The Arbitration Newsletter

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(John Allen Chalk, Sr., Editor)

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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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BROAD SCOPE ARBITRATION AGREEMENT

BBVA Compass Investment Solutions, Inc. v. Brooks, 2015 WL 595209 (Tex. App.—Fort Worth Feb. 12, 2015, no pet.)

The Texas Second Court of Appeals recently overturned a trial court's refusal to compel arbitration by deciding that, not only did the plaintiffs' tort claims fall within the scope of the arbitration agreement contained in a brokerage contract, but also the plaintiffs' claim of being unable to anticipate wrongdoing when adopting the brokerage contract does not render an arbitration agreement procedurally unconscionable.[2] Although some courts are divided as to whether non-contractual claims, such as torts, are within the scope of an arbitration agreement contained in a contract, the Second Court reemphasized that tort claims are not automatically exempted from arbitration.[3] Instead, if a dispute is "factually intertwined" with arbitrable claims, parties should be compelled to arbitrate, especially if the claims cannot be maintained without reference to the contract.[4]

Plaintiffs signed a brokerage agreement with BBVA Compass Investment Solutions, Inc. ("Defendant") in order to open an IRA with the bank.[5] In August of 2010, a third party gave false information to Defendant that Plaintiffs were deceased and showed a power of attorney authorization, causing the Defendant to transfer all of Plaintiffs' IRA funds into the third party's account, thereby closing Plaintiffs' account.[6] When the Plaintiffs discovered this error, they unsuccessfully attempted to resolve the dispute internally with the Defendant; this led to the Plaintiffs filing a suit against Defendant asserting multiple claims, including several tort claims

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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. My thanks to Nicole Muñoz, third-year law student at Texas A&M University School of Law, for her research and drafting assistance.

[2] *BBVA Compass Inv. Solutions, Inc. v. Brooks*, 2015 WL 595209 (Tex. App.—Fort Worth Feb. 15, 2015, no pet.).

[3] *Id.* at *6.

[4] *Id.*

[5] *Id.* at *1.

[6] *Id.*

along with breach of contract.[7] Pursuant to the arbitration agreement[8] in the brokerage agreement, the Defendant moved to compel arbitration.[9] Without stating its reasons, the trial court denied the motion to compel, and the Defendant appealed.[10]

The Defendant asserted that the trial court erred by denying the motion to compel "because the [arbitration] agreement was broad enough to encompass all controversies between the parties" including the Defendant's performance of services under the brokerage agreement.[11] In contrast, the Plaintiffs argued that its dispute should not be arbitrated "because the scope of the arbitration clause does not encompass Appellants' [Defendant's] tortious conduct and because the contractual relationship between the parties ended once Appellants liquidated and closed the [IRA] account."[12] In addition, Plaintiffs asserted that the arbitration clause within the brokerage agreement was both procedurally and substantively unconscionable, which the Second Court quickly rejected.[13]

The Court turned to the central issue, which was whether Plaintiffs' claims fell within the scope of the arbitration agreement.[14] In "determining whether a claim is within the scope of an arbitration agreement, courts focus on the factual allegations of the complaint rather than the legal causes of action asserted."[15] The Court explained that "unless it can be said with positive assurance that an arbitration clause is not susceptible of an interpretation which would cover the dispute at issue, a court should not deny arbitration."[16] Applying principles of contract interpretation, the Court agreed with the Defendant that the "purpose of the [brokerage] agreement was not to establish an account 'to' purchase and sell securities... [but] to establish an account 'and' purchase securities,"[17] which showed the arbitration agreement was not limited to transactions; it applied to all disputes concerning the contract's construction, performance, breach of the agreement, or any transaction involving the Plaintiffs' account.[18] Consequently, all

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[7] *Id.*

[8] The arbitration clause contained within the Brokerage Agreement provides, "...You agree that, except as provided below, all controversies which may arise between you and Compass, its affiliates, officers, directors, employees, representatives, and agents concerning the construction, performance or breach of this agreement, agreements related hereto, or any transaction involving securities and/or your securities account, whether entered into prior to, or subsequent to the date hereof, shall be resolved by arbitration in accordance with the Code of Arbitration Procedure of the National Association of Securities Dealers ("CAPNASD") or, if the CAPNASD is unavailable for any reason, the rules of procedure of the American Arbitration Association." *Id.* at *2.

[9] *Id.*

[10] *Id.*

[11] *Id.* at *3.

[12] *Id.*; Rejecting the latter argument, the Second Court described the severability doctrine with case citations that "an agreement to arbitrate contained within a contract survives the termination or repudiation of the contract as a whole." *Id.* at *3; *see Dish Network L.L.C. v. Brenner,* No. 13–12–00564–CV, 13–12–00620–CV, 2013 WL 3326640, at *7 (Tex.App.—Corpus Christi June 27, 2013, no pet.) (mem. op.); *see also Cleveland Constr., Inc. v. Levco Constr, Inc.*, 359 S.W.3d 843, 854 (Tex.App.—Houston [1st Dist.] 2012, pet. dism'd).

[13] *BBVA Compass*, 2015 WL 595209 at *7.

[14] *Id.* at *3.

[15] *Id.* at *4 (citing *McReynolds v. Elston*, 222 S.W.3d 731, 740 (Tex. App.—Houston [14th Dist.] 2007, no pet.)).

[16] *Id.* (citing *Prudential Sec. Inc. v. Marshall*, 909 S.W.2d 896, 899 (Tex. 1995)).

[17] *Id.*

[18] *Id.*

of the Defendant's subsequent conduct, of which the Plaintiffs complain, fell within the plain language of the arbitration clause.[19]

The Court also addressed whether Plaintiffs' non-contractual claims were within the scope of the arbitration agreement. Although the Plaintiffs asserted that tort claims are typically not subject to arbitration,[20] the Court disagreed explaining tort claims are not automatically exempted from arbitration.[21] To determine if a tort claim should be sent to arbitration along with contract claims, "a court must determine if the tort claim is 'so interwoven with the contract that it could not stand alone, or on the other hand, is completely independent of the contract that it could be maintained without reference to the contract.'"[22] Concluding that all of the damages in this dispute arose as a result of the Defendant's payment of Plaintiffs' IRA funds to a third party, the Court held "it cannot be said with positive assurance that the arbitration clause does not encompass the dispute in question,"[23] agreeing with the Defendant that all Plaintiffs' claims—torts included—are related to the brokerage agreement and are within the scope of the arbitration provision contained in the brokerage agreement.[24]

Lastly, the Court found no merit to the Plaintiffs' argument that the arbitration agreement was both substantively and procedurally unconscionable.[25] The Plaintiffs claimed the arbitration agreement was substantively unconscionable by claiming the arbitration costs were excessively high and oppressive. They claimed procedural unconscionability by asserting "unfair surprise because, at the time of the agreement, the Brookses could not anticipate" any alleged future wrongdoing of the Defendant.[26] The Court found no substantive unconscionability because the Plaintiffs' affidavit regarding financial burden was conclusory and insufficient.[27] In regards to procedural unconscionability, the Court reemphasized that it is the "circumstances surrounding the adoption of the arbitration agreement [that] determine whether the provision is procedurally unconscionable."[28] Agreeing with the Defendant, the Court held that surprise by a subsequent event does not retroactively render an arbitration agreement procedurally unconscionable.[29] Nor was there any evidence that the Plaintiffs were incapable of understanding the agreement at the time it was signed.[30]

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[19] *Id.*
[20] *Id.* at *5.
[21] *Id.* at *5-6 (citing *In re Computer Components Corp.*, No. 05-99-01289-CV, 1999 WL 1212163, at *2 (Tex. App.—Dallas Dec. 20, 1999, no pet.)).
[22] *Id.* at *5 (citing *Hearthshire Braeswood Plaza Ltd. P'ship, SMP v. Bill Kelly Co.*, 849 S.W.2d 380, 391 (Tex. App.—Houston [14th Dist.] 1993, writ denied)).
[23] *Id.* at *7.
[24] *Id.*
[25] *Id.* at *8-9.
[26] *Id.* at *7.
[27] *Id.* at *8 ("Nothing in Geneva Brooks's affidavit remotely approaches the likely cost of arbitration ... Brooks's affidavit does not even go so far as to speculate."). "'[A] comparison of the total costs of the two forums [(arbitration and litigation)] is the most important factor in determining whether the arbitral forum is an adequate and accessible substitute to litigation [substantive unconscionability].'" *In re Olshan Found. Repair Co., LLC*, 328 S.W.3d 883, 894–95 (Tex. 2010); *see also Olshan Found. Repair Co. v. Ayala*, 180 S.W.3d 212, 214 (Tex. App.—San Antonio 2005, pet. denied).
[28] *BBVA Compass*, 2015 WL 595209 at * 8 (citing *Olshan*, 328 S.W.3d at 892).
[29] *Id.*
[30] *Id.* at *9.

OBSERVATIONS

1. The Court in this case reaffirms the well-established principle that an arbitration clause contained within a contract is separable and survives even if the underlying contract is terminated or found to be invalid; disputes concerning a party's actions taken after a contract is no longer in effect are *still* subject to arbitration.[31]

2. When drafting litigation claims possibly subject to an arbitration agreement, it is important to remember that the scope of an arbitration agreement turns on the substance and the facts stated in the litigation claims pleading, not the causes of action asserted. Texas courts will not usually allow a party to evade arbitration through artful pleading.[32]

3. If a party to an arbitration agreement does not intend to allow tortious conduct to be included within the scope of an arbitration agreement, then it should specifically and explicitly state that exclusion in the arbitration agreement.

4. The unconscionability defense is to prevent unfair surprise and oppression, however, it is not a vehicle designed to circumvent the enforcement of an arbitration agreement simply because of one party's unfair bargaining power.[33]

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[31] *Id.* at *3; *see Henry v. Gonzalez*, 18 S.W.3d 684, 690 (Tex. App.—San Antonio 2000, pet. dism'd); *see also Dallas Cardiology Assocs., P.A. v. Mallick*, 978 S.W.2d 209, 213 (Tex. App.—Texarkana 1998, pet. denied). An arbitration agreement within a written contract is separable from the entire contract. *See Pepe Int'l Dev. Co. v. Pub Brewing Co.*, 915 S.W.2d 925, 932 (Tex. App.—Houston [1st Dist.] 1996, no writ).

[32] *BBVA Compass*, 2015 WL 595209 at * 4; *see In re Trammell*, 246 S.W.3d 815, 820 (Tex. App.—Dallas 2008, no pet.).

[33] *BBVA Compass*, 2015 WL 595209 at * 7. "[T]he basic test for unconscionability is whether, given the parties' general commercial background and the commercial needs of the particular trade or case, the clause involved is so one-sided that it is unconscionable under the circumstances existing when the parties made the contract." *In re First Merit Bank, N.A.*, 52 S.W.3d 749, 757 (Tex. 2001); *see also* Chalk, John Allen, "*Texas Supreme Court Warns About Misuse of Unconscionability Defense*," THE ARBITRATION NEWSLETTER, Sept. 2014, at 1-4, *available at* http://whitakerchalk.wpengine.com/wp-content/uploads/2015/02/The-Arbitration-Newsletter-September-2014.pdf.