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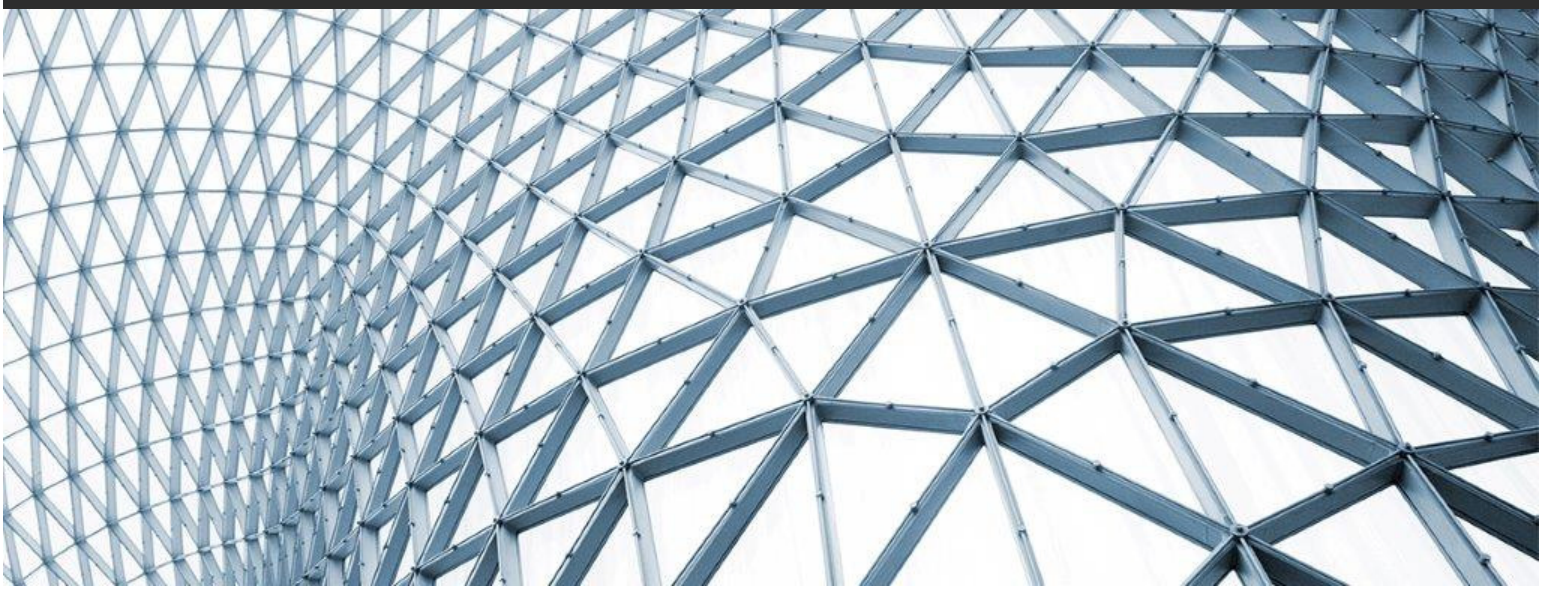
I Never Agreed to That



With the adoption of the Texas Arbitration Act, the last half-century has been marked by a steady increase in courts' willingness to, and even preference for, enforcing arbitration provisions.

By Craig Duewall and Alan W. Hersh| May 13, 2020 | Texas Lawyer

Developments in Texas' Enforcement of Involuntary Arbitration Provisions

With the adoption of the Texas Arbitration Act, the last half-century has been marked by a steady increase in courts' willingness to, and even preference for, enforcing arbitration provisions. *See* Yvette Ostolaza, *Overview of Arbitration Clauses in Consumer Financial Services Contracts*, 40 Tex. Tech. L. Rev. 37, 41-43 (2007). Indeed, courts generally only refuse to enforce an arbitration agreement on three principal grounds: (1) the parties have not contractually agreed to arbitrate; *G.T. Leach Builders, LLC v. Sapphire V.P., L.P.*, 458 S.W.3d 502, 524 (Tex. 2015); *Archer & White Sales, Inc. v. Henry Schein, Inc.* 878 F.3d 488, 492 (5th Cir. 2017); (2) the dispute is not within the scope of the arbitration provision; *Ellis v. Schlimmer*, 337 S.W.3d 860, 862 (Tex. 2011); or (3) some state law defense, such as fraudulent inducement, applies specifically to the arbitration provision. *Young v. Valt.X Holdings, Inc.*, 336 S.W.3d 258, 262 (Tex. App.—Austin 2010, pet. dism'd). Over the last few years, however, the first requirement—i.e., whether the parties actually agreed to arbitrate—has come into doubt.

In a series of cases, courts have been willing to enforce an arbitration provision by or against a party who never explicitly agreed to them. This article summarizes that trend, the rationales by which courts have

enforced arbitration provisions against non-signatories, and potential avenues to protect yourself from unagreed to arbitration

A Trend Emerges

Beginning with employment contracts, Texas courts began confronting issues where one party unilaterally amended a contract to add a requirement to arbitrate disputes. *In re Halliburton Co.*, 80 S.W.3d 566 (Tex. 2002). Employment cases at least had some guidance from precedent. Texas has long recognized that as long as an employee is given sufficient notice, an employer can amend employment terms prospectively. *Hathaway v. Gen. Mills, Inc.*, 711 S.W.2d 227 (Tex. 1986). Thus, notice—and the implicit requirement that arbitration rights not be "illusory"—are all that are required to allow employers to add arbitration provisions to existing employment agreements. *In re Halliburton Co.*, 80 S.W.3d at 569-71.

However, could individuals in other contexts have to submit to arbitration agreements they never agreed to? For example, can corporations amend their bylaws to require executives, directors, or shareholders to arbitrate disputes? Could insurance contracts or loan agreements be amended to compel arbitration?

Furthermore, what about compelling arbitration by or against companies or individuals that are themselves not parties to an arbitration agreement? Given that, even implicitly, only parties to the arbitration agreement assent to it, how could a non-party be allowed or required to enforce an arbitration agreement?

In each of these contexts, there have been instances in which the courts have compelled arbitration against individuals or business who never anticipated or agreed to arbitrate these issues. This trend of compelling arbitration against non-signatories raises planning issues for all businesses with even tangential connection to Texas businesses. Moreover, it offers lopsided benefits to parties seeking to compel arbitration, because only a court's order denying a motion to compel arbitration is subject to immediate appeal. *In re Gulf Expl., LLC*, 289 S.W.3d 836 (Tex. 2009) (explaining that while Texas Arbitration Act permits interlocutory appeal from denial of motion to compel arbitration, neither interlocutory appeal nor mandamus are available from order granting motion to compel).

Rationales for Compelling Arbitration Against Non-Signatories

There are essentially two categories of groups who may be compelled to arbitrate disputes. The first are instances in which one party has a unilateral or superior right to amend the contract without the other party's consent. The second is where non-parties to the contract either seek to enforce or are bound to an arbitration agreement based on their relationship to a party to the contract. The legal issues surrounding each category is distinct, and will be addressed separately.

1. Unilateral Right to Add an Arbitration Agreement

Employment agreements are not the only instance of contracts that can be unilaterally amended by one party at the expense of another. For example, corporate formation documents—such as bylaws or articles of incorporation—can frequently be amended by a simple majority vote. *See* Tex. Bus. & Comm. Code § 21.052. Thus shareholders, directors, or executives might find their corporate rights redefined to include an unexpected arbitration agreement.

Although the Texas Supreme Court has not directly ruled on this issue, there is some clear support in other cases. In *Pinto Technology Ventures, L.P. v. Sheldon*, the court confronted a shareholder agreement that was amended multiple times to add a forum-selection clause. 526 S.W.3d 428 (2017). The shareholder at issue had not only purchased his shares before the forum-selection clause was added, he repeatedly voted

against the amendments to the shareholder agreement. *Id.* at 434-36. Moreover, unlike the employee who continues to receive salary as compensation in exchange for submitting to a new arbitration provision, a shareholder does not gain any rights or additional shares in exchange for an amended shareholder agreement.

Nevertheless, *Pinto* held that by originally purchasing shares that could be amended by majority vote, the shareholder "bound himself to any properly amended forum-selection clause." *Id.* at 443. Tellingly, the court cited and "dr[ew] analogies between forum-selection causes and *arbitration clauses*, which are a 'specialized kind of forum-selection clause.'" *Id.* at 437 (quoting *Scherk v. Alberto-Culver Co.*, 417 U.S. 506, 519 (1974)). Thus, *Pinto* all but held that its analysis would be the same for arbitrations provisions. At least one Texas district court has similarly compelled arbitration when a company agreement was amended to add an arbitration provision. *See Phipps v. Nikkels*, Case No. D-1-GN-18-002708, 126th District Court of Travis Cty., Texas.

If utilized more frequently, corporations may amend their corporate documents to add arbitration provision to avoid the costs and burdens of shareholder derivative suits, minority-shareholder oppression claims, and ultra vires claims.

2. Compelling Arbitration by or Against Third Parties

Perhaps more logically challenging are cases in which a party who has signed an arbitration agreement has sought to enforce the agreement against strangers to the contract. Conversely, parties who are strangers to arbitration agreements have sought to compel arbitration against parties. These extracontractual enforcements of contractual arbitration provisions have been approved—or rejected—on various grounds.

In the context of non-parties being compelled to arbitration, the cases are clearer. Texas Law "requires a nonparty to arbitrate a claim if it seeks, through the claim, to derive a direct benefit from the contract containing the arbitration provision." *In re Vesta Ins. Grp., Inc.*, 192 S.W.3d 759. 761 (Tex. 2006) (internal quotations omitted). For a clear example, if a non-party claims that it is a third-party beneficiary to a contract, the defendant can compel the non-party to abide by the contract's arbitration provision. By comparison, a non-party is not required to arbitrate claims that only tangentially relate to a contract that contains an arbitration provision. *See id.* (refusing to enforce arbitration provision that was not sufficiently related to subcontractors claim against project manager); *Janvey v. Alguire*, 847 F.3d 231 (5th Cir. 2017) (holding that reference to "affiliates" in arbitration agreement was not enough to compel bank to arbitrate claims for fraudulent transfer).

However, there are many theories by which non-parties have sought to take advantage of an arbitration provision they did not sign, with more varying success. For example, the Texas Supreme Court refused to allow a signatory to arbitrate claims against non-signatory defendants for alleged "concerted misconduct" with a party to the agreement. *In re Labatt Food Serv., L.P.*, 279 S.W.3d 640, 644 (Tex. 2009). Similarly, when a third-party non-signatory sued for alleged direct benefits under a contract, the court held that the defendant signatory was under no obligation to exercise its right to arbitrate the claim. *VanZanten v. Energy Transfer Prtns.*, 320 S.W.3d 845 (Tex. App.—Houston [1st Dist.] 2010, no pet.). By contrast, courts have allowed non-signatory defendants to compel arbitration where plaintiff-signatories sue for such claims as tortious interference, *Hays v. HC Holdings, Inc.*, 838 F.3d 605 (5th Cir. 2016), or trade-secret misappropriation. *The Muecke Co. v. CVS Caremark Corp.*, 615 Fed. App'x 837 (5th Cir. 2015).

Two principles can be derived from these cases. First, courts will not allow signatories to compel non-parties to arbitration in a way that would make arbitration provisions "easier to enforce than other contracts." *Glassell Prod. Co. v. Jared Res., Ltd.*, 422 S.W.3d 68, 82 (Tex. App.—Texarkana 2014, no pet.)

(internal quotations omitted). Second, courts will generally only allow non-parties to enforce an arbitration agreement when they are the defendant and the signatory plaintiff's claims relate to the underlying contract. Given the nearly endless unique relationships of parties and claims, these two general principles will likely be tested and refined until the Texas Supreme Court offers more concrete guidance.

3. Conclusion and Recommendation

Given the evolving nature of enforcing arbitration agreements against non-signatories, numerous opportunities exist to force litigation into arbitration in ways that might not have existed a few years ago. Business entities should consider amending their corporate governing documents to add arbitration provisions. Similarly, clients and their counsel that are entangled in litigation should review every potentially relevant contract—even those the client did not sign—to see if there is an arbitration agreement that might cover the dispute. By contrast, attorneys seeking to avoid arbitration may find a tougher road toward their own day in court.

About the Authors:

Craig Duewall is a Shareholder at Greenberg Traurig. He focuses his complex commercial litigation and arbitration practice on cases involving class actions, trade secrets, private equity, environmental, oil and gas, securities fraud, fiduciary duty, construction, real estate, business and partnership disputes, and insurance coverage.

Alan W. Hersh is an Associate at Greenberg Traurig. He focuses his practice on class action and antitrust litigation, and is experienced in handling asset purchase negotiations, lien and land restrictions on client holdings, and class action appellate issues.

Craig Duewall
duewallc@gtlaw.com

Alan W. Hersh
hersha@gtlaw.com