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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WHERE DID I SIGN?

(Nonsignatories and Arbitration)

Apache Corp. v. Bryan C. Wagner[2]

In 2018, the Fort Worth Court of Appeals held that a signatory defendant (Apache Corp.) could force nonsignatory parties to an oil and gas Purchase and Sale Agreement (that included a broad form arbitration agreement) to arbitrate indemnity claims based on third-party lawsuits filed against Apache Corp. In this Federal Arbitration Act case, Apache Corp. ("Apache") and Wagner Oil Company ("WOC") entered into a Purchase and Sale Agreement ("PSA"). The arbitration clause in the PSA stated any dispute arising out of or in connection with the PSA would be resolved by arbitration in Houston, Texas, further stating, "in the event a third party brings an action against [WOC] or [Apache] concerning this Agreement … or transactions contemplated … [WOC] and [Apache] shall not be subject to mandatory arbitration… and shall each be entitled to assert their respective claims, if any, against each other in such third party action … ."[3] WOC agreed to "assume responsibility and to pay, perform, fulfill, and discharge all claims, costs, expenses, liabilities and obligations…" relating to the purchased assets. WOC also agreed to "defend and hold harmless [Apache] from any of the claims, costs, expenses, liabilities, and obligations assumed by [WOC]."[4] The PSA also held that the parties could not assign any rights or duties unless the assignor continued to remain liable for the performance of its obligations[5] and that the PSA would be binding on both WOC and Apache, and their respective successor and assigns.[6]

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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 Dylan C. Campbell, a law student at Texas A&M School of Law, for his research and drafting assistance.
[2] Apache Corp. v. Bryan C. Wagner, Nos. 02-18-00132-CV, 02-18-00135-CV, 2018 Tex. App. LEXIS 9766 (Tex. App.—Fort Worth Nov. 29, 2018, pet. denied).
[3] *Id.* at *7-8.
[4] *Id.* at *7.
[5] *Id.* at *5.
[6] *Id.*

Apache assigned to WOC the purchased assets "pursuant to and subject to all of the terms and conditions" in the PSA ("Apache Assignment").[7] WOC then assigned all of the purchased assets to Wagner, Trade Exploration Corporation ("Trade"), and Wagner & Cochran, Inc. ("W&C") ("WOC Assignment").[8] The WOC Assignment was subject to "all the terms and conditions contained in the Apache Assignment," adding that the "Assignees agree to perform their proportionate parts of all the obligations imposed upon [WOC] by the Apache Assignment."[9]

Apache later incurred an alleged $15 million in costs from the third-party lawsuits, and filed a demand for arbitration with AAA against WOC, Wagner, Trade, and W&C ("Appellees") for indemnity. The Appellees then filed a declaratory judgment in a Tarrant County District Court stating that Wagner, Trade, and W&C were not parties to the PSA and were not subject to arbitration.[10] The trial court denied Apache's motion to abate and compel arbitration and held that Apache had failed to establish that a valid agreement existed.

On review, the Court of Appeals faced two issues: (1) Whether there was a valid agreement to arbitrate between Apache and WOC; and (2) whether Apache could compel arbitration in relation to the nonsignatory Appellees.[11]

The Court addressed the first issue by looking to the language in the Apache Assignment. The Court held that the Apache Assignment was expressly made subject to the terms and conditions of the PSA, and, therefore, contained a valid agreement to arbitrate. The WOC Assignment then expressly adopted "all terms, provisions and conditions contained in the Apache assignment."[12]

As to the second issue pertaining to the nonsignatory WOC Assignees, the Court reviewed arbitrability by an analogous analysis of a forum-selection clause. Holding that an arbitration clause is a "specialized kind of forum selection clause,"[13] the Court noted that the circumstances in which nonsignatories can be bound to a forum-section clause are rare. But the Court observed that of the six scenarios in which nonsignatories can be bound to a forum-selection clause (analogous to an arbitration clause), the WOC Assignees were subject to three of them - assumption, direct benefits estoppel, and incorporation by reference.[14]

Because the PSA, Apache Assignment, and WOC Assignment were all subject to the same ultimate transaction, the nonsignatory Appellees were also subject to the PSA's arbitration clause.[15]

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[7] *Id.* at *9.
[8] *Id.*
[9] *Id.* at *9-10.
[10] *Id.* at *10.
[11] *Id.* at *1.
[12] *Id.* at *9-10.
[13] *Id.* at *15.
[14] *Id.* at *18-19 fns 8 and 9.
[15] *Id.* at *18-19 fns 8 and 9, 20-21; *see also* Pinto Tech. Ventures, L.P. v. Sheldon, 526 S.W. 3d 428, fn 65 (Tex. 2017).

OBSERVATIONS

1. Nonsignatories continue to be a murky area of arbitration law – state, federal, and international.[16]

2. “Rare circumstances” (that justify compelling nonsignatories to arbitrate) seems an inappropriate description when there are at least six (6) contract and equitable doctrines by which nonsignatories may enforce or be forced to arbitrate an arbitration clause they didn’t sign.

3. The arbitration “contract” and consent thereto remain central to who can be bound thereto.[17]

4. When drafting an arbitration “contract,” the drafter should ask who is to be bound by this arbitration “contract.”

5. The definition of “parties” to the arbitration “contract” can be carefully drafted either to include or exclude nonsignatories.

6. The definition of “parties” in the general agreement in which a separate arbitration “contract” is included may not be the same “parties” the drafter wants included or excluded in the arbitration “contract.”

[16] GE Energy Power Conversion France SAS v. Outokumpu Stainless USA, LLC, 207 L.Ed.2d 1, 2020 U.S. LEXIS 3029 (U.S. 2020).

[17] *Id.*at **22 (Sotomayor, J., concurring)(noting the difficulty and importance in determining whether a particular “nonsignatory doctrine reflects consent to arbitrate”).