STATE OF LOUISIANA

COURT OF APPEAL

FIRST CIRCUIT

NO. 2018 CA 0075

FLORIDA GAS TRANSMISSION COMPANY, LLC

VERSUS

TEXAS BRINE COMPANY, LLC, ET AL.

CONSOLIDATED WITH

NO. 2018 CA 0241

PONTCHARTRAIN NATURAL GAS SYSTEM,
K/D/S PROMIX, L.L.C., AND
ACADIAN GAS PIPELINE SYSTEM

VERSUS

TEXAS BRINE COMPANY, LLC

CONSOLIDATED WITH

NO. 2018 CA 0796

CROSSTEX ENERGY SERVICES, LP; CROSSTEX LIG, LLC;
AND CROSSTEX PROCESSING SERVICES, LLC

VERSUS

TEXAS BRINE COMPANY, LLC; ZURICH AMERICAN
INSURANCE COMPANY; AND AMERICAN GUARANTEE AND
LIABILITY INSURANCE COMPANY

Judgment Rendered: JUL 01 2019

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On Appeal from
The 23rd Judicial District Court,
Parish of Assumption, State of Louisiana
Trial Court Nos. 34,316, 34,265, and 34,202
The Honorable Thomas J. Kliebert Jr., Judge Presiding

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BEFORE: McDONALD, HIGGINBOTHAM, AND CRAIN, JJ.

CRAIN, J.

In these consolidated appeals, Occidental Chemical Corporation appeals summary judgments declaring a lease terminated by confusion. We vacate the summary judgments and remand.

FACTS AND PROCEDURAL HISTORY

This litigation arises out of a sinkhole that developed from the collapse of a salt mine cavern in Assumption Parish on or about August 3, 2012. The present matter involves claims between Texas Brine Company, LLC, which operated the brine production well, and Occidental, the owner of the land where the sinkhole occurred. The relationship between these parties dates back to 1975 when Occidental's predecessor-in-interest, "Hooker Chemicals and Plastics Corp.," leased to Texas Brine the right to produce salt from the subject property. In 1976, Texas Brine assigned or sub-leased—the precise nature of the transaction is disputed—the salt lease to Vulcan Materials Company, but Texas Brine remained operator of the brine well and related facilities pursuant to an operating agreement with Vulcan. The parties amended and restated the operating agreement in its entirety on January 1, 2000.

Through a series of transactions culminating in 2008, Occidental acquired Vulcan's interest in the salt lease and the amended operating agreement. As a result of those transactions, Texas Brine and Occidental were parties to the salt lease and the amended operating agreement when the sinkhole occurred. Notably, the amended operating agreement contains an arbitration clause whereby the parties agreed, "Any dispute, controversy or claim arising out of or relating to this Agreement or the breach, validity or termination thereof shall be finally settled by arbitration."

The sinkhole spawned numerous suits, three by companies owning or operating pipelines damaged by the sinkhole, including (1) Florida Gas

Transmission Company, LLC (2) Pontchartrain Natural Gas System, K/D/S Promix, L.L.C. and Acadian Gas Pipeline (collectively, "Pontchartrain"), and (3) Crosstex Energy Services, LP.[1] The claims asserted in these pipeline suits include incidental demands between Texas Brine and Occidental based in tort and contract.

On August 1, 2013, at Texas Brine's request, an arbitration proceeding was initiated to resolve the claims between Texas Brine and Occidental. In conjunction with that proceeding, the trial court stayed all "contractual, non-tort claims" between Occidental and Texas Brine in the pipeline suits "until such time as the arbitration has ended." One issue submitted to arbitration was whether the salt lease terminated by confusion in 2008, when Occidental allegedly became both the lessor and lessee under the lease.

In June, 2017, with the arbitration proceeding still pending, Texas Brine filed motions for partial summary judgment in each of the pipeline suits, asserting the salt lease terminated by confusion for the same reasons urged in arbitration. To avoid further arbitration, Texas Brine argued Occidental presented the salt lease claims to the trial court for adjudication by filing an amended incidental demand against Texas Brine purportedly asserting claims based on the salt lease. Occidental opposed the summary judgment motions, arguing the parties submitted the confusion claim to the arbitration panel and were "awaiting a decision any day now," and Texas Brine's motions violated the trial court's stay order. The trial court granted the motions, then signed judgments in favor of Texas Brine and against Occidental, decreeing the salt lease "terminated as a matter of law as of

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[1] The plaintiffs in the Crosstex proceeding are multiple Crosstex entities, collectively referred to herein as "Crosstex." The suits instituted by the identified pipeline companies will sometimes collectively be referred to herein as the "pipeline suits."

March 27, 2008," and dismissing with prejudice any actions based on the salt lease arising thereafter. Occidental appeals.[2]

DISCUSSION

Because the relevant facts are not in dispute, this appeal presents questions of law subject to *de novo* review. *See FIA Card Services, N.A. v. Weaver*, 10-1372 (La. 3/15/11), 62 So. 3d 709, 712; *Arkel Constructors, Inc. v. Duplantier & Meric, Architects, L.L.C.*, 06-1950 (La. App. 1 Cir. 7/25/07), 965 So. 2d 455, 461.

Arbitration is a matter of contract. *AT&T Mobility LLC v. Concepcion*, 563 U.S. 333, 339, 131 S.Ct. 1740, 1745, 179 L.Ed.2d 742 (2011). Therefore, we begin our analysis with the language of the amended operating agreement, which at Section 12.10(a) provides:

> Any dispute, controversy or claim arising out of or relating to this Agreement or the breach, validity or termination thereof shall be finally settled by arbitration. Any dispute, controversy or claim arising out of or relating to any of the other instruments and agreements pertaining to the Leased Premises or the use or operation thereof (or the breach, validity or termination thereof) may be consolidated in one proceeding with any arbitration relating to this Agreement. The arbitration shall be conducted in accordance with the Commercial Arbitration Rules of the American Arbitration Association in effect at the time of arbitration ("the Rules"), except as modified herein or by mutual agreement of the parties. The arbitration shall be held in New Orleans, Louisiana. The arbitration shall be governed by the U.S. Federal Arbitration Act.

In the amending operating agreement, the parties specified the arbitration agreement is governed by the Federal Arbitration Act at 9 U.S.C. §§ 1-16 (FAA) and the AAA Rules. Section 2 of the FAA provides:

> A written provision in . . . a contract evidencing a transaction involving commerce to settle by arbitration a controversy thereafter arising out of such contract . . . shall be valid, irrevocable, and

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[2] The trial court designated the judgments as final pursuant to Louisiana Code of Civil Procedure article 1915B(1). Having reviewed the record, we find no error in the designation. *See R.J. Messinger, Inc. v. Rosenblum*, 04-1664 (La. 3/2/05), 894 So. 2d 1113. We also note Occidental filed appeals in each of the pipeline suits, and by order dated September 20, 2018, this court consolidated *Pontchartrain Natural Gas System v. Texas Brine Co.*, 2018 CA 0241, and *Crosstex Energy Services v. Texas Brine Co.*, 2018 CA 0796, with and into *Florida Gas Transmission Co. v. Texas Brine Co.*, 2018 CA 0075.

> enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract.

Section 2, considered the "primary substantive provision" of the FAA, places arbitration agreements on an equal footing with other contracts and requires courts to enforce them according to their terms. *See Rent-A-Center, West, Inc. v. Jackson*, 561 U.S. 63, 67, 130 S.Ct. 2772, 2776, 177 L.Ed. 2d 403 (2010); *Moses H. Cone Memorial Hospital v. Mercury Construction Corporation*, 460 U.S. 1, 24, 103 S.Ct. 927, 941, 74 L.Ed.2d 765 (1983).

Quoting the arbitration clause, Occidental contends the salt lease confusion claim is subject to arbitration because it is a "dispute, controversy or claim arising out of or relating to [the amended operating agreement] or the breach, validity or termination thereof." The status of the salt lease, according to Occidental, falls within the scope of this provision, because a section of the amended operating agreement provides, "If, on the other hand, the Salt Lease terminates prior to December 31, 2017 (for reasons other than default by either party) the term of this Agreement shall be adjusted accordingly." While not conceding this interpretation, Occidental points out this provision may link the term of the operating agreement to the salt lease, which, if so, means the alleged termination of the salt lease by confusion in 2008 would have also terminated the amended operating agreement. Therefore, the argument continues, Texas Brine's confusion claim "relat[es] to" the termination of the amended operating agreement and must be arbitrated. Texas Brine, while agreeing with all but the final point of this reasoning, maintains the confusion claim is not subject to arbitration because it arises strictly under the salt lease, which does not have an arbitration clause.

These arguments implicate the "arbitrability" of the confusion claim, an issue that requires us to first decide *who makes that determination*—the court or the arbitration panel? Parties may agree for an arbitrator to decide not only the

merits of a dispute, but also gateway questions of arbitrability, such as whether the parties have agreed to arbitrate or whether their agreement covers a particular controversy. *Henry Schein, Inc. v. Archer and White Sales, Inc.*, ___ U.S. ___, 139 S. Ct. 524, 529, 202 L.Ed.2d 480 (2019); *Rent-A-Center*, 561 U.S. at 68-69, 130 S.Ct. at 2777. Such a provision, sometimes referred to as a "delegation clause," is an additional, antecedent agreement the party seeking arbitration asks the court to enforce, and the FAA applies to this additional arbitration agreement just as it does on any other. *See New Prime Inc. v. Oliveira*, ___ U.S. ___, 139 S.Ct. 532, 538, 202 L.Ed.2d 536 (2019); *Henry Schein, Inc.*, ___ U.S. at ___, 139 S.Ct. at 529; *Rent-A-Center*, 561 U.S. at 70, 130 S.Ct. at 2777-78.

This court recently addressed arbitrability involving this same agreement in *Florida Gas Transmission Company, LLC v. Texas Brine Company, LLC*, 17-0304 (La. App. 1 Cir. 12/6/18), 267 So. 3d 633, where Texas Brine argued the amended operating agreement, specifically the arbitration clause, was unenforceable due to fraud. Reviewing the language of the arbitration clause, we found the parties, by incorporating the AAA Rules, clearly and unmistakably agreed to submit arbitrability of the fraud claim to the arbitration panel. *Florida Gas Transmission Company, LLC*, 267 So. 3d at 637. We relied on Rule R-7 of the AAA Rules, which provides the arbitrator "shall have the power to rule on his or her own jurisdiction, including any objections with respect to the existence, scope or validity of the arbitration agreement." *Id.*; *see also Jasper Contractors, Inc. v. E-Claim.com, LLC*, 11-0978 (La. App. 1 Cir. 5/4/12), 94 So. 3d 123, 133; *Brittania-U Nigeria, Ltd. v. Chevron USA, Inc.*, 866 F.3d 709, 714 (5th Cir. 2017) (interpreting a rule similar to Rule R-7 under United Nations Commission on International Trade Law Arbitration Rules); *Petrofac, Inc. v. DynMcDermott Petroleum Operations Co.*, 687 F.3d 671, 675 (5th Cir. 2012).

Within weeks of this court's *Florida Gas* decision, the United States Supreme Court examined an arbitrability issue in *Henry Schein, Inc. v. Archer and White Sales, Inc.*, ___ U.S. ___, 139 S.Ct. 524 (2019), where a party sought to avoid arbitration by invoking a jurisprudentially-created exception to delegation clauses for "wholly groundless" claims of arbitration. In a unanimous opinion, the Supreme Court began its analysis by reiterating the parties' right under the FAA to delegate arbitrability to the arbitrator:

> When a dispute arises, the parties sometimes may disagree not only about the merits of the dispute but also about the threshold arbitrability question—that is, whether their arbitration agreement applies to the particular dispute. Who decides that threshold arbitrability question? Under the [FAA] and this Court's cases, the question of who decides arbitrability is itself a question of contract. The [FAA] allows parties to agree by contract that an arbitrator, rather than a court, will resolve threshold arbitrability questions as well as underlying merits disputes.

Henry Schein, Inc., ____ U.S. at ____, 139 S.Ct. at 527.

Deferring to the parties' contractual right to choose the decision-maker, the Supreme Court refused to carve out a "wholly groundless" exception to allow a district court, in derogation of a delegation clause, to decide arbitrability, explaining:

> When the parties' contract delegates the arbitrability question to an arbitrator, a court may not override the contract. In those circumstances, a court possesses no power to decide the arbitrability issue. That is true even if the court thinks that the argument that the arbitration agreement applies to a particular dispute is wholly groundless.
>
> That conclusion follows not only from the text of the [FAA] but also from precedent. We have held that a court may not rule on the potential merits of the underlying claim that is assigned by contract to an arbitrator, even if it appears to the court to be frivolous. A court has no business weighing the merits of the grievance because the agreement is to submit all grievances to arbitration, not merely those which the court will deem meritorious.
>
> That . . . principle applies with equal force to the threshold issue of arbitrability. Just as a court may not decide a merits question that the parties have delegated to an arbitrator, a court may not decide an arbitrability question that the parties have delegated to an arbitrator.

Henry Schein, Inc., ___ U.S. at ___, 139 S.Ct. at 529-30 (citations and internal quotation marks omitted).

By incorporating the AAA Rules into the amended operating agreement, Texas Brine and Occidental agreed the arbitration panel "shall have the power to rule on [its] own jurisdiction, including any objections with respect to the existence, scope or validity of the arbitration agreement." *See* Rule R-7, AAA Rules. This language vests the arbitration panel with authority to decide arbitrability. *See Florida Gas Transmission Company, LLC*, 267 So. 3d at 637; *Jasper Contractors, Inc.*, 94 So. 3d at 133; *Brittania-U Nigeria, Ltd.*, 866 F.3d at 714; *Petrofac, Inc.*, 687 F.3d at 675. Texas Brine's confusion claim requires interpretation of the arbitration clause to determine its scope and applicability, a task delegated to the arbitration panel. A court may not decide arbitrability when the parties delegate that authority to an arbitrator. *See Henry Schein, Inc.*, ___ U.S. at ___, 139 S.Ct. at 529-30.

Texas Brine alternatively argues Occidental, by asserting claims against Texas Brine based on the salt lease, has "opened the proverbial door" and "waived any argument that the status of the Salt Lease is restricted exclusively to the arbitration." When presented as a defense to arbitration, the Supreme Court has described waiver as a "procedural" question "presumptively not for the judge, but for an arbitrator, to decide." *See Howsam v. Dean Witter Reynolds, Inc.*, 537 U.S. 79, 84, 123 S.Ct. 588, 592, 154 L.Ed. 2d 491 (2002). The presumption is the arbitrator should decide allegations of waiver, delay, or a like defense to arbitrability. *Id.*

The Louisiana Supreme Court, applying the Louisiana Binding Arbitration Law at Louisiana Revised Statutes 9:4201-4217, reached the same conclusion in *International River Center v. Johns-Manville Sales Corp.*, 02-3060 (La. 12/3/03),

861 So. 2d 139. There, the plaintiff argued the defendant waived the right to arbitrate a dispute by participating in litigation involving the same claim. *International River Center*, 861 So. 2d at 140. The supreme court focused on two provisions in the statute specifying the trial court's authority at the outset of a dispute involving a written arbitration agreement: Section 9:4202, which requires staying a suit brought on "any issue referable to arbitration under [a written] agreement," and Section 9:4203, which allows the court to issue an order "directing that the arbitration proceed in the manner provided for in the agreement." *International River Center*, 861 So. 2d at 141. Neither statute allows the trial court to determine a claim of waiver. *International River Center*, 861 So. 2d at 142. The supreme court refused to consider the merits of the waiver argument, explaining:

> Although we do not believe that the arbitrator is necessarily in the best position to determine if waiver has occurred, the legislature has determined that it is the arbitrator who will make that decision and it is not the province of this court to second guess such policy decisions. If, however, the parties to an arbitration agreement wish for the courts, rather than the arbitrator, to determine the issue of waiver, they may certainly construct the arbitration clause in such a manner as to so allow.

International River Center, 861 So. 2d at 144; *see also Arkel Constructors, Inc.*, 965 So. 2d at 461 ("[T]he trial court erred as a matter of law in determining the waiver issue, which . . . is clearly a function of the arbitrator."); *University of Louisiana Monroe Facilities, Inc. v. JPI Apartment Development, L.P.*, 49,148 (La. App. 2 Cir. 10/8/14), 151 So. 3d 126, 133, *writs denied*, 14-2344 (La. 2/6/15), 158 So. 3d 818, 820 ("[T]he issue of alleged waiver is a question for the arbitrator, not for the court."); *Nelson v. H20 Hair, Inc.*, 19-193 (La. App. 5 Cir. 5/22/19), ___ So. 3d ___, ____ (2019WL2205682 at *2) ("[T]he issue of waiver should be addressed to the arbitrator.").

The relevant language of Sections 3 and 4 of the FAA is virtually identical to Sections 9:4202 and 4303 and has been interpreted similarly on this issue. *See Duhon v. Activelaf, LLC*, 16-0818 (La. 10/19/16), ___ So. 3d ___ (2016WL6123820, *3), *cert denied*, 137 S.Ct. 2268, 198 L.Ed.2d 700 (2017); *Aguillard v. Auction Management Corp.*, 04-2804 (La. 6/29/05), 908 So. 2d 1, 18. Guided by jurisprudence from both the United States Supreme Court and the Louisiana Supreme Court, and cognizant of the delegation clause in the amended operating agreement, we find Texas Brine's waiver claim must be decided by the arbitration panel. *See Howsam*, 537 U.S. at 84, 123 S.Ct. at 592; *International River Center*, 861 So. 2d at 144; *Arkel Constructors, Inc.*, 965 So. 2d at 461; *University of Louisiana Monroe Facilities, Inc.*, 151 So. 3d at 133.[3]

Texas Brine also argues the status of the salt lease is relevant to pending claims between parties not privy to the arbitration clause. While that may be correct, the summary judgment on appeal was rendered in response to a motion filed by Texas Brine against Occidental and grants relief in favor of Texas Brine and against Occidental. Between these parties, arbitrability must be decided by the arbitration panel. *See Henry Schein, Inc.*, ___ U.S. at ___, 139 S.Ct. at 529-30; *Florida Gas Transmission Company, LLC*, 267 So. 3d at 637; *Jasper Contractors, Inc.*, 94 So. 3d at 133.

In a similar argument, Texas Brine contends allowing "two separate fora to decide this issue would invite the risk of contradictory adjudications and contractual chaos." That an arbitrable claim may be intertwined with other claims is irrelevant; an arbitrable claim must be referred to arbitration "even where the

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[3] *Vine v. PLS Financial Services, Inc.*, 689 F. App'x 800, 803 (5th Cir. 2017) (*per curiam*) held "litigation-conduct waiver" should be decided by the court. We distinguish *Vine* based on the delegation clause in the present case. We are also persuaded by *International River Center*, *Arkel Constructors, Inc.*, and *University of Louisiana Monroe Facilities, Inc.*, where the conduct allegedly constituting a waiver was a party's invoking or participating in litigation. *See International River Center*, 861 So. 2d at 140-41; *Arkel Constructors, Inc.*, 965 So. 2d at 457-58; *University of Louisiana Monroe Facilities, Inc.*, 151 So. 3d at 131.

result would be possibly inefficient maintenance of separate proceedings in different forums." *See Dean Witter Reynolds, Inc. v. Byrd*, 470 U.S. 213, 217, 105 S.Ct. 1238, 1241, 84 L.Ed.2d 158 (1985); *University of Louisiana Monroe Facilities, Inc.*, 151 So. 3d at 132. As explained in *Dean Witter Reynolds*:

> We . . . are not persuaded by the argument that the conflict between two goals of the Arbitration Act—enforcement of private agreements and encouragement of efficient and speedy dispute resolution—must be resolved in favor of the latter in order to realize the intent of the drafters. The preeminent concern of Congress in passing the Act was to enforce private agreements into which parties had entered, and that concern requires that we rigorously enforce agreements to arbitrate, even if the result is 'piecemeal' litigation.

Dean Witter Reynolds, Inc., 470 U.S. at 221, 105 S.Ct. at 1242-43.

We also reject Texas Brine's final argument that the arbitration clause should not be enforced, because of an "inordinate delay" in the arbitration panel's ruling. Texas Brine points to no authority allowing a court to decide issues previously submitted to arbitration based on the arbitration panel's delay in ruling. Further, Texas Brine has not identified efforts to expedite the panel's decision on the confusion claim, nor does the record reflect any prejudice to Texas Brine from the delay. To the contrary, the record shows Texas Brine used the delay to present additional evidence. This argument is without merit.

The arbitration agreement between Texas Brine and Occidental must be rigorously enforced. *Dean Witter Reynolds, Inc.*, 470 U.S. at 221, 105 S.Ct. at 1242. The trial court exceeded its authority by deciding an issue the parties delegated to the arbitration panel, namely whether Texas Brine's claim the salt lease terminated by confusion falls within the scope of the arbitration clause. Between Texas Brine and Occidental, exclusive authority to make that gateway determination rests with the arbitration panel. *See Henry Schein, Inc.*, ___ U.S. at ___, 139 S. Ct. at 529-30; *Florida Gas Transmission Company, LLC*, 267 So. 3d at 637; *Jasper Contractors, Inc.*, 94 So. 3d at 133; *Brittania-U Nigeria, Ltd.*, 866

F.3d at 714; *Petrofac, Inc.*, 687 F.3d at 675. The trial court erred in determining the merits of Texas Brine's claim asserting the salt lease terminated by confusion. The summary judgments in that regard must be vacated.

CONCLUSION

We vacate the summary judgments finding the salt lease terminated by confusion signed on (1) August 6, 2017, in *Florida Gas Transmission Co. v. Texas Brine Co.*, 2018 CA 0075; (2) August 23, 2017, in *Pontchartrain Natural Gas System v. Texas Brine Co.*, 2018 CA 0241; and (3) August 23, 2017, in *Crosstex Energy Services v. Texas Brine Co.*, 2018 CA 0796. This matter is remanded for further proceedings. All costs of this appeal are assessed to Texas Brine Company, LLC.

SUMMARY JUDGMENTS VACATED; CASE REMANDED.[4]

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[4] All pending motions are denied. We also find no merit in Texas Brine's Exception of Res Judicata, wherein it contends the supreme court's order in *Crosstex Energy Services, LP v. Texas Brine Company, LLC*, 18-1128 (La. 10/29/18), 255 So. 3d 587 (*per curiam*) is *res judicata* as to the arbitrability of the salt lease confusion claim. The supreme court's three-sentence order does not address the subject arbitration clause or the arbitrability of the confusion claim. The Exception of Res Judicata is denied.