

# *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.<sup>1</sup>

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## **TO SIGN OR NOT TO SIGN? AND WHY IT MAY NOT MATTER**

### **Gainey v. Minoo, LLC<sup>2</sup>**

In a recent case, the Texas Second District Court of Appeals compelled arbitration between two parties even though neither of the parties signed the arbitration agreement.<sup>3</sup> The case involved a real estate transaction where both the buyer (Minoo, LLC) and the seller (Hebron Plaza, LLC) used agents to negotiate and broker the sale.<sup>4</sup> The buyer's agent (on the buyer's behalf) and the seller signed the purchase agreement, which contained an arbitration clause.<sup>5</sup> When the buyer, who never actually signed the agreement, brought suit against the seller's agents, who also did not sign the agreement, for allegedly failing to disclose material information, the trial court faced an interesting dilemma – can the court compel arbitration when neither parties are signatories?<sup>6</sup>

The trial court decided that the answer to this question was no and denied the seller's agents' motion to compel.<sup>7</sup> On appeal, however, the Second District Court of Appeals disagreed and compelled arbitration between the nonsignatories.<sup>8</sup> In coming to this decision, the court answered the following three questions:<sup>9</sup>

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<sup>1</sup> 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 Brandie Moser, a third-year law student at Texas A&M School of Law, for her drafting assistance.

<sup>2</sup> *Gainey v. Minoo, LLC*, No. 02-19-00171-CV, 2019 Tex. App. LEXIS 10798 (Tex. App.—Fort Worth Dec. 12, 2019, no pet. hist.) (Citing Tex. Civ. Prac. & Rem. Code §171.021(a); *see also* 2012 Tex. App. LEXIS 20798, \*20 fn4 stating court's presumption that the TAA applies and explaining that the court cites to the FAA because of no conflict between TAA and FAA for this case.).

<sup>3</sup> *Id.* at \*1-3.

<sup>4</sup> *Id.* at \*3-4.

<sup>5</sup> *Id.* at \*3.

<sup>6</sup> *Id.* at \*7-8.

<sup>7</sup> *Id.* at \*9-10.

<sup>8</sup> *Id.* at \*3.

<sup>9</sup> *Id.* at \*17.

1. Is the buyer (who did not sign the purchase agreement) bound by the arbitration provision?
2. Can the seller's agents (who did not sign the purchase agreement) enforce the arbitration provision?
3. Does the arbitration provision apply to the buyer's claims?

In addressing the first issue, the court explained that whether a nonsignatory can compel arbitration pursuant to an arbitration clause questions the existence of a valid arbitration clause between specific parties and is therefore a gateway matter for the court to decide.<sup>10</sup> The court further explained that Texas courts have articulated six scenarios in which arbitration with non-signatories may be required: (1) incorporation by reference, (2) assumption, (3) agency, (4) alter ego, (5) equitable estoppel, and (6) third-party beneficiary.<sup>11</sup> Since the buyer admitted that the person who signed the purchase agreement was acting on its behalf as its agent, the court determined that the nonsignatory buyer was bound by the purchase agreement and its arbitration clause.<sup>12</sup>

In addressing whether the seller's agents could enforce the arbitration agreement, the court explained that a third party may recover on a contract made between other parties if the contracting parties intended to secure some benefit to that third party and entered into the contract directly for the third party's benefit.<sup>13</sup> However, a third party seeking beneficiary status is not required to show that the contract was made solely for its benefit.<sup>14</sup> Additionally, while the court acknowledged that there is generally a presumption against third-party beneficiary status, the court also noted that this presumption is diminished when the contract creates a legal duty to the third party, such as indemnification for the third party.<sup>15</sup> The court found it relevant that the purchase agreement named and referenced the seller's agents multiple times throughout the contract and even specifically described the agents' duties and limited their liability through an indemnity provision.<sup>16</sup> Since the indemnity provision creates a legal duty that runs to the seller's agents, the court found that the provision makes them third-party beneficiaries and indicates an intent to permit them to gain the benefit of the arbitration clause.<sup>17</sup>

Finally, the court addressed whether the claims fell within the scope of the agreement.<sup>18</sup> The arbitration agreement required arbitration of "any controversy or claim arising out of or

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<sup>10</sup> *Id.* at \*20 (citing *In re Rubiola*, 334 S.W.3d 220, 223-24 (Tex. 2011); *Hart of Tex. Cattle Feeders, LLC v. Bonsmara Nat. Beef Co.*, 583 S.W.3d 705, 710 (Tex. App.—Amarillo 2019, pet. granted) (mem. op.)).

<sup>11</sup> *Id.* at \*20-21 (citing *Jody James Farms, JV v. Altman Grp., Inc.*, 547 S.W.3d 624, 633 (Tex. 2018)).

<sup>12</sup> *Id.* at \*23.

<sup>13</sup> *Id.* at \*24 (citing *MCI Telecomms. Corp. v. Tex. Utils. Elec. Co.*, 995 S.W.2d 647, 651 (Tex. 1999)).

<sup>14</sup> *Id.* at \*27 (citing *ConocoPhillips Co. v. Graham*, No. 01-11-00503-CV, 2012 Tex. App. LEXIS 2461, 2012 WL 1059084, at \*6 (Tex. App.—Houston [1st Dist.] Mar. 29, 2012, no pet.) (mem. op.)).

<sup>15</sup> *Id.* at \*25-27.

<sup>16</sup> *Id.* at \*30-33.

<sup>17</sup> *Id.* at \*34.

<sup>18</sup> *Id.* at \*39-45.

relating to” the purchase agreement.<sup>19</sup> Since the buyer’s fraudulent inducement claims related to the purchase agreement, the court found that claim was within the scope.<sup>20</sup>

Ultimately, the court answered affirmatively all three questions presented and found that (1) the buyer was bound by the arbitration agreement, (2) the seller’s agents were entitled to enforce the arbitration agreement, and (3) the fraudulent inducement claim fell within the arbitration agreement’s scope. Thus, the appellate court reversed the trial court and granted the motion to compel arbitration.

## OBSERVATIONS

1. Texas arbitration law, as well as federal arbitration law, has long recognized the rights of non-signatories to enforce or be required to participate in arbitration.<sup>21</sup>
2. The unique relationships between brokers and agents and the principals (buyer and seller) in this transaction provided the basis for the appellate court’s grant of the motion to compel.
3. This case underscores the fundamental premise that arbitration is a creature of contract and that state-law contract principles are to be applied to arbitration agreements as those same principles are applied to all other contracts.<sup>22</sup>
4. One of the concerns in drafting an arbitration clause is the identification of all the possible parties that may need to take advantage of the underlying contract as well as use the underlying contract’s embedded arbitration clause.

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<sup>19</sup> *Id.* at \*33-34.

<sup>20</sup> *Id.* at \*39-45.

<sup>21</sup> *In re Kellogg Brown & Root, Inc.*, 166 S.W.3d 732, 739 (Tex. 2005); *Arthur Andersen LLP v. Carlisle*, 556 U.S. 624, 630-31 (2009).

<sup>22</sup> *United Steelworkers v. Warrior & Gulf Nav. Co.*, 363 U.S. 574, 582 (1960).