The Arbitration Newsletter

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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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YOU CAN'T HAVE YOUR ARBITRATON AND VACATE IT TOO

Ruff v. Ruff.[2]

A wealthy businessman died in 1998 leaving his wife and five children an estate worth nearly fifty million dollars.[3] The surviving family managed their fortune through a family trust for which the eldest son was named trustee.[4] After years of alleged improper distributions and management, the mother asked the son to resign as trustee. As part of the resignation, the mother and the son signed a family settlement and release agreement ("FSA") in 2009.[5] This agreement released all claims the mother had against the son, but it did not contain an arbitration provision.[6] Frost Bank ("Frost") subsequently assumed the role of trustee of the family trust, and the mother executed a release agreement acknowledging Frost as trustee ("Frost Release") in early 2010. The Frost Release contained an arbitration provision requiring "any controversy or claim arising out of or relating to [the Frost Release], or breach of any contractual or non-contractual duties" under the [Frost Release] be arbitrated "by the [AAA] in accordance with its Commercial Arbitration Rules."[7] Each of the siblings, including the eldest son, signed separate release agreements with Frost that contained identical arbitration clauses.[8]

The mother filed a petition to modify certain terms of the trust in 2011, and later amended her petition to include numerous tort claims against the eldest son for misconduct during his time as trustee of the family trust.[9] The son answered with affirmative defenses including that the mother's

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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 Jared Hendrix, a third-year law student at Texas A&M University School of Law, for his research and drafting assistance.

[2] Ruff v. Ruff, No. 05-18-00326-CV, 2020 Tex. App. LEXIS 6344 (Tex. App.—Dallas Aug. 11, 2020, no pet. h.) (mem. op.) (trial court's confirmation of an arbitration award of $49 million plus attorneys' fees was affirmed).

[3] *Id.* at *2.

[4] *Id.*

[5] *Id.*

[6] *Id.*

[7] *Id.* at *2-3.

[8] *Id.*

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

claims were barred by the 2009 FSA.[10] The son also filed a counterclaim seeking a declaratory judgment that the FSA barred the mother's claims and a third-party petition joining Frost in the suit.[11] The son then asserted that he was a third-party beneficiary of the Frost Release and filed an arbitration demand with the AAA seeking a declaration of the FSA's enforceability.[12] He also moved to stay the trial court's proceedings involving the mother's claims, claiming that the arbitration would settle whether the tort claims were barred by the FSA.[13]

The mother opposed the arbitration demand and the stay request, arguing that the son was not a signatory on the Frost Release and therefore could not rely on the arbitration clause contained therein.[14] The son argued that he was a signatory to the Frost Release because it was "part and parcel of a series of documents" that comprised a single transaction.[15] The son also argued that it was up to the arbitrator panel to determine whether the mother's tort claims were barred by the FSA.[16] The trial court granted the son's motions, staying the trial court proceedings and compelling arbitration.

In the arbitration proceedings the mother asserted her tort claims as counterclaims against the son, but the son challenged whether they were included in the scope of the arbitration clause.[17] The arbitrator panel concluded they were within the panel's jurisdiction, and the claims would be heard.[18] The final arbitration hearing began in August 2017, but the son nonsuited his declaratory judgment claims in September 2017 and filed a refusal to arbitrate in October 2017.[19] The arbitration continued without the son, resulting in a final award of $49,000,000 plus attorneys' fees in favor of the mother.[20]

The mother moved to confirm the award.[21] The son moved to vacate it under the TAA grounds that the award was obtained by corruption or fraud, that the arbitrators exceeded their powers, refused to postpone the hearing, refused to consider material evidence, and that the son was prejudiced by the arbitrators' evident partiality and misconduct.[22] The son also argued that there was no valid arbitration agreement between himself and the mother, and that the mother failed to prove that the tort claims fell under such an agreement.[23] The trial court confirmed the award, leading to the instant appeal.[24]

The Dallas Court of Appeals court first considered whether the trial court erred in confirming the award despite the son not agreeing to arbitrate the mother's tort claims.[25] The son argued that the *Jody James Farms* standard should be applied, because he was a non-signatory to the Frost Release,

[10] *Id.*
[11] *Id.* at *4-5.
[12] *Id.* at *5.
[13] *Id.* at *6.
[14] *Id.*
[15] *Id.*
[16] *Id.* at *7.
[17] *Id.*
[18] *Id.*
[19] *Id.* at *8.
[20] *Id.*
[21] *Id.*
[22] *Id.*
[23] *Id.* at *8-9.
[24] *Id.* at *9.
[25] *Id.* at *9-10.

and that the appeals court should consider the entire case de novo.[26] The appeals court held, however, that this situation was the opposite of *Jody James Farms*. The son, a non-signatory to the Frost Release, was trying to force the mother, a signatory to the Frost Release, to arbitrate her claims, which meant the concerns about "foisting an arbitration agreement on a party that had not previously agreed to arbitrate do not exist."[27]

The son argued that no arbitration agreement existed between himself and the mother.[28] Instead, he insisted that he compelled arbitration only as a third-party beneficiary to the Frost Release, and he only did so to receive a declaratory judgment on the FSA's validity.[29] The tort claims, he argued, should not have been considered by the arbitrator panel.[30]

The appeals court disagreed, ruling that because the son compelled arbitration, any error by the trial court would be an invited error.[31] Since the son initiated the arbitration, "he cannot rescind his assent now that he dislikes its consequences."[32] Additionally, each of the agreements at issue (the FSA, Frost Release, and the siblings' individual releases with Frost) are part of and necessary for a single transaction establishing Frost as trustee.[33] Therefore, "an arbitration agreement clause in one document . . . reach[es] all aspects of the transaction governed by other contemporaneously executed agreements."[34] The son admitted as much in his request for arbitration, stating that all the documents were "integral" to establishing Frost as trustee of the family trust.[35]

The appeals court also assumed for the purpose of review that the arbitration agreement did not delegate to the arbitrators the power to determine scope.[36] The son initiated the arbitration proceedings, and the mother asserted her counterclaims against the son in the arbitration proceeding.[37] Thus, any error in determining scope would be an invited error.[38] Even so, the court considered, in the alternative, and determined that the mother's claims were within the scope of the Frost Release's arbitration clause.[39]

In its review, the appeals court looked at the language of the arbitration clause in the Frost Release, specifically analyzing whether the clause was broad enough to include the mother's tort

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[26] *Id.* at *10. In *Jody James Farms* the signatory of an arbitration agreement was trying to force a non-signatory to arbitrate. The court held that in such a case the trial court should decide arbitrability issues, not the arbitrator. *See* Jody James Farms, JV v. Altman Group, Inc. 547 S.W.3d 624 (Tex. 2018).
[27] *Id.* at *11.
[28] *Id.* at *12.
[29] *Id.*
[30] *Id.* at *13.
[31] *Id.* at *14.
[32] *Id.*
[33] *Id.* at *15.
[34] *Id.* at *17.
[35] *Id.* at *16.
[36] *Id.* at *20.
[37] *Id.* at *21 ("Unless she asserted her counterclaims in the arbitration, [the mother] faced the possibility of losing them completely under res judicata.") (citing Premium Plastics Supply, Inc. v. Howell, 537 S.W.3d 201, 205-06 (Tex. App.—Houston [1st Dist.] 2017, no pet.). The arbitration was governed by the AAA's Commercial Arbitration Rules which allow parties to assert counterclaims. *Id* at *21; *See also* AM. ARBITRATION ASS'N, COMMERCIAL ARBITRATION RULES & MEDIATION PROCEDURES, R-5 (2013).
[38] *Ruff,* at *21.
[39] *Id.* at *21-22.

claims.[40] The court stated that arbitration clauses containing broad terms like "relating to," "any dispute," create broad, far-reaching arbitration agreements that cover any matter with a significant relationship to or factually interconnected with the contract at issue.[41] Claims may only be excluded from arbitration if they are able to stand on their own apart from the contract or by express provisions.[42] The arbitration clause in the Frost Release covered "*any controversy* or claim arising out of or *relating to* the agreement."[43] The court determined that the term "any controversy" is also a broad and expansive term that covers not only the construction and validity of the agreements, but also any controversy related to the agreements.[44] The son failed to show the court how the mother's claims could be resolved without reference to the FSA for which the son was seeking a declaratory judgment.[45] The court determined that the mother's tort claims were factually intertwined with the FSA and subsequent agreements, and, therefore, the claims were covered under the broad scope of the Frost Release's arbitration clause.[46]

The appeals court also considered whether the trial court erred in denying discovery related to the son's vacatur claim that one of the arbitrators showed evident partiality.[47] During the arbitration proceeding, an arbitrator revealed that he had a connection to Frost.[48] Two years after the arbitrator disclosed this relationship, the son objected to the entire arbitration panel and asked the AAA's Administrative Review Council ("ARC') to rule on the issue.[49] The ARC conclusively reaffirmed the panel's appointment.[50] After the final award the son claimed that new evidence had come to light and requested additional discovery, which the trial court denied.[51] The appeals court held that the arbitrator disclosed his relationship with Frost, the son failed to expand his timely investigation of the disclosure, and, therefore, the ARC's ruling on the matter was final.[52] The court noted that when an arbitrator discloses relevant information at the outset, and the parties proceed with the arbitration, a later finding of evident partiality is foreclosed.[53]

OBSERVATIONS

1. The party who initiates an arbitration, especially by motion to compel in the trial court, has to live with a fairly administered arbitration process.

2. Disclosures made timely and communicated fully to the parties create immediate duties in the parties to investigate or waive any objection.

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[40] *Id.* at *22-23.
[41] *Id.*
[42] *Id.*
[43] *Id.* at *26 (emphasis added).
[44] *Id.*
[45] *Id.*
[46] *Id.*
[47] *Id.* at *30.
[48] *Id.*
[49] *Id.*
[50] *Id.* at *31.
[51] *Id.* at *33-34.
[52] *Id.* at *37.
[53] *Id.* at *36-37.

3. Disclosures can foreclose an "evident partiality" charge or any other vacatur claim "because the parties can evaluate the potential bias at the outset, rather than requesting that a court do so after the arbitration."[54]

4. The three vacatur grounds in Section 171.088(a)(1)-(3) of the Texas Civil Practice and Remedies Code urged by the losing party in this arbitration were denied by the trial court and affirmed by the Dallas Court of Appeals.

5. A "Refusal to Arbitrate" filed by the Claimant and Counter-Respondent after the final hearing started did not affect the existing counterclaims on which the Panel proceeded to a final award.

6. Scope of arbitration claims can be established by "single transaction" documents that do not contain an arbitration agreement, provided one of the "single transaction" documents does contain an arbitration agreement.

7. This case can be described as a "non-signatory" case in which the alleged non-signatory asked the trial court to compel a signatory to arbitration, although the non-signatory did sign a "single transaction" document that contained an arbitration agreement.

[54] *Id.* at *37.