The Arbitration Newsletter

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

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SIGNED ACKNOWLEDGMENT OF RECEIPT EQUALS ACTUAL RECEIPT (*In re Dallas Peterbilt*)

An at-will employee at Dallas Peterbilt claimed he never got the employer's "Mutual Agreement to Arbitrate Claims" in effect when he was hired.[2] In this Federal Arbitration Act case, the terminated employee filed suit and got both the trial court and the Dallas Court of Appeals to agree with him that there was no agreement to arbitrate. But the Texas Supreme Court conditionally granted the employer's petition for writ of mandamus because the employee signed an acknowledgment form indicating that he received a "Summary Plan Description of Mutual Agreement to Arbitrate Claims." His signed acknowledgment also listed the various claims that he would be required to arbitrate (which included all the claims made in the trial court by the ex-employee).[3] All the employer had to do to establish its right to arbitrate was show the at-will employee "received notice of the employer's arbitration policy and accepted

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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]*See In re Dallas Peterbilt, Ltd., L.L.P.*, 2006 Tex.LEXIS 552, 49 Tex.Sup.J. 759 (June 16, 2006).

[3]*Id*. at *2.

it."[4] In *Halliburton* the employee received a one-page summary of the agreement to arbitrate.[5] The Court clarified that the employee did not have to receive a copy of the actual arbitration agreement to receive sufficient notice. The required notice can arise from "all communications between the employer and employee."[6] Peterbilt's six-page "Summary" and the employee's signed acknowledgment of receipt of that "Summary," satisfied the Texas "notice" requirement.

Although an at-will employee, the employee accepted the employer's arbitration agreement, once sufficient notice was given to the employee, by accepting employment.[7]

The Texas Supreme Court has now told the lower courts of Texas not once,[8] not twice,[9] but three times - you don't have to have a signed employment agreement to compel arbitration. All it takes is sufficient notice of the arbitration agreement (based on "all communications between the employer and employee")[10] and acceptance (either by going to work or continuing to work after notice for the at-will employee).[11]

REMEMBER

1. It isn't necessary for an employer to show actual receipt of the arbitration agreement in order to compel an employee to arbitrate the employee's claims.

2. But the employer will be required to show legally-sufficient notice as described in *In re Dallas Peterbilt* and two others decided by the Texas Supreme Court in the last four

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[4]*Id.* at *3; *citing In re Dillard Dep't Stores, Inc.,* 2006 Tex.LEXIS 196, at *2 (Tex.2006)(per curiam) and *In re Halliburton Co.,* 80 S.W.3d 566, 568 (Tex.2002).

[5]80 S.W.3d at 568-69.

[6]*In re Dallas Peterbilt,* 2006 Tex.LEXIS 552, at *3.

[7]*Id.* at *4 - 5.

[8]*In re Halliburton Co.*, 80 S.W.3d 566, 568 (Tex.2002).

[9]*In re Dillard Dep't Stores, Inc.*, 2006 Tex.LEXIS 196, *2 (Tex.2006).

[10]*In re Dallas Peterbilt,* 2006 Tex.LEXIS 552, *3 - 4; *citing In re Halliburton Co.,* 80 S.W.3d at 569.

[11]*In re Dallas Peterbilt,* 2006 Tex.LEXIS 552, *4 - 5.

years.[12]

3. The safest course is to have the employee or prospective employee sign the arbitration agreement itself. But sufficient notice of the arbitration agreement (the notice in *In re Dallas Peterbilt* included a list of the kinds of claims subject to arbitration) will create an enforceable agreement to arbitrate.

4. The employer will also have to show that the employee accepted the employer's arbitration agreement which for the at-will employee is either acceptance of employment or continued employment after legally-sufficient notice of the employer's arbitration agreement as a condition of future or continuing employment.

5. An employer should make sure that all employee files contain the following documentary proof: (i) a signed arbitration agreement; (ii) a signed acknowledgment of the employee's receipt of the arbitration agreement; (iii)a signed acknowledgment of the employee's receipt of the notice of the arbitration agreement; (iv) a signed acknowledgment of receipt of a summary of the arbitration agreement including a list of all the types of claims subject to the employer's arbitration agreement; and (v) any other documents that evidence the employee's sufficient notice of the employer's arbitration agreement.

6. One further practice note for the employer who didn't get an employee signature on the arbitration agreement: put the arbitration agreement in the record during the hearing on your motion to compel. It will confirm that the notice was sufficient and that the claims made are within the scope of the arbitration agreement (not just the summary notice).[13]

TEXAS SUPREME COURT WANTS TO ELIMINATE DUAL-TRACK ATTACKS ON TRIAL COURT FAILURES TO COMPEL ARBITRATION (*In re D. Wilson Construction Company*)

When a Texas trial court refuses to compel arbitration the party whose motion has been denied has to either gamble or use a belt-and-suspenders approach to an interlocutory request for appellate review. If the Federal Arbitration Act ("FAA") governs, then in Texas a petition for writ of mandamus is required.[14] But if the Texas General Arbitration Act ("TGAA") controls,

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[12]*See In re Dillard Dep't Stores, Inc.*, 2006 Tex.LEXIS 196 (Tex.2006); and *In re Halliburton Co.*, 80 S.W.3d 566 (Tex.2002).

[13]*See In re Dallas Peterbilt*, 2006 Tex.LEXIS 552, *5.

[14]*See Jack B.Anglin Co. v. Tipps*, 842 S.W.2d 266, 272-273 (Tex.1992).

then an interlocutory appeal is authorized.[15] And if one isn't sure what arbitration law applies both a petition for writ of mandamus and an interlocutory appeal are filed with separate cause numbers in the same appellate court.

But drafters of pre-dispute arbitration agreements rarely consider this problem when negotiating the arbitration clause. That's exactly what the drafters of the American Institute of Architects failed to do when drafting the form AIA Document A201, *General Conditions of the Contract for Construction - 1987 Edition.*[16] The contract in question in *In re Wilson* contained no reference to either the FAA or the TGAA.[17] The parties whose motion to compel arbitration was denied by the trial court, appealed pursuant to the TGAA and simultaneously filed their petition for writ of mandamus pursuant to the FAA.[18] But the Corpus Christi Court of Appeals decided that the FAA applied and **preempted** the TGAA interlocutory appeal.[19] Although that allowed the complaining parties to continue their attack on the trial court's failure to compel arbitration, the Texas Supreme Court took the opportunity "to clarify precisely when the FAA preempts the TAA."[20] The Court explained that the FAA and the TGAA are not "mutually exclusive" as Texas courts of appeals have "wrongly" concluded.[21] The FAA only **preempts** "*contrary*" state law not "consonant" state law as explained in *Volt* and *In re Nexion Health*. In fact, the Texas Supreme Court has a four-part test for FAA **preemption** of the TGAA as explained in 2005 in *In re Nexion Health*.[22]

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[15]*See* TEX.CIV.PRAC.&REM.CODE §171.098(a)(1).

[16]*See In re D. Wilson Construction Company*, 2006 Tex.LEXIS 644, *1-2, fn1, 49 Tex.Sup.Ct.J. 909 (June 30, 2006).

[17]*Id*. at *6; *citing Volt Info. Scis., Inc. v. Bd. of Trs. of Leland Stanford Junior Univ.*, 489 U.S. 468, 477-78, 109 S.Ct. 1248, 1032 L.Ed. 2d. 488 (1989) *and In re Nexion Health at Humble, Inc.*, 173 S.W.3d 67, 69 (Tex.2005).

[18]*Id.* at *3 - 4.

[19]*Id.* at *7- 8.

[20]*Id*. at *9.

[21]*Id*.

[22]"The FAA ***only*** preempts the T[G]AA if: '(1) the agreement is in writing, (2) it involves interstate commerce, (3) it can withstadn scrutiny under traditional contract defenses [under state law], and (4) *state law affects the enforceability of the agreement'*." *In re D. Wilson Construction Company*, 2006 Tex.LEXIS 644 at *10; *citing In re Nexion Health at Humble, Inc.*, 173 S.W.3d at 69.

The Court in *In re Wilson* took the opportunity, again, to call on the Texas legislature to eliminate the dual-track appeals required by the FAA and the TGAA.[23] But until that happens parties not getting their arbitration rights arising out of arbitration clauses that do not spell out which arbitration law applies, will continue to be forced to use the belt-and-suspenders approach to appellate review of trial court failures to compel arbitration.

NO CONTRACT AMBIGUITY REGARDING ARBITRATION

There was no ambiguity in *In re D. Wilson* between the AIA Document A201 arbitration clause at Subparagraph 4.5.1 and the Supplementary Conditions at Clause 4.5.1.1. The trial court and the Corpus Christi Court of Appeals erred in finding an ambiguity regarding the agreement to arbitrate created by these two provisions and refusing to compel arbitration.[24]

PRACTICAL SUGGESTIONS FROM *IN RE WILSON*

1. Recite either the FAA or the TGAA in your arbitration agreements providing a brief factual summary for the parties' choice of arbitration law.

2. Review both the FAA and the TGAA provisions for which law best fits the relationship of the contracting parties in each transaction.

3. Remember that state courts can enforce the FAA; no exclusive federal court jurisdiction is created by the FAA.

4. No longer can the prudent practitioner or appellate court conclude that if the FAA applies the TGAA is automatically preempted. If preemption remains an issue then apply the *In re D. Wilson* four-part test.[25]

5. Let's also work to get the "unnecessarily expensive and cumbersome" parallel appellate review procedure changed in Texas![26]

ABOUT WHITAKER, CHALK, SWINDLE AND SAWYER, L.L.P.

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[23]2006 Tex.LEXIS 655, *11fn4.

[24]*Id*. at *14 - 18.

[25]*Id*. at *10.

[26]*Id*. at *11fn4.

Whitaker, Chalk, Swindle and Sawyer, L.L.P. attorneys and counselors have been serving clients in domestic and international transactions and civil disputes since 1978. See our website at www.whitakerchalk.com for more information about the firm and its lawyers.

John Allen Chalk, Sr., editor of *The Arbitration Newsletter*, has served as an arbitrator in more than two hundred (200) domestic and international arbitrations involving business, commercial, healthcare, employment, insurance, franchise, real estate, oil and gas, partnership, torts, and other issues. Mr. Chalk also serves as a mediator for disputes in all these areas.

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