The Arbitration Newsletter

(Published by Whitaker Chalk Swindle & Schwartz PLLC)
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May, 2013

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

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TRUST ARBITRATION UPHELD
RACHAL v. REITZ
2013 WL 1859249 (Texas May 3, 2013)[2]

For the second time in two years, the Texas Supreme Court has extended arbitration's reach under the Texas General Arbitration Act[3] (the "TGAA") beyond the ambit of the Federal Arbitration Act (the "FAA") in *Rachal v. Reitz*.[4] The Texas high court reversed the Fifth Court of Appeals (Dallas) and remanded to the trial court for entry of order granting an *inter vivos* trustee's motion to compel arbitration.[5] Four justices on the Fifth Court of Appeals had dissented to that court's affirmance of the trial court's denial of the trustee's motion to compel, which gave the Texas Supreme Court jurisdiction to hear the case.

The TGAA provides: "A written **agreement** to arbitrate is valid and enforceable if the **agreement** is to arbitrate a controversy that: (1) exists at the time of the **agreement**; or (2) arises between the parties after the date of the **agreement**."[6] The FAA, in contrast, provides: "A written provision in any maritime transaction or a **contract** evidencing a transaction involving commerce to settle by arbitration a controversy thereafter arising out of such **contract** or transaction ... shall be valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any **contract**."[7] The Court held that since "agreement" is not defined in the TGAA, and based on Black's Law Dictionary and Williston and Lord's "Treatise on the Law of Contracts," agreement "is really an expression of greater breadth of

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[1] Nothing in *The Arbitration Newsletter* is presented as or should be relied on as legal advice to clients or prospective clients. The sole purpose of *The Arbitration Newsletter* is to inform generally. The application of the comments in *The Arbitration Newsletter* to specific questions and cases should be discussed with the reader's independent legal counsel.

[2] Opinion not yet released for publication and subject to revision or withdrawal.

[3] Texas Civil Practice and Remedies Code ch. 171.

[4] In *Nafta Traders, Inc. v. Quinn*, 339 S.W.3d 84 (Tex. 2011), the Texas Supreme Court held that under the Texas General Arbitration Act parties could contract for expanded judicial review without violating *Hall Street Associates, LLC v. Mattel, Inc.*

[5] 2013 WL 1859249, *1.

[6] Tex. Civ. Prac. & Rem. Code §171.001(a)(1)-(2). Emphasis added.

[7] 9 USC §2.

meaning and less technicality."[8] An "agreement" only requires "mutual assent" whereas a "contract" must meet certain formal requirements.[9]

Although "mutual assent" is usually evidenced by signatures of the assenting parties, signatures are not the only way to confirm "mutual assent."[10] When Reitz, a trust beneficiary, sued to enforce the provisions of the trust, sought benefits granted to him under the trust, and did not disclaim any interest in the trust at the appropriate time, he was equitably estopped to oppose the enforcement of the arbitration provision in the trust under the "direct benefits estoppel" doctrine.[11] Reitz's conduct and claims in the lawsuit "indicated acceptance of the terms and validity of the trust," which included the arbitration provision.[12] The Court rejected Reitz's claim that no **contract** existed between the beneficiary and the trustee and explained that because "direct benefits estoppel" is similar in nature to "the defensive theory of promissory estoppel," no **contract** is required for the estoppel to apply in this case.[13]

Reitz had also relied on California and Arizona cases to show that arbitration cannot be required by a trust declaration because of no "exchange of promises" between the trustor and the beneficiary.[14] But both these cases had been superseded by the time the Texas Supreme Court made its decision – the California case by appeal and the Arizona case by statutory change. The California Arbitration Act also contained the same "**agreement**" terminology as the TGAA.[15] The Texas Supreme Court also cited federal district courts in Pennsylvania and Mississippi enforcing arbitration agreements in trust documents.[16]

Once the Texas Supreme Court found an enforceable arbitration provision in the trust in question, it quickly determined that the dispute in question was within the scope of the arbitration provision. The arbitration provision stated: "Despite anything herein to the contrary, I intend that as to any dispute of any kind involving this Trust or any of the parties or persons concerned herewith (e.g., beneficiaries, Trustees), arbitration as provided herein shall be the sole and exclusive remedy, and no legal proceedings shall be allowed or given effect except as they may relate to enforcing or implementing such arbitration in accordance herewith."[17] The parties did not dispute "that the claims refer to and depend upon the trust."[18]

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[8] 2013 WL 1859249, *4.
[9] *Id.*
[10] *See In re Kellogg Brown & Root, Inc.*, 166 S.W.3d 732, 739 (Tex.2005).
[11] 2013 WL 1859249, *5-7, citing both state and federal cases that have previously used "direct benefits estoppel" to bind non-signatories to an arbitration provision.
[12] 2013 WL 1859249, *6.
[13] The Court observed that under this equitable theory, the "unclean hands" defense might have been raised by Reitz but was not and, therefore, was not considered by the Court. 2013 WL 1859249, *7 fn7.
[14] 2013 WL 1859249, *7-8.
[15] *Cal.Civ.Proc.Code* §1281.1.
[16] 2013 WL 1859249, *8.
[17] 2013 WL 1859249, *9.
[18] 2013 WL 1859249, *6 fn6.

OBSERVATIONS

1. The arbitration clause drafter should consider carefully whether to adopt the FAA or the applicable state arbitration law in light of the "agreement" versus "contract" language in *Rachal v. Reitz.*[19]

2. An arbitration law should always be selected and included in the well-drafted arbitration provision, so that the substantive governing law of the larger agreement or contract is not the default arbitration law.

3. When putting an arbitration clause in a trust declaration, one should confirm the language of the arbitration law to be used to make sure that the broadest possible language ("agreement" versus "contract") is used in the arbitration law selected.

4. When putting an arbitration clause in a trust declaration, one should also consult the law of trusts in the applicable state law.[20]

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[19] *See* 2013 WL 1859249, *4, *citing 1 Williston and Lord, A Treatise on the Law of Contracts* §1:3, at 13-14 (4th ed. 1990) ("Every contract is an agreement; but not every agreement is a contract.").

[20] The revised Arizona statute states: "A trust instrument may provide mandatory, exclusive and reasonable procedures to resolve issues between the trustee and interested persons or among interested persons with regard to the administration or distribution of the trust." 2013 WL 1859249, *8.