Corp.*, 463 F.3d 410, 418 (5th Cir. 2006). First, because arbitration is a creature of contract, "a party cannot be required to submit to arbitration any dispute which he has not agreed to submit." *Id.* (quoting *AT&T Techs., Inc. v. Commc'ns Workers of Am.*, 475 U.S. 643, 648 (1986)). Second, the threshold question of whether the parties agreed to arbitrate is one for the courts, not the arbitrator, unless "the parties clearly and unmistakably provide otherwise." *Id.* Third, this Court is not to consider the merits of the claims in determining arbitrability. *Id.* Fourth, "where the contract contains an arbitration clause, there is a presumption of arbitrability." *Id.* (quoting *AT&T Techs.*, 475 U.S. at 650). The presumption of arbitrability requires this Court to resolve any ambiguities as to the scope of the arbitration agreement in favor of arbitration. *Id.*

Mindful of these guiding principles, this Court conducts a two-step analysis in deciding whether to compel arbitration under the Federal Arbitration Act, 9 U.S.C. §§ 1 *et seq.* *Id.* The first step is to "determine whether the parties agreed to arbitrate the dispute in question." *Id.* This step involves two inquiries: "(1) whether there is a valid agreement to arbitrate between the parties; and (2) whether the dispute in question falls within the scope of that arbitration agreement." *Id.*

(quoting *Webb v. Investacorp, Inc.,* 89 F.3d 252, 258 (5th Cir. 1996)). The second step is to "determine whether legal constraints external to the parties' agreement foreclosed the arbitration of those claims." *Id.* As LCRA correctly points out, as "the party resisting arbitration [,]" Papalote "shoulders the burden of proving that the dispute is not arbitrable." *Overstreet v. Contigroup Companies, Inc.,* 462 F.3d 409, 412 (5th Cir. 2006) (citing *Am. Heritage Life Ins. Co. v. Lang,* 321 F.3d 533, 539 (5th Cir. 2003)).

II. Application

The parties agree that Article 13 is a valid and enforceable arbitration provision. *See* Def.'s Resp. [#20] at 4. Consequently, under the first step of the analysis, the only question before the Court is whether the dispute in question falls within the scope of Article 13. *See Tittle,* 463 F.3d at 418.

LCRA begins by arguing its dispute with Papalote over the correct interpretation of the PPA's damages provision falls within the arbitration clause because it is a "dispute[] arising under this Agreement" within the meaning of § 13.2. LCRA notes § 13.2 uses the broad phrase "any dispute," and contends the instant dispute clearly "aris[es] under this Agreement" because it concerns the interpretation of a provision of the PPA.

In response, Papalote takes the position it is not the phrase "any dispute" in § 13.2 which controls. Instead, Papalote points to § 13.1, which refers to "any dispute . . . with respect to either Party's performance [under the PPA]." PPA § 13.1. Papalote points out § 13.1 and § 13.2 are linked, as § 13.1 provides that only *after* the initial consultation it requires may a dispute be "refer[red] . . . to the procedures outlined in the remainder of this Article 13." PPA § 13.1. In Papalote's view, § 13.2

confirms this reading by stating that "*[a]fter* the expiration of the ten (10) Day period described in Section 13.1 . . . , any disputes arising under this Agreement" may be submitted to arbitration. *Id.* § 13.2 (emphasis added).

As the parties agree, the Court must apply Texas law in construing the PPA and determining whether the parties agreed to arbitrate this matter. *See Tittle,* 463 F.3d at 419 (citing *Wash. Mut. Fin. Grp. v. Bailey,* 364 F.3d 260, 264 (5th Cir. 2004) ("[I]n determining whether the parties agreed to arbitrate a certain matter, courts apply the contract law of the particular state that governs the agreement.")). Under Texas law, a court construing a contract must read the contract in a manner that confers meaning to all its terms, rendering the terms consistent with one another. *Id.* (citing *Coker v. Coker,* 650 S.W.2d 391, 393 (Tex. 1983)). In so doing, courts must "examine and consider the entire writing in an effort to harmonize and give effect to all the provisions of the contract so that none will be rendered meaningless . . . . No single provision taken alone will be given controlling effect; rather, all the provisions must be considered with reference to the whole instrument." *Id.* (quoting *Coker,* 650 S.W.2d at 393). In harmonizing the provisions of the contract, "terms stated earlier in an agreement must be favored over subsequent terms." *Coker,* 650 S.W.2d at 393 (citing *Ogden v. Dickinson State Bank,* 662 S.W.2d 330, 335 (Tex. 1983)).

Applying these principles, the Court agrees with Papalote that the parties agreed to arbitrate only those disputes which "arise[] with respect to either Party's performance" under the PPA Section 13.1, which comes first, acts as a gate-keeping provision: it is only when the parties are "unable to resolve" their "dispute [which]

ar[ose] with respect to either Party's performance" that "either Party may refer the dispute to the procedures outlined in the remainder of this Article 13." *See Coker,* 650 S.W.2d at 393 (earlier terms must be favored over subsequent terms). Section 13.2 does not apply at all until the parties have exhausted § 13.1, which requires the parties confer via phone or in person concerning their dispute and then wait ten days before escalating it to the next stage, outlined in § 13.2. That § 13.2 does not qualify "any dispute" is simply irrelevant. Accepting LCRA's contrary position would impermissibly isolate § 13.2 from § 13.1, render the linkage between § 13.1 and § 13.2 meaningless, and elevate a general phrase over a specific one. Each of those consequences contravenes a Texas canon of construction. *See Coker,* 650 S.W.2d at 393; *Tittle,* 463 F.3d at 419; *NuStar Energy, L.P. v. Diamond Offshore Co.,* 402 S.W.3d 461, 466 (Tex. App. Houston [14th Dist.] 2013, no pet.) ("To the extent of any conflict, specific provisions control over more general ones." (quoting *Grynberg v. Grey Wolf Drilling Co.,* 296 S.W.3d 132, 137 (Tex. App.-Houston [14th Dist.] 2009, no pet.))). LCRA's argument is therefore rejected.

Because only those disputes which arise with respect to either party's performance under the PPA fall within the scope of the PPA's arbitration provision, the dispositive question becomes whether the dispute LCRA seeks to arbitrate—whether or not LCRA's liability would be capped at $60 million in the event it elected to purchase from Papalote less than the total amount of energy it contracted to buy—qualifies as a dispute "with respect to either Party's performance" under the PPA.

Papalote urges that LCRA has not and cannot present a performance-related dispute at this time, as all parties are fully performing their obligations under the PPA at

present. In Papalote's view, its dispute with LCRA concerns LCRA "potential liability for damages in the event of breach, not a performance obligation. *See* Resp. [#20] at 13. Disagreeing, LCRA characterizes its obligation to pay Papalote if it fails to purchase 100% of the energy produced by the Project as "among the primary performance obligations that LCRA has under the PPA." Reply [#27] at 3. This is so, LCRA argues, because the PPA permits LCRA to cure a failure to take through the payment of money, thereby keeping the PPA in full force and effect even if LCRA fails to meet its energy-purchasing obligations. *See id.* at 3 ("Papalote would have no right to terminate the PPA [if LCRA pays the specified liquidated damages]."). Additionally, LCRA points out that Papalote's argument highlighting the absence of a present breach is, in reality, a ripeness argument, and states questions of ripeness are for the arbitrator, not the Court.

The Court finds LCRA has presented a performance-related dispute. It is true that in a certain sense, one could understand "performance" to concern only those promises which were the essence of the PPA—the sale and production of wind energy—and conceptualize the buyer's obligation to pay for failing to take as compensation for its failure to perform, rather than as an independent performance obligation. *See Huffhines v. Bourland*, 280 S.W. 561, 562-63 (Tex. 1926)[4] ("Where . . . the terms of the contract . . . bind the seller . . . to accept such sum in satisfaction of the obligations of the . . .

[4] Because this Commission of Appeals opinion was adopted and entered as the judgment of the Texas Supreme Court, *see Huffhines*, 280 S.W. at 563, it is cited as an opinion of the Texas Supreme Court. *See* THE GREENBOOK: TEXAS RULES OF FORM § 5.2.2, at 35 (13th ed. 2015).

purchaser, the contract will be construed as giving to the latter . . . an option either to perform his obligation to purchase . . . , or, failing in that, to stand bound to pay to the seller such stipulated sum as liquidated damages"). The Court believes the better view here, however, is that LCRA's bargained-for obligation to pay Papalote a specified sum if LCRA takes less than all of the energy produced is itself a performance obligation under the PPA.

The Court reaches this conclusion because LCRA's failure to take is not treated by the PPA as a breach giving Papalote the right to suspend performance and terminate the PPA. Rather, Papalote's "exclusive remedy" for LCRA's failure to take, absent other circumstances not applicable here,[5] is the payment of

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[5] The relevant provision reads in full:

> 4.3 Liquidated Damages Due to Buyer' s Failure to Take. As Seller's exclusive remedy hereunder if . . .Buyer fails to take any of Net Electricity at the Delivery Point and such failure to take is not excused pursuant to the terms of this Agreement, . . . or . . . Seller suspends performance due to a Buyer Event of Default, then Buyer shall pay Seller . . . an amount equal to the product of . . . the positive difference, if any, obtained by subtracting . . .the Sales Price from . . . the Contract Price, multiplied by . . . the sum of Net Electricity and any Deemed Generated Energy during the term period of such . . . suspension, plus costs reasonably incurred by Seller; provided, however, . . .that if Seller fails to make available to Buyer fifty percent (50%) or more of the applicable Monthly Minimum Contract Amounts fora consecutive period of sixty (60) Days, all remedies in Section 6.2 shall be available to Seller.

PPA § 4.3. It is only when "Seller fails to make available to Buyer fifty percent or more of the applicable Monthly Minimum Contract Amounts for a consecutive period of sixty (60) Days" that termination is available as a remedy subsequent to the buyer's failure to take. *See id.;* PPA § 6.2 (listing "Default Remedies").

money. *See* PPA § 4.3 (articulating "Seller's exclusive remedy hereunder" for "Buyer's Failure to Take"). Section 4.3 of the PPA thus contemplates a continuation of the parties' relationship upon LCRA's failure to take, so long as the payment is made—not a suit for breach and to enforce the liquidated damages provision. In contrast, were LCRA to fail to make the payment, that failure would constitute an "Event of Default" permitting Papalote to suspend its performance and terminate the agreement. *See* PPA § 6.1 (listing among "Events of Default" the "[f]ailure by a Party to make any payment required hereunder when due"); *id.* § 6.2 (listing remedies available upon occurrence of an "Event of Default"). As such, the Court finds LCRA's obligation to pay money pursuant to § 4.3 is a performance obligation under the PPA.

As for the second prong of the inquiry: although neither party expressly identified ripeness as a "legal constraint[] external to the parties' agreement [that] foreclose[s] the arbitration of [LCRA's] claim," *Tittle*, 463 F.3d at 418, ripeness questions plainly loom, as neither party is presently in breach of the PPA. Given the parties' failure to brief ripeness at all and to adequately brief the question whether ripeness should be decided by the courts or the arbitrators, however, the Court leaves both issues for another day. *See Ace Am. Ins. Co. v. Huntsman Corp.*, 255 F.R.D. 179, 210 (S.D. Tex. 2008) ("[I]f it is determined that arbitration is warranted, questions of the ripeness of the underlying disputes between IRIC and the Reinsurers ultimately may be determined by the arbitrators."). LCRA's Second Amended Petition to Compel Arbitration, moreover, asks for nothing more than what its title reveals; there is no request for declaratory judgment on

the merits of the dispute (which may, in itself, provide all the commentary on the ripeness question that is necessary). Papalote is, of course, free to raise any ripeness arguments before the arbitrator.

In sum, the parties' arbitration agreement is valid, the dispute LCRA has articulated falls within the scope of the arbitration provision, and the parties have identified and argued no legal constraints external to the agreement that foreclose the arbitration of this claim. As such, the Court grants LCRA's motion to compel arbitration.

Conclusion

As LCRA's presently live pleading seeks only to compel Papalote to arbitrate, resolution of LCRA's motion disposes of this suit. Judgment in favor of LCRA is due to be granted.

Accordingly:

IT IS ORDERED that Sumitomo Mitsui Banking Corporation's Motion to Intervene for the Limited Purpose of Resolving Its Motion to Disqualify Plaintiff's Counsel [#17] is DISMISSED AS MOOT;

IT IS FURTHER ORDERED that Defendant Papalote Creek II, LLC's Objections to the Affidavit of Richard Williams [#19] are DISMISSED AS MOOT; and

IT IS FINALLY ORDERED that Plaintiff Lower Colorado River Authority's Opposed Motion to Compel Arbitration [#8] is GRANTED. The parties are ordered to arbitrate their claims in the manner provided for in the arbitration agreement, pursuant to 9 U.S.C. § 4.

SIGNED this the 24th day of February 2016.

s/ Sam Sparks
SAM SPARKS
UNITED STATES DISTRICT
JUDGE

APPENDIX C

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 16-50317

(Filed July 25, 2017)

LOWER COLORADO RIVER AUTHORITY,

Plaintiff - Appellee

v.

PAPALOTE CREEK II, L.L.C., formerly known as
Papalote Creek Wind Farm II, L.L.C.,

Defendant - Appellant

Appeal from the United States District Court for the
Western District of Texas, Austin

ON PETITION FOR REHEARING EN BANC

(Opinion 5/31/17, 5 Cir., _____, ____ F.3d_____)

Before KING, JOLLY, and PRADO, Circuit Judges.

PER CURIAM:

(X) Treating the Petition for Rehearing En Banc as a Petition for Panel Rehearing, the Petition for Panel Rehearing is DENIED. No member of the panel nor judge in regular active service of the court having requested that the court be polled on Rehearing En Banc (FED R. APP. P. and 5TH CIR. R. 35), the Petition for Rehearing En Banc is DENIED.

( ) Treating the Petition for Rehearing En Banc as a Petition for Panel Rehearing, the Petition for Panel Rehearing is DENIED. The court having been polled at the request of one of the members of the court and a majority of the judges who are in regular active service and not disqualified not having voted in favor ((FED R. APP. P. and 5TH CIR. R. 35), the Petition for Rehearing En Banc is DENIED.

ENTERED FOR THE COURT:

/s Carolyn Dineen King
UNITED STATES CIRCUIT JUDGE

APPENDIX D

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 16-50317

United States Court of Appeals
Fifth Circuit
FILED
May 31, 2017
Lyle W. Cayce
Clerk

D.C. Docket No. 1:15-CV-656

LOWER COLORADO RIVER AUTHORITY,

Plaintiff - Appellee

v.

PAPALOTE CREEK II, L.L.C., formerly known as
Papalote Creek Wind Farm II, L.L.C.,

Defendant - Appellant

Appeal from the United States District Court for the
Western District of Texas, Austin

Before KING, JOLLY, and PRADO, Circuit Judges.

J U D G M E N T

This cause was considered on the record on appeal and

was argued by counsel.

It is ordered and adjudged that the judgment of the District Court is vacated, and the cause is remanded to the District Court for further proceedings in accordance with the opinion of this Court.

IT IS FURTHER ORDERED that plaintiff-appellee pay to defendant-appellant the costs on appeal to be taxed by the Clerk of this Court.

APPENDIX E

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 16-50317

United States Court of Appeals
Fifth Circuit
FILED
May 31, 2017
Lyle W. Cayce
Clerk

D.C. Docket No. 1:15-CV-656

LOWER COLORADO RIVER AUTHORITY,

Plaintiff - Appellee

v.

PAPALOTE CREEK II, L.L.C., formerly known as
Papalote Creek Wind Farm II, L.L.C.,

Defendant - Appellant

Appeal from the United States District Court for the
Western District of Texas, Austin

Before KING, JOLLY, and PRADO, Circuit Judges.

J U D G M E N T

This cause was considered on the record on appeal and was argued by counsel.

It is ordered and adjudged that the judgment of the District Court is vacated, and the cause is remanded to the District Court for further proceedings in accordance with the opinion of this Court.

IT IS FURTHER ORDERED that plaintiff-appellee pay to defendant-appellant the costs on appeal to be taxed by the Clerk of this Court.

Certified as a true copy and issued as the mandate on Aug 02, 2017

Attest: *s/ Lyle W. Cayce*

Clerk, U.S. Court of Appeals, Fifth Circuit

APPENDIX F

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF TEXAS
AUSTIN DIVISION

FILED
April 22, 2016
Clerk, U.S. District Court
Western District of Texas

Case No. A-16-CA-1097-SS

PAPALOTE CREEK II, LLC f/k/a Papalote Creek Windfarm II, LLC,
Plaintiff,

-vs-

LOWER COLORADO RIVER AUTHORITY,
Defendant.

O R D E R

BE IT REMEMBERED on this day the Court reviewed the file in the above-styled cause, and specifically Defendant Papalote Creek II, LLC f/k/a Papalote Creek Wind Farm II, LLC's Motion to Stay Arbitration Pending Appeal [#44], Plaintiff Lower Colorado River Authority's Response [#44] thereto, and Defendant's Reply [#50] in support. Having considered the documents, the governing law, and the file as a whole, the Court now enters the following opinion and orders.

Background

Plaintiff Lower Colorado River Authority (LCRA), a conservation district and political subdivision of the State of Texas, brought this action against Defendant Papalote Creek II, LLC (Papalote), a wind energy company, seeking to compel Papalote to arbitrate a contract dispute. By order dated February 24, 2016, the Court granted LCRA's motion to compel arbitration, finding the dispute articulated by LCRA fell within the scope of the parties' valid agreement to arbitrate.

After making that finding, the Court noted that "although neither party expressly identified ripeness as a legal constraint external to the parties' agreement that foreclose[d] the arbitration of LCRA's claim," ripeness questions "plainly loom[ed], as neither party is presently in breach[.]" Order of Feb. 24, 2016 [#41] at 10. The Court concluded any ripeness issues the parties wished to raise would be left for the arbitrator, "[g]iven the parties' failure to brief ripeness at all and to adequately brief the question whether ripeness should be decided by the courts or the arbitrators." *Id.* The Court granted LCRA's motion to compel arbitration and, that same day, entered final judgment in favor of LCRA, as its live pleading sought only to compel Papalote to arbitrate. *See id.* at 10-11; J. [#42].

On March 23, 2016, Papalote filed its motion seeking a stay of the arbitration pending appeal to the Fifth Circuit of the Court's decision compelling arbitration. LCRA responded on April 8, 2016. The motion is now ripe for decision.

Analysis

I. Legal Standard

Because an order compelling arbitration is injunctive relief, a party may move to stay enforcement of the injunction while an appeal from the final judgment (or interlocutory order) granting relief is pending. *See* FED. R. CIV. P. 62(c). A stay, however, "'is an intrusion into the ordinary processes of administration and judicial review' and a party is not entitled to a stay as a matter of right." *Campaign for S. Equality v. Bryant,* 773 F.3d 55, 57 (5th Cir. 2014) *(quoting Nken v. Holder,* 556 U.S. 418, 427 (2009)). In determining whether to grant a stay pending appeal, courts consider four factors: "(1) whether the stay applicant has made a strong showing that he or she is likely to succeed on the merits; (2) whether the applicant will be irreparably injured absent a stay; (3) whether issuance of the stay will substantially injure the other parties interested in the proceeding; and (4) where the public interest lies." *Id.* (quoting *Veasy v. Perry,* 769 F.3d 890, 892 (5th Cir. 2014)). These factors should not be applied, however, "in a rigid or mechanical fashion." *Id.* (quoting *United States v. Baylor Univ. Med. Ctr.,* 711 F.2d 38, 39 (5th Cir. 1983)). Moreover, the movant "need only present a substantial case on the merits when a serious legal question is involved and show that the balance of equities weighs heavily in favor of granting the stay." *Id.*

II. Application

Although Papalote failed to brief the question whether ripeness was an issue for the Court or for the arbitrator to decide, *see* Resp. Mot. Compel [#20] at 16-17 (stating, without citation to authority, that "Papalote is not asking the Court to resolve the Motion based on issues that are

for an arbitrator to decide"), and gave cursory treatment to the question of ripeness itself, *see id.* (stating no binding authority would *prevent* a finding the dispute was not ripe and citing the "basic rationale" underlying the ripeness principle), Papalote now asks this Court to stay arbitration pending the outcome of its appeal on ripeness grounds. As set forth below, the Court finds the request for stay should be denied.

First, as the Court noted in its order granting the motion to compel arbitration, the parties are free to raise the ripeness issue before the arbitrator. Ripeness may be determined at the threshold in that forum, just as it would be determined at the threshold in this forum. Thus, a stay of the arbitration pending appeal would merely result in delaying the resolution of the ripeness question. Consequently, the Court is unconvinced by Papalote's claim irreparable harm will result absent a stay because "[f]orcing the parties to litigate the meaning of Section 9.3 . . . could trigger a waterfall of events with enormous practical consequences." Mot. Stay [#44] at 6. If the arbitrator finds the dispute unripe, it need progress no further.

Second, Papalote has not shown it is likely to succeed on the merits of its claim. Not only does Papalote's motion still lack analysis of the question whether the dispute *is in fact ripe,* but also the weight of authority on the topic states ripeness is a question for the arbitrator to decide.[1] *See Ace Am. Ins. Co. v. Huntsman Corp.,* 255 F.R.D. 179, 210 (S.D. Tex. 2008) ("[Q]uestions of the ripeness of the underlying disputes . . . ultimately may be

[1] Papalote marshals virtually no argument regarding the Court's finding the parties' dispute falls within the scope of the arbitration clause, only" further submit[ting] that it will succeed on appeal" regarding that claim. Mot. Stay [#44] at 4-5.

determined by the arbitrators."); *Transp. Workers Union of Am. v. Veolia Transp. Servs., Inc.*, 24 F. Supp. 3d 223, 229-30 (E.D.N.Y. 2014) (finding ripeness of dispute an "issue[] for the arbitrator to decide, not the Court"); *Milliman, Inc. v. Health Medicare Ultra, Inc.*, 641 F. Supp. 2d 113, 119 (D.P.R. 2009) ("Whether the alleged dispute that led Petitioners to commence arbitration proceedings before the AAA is ripe must ultimately be determined by the arbitrator."); *Grant v. Brown*, No. 4:14CV01395 ERW, 2014 WL 6389577, at *2 (E.D. Mo. Nov. 14, 2014) ("Issues that are conditions precedent to arbitrability and other prerequisites such as time limits, notice, laches, and estoppel are for the arbitrators to decide. The arbitrator must ultimately decide whether the dispute is ripe for arbitration." (citation omitted)); *Local Union No. 13417 of the United Steel Workers v. Kan. Gas Serv. Co.*, No. 12-1003-JWL, 2012 WL 1435305, at *7 (D. Kan. Apr. 25, 2012) ("To the extent the Company is suggesting that the Union's grievance is not ripe, that question is left to the arbitrator."); *Albritton v. W.S. Badcock Corp.*, Nos. 1:02-CV378-D-D, 1:02-CV379-D-D, 2003 WL 21018636, at *4 (N.D. Miss. Apr. 7, 2003) ("[P]rocedural questions such as ripeness are for an arbitrator, not for the court, to decide." *(citing Howsam v. Dean Witter Reynolds, Inc.*, 537 U.S. 79 (2002))).

To the extent these decisions are in tension with *Tittle v. Enron Corp.*, 463 F.3d 410 (5th Cir. 2006)—which did not directly address the question whether ripeness should be decided by the arbitrator or by the Court-—that tension does not warrant a stay pending appeal. Further, the Court acknowledges both that there is ample room for disagreement on the question whether courts or arbitrators should decide ripeness issues and

that the contours of the question remain, despite the authority cited above, somewhat unexplored. As the Seventh Circuit has noted in dicta:

> As an abstract matter, there may be some room for doubt whether it is the role of the court to determine if a live "controversy" or "disagreement" exists between the parties, in the sense in which those terms are employed in an arbitration clause . . . . [T]here is authority that the court should inquire only whether the subject matter of a dispute is within the arbitration clause, leaving the arguably procedural issue of "ripeness" to the arbitrator. Whether parties have assumed a position of concrete adversity, so that the issues are effective and vigorously presented to the arbitrator, might be the sort of procedural issue which is properly left for the arbitrator's decision. Fortunately, we need not address the perhaps difficult question of where this "ripeness" issue falls on the substantive/procedural continuum.

Chi. Typographical Union No. 16 v. Chi. Sun-Times, Inc., 860 F.2d 1420, 1425 (7th Cir. 1988) (further noting, with citation to two Supreme Court decisions, that "[d]rawing a principled distinction between 'substance' and 'procedure' is an intractable problem, and one which has confounded many able judges"). That there is room for disagreement, however, does not affect the Court's conclusion that a stay is not warranted in this case.

Finally, the Court finds the parties' arguments regarding harm to LCRA and the public interest to have minimal to no impact on the analysis. LCRA argues it will be harmed by a stay because, in effect, it wants a resolution of this dispute to occur quickly, *see* Resp. [#47] at 9-10, and Papalote claims the public interest

favors a stay because of the public's interest in the efficient resolution of disputes. Neither argument is particularly persuasive or impactful.

Conclusion

In sum, the Court finds a stay of its judgment compelling to the parties to arbitration is not appropriate, as Papalote has failed to "make a strong showing that [it] is likely to succeed on the merits" or will be "irreparably injured absent a stay," *Bryant,* 773 F.3d at 57, and the remaining factors have little to no impact on the analysis.

Accordingly,

IT IS ORDERED that Defendant Papalote Creek II, LLC f/k/a Papalote Creek Wind Farm II, LLC's Motion to Stay Arbitration Pending Appeal [#44] is DENIED.

SIGNED this the 22nd day of April 2016.

s/ Sam Sparks
SAM SPARKS
UNITED STATES
DISTRICT JUDGE