2012

Alternative Dispute Resolution

Will Pryor

ALTERNATIVE DISPUTE RESOLUTION

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I. INTRODUCTION

LAST year's Survey included this observation: "While the Survey year witnessed dynamic change in the practice and public perception of arbitration, the swinging pendulum will be barely noticed in reported appellate decisions discussed in this survey."[1] It appears that our courts are finally beginning to sense, and are willing to join in, a changing arbitration climate. The pendulum appears to have started swinging. Courts are exercising more scrutiny of agreements to arbitrate, the process of arbitrating, and the credibility of awards. Whereas in recent years virtually every appellate decision addressing an arbitration issue seemed to favor the arbitration clause, failed to find waiver of the right to arbitrate, or confirmed rather than vacated an arbitration award, this Survey year provides evidence that our courts are slowly beginning to take a more nuanced view of arbitration. We will review cases where arbitration clauses were deemed unenforceable because they were "illusory," where the right to arbitration was waived by a party "substantially invoking judicial process," and where arbitration awards were vacated

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1. *See* Will Pryor, *Alternative Dispute Resolution*, 64 SMU L. REV. 3, 5 (2011).

due to "evident partiality" by an arbitrator's failure to make adequate disclosures. While our courts are still, on balance, enormously receptive to and supportive of arbitration, predicting the result of arbitration-related decisions has become a bit more challenging.

II. MEDIATION

Judicial interaction with the practice of mediation is rare. As always, this is as it should be. But the Survey year included a greater than usual number of decisions discussing mediation topics. Most successful mediations result in a written Mediated Settlement Agreement (MSA), even though the terms of the settlement may not be thoroughly spelled out. MSAs frequently are perfunctory, occasionally are handwritten, and often resemble a term sheet or a checklist of essential terms of the final settlement agreement, which the parties and counsel expect will eventually be executed. But what happens when the settlement breaks down, when one party realizes that the MSA failed to include an essential deal-point, and the other side finds the point unacceptable? Deal, or no deal?

Border Gateway, L.L.C. v. Gomez[2] should help mediators and advocates alike with the preparation of mediated MSAs that will be binding and enforceable. The parties in *Border Gateway* obligated themselves to "enter into a formal settlement agreement within ten business days" of their MSA.[3] Relying on established precedent as well as the Restatement (Second) of Contracts, the court held that when the parties have reached an agreement on certain material terms of a settlement, "the fact that the parties intend for an informal agreement to be reduced to a more formal writing will not necessarily prevent present, binding obligations from arising."[4] The court enforced the MSA, noting that "appellants cannot establish as a matter of law that the mediation agreement manifests an intent not to be bound."[5] Practitioners and mediators should consider including an expression similar to "the parties intend to be bound by this MSA, notwithstanding that more formal settlement documents are contemplated," to expressly manifest an intent to be bound and satisfy a future court if a subsequent dispute arises. Conversely, if counsel has reason to be wary of the transition from an MSA to the final documents, a provision declaring an intent to *not* be bound should be considered.

In *Young v. Sanchez*,[6] the parties addressed the possibility of a dispute arising after the execution of an MSA in another fashion. The MSA stated that the parties would agree to "try to resolve" any dispute arising

2. Border Gateway L.L.C. v. Gomez, No. 14-10-01266-CV, 2011 WL 4361485 (Tex. App.—Houston [14th Dist.] Sept. 20, 2011 no pet.) (mem. op.).

3. *Id.* at *2.

4. *Id.* at *3 (citing Scott v. Ingle Bros. Pac, Inc., 489 S.W.2d 554, 556 (Tex. 1972); Murphy v. Seabarge, Ltd., 868 S.W.2d 929, 933 (Tex. App.—Houston [14th Dist.] 1994, writ denied)).

5. *Id.* at *4.

6. Young v. Sanchez, No. 04-10-00845-CV, 2011 WL 4828021 (Tex. App.—San Antonio Oct. 12, 2011, no pet.) (mem. op.).

out of the agreement by phone conference with the mediator.[7] When two years passed without resolution, one party amended their counterclaim and the court granted summary judgment on the new breach of contract claim, the contract being the MSA. Again, a condition precedent argument was made and, again, it was rejected: "Even if there [was] an order referring the case back to mediation in the record before us, it would not affect the trial court's jurisdiction over this case."[8] Thus, neither factor—the parties' agreement to return to the mediator or the court's order to mediate at the time summary judgment was granted—warranted setting aside the court's ruling.[9]

It is a bit of a curiosity that participants in mediations often, when things aren't going well, make statements along the lines of "can we leave now?" or "Mr. Mediator, we wish you would declare an impasse so we can leave." Many practitioners are not aware of one of the fine-print rules for mediation that Texas courts have attached to, or incorporated into, mediation orders for years. One of the rules suggests that *any party to a mediation may declare an impasse by a written declaration, after the completion of one full mediation session.*[10] Indeed, the Waco Court of Appeals did not feel the need to consider this seldom-noticed rule when, following a court-ordered appellate mediation, the mediator reported that one of the parties abruptly "left the premises and did not return, prior to the mediation being terminated, adjourned, or recessed by the [volunteer mediator]."[11] Because the departure "violated both the letter and spirit of the court's order, which explicitly required him 'to attend the mediation', and to 'be present during the entire mediation process,'" the court dismissed his appeal.[12] Perhaps the court's mediation order did not include the standard language allowing any party to declare an impasse after one full session, or perhaps the appeals court was aware of the rule but chose not to refer to it in light of the lack of any evidence that the party abandoning the process did so without a written declaration. But in light of this rule, and given the time-honored absence of any good faith obligation by the parties to mediations in Texas, this case may have been wrongly decided.[13]

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7. *Id.* at *3.

8. *Id.*

9. *Id.* at *4.

10. *See, e.g.*, Jefferson County Guidelines for Meditation, *available at* http://www.co.jefferson.tx.us/drc/forms/20110824_GuidelinesforMediation.pdf (last visited April 2, 2012). "Termination of Mediation: The mediation shall be terminated due to the following: a. the execution of a settlement agreement by the parties; b. the Mediator declaring that further efforts during mediation are no longer worthwhile . . . ; d. verbal or written declaration of a party or parties that they wish to terminate *mediation proceedings*" (emphasis added).

11. *In re* Estate of Rice, No. 10-10-00021-CV, 2011 WL 3503331, at *1 (Tex. App.—Waco Aug. 10, 2011, (mand. denied) (mem. op.).

12. *Id.*

13. *See* Decker v. Lindsey, 824 S.W.2d 247, 251 (Tex. App.—Houston [1st Dist.] 1992, writ granted) (finding that a trial court's ADR order can "require the parties to come together," but cannot "require them to 'negotiate in good faith and attempt to reach a settlement'").

III. ARBITRATION

Can a product manufacturer, financial institution, insurance company, or other institutional litigant impose on an unknowing consumer a prohibition in an arbitration clause against class actions? Further, can common law contractual defenses of a state declare such restrictions unconscionable and unenforceable? The answer to the first question has long been yes. As to the second question, after the United States Supreme Court's long-awaited decision in *AT&T Mobility, LLC v. Concepcion*,[14] states cannot condition the enforceability of a consumer arbitration clause on the preservation of class-wide arbitration procedures.

California arbitration law had included, since 2005, a rule known as the "*Dover Bank*" rule. Under this rule, when a consumer alleged widespread, small-dollar fraud, courts would not enforce class action and class arbitration waivers in contracts of adhesion; such waivers were deemed unconscionable and against public policy.[15] In *AT&T Mobility*, however, the United States Supreme Court deemed such state law contract defenses inconsistent with the purposes of the Federal Arbitration Act, specifically the "Savings Clause" of Section 2 of the Act.[16] Given the Court's far-reaching opinion, the savings clause will be construed in a more and more limited fashion as states attempt to address increasingly popular concerns regarding the fundamental fairness of consumer arbitration. Class arbitration of consumer claims is a thing of the past. One wonders whether the Court's mantra of "a liberal federal policy favoring arbitration"[17] really means the kind of arbitration in which the institutional, "repeat player" in arbitration has leverage, and not the other way around.[18]

A. TEXAS GENERAL ARBITRATION ACT VS. THE FEDERAL ARBITRATION ACT

Further evidence of the "swinging pendulum" referred to in the introduction to this Survey is the increase in the number of cases finding that the Texas General Arbitration Act (TAA), rather than the Federal Arbi-

14. AT&T Mobility, LLC v. Concepcion, 131 S. Ct. 1740 (2011).

15. Discover Bank v. Sup. Ct. *ex rel.* Boehr, 113 P.3d 1100, 1108–17 (Cal. 2005).

16. *See* 9 U.S.C. § 2 (2011) (arbitration agreements are "valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract").

17. The *AT&T* Court noted that Supreme Court precedents have "repeatedly described the [Federal Arbitration] Act as 'embod[ying] [a] national policy favoring arbitration . . . .'" *AT&T*, 131 S. Ct. at 1749.

18. The United States Supreme Court was also poised to jump into the discussion of when one party's waiver of arbitration by substantially invoking judicial process must also include a finding of prejudice to the other side before the waiver is effective. The Court agreed to review Citibank, N.A. v. Stok & Associates., P.A., but the case was settled before it could be heard and decided. Citibank, N.A. v. Stok & Assoc., P.A., 387 Fed. Appx. 921 (11th Cir. 2010), *cert. dismissed*, 131 S. Ct. 295 (2011). Courts in Texas follow the general rule that a finding of prejudice must accompany the waiver for the waiver to be binding and irrevocable. Expect the Supreme Court to reach out for another arbitration waiver case, and to establish a very low bar for the required evidence of prejudice.

tration Act (FAA) controls. When the TAA rather than the FAA controls, arbitration clauses are far more likely to be deemed unenforceable, and arbitration awards are far more likely to be vacated. This tendency might reflect the rather rigid treatment that courts apply when interpreting arbitration agreements and awards.

The Texas Supreme Court weighed in on this discussion in *In re Olshan Foundation Repair Company,*[19] an important consolidated decision involving four different cases, three trial court decisions, and three courts of appeal decisions. In one of the cases, ("*Waggoner*"), the TAA was deemed to apply because the arbitration clause stated that the arbitration was "pursuant to the Texas General Arbitration Act."[20] With respect to *Waggoner*, "[w]hen an agreement specifically states that it is to be governed by the Texas General Arbitration Act, we hold that it will be governed by the Act, which may mean that disputes arising from its terms will be excluded from arbitration . . . [T]he TAA applies to the arbitration agreement between the Waggoners and Olshan and renders it unenforceable."[21] The court summarily concluded that the TAA rendered the *Waggoner* arbitration clause unenforceable, apparently because the "TAA renders . . . agreements unenforceable if the agreements containing the arbitration clauses are agreements . . . 'in which the total consideration to be furnished by the individual is not more than $50,000' and the agreements are not in writing, signed by each party, and each party's attorney."[22] With respect to the other three arbitration clauses, the court concluded that they were governed by the FAA, and enforceable: "[T]here is no evidence that the arbitration agreements were unconscionable as a matter of law, and all other disputed issues are questions for the arbitrator."[23] Interestingly, the other three clauses provided that the binding arbitration would be conducted "pursuant to the arbitration laws in your state,"[24] and the "arbitration laws" in Texas include the FAA.[25]

Distinguishing interpretation of arbitration clauses under the TAA and FAA was also outcome determinative in a decision of the Texas Supreme Court in *Nafta Traders, Inc. v. Quinn.*[26] This decision is significant in light of the oft-cited 2008 decision of the United States Supreme Court in *Hall Street Associates, L.L.C. v. Mattel, Inc.*[27] which narrowly restricted the grounds for vacature of awards to those enumerated in the FAA, prohibiting the parties from supplementing such grounds by agreement. "We must," wrote the *Nafta Traders* court, "follow *Hall Street* in applying the FAA, but in construing the TAA, we are obliged to examine *Hall*

19. *In re* Olshan Foundation Repair Co., 328 S.W.3d 883 (Tex. 2010).
20. *Id.* at 887.
21. *Id.* at 899.
22. *Id.* at 888 (citing TEX CIV. PRAC. & REM. CODE § 171.002(a)(2) (West 2008)).
23. *Id.* at 886.
24. *Id.* at 886–87.
25. *Id.* at 890.
26. Nafta Traders, Inc. v. Quinn, 339 S.W.3d 84 (Tex. 2011).
27. Hall St. Assoc., LLC v. Mattel, Inc., 552 U.S. 576 (2008).

Street's reasoning and reach our own judgment."[28] As did the parties in *Hall Street*, the parties in *Nafta Traders* agreed to a standard of review that included errors of law: "The arbitrator does not have authority (i) to render a decision which contains a reversible error of state or federal law, or (ii) to apply a cause of action or remedy not expressly provided for under existing state or federal law."[29] In a stunning decision that seems to contradict the Texas Supreme Court's reasoning just months earlier in *Olshan Foundation*, the Court found that "[i]t was not necessary for Quinn and Nafta to choose the TAA to govern their agreement, nor would that choice alone have provided them expanded judicial review of an arbitration award".[30] Almost inexplicably, the Court concluded that the TAA applied, and that the "only reasonable reading of the opinions in *Hall Street*, in our view, is that the FAA does not preempt state law that allows parties to agree to a greater review of arbitration awards."[31] The Court directed the trial court to review the arbitration award for substantive errors of law.

B. Disclosures and "Evident Partiality"

In recent years, motions to vacate arbitration awards have been on the rise.[32] Many such motions are based on the "evident partiality" of one of the arbitrators; evident partiality is one of the enumerated standards for vacature under the Federal Arbitration Act.[33] The most popular means of proving evident partiality is to challenge the adequacy of the disclosures made by the arbitrator prior to confirmation.

We have three examples of arbitration awards being set aside (vacated) due to inadequate disclosures made by an arbitrator. Taking the easiest case first, in *Karlseng v. Cooke*,[34] arbitrator Robert Faulkner, a former federal magistrate judge, failed to disclose a long list of social and professional contacts with Dallas attorney Brett Johnson, including expensive dinners, exchanges of gifts, numerous phone calls and emails, and Dallas Mavericks game tickets. Remarkably, even in the face of such extensive evidence of a prior and undisclosed relationship—including testimony that Faulkner and Johnson acted as though they were strangers at the commencement of the hearing—the trial court confirmed the arbitration

28. *Nafta Traders*, 339 S.W.3d. at 91–92.
29. *Id.* at 87, n.7.
30. *Id.* at 101.
31. *Id.*
32. At least one commentator provides statistical analysis that documents a nationwide increase in the number of motions to vacate arbitration awards. *See* Leigh Jones, *Gotcha Game: A Rising Tide of Challenges to Arbitration Threatens to Undermine the System*, The National Law Journal, February 14, 2011, at 1. A number of factors appear to be encouraging the increase in such motions, including the increase in the number of arbitrations generally and the ever-higher stakes of commercial arbitration. Though the article suggests only a slight increase in the percentage of such motions that are successful, this author believes that an increase in judicial openness to reviewing arbitration awards will fuel substantial increases in appeals.
33. *See* 9 U.S.C. § 10(a)(2) (2012).
34. Karlseng v. Cooke, 346 S.W.3d 85 (Tex. App.—Dallas 2011, no pet.).

award of twenty-two million dollars in favor of Johnson's client, including six million dollars in attorney's fees.[35] The appellate court disagreed: "Our examination of the entire record in this case shows a direct, personal, professional, social, and business relationship . . . . The facts demonstrating this relationship 'might, to an objective observer, create a reasonable impression of the arbitrator's partiality'. . . . His failure to disclose the relationship constitutes evident partiality."[36]

The evidence of evident partiality is not ordinarily expensive dinners and game tickets, but more often the failure to disclose a prior professional engagement. This was the case in *Alim v. KBR-Halliburton*,[37] when the arbitrator "failed to disclose, among other things, that he had served as an arbitrator in a prior case involving KBR's party representative and a related company."[38] The court concluded that the arbitrator "failed to disclose facts which might, to an objective observer, create a reasonable impression of the arbitrator's partiality," and vacated the award.[39]

In *Amoco D.T. Co. v. Occidental Petroleum Corp.*,[40] the following facts were undisputed: arbitrator Thomas McDade, a partner in the Beck Redden law firm, was appointed to the panel by appellant Amoco; a Beck Redden conflicts check included mention of Beck Redden attorney David Gunn's representation of BP Products, a sister company of the parent company of appellant Amoco entities; and McDade had actual knowledge of the Beck Redden representation of BP Products, but did not disclose it.[41] In an elaborate analysis that resulted in vacature of the arbitration award, the court addressed, along with more common arguments, two novel defenses to the failure to adequately disclose. Amoco argued that Oxy, the appellee, waived its objection to the undisclosed conflict by failing to investigate McDade's background. The court noted that no Texas case had yet ruled directly on whether an arbitrating party waives an arbitrator's conflicts if the party fails to investigate the arbitrator's background."[42] Yet, the court noted, several cases, including the Texas Supreme Court's 2001 decision in *Mariner Financial Group, Inc. v. Bossley*,[43] have ruled that the party asserting the waiver argument would have to establish that a reasonable investigation would have easily discovered the relationship. Here, too, the court ruled that Amoco had not presented "evidence establishing that OXY would have discovered the BP Products representation through 'reasonable investigation.'"[44]

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35. *Id.* at 87.
36. *Id.* at 100.
37. Alim v. KBR-Halliburton, 331 S.W.3d 178 (Tex. App.—Dallas 2011, no pet.).
38. *Id.* at 180.
39. *Id.*
40. Amoco P.T. Co. v. Occidental Petrol. Corp., 343 S.W.3d 837 (Tex. App.—Houston [14th Dist.] 2011, pet. denied).
41. *Id.* at 846–47.
42. *Id.* at 845.
43. Mariner Fin. Grp., Inc. v. Bossley, 79 S.W.3d 30 (Tex. 2002).
44. *Amoco*, 343 S.W.3d at 846.

Amoco also argued that Oxy failed to demonstrate that it would have objected to McDade's service on the panel had the BP Products representation been disclosed. This the court found to be inconsequential: "Whether the party asserting evident partiality would have actually objected to the undisclosed information is not an element of the evident partiality standard. "Evident partiality is established from the *nondisclosure* itself, regardless of whether the nondisclosed information necessarily establishes partiality or bias."[45]

Disclosures were deemed adequate in *Skidmore Energy, Inc. v. Maxus (U.S.) Exploration Co.*,[46] which confirmed a "take nothing" arbitration award. Skidmore Energy moved to vacate the award, suggesting that arbitrator Martin McNamara failed to make necessary pre-arbitration disclosures. McNamara disclosed that he was a member of the Board of Directors of Transocean, Inc.; during the hearing, evidence was introduced regarding a business relationship between one of the parties, Maxus, and Transocean.[47] During post-award discovery, McNamara testified that he had no knowledge of the business relationship, and the court noted that it was undisputed that Skidmore Energy and their counsel "had been aware for years prior to the arbitration that Maxus had done business with Transocean." The court found that "based upon the entirety of this record that McNamara did not fail to disclose facts which might, to an objective observer, create a reasonable impression of the arbitrator's partiality."[48] Moreover, even if the disclosures were not as thorough as they could have been, "appellants have waived their complaint concerning McNamara's alleged evident partiality by failing to raise the issue prior to issuance of the arbitration award."[49]

In so many words, courts reviewing challenges for evident partiality based on an arbitrator's disclosures, or lack thereof, appear to follow a pragmatic, objective standard: were the disclosures sufficient to put the

45. *Id.* at 849 (quoting Burlington N. R.R. Co. v. TUCO, Inc., 960 S.W.2d 629, 636 (Tex. 1997)).

46. Skidmore Energy, Inc. v. Maxus (U.S.) Exploration Co., 345 S.W.3d 672, 684–85 (Tex. App.—Dallas 2011, pet. denied). In a discussion not perfectly relevant to the court's conclusion, the opinion highlights a too common occurrence: a misunderstanding or disagreement about whether "party-appointed" arbitrators owe the parties a duty of neutrality, or whether they may, in fact, be partial. *Id.* at 678. For decades it was not uncommon for party-appointed arbitrators to be openly partial, in effect serving as advocates on the panel for the party appointing them. The standard and popular Commercial Arbitration Rules of the American Arbitration Association, until 2003, adopted partiality as the role of such arbitrators, in the absence of an express agreement to the contrary. Carrie Menkel-Meadow, *Ethics Issues in Arbitration and Related Dispute Resolution Processes: What's Happening amd What's Not*, 56 U. MIAMI L. REV. 949, 957 n.40 (2002). But in 2004 the AAA's rule was reversed, and now the common practice is to have all panelists, even those appointed by one party, serve as neutrals. *See* Am. Arbitration Assoc., *The Code of Ethics for Arbitrators in Commercial Disputes*, March 1, 2004. Advocates and arbitrators are well advised to clarify, in every case at the very outset, the expectations of the parties regarding the duty of neutrality of each panelist.

47. *Skidmore Energy, Inc.*, 345 S.W.3d at 679–80.

48. *Id.* at 684.

49. *Id.*

parties on notice to the point that an objection could have been raised, or clarification and more information sought?

C. Waiver / Substantially Invoking Judicial Process

Since the Texas Supreme Court's infamous 2008 decision in *Perry Homes v. Cull*,[50] highlighting the standard to be applied when a party argues that the other party has waived its right to arbitrate by "substantially invoking judicial process,"[51] a number of cases have raised different and challenging circumstances requiring application of the standard.

Adams v. StaxxRing, Inc.[52] presented such a challenge for the Dallas Court of Appeals. "Here, the record does not fit squarely within the circumstances that clearly would constitute waiver, and we therefore must review relevant factors in the context of the totality of the circumstances."[53] Citing *Perry Homes*, the court set out the factors: "[W]hen Adams [the party alleged to have waived arbitration] knew of the arbitration clause; the extent of discovery, who initiated it, whether it related to the merits rather than arbitrability or standing, and how much of it would be useful in arbitration; and, whether Adams sought judgment on the merits."[54] The court concluded, after extensive analysis, that Adams had substantially invoked judicial process: "Although we have a reporter's record for only one of the several hearings, the clerk's record consists of over thirteen hundred pages."[55]

By way of contrast, in *Ellis. v. Schlimmer*,[56] both parties relied upon the *Perry Homes* decision to support their respective arguments of waiver. Turning to the appellees' contention that the appellants had substantially invoked judicial process, the court of appeals noted that appellants waited until five months before trial to demand arbitration, discovery had taken place, experts were retained, and an alleged $11,000 had been spent in litigation expenses."[57] Despite this significant engage-

50. Perry Homes v. Coll, 258 S.W.3d 580 (Tex. 2008).

51. *Id.* at 589–94 (outlining factors pertaining to substantially invoking judicial process).

52. Adams v. StaxxRing, Inc., 344 S.W.3d 641 (Tex. App.—Dallas 2011, pet. denied).

53. *Id.* at 648.

54. *Id.*

55. *Id.*; *see also* PRSI Trading Co. LP v. Astra Oil Trading NV, No. 01-10-00517-CV, 2011 WL 3820817 (Tex. App.—Houston [1st Dist.] Aug. 25, 2011, pet. denied) (mem. op.) (finding waiver where one party waited eleven months from the filing of the Original Petition before moving to compel arbitration; conducted discovery relating to a ten million dollar loan claim by serving requests for disclosure, requests for production, and deposition notices; filed motions to compel and agreed to the appointment of a special discovery master; and deposed senior executives of the opposing party).

56. Ellis v. Schlimmer, No. 13-09-00426-CV, 2011 WL 3821969 (Tex. App.—Corpus Christi Aug. 24, 2011) (no pet.) (mem. op.).

57. *Id.* at *4. This was the second court of appeals decision in this case. The case started when the Schlimmers, home purchasers, sued Ellis (the listing agent) as well as the broker. Ellis filed a third party complaint against the homebuilder. After several months, the defendants filed a motion to abate the litigation and compel arbitration. The district court denied the motion, and the court of appeals dismissed the interlocutory appeal for want of jurisdiction. Ellis v. Schlimmer, 338 S.W.3d 12, 17 (Tex. App.—Corpus Christi

ment in the litigation, the court held that "appellees did not overcome the presumption against waiver and meet their burden to show prejudice."[58]

The only way to reconcile these decisions, which wrestle with the question of how much litigation is too much, is to notice that each seems to fall back on principles of fundamental fairness, the totality of the circumstances, and prejudice. Is the party that claims waiver the party that initiated the litigation, or the party that was sued? Can the discovery conducted be used in a subsequent arbitration? No bright line rule will be found.

D. Individuals Bound By An Entity's Arbitration Agreement?

Two opinions by the Fifth Circuit Court of Appeals, published only a week apart (and written by the same Justice), delve into the question of when officers, directors, or agents of a company can be individually bound by an arbitration agreement entered into by the company.

In *DK Joint Venture 1 v. Weyand*,[59] the court vacated an arbitration award against Richard Weyand and Peter Thiessen, the CEO and CFO, respectively, of the defendant corporations. Relying on ordinary principles of contract and agency law, the court found that

> Weyand and Thiessen, as CEO and CFO of the defendant corporations, were the corporations' agents . . . [the] fact that the defendant corporations entered into the Subscription Agreements did not cause their agents, Weyand and Thiessen, who acted only as officers on behalf of the corporations, to be personally bound by those agreements.[60]

The same rationale, and even much of the same language, can be found in *Covington v. Aban Offshore Ltd.*[61] In *Covington*, the court of appeals overruled the district court's order compelling arbitration because two individuals, one a vice-president of sales and marketing and the other a president and director, were not personally bound by an arbitration agreement entered into by their company.[62]

Although non-signatories may resist being drawn into an arbitration proceeding against their will, in some circumstances non-signatories to a contract may find it advantageous to participate in an arbitration and are opposed by a party to the agreement. In *In re Rubiola*,[63] the Texas Su-

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2010) (pet. denied) (mem. op.), *rev'd*, 337 S.W.3d 860 (Tex. 2011). The Texas Supreme Court reversed, holding that the court of appeals had incorrectly placed the burden on the defendants to establish the absence of any defenses to arbitration. *Ellis*, 337 S.W.3d at 862. Thus, the Court remanded the case to the court of appeals to consider the merits of the appeal.

58. *Ellis*, 2011 WL 3821969, at *4.
59. DK Joint Venture 1 v. Weyand, 649 F.3d 310 (5th Cir. 2011).
60. *Id.* at 314.
61. Covington v. Aban Offshore Ltd., 650 F.3d 556 (5th Cir. 2011).
62. *Id.* at 559–60.
63. *In re* Rubiola, 334 S.W.3d 220 (Tex. 2011).

preme Court decided "whether the parties who actually agree to arbitrate may also grant third parties the right to enforce their arbitration agreement and, if so, whether the signatories here intended to grant such rights to these Relators."[64] The Salmons, purchasers of a home from the Rubiolas, engaged the services of the seller's brother, Greg Rubiola, as the listing broker for the property, utilizing a standard form Texas real estate sales contract with no arbitration clause. After agreeing to purchase the home the Salmons then used Greg Rubiola as their mortgage broker and loan officer. The loan agreement contained an arbitration clause for any disputes between "the parties," and defined "parties" as "Rubiola Mortgage Company, and each and all persons and entities signing this agreement *or any other agreements between or among any of the parties as part of this transaction*."[65] When the Salmons eventually sued the *sellers* for misrepresentations and various DTPA violations in connection with the sale of the home, the sellers moved to compel arbitration based on the arbitration clause in the loan agreement, to which they were not signatories. The Court thus addressed whether "the Rubiolas, as non-signatories to the arbitration agreement, have authority to compel the Salmons to arbitrate . . . ."[66] The court found that "signatories to an arbitration agreement may identify other parties in their agreement who may enforce arbitration as though they signed the agreement themselves."[67]

E. When Is an Arbitration Clause Illusory?

Courts have consistently been concerned with arbitration clauses that appear to grant one party the unilateral right to choose whether or not to arbitrate, or to amend the rules of the process at any time. Thus, in *Weekley Homes v. Rao*[68] the Dallas Court of Appeals confirmed a trial court ruling that refused to enforce an arbitration clause. The arbitration clause at issue appeared in an employee handbook. When Len Rao, a former division president of the company, filed suit on numerous theories, including breach of contract, the former employer moved to compel arbitration. The clause stated, "policies are not to be interpreted as a promise by the Company that any particular situation will be handled in the express manner set forth in the text."[69] The clause was not enforceable: "The plain language of the modification provision gives Weekley Homes the unilateral power, at any time, to elect not to enforce any pol-

64. *Id.* at 222.
65. *Id.* (emphasis added).
66. *Id.*
67. *Id.* at 226. The result is fascinating. How much was the court influenced by the "family nature" of the Rubiola enterprises? We will never know. But if I accept employment on a loading dock and sign an employment contract with no arbitration clause, and in a related but unrelated transaction go across the street and purchase my work uniforms (as directed by my new employer), and my purchase invoice has an arbitration clause with a definition of "parties" similar to the Rubiolas, am I bound to arbitrate any subsequent employment dispute with my employer if my employer insists on arbitration?
68. Weekley Homes v. Rao, 336 S.W.3d 413 (Tex. App.—Dallas 2011, pet. denied).
69. *Id.* at 415.

icy or provision in the Handbook."[70]

F. When a Mediator Wears Two Hats

The role of the mediator, particularly whether a mediator should agree to serve as arbitrator of the same dispute, is a subject of extensive academic discussion in ethics scholarship.[71] Many commentators take a dim view of the crossover, even when the mediator's new role is one that both parties have requested.[72] But in the real world, where the disputing parties have both developed a degree of trust in the neutral, and where the transaction costs, including delay, of employing a new neutral and bringing the new neutral "up to speed" are steep, the practice of employing the mediator as arbitrator is not uncommon. Whether or not the practice violates most codes of ethics for mediators may be problematic, but since codes of ethics are aspirational, and the needs, interests, and desires of disputants and their lawyers are real, the practice of crossing over continues.

In re Marriage of Allen,[73] which reflects a crossing over situation, defies easy categorization. The MSA provided that the mediator would be the "sole arbiter of any disagreement with regard to the drafting and intent of the final documents to effectuate this Agreement."[74] After the mediator was later obligated under the agreement to determine how a piece of property should be divided, one party filed a motion to vacate the 'arbitration award,' arguing that it was obtained by "corruption, fraud, or other undue means."[75] The court's analysis is intriguing: "We first note that no binding arbitration took place in this case."[76] Once the court reached this curious first step, the outcome was inevitable; the court merely enforced what was then a binding MSA. The court's conclusion, however, seems plainly wrong. Whether a decision to be made by a neutral that is binding on the parties constitutes an "arbitration" should not depend on the name attached to the procedure that resulted in the decision. Here the neutral, by agreement, was charged with rendering a binding decision. Mediators do not make binding decisions and are, in fact, prohibited by statute and codes of ethics from doing so.[77] The mediator's

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70. *Id.* at 421.

71. *See, e.g.*, Kristen M. Blankley, *Keeping Secrets from Yourself? Confidentiality When the Same Neutral Serves Both as Mediator and Arbitrator in the Same Case*, 63 Baylor L. Rev. 317 (2011) (analyzing confidentiality, privilege, and waivers in processes in which the mediator also serves as arbitrator); Barry C. Bartel, Comment, *Med-Arb as a Distinct Method of Dispute Resolution: History, Analysis, and Potential*, 27 Willamette L. Rev. 661 (1991) (discussing and analyzing of variations in such processes).

72. *See* Jay Folberg, Dwight Golann, Thomas J. Stipanowich & Lisa A. Kloppenburg, Resolving Disputes: Theory, Practice, and Law 605–606 (2d ed. 2010) (discussing concerns about mixing the roles).

73. *In re* Marriage of Allen, 343 S.W.3d 513 (Tex. App.—Texarkana 2011, no pet.).

74. *Id.* at 515.

75. *Id.* at 516.

76. *Id.* at 517–18.

77. Tex. Civ. Prac. & Rem. Code Ann. §§ 154.023(b) (West 2005 & Supp. 2008): "A mediator may not impose his own judgment on the issues for that of the parties." The

decision was an arbitration decision, even though it stemmed from a process described as a mediation.

G. Donative Arbitration Clauses

While on the subject of arbitration-related decisions that defy easy categorization, *Rachal v. Reitz*[78] deserves mention. In this case the appellee Reitz was a beneficiary of a trust established by his father. When Reitz later found fault with the actions of the trustee, appellant Rachal, Reitz filed suit. The trust document contained the following provision: "I intend that as to any dispute of any kind involving this Trust or any of the parties or persons concerned herewith (e.g. beneficiaries, Trustees), arbitration as provided herein shall be the sole and exclusive remedy . . . ."[79] In an extensive analysis, the court concluded that the beneficiary was not obligated to arbitrate: "[O]nly two jurisdictions in the country have considered a similar issue. Both have concluded that a trust in not a contract and that a beneficiary of a trust cannot be compelled to arbitrate disputes arising under the trust."[80]

IV. CONCLUSION

In December of 2010, the Texas Supreme Court distinguished between arbitration clauses that said "pursuant to the Texas General Arbitration Act" and clauses that said "pursuant to the arbitration laws in your state." The court found the difference to be outcome determinative in whether the TAA or FAA applied, and consequently outcome determinative in whether disputes were required to be arbitrated.[81] In May of 2011, the Texas Supreme Court found the TAA controlled an arbitration clause because "[i]t was not necessary for Quinn and Nafta to choose the TAA to govern their agreement . . . "[82] If you have difficulty in reconciling the language and conclusions in these opinions, you are not alone.

The net result in both cases was a finding that an arbitration clause was unenforceable. The pendulum is swinging, indeed.

Model Standards of Conduct for Mediators, published by the American Bar Association and the American Arbitration Association in 2005, essentially a "code of ethics" for mediators, does not state that party "self determination" should be the basis for mediation: "Self-determination is the act of coming to a voluntary, uncoerced decision in which each party makes free and informed choices as to process and outcome."

78. Rachal v. Reitz, 347 S.W.3d 305 (Tex. App.—Dallas 2011, pet. granted).

79. *Id.* at 308.

80. *Id.* at 310. For an even more extensive, and very recent, discussion of "donative arbitration clauses," see Stephen Wills Murphy's article. Stephen Wills Murphy, *Enforceable Arbitration Clauses in Wills and Trusts: A Critique*, 26 Ohio St. J. on Disp. Resd. 627 (2011).

81. *In re* Olshan Foundation Repair Co., 328 S.W.3d 883, 890 (Tex. 2010).

82. Nafta Traders, Inc. v. Quinn, 339 S.W.3d 84, 101 (Tex. 2011).