The Arbitration Newsletter

(Published by Whitaker Chalk Swindle & Schwartz PLLC)
(John Allen Chalk, Sr., Editor)

April, 2013

****

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]

****

ARBITRABILITY CONFUSION
Academy, Ltd. *et al.* v. Miller
2013 WL 634723
(Tex.App. – Houston [1st District] Feb. 21, 2013)
Not Released For Publication

A trial court's decision to hear a party's motion to clarify a prior order compelling arbitration is vacated by mandamus issued by the First Court of Appeals in Houston. The trial court had previously compelled the parties to arbitrate. But upon one party's motion to clarify, the trial proceeded to interpret the parties' arbitration agreement regarding the administration of the arbitration. The trial court chose to decide whether the parties' arbitration agreement required administration of the arbitration by the American Arbitration Association.[2] The arbitration agreement in question stated: "The Arbitration shall be conducted in accordance with the rules of the American Arbitration Association for resolution of commercial disputes ... ."[3] The trial court ordered that "the previously ordered arbitration of this cause shall be conducted privately and without having to file and administer the arbitration with the American Arbitration Association."[4]

Although the trial court misinterpreted the arbitration agreement,[5] the court of appeals did not discuss this issue but instead focused on the arbitrability question – who decides what when a party refuses to go to arbitration notwithstanding a prior agreement to arbitrate. After reviewing some of the prior cases – both federal and state – beginning with *Green Tree Financial Corp. v.*

---

[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] 2013 WL 634721, *3.

[3] 2013 WL 634721, *1.

[4] 2013 WL 634721, *1.

[5] When parties expressly adopt AAA arbitration rules, as they did in this case – the "commercial" rules - that rules adoption language "thereby authorize[s] the AAA to administer the arbitration." R-2, AAA Commercial Arbitration Rules; see also R-3, AAA Employment Arbitration Rules, R-2, AAA Construction Industry Arbitration Rules, R-3, AAA Labor Arbitration Rules, and R-2, AAA Healthcare Payor Provider Arbitration Rules.

Bazzle, the Houston First Court of Appeals limited the trial court's determinations to "whether the parties have a valid arbitration clause" and "whether a concededly binding arbitration clause applies to a certain type of controversy."[6] Since the question of whether the "concededly binding arbitration clause" permits private *ad hoc* arbitration or requires administration by AAA is "neither the validity nor the scope" question, it is the arbitrator not the trial court that makes this decision.[7] It is an abuse of discretion for the trial court to have made this decision and mandamus was conditionally issued to the trial court to vacate this decision.[8]

A secondary issue arose in this case regarding what arbitration interlocutory appeal law applied – the Texas General Arbitration Act or the Federal Arbitration Act.[9] The appellant filed both an interlocutory appeal and a petition for writ of mandamus regarding the trial court's grant of the motion to clarify. The appellate court found no statutory permission for an appeal from this particular order,[10] but did find an abuse of discretion by the trial court and conditionally granted the writ of mandamus.[11]

OBSERVATIONS

1. A well-drafted arbitration clause should expressly address what arbitration law is going to apply. The drafter should not rely on the substantive governing law in the general contract to determine what arbitration law applies for the arbitration.

2. A well-drafted arbitration clause will expressly state what arbitration rules apply.[12]

3. A well-drafted arbitration clause should expressly address the "administration" of the arbitration rather than relying indirectly on the arbitration rules adopted by the parties.[13]

4. In a motion to compel arbitration hearing, resist the trial court's temptation to broaden the narrow determination to be made by the court. The existence *vel non* of a valid arbitration agreement is to be "summarily" determined. It is an "up" or "down" issue for the trial court on a motion to compel arbitration.[14]

---

[6] Quoting *Green Tree Financial Corp.*, 539 U.S. 444,452 (2003); *citing Howsam v. Dean Witter Reynolds, Inc.*, 537 U.S. 79, 82-83, 123 S.C. 588, 591 (2002).
[7] 2013 WL 634721, *3.
[8] 2013 WL 634721, *2 and 4.
[9] 2013 WL 634721, *2.
[10] Tex. Civ. Prac. & Rem. Code §§51.016 (FAA appeals) and 171.098 (TGAA appeals).
[11] 2013 WL 634721, *2 ("A party seeking relief from the failure to enforce a valid arbitration agreement, according to its terms, has no adequate remedy at law and is entitled to mandamus relief to correct the trial court's error."); *citing In re Serv. Corp. Int'l,* 355 S.W.3d 655, 657 (Tex.2011).
[12] This case arose out of an "executive compensation plan" that suggests AAA's Employment Arbitration Rules but the arbitration clause in this "executive compensation plan" called for use of "the rules of the American Arbitration Association for resolution of commercial disputes." A more specific reference could have been the "AAA Commercial Arbitration Rules," thereby preventing any suggestion of ambiguity about what rules were to be applied.
[13] See footnote 10.
[14] Tex. Civ. Prac. & Rem. Code §171.021(a)("a court shall order ...") and (b)("... the court shall summarily determine that issue.").

5. A well-drafted arbitration clause should provide in "clear and unmistakable" language that all arbitrability issues (including existence and scope of the arbitration agreement) will be decided by the arbitrator not the court.[15]

[15] *Green Tree Financial Corp.*, 539 U.S. 444, 452 (2003); 2013 WL 634721, *2-3.