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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THE COMPLEX ARBITRATION AGREEMENT
Renfro Industries, Inc. v. Maria Rojas[2]

After an on-the-job injury working for a Texas non-subscriber employer ("Renfro" or "Employer") on **December 22, 2014**, the injured employee ("Rojas" or "Employee") filed a state court lawsuit on **August 15, 2016**, against Renfro, Essential Corporate Solutions, Inc. ("ECS"),[3] and Dispute Solutions, Inc. ("DSI").[4] Renfro filed an answer, requested a stay, and sought arbitration administered by DSI or AAA. Rojas filed an amended state court petition on **October 12, 2016**, asking the court to enjoin "DSI from conducting arbitration of her claims against Renfro" because of alleged undisclosed relationships among ECS, DSI, Renfro, and Renfro's lawyer.[5] The parties and the trial court signed an "Agreed Order Granting Application for Arbitration Order" on **September 18, 2017**, directing arbitration by AAA.

Rojas filed her arbitration demand with AAA on **October 2, 2017**, more than two years after Rojas's on-the-job injury. The arbitrator signed a final award on **August 13, 2019**, denying Rojas's claims and assessing against Rojas "charges of $20,655.00 and AAA Fees of $2,950.00."[6] Neither the filing of the state court lawsuit nor the filing of the initial arbitration demand tolled the statute of limitations as described in the parties' arbitration agreement.[7]

The parties' arbitration agreement was contained in a confusing combination of provisions in (i) "Election and Arbitration Agreement" ("EAAA"); (ii) Section I, Paragraph B of the "Renfro Industries, Inc. Employee Injury Benefit Plan" ("Plan"); and (iii) Section IX of the "Summary Plan

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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 Madeline Bergstrom, a third-year law student at Texas A&M University School of Law, for her research and drafting assistance.

[2] 2021 Tex. App. LEXIS 6151 (Tex.App. – Dallas, July 30, 2021, no pet.) (Memorandum Opinion).

[3] *Id.* at *2 ("[A] human resources company.").

[4] *Id.* ("[A]n arbitration company with same ownership as ECS.").

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

[6] *Id.* at *4.

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

Description" ("Summary Plan"). The EAAA and "the incorporated Arbitration Procedures in Section IX of the Summary Plan Description" were described in the EAAA as "the complete agreement between the Company and [Rojas]."[8] The last sentence, bolded, in Section IX(1) of the Plan Summary stated: "**Neither filing nor serving a lawsuit stops the applicable statute of limitations from continuing to run**."[9] Earlier in the same Section IX(1), the parties agreed that "the other party **must** make a written demand for arbitration on the other party within the applicable statute of limitations, and **that failure** to make such written demand for arbitration within the applicable statute of limitations **bars** the claims and causes of action."[10]

Section IX(8)(a) of the Summary Plan ("Appeal Procedures") authorized any party to "appeal any arbitration award that has been rendered and become final under the rules governing the arbitration."[11] The last sentence of this Section IX(8)(a) stated: "Once an appeal is timely served, the arbitration award by the hearing arbitrator shall no longer be considered final for purposes of seeking judicial enforcement, modification or vacation under the Federal Arbitration Act."[12] Subsequent subsections of Section IX(8)(b)-(h) of the Summary Plan then described appellate arbitration by a panel of three "appellate arbitrators" appointed by AAA with the appealing party paying the AAA and the appellate arbitrators.

Rojas timely filed her appeal of the award with AAA on **September 12, 2019**.[13] But Rojas never paid the AAA filing fee of $6,000 or deposits for the three appellate arbitrators.[14] Ultimately, the AAA ruled on **October 22, 2019**, that Renfro should pay "the appellate filing fee," which Renfro refused to pay.[15] Renfro then filed a motion to confirm the arbitration award claiming the award was "final" because Rojas failed to timely appeal **and** pay the AAA filing fee.[16] A visiting judge granted Renfro's motion to confirm the award on **February 25, 2020**. Rojas then filed a motion for new trial and requested sanctions on Renfro for claiming before the trial court that AAA had dismissed Rojas's appeal. The trial court granted Rojas's motion for new trial on **May 8, 2020**, and Renfro appealed to the Dallas Court of Appeals.[17]

The Dallas Court of Appeals ruled that the arbitration award against Rojas was not final because the parties' arbitration agreement only required timely appeal to render the award not final, but did not require payment of appellate costs and fees to render the award no longer final.[18] The Court also recognized that if the award had become not final, then 9 U.S.C. §10(a) could not be applied to a non-final award.[19] But the Court granted Renfro's appeal of the trial court's "returning

[8] Election and Arbitration Agreement, page 2 of 4. Filed in the appellate record but not attached to the award.
[9] 2021 Tex. App. LEXIS 6151, *3-4. The Summary Plan was filed in the appellate record but not attached to the award or quoted in the appellate opinion.
[10] 2021 Tex. App. LEXIS 6151, *3-4 (emphasis added).
[11] *Id.* at *4.
[12] *Id*.
[13] *Id.* at *4-5.
[14] *Id.* at *5 (Rojas filed with AAA an "Affidavit in Support of Administrative Fees Hardship Waiver.").
[15] *Id.* at *5-6.
[16] *Id.* at *5-7.
[17] *Id.* at *6-7.
[18] *Id.* at *8-11.
[19] *Id.* at *11-12.

the case to its active docket for further proceedings" and remanded the case to the trial court "with instructions to remand the case to arbitration."[20]

OBSERVATIONS

1. An arbitration party at the beginning of an arbitration should always identify and then reconfirm that identification of the entire applicable arbitration agreement.

2. The limited tolling of the applicable statute of limitations in this arbitration agreement was located in the last sentence of a subsection of one of three pieces of the complete arbitration agreement.

3. The appellate arbitration procedure required almost two full pages in paragraph 8 of the Summary Plan, which contained one of three pieces of the complete arbitration agreement.

4. The parties' "Election and Arbitration Agreement" in an unnumbered paragraph on page 2 of 4 (entitled "**COMPLETE AGREEMENT**"), "incorporated by reference" as "Arbitration Procedures" both the Summary Plan and the Plan as part of the Election and Arbitration Agreement and then expressly incorporated in a second sentence "Arbitration Procedures in Section IX of the Summary Plan Description" and made all three of these documents "the complete [arbitration] agreement between the Company and [Rojas]."

5. This incorporated Section IX of the Summary Plan included both the limited tolling of the statute of limitations and the appellate arbitration procedure that de-finalized the appealed arbitration award.

6. This complex arbitration agreement resulted in five years of litigation and arbitration between the employer and the employee.

7. The contractual limits on the employee's deadline to file a claim for her on-the-job injury resulted in the employee's failure to obtain damages for her injury.

8. The appellate arbitration procedure resulted in the loss of award finality for both parties.

9. The Dallas Court of Appeals sent the dispute back to the AAA "for further proceedings" (as the proceedings existed with the August 13, 2019 arbitration award in favor of the employer).[21]

10. The more complex the arbitration agreement the more critical is early mastery of all its terms.

[20] *Id.* at *15-16.
[21] There is no further appellate history in Texas cases for this dispute.