Did You Agree to Arbitrate?

By Laura A. Kaster

The most basic concept in arbitration law is that arbitration is voluntary. It requires the agreement of two or more parties: "a party cannot be required to submit to arbitration any dispute which he has not agreed so to submit." *AT&T Techs, Inc. v. Communication Workers of Am.* [1] Under the Federal Arbitration Act, the agreement must be in writing. 9 U.S.C. § 2. And an award may not be enforced without providing the arbitration agreement to the court. 9 U.S. C § 13. Under the Revised Uniform Arbitration Act (RUAA) Section 6, the arbitration agreement must be "contained in a record."[2] But what at first blush appears to be a simple threshold issue often requires more searching analysis by the advocate, arbitrator, or judge. Whether a party is bound to arbitrate or may invoke the right to arbitrate requires examination of at least the following questions:

- What documents govern?
- What is a writing or a record?
- Who is party to the writing or record?
- What law applies?
- Who decides?

Several recent cases illustrate a few of the nuances that may be involved in examining what is often thought to be a straightforward starting point for issues of arbitrability.

What Documents Govern

Be thoughtful about the potential documents that may impact claims.

Your client tells you that she has discovered evidence that her wages and those of other women with her job title have been consistently lower than men to whom her employer gives identical job titles and who have the same seniority. You think she and others may have a statutory claim. There is no contract of employment. Where else do you need to look?

The U.S. Supreme Court has just informed us that you must also ask your client if she is a member of a labor union and if so, you must examine the collective bargaining agreement. In *14 Penn Plaza v. Pyett*[3] the Court held that if the collective bargaining agreement clearly specifies that claims under the statutes you deem to be applicable must be arbitrated, your client has been bound by someone else to arbitrate. Similarly, 14 Penn Plaza was itself bound to arbitrate by a multi-employer bargaining association.

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[1] *AT&T Techs, Inc. v. Communication Workers of Am.*, 475 U.S. 643, 648 (1968).
[2] The RUAA definition section provides : Record" means information that is inscribed on a tangible medium or that is stored in an electronic or other medium and is retrievable in perceivable form. RUAA Section 1.
[3] *14 Penn Plaza v. Pyett*, 128 S.Ct. 1233 (2009).

A claim by a partner or member of a law firm would require examination of the bylaws of the incorporated firm to determine whether there is specific agreement to arbitrate the claim. The nature and degree of proof required may be governed by state law. In *Kirleis v. Dickie McCarry & Chilicote, PC.,* [4] The Court held that the bylaws of the law firm could control but that there must be express and unequivocal agreement to arbitrate under Pennsylvania law, and finding the expression insufficient, it denied arbitration. The federal court held that as a matter of first impression under Pennsylvania law, a shareholder could not be compelled to arbitrate claims against the firm under corporate bylaws to which she did not explicitly consent.

The ruling in *Kirleis* is somewhat at odds with the comments to RUAA Section 6 that note that as an agreement between the corporation and its members and among its members, bylaws are enforceable. The RUAA, like the Uniform Arbitration Act was intended to include arbitration provisions contained in the bylaws of corporate or other associations as valid and enforceable arbitration agreements.[5] In any case, under both the decision in *Kirleis* and the RUAA, bylaws must be evaluated in assessing whether arbitration is available or may be ordered.

Your client may also be bound by a writing or record that he or she has not signed, and arguably not received if the seller can show it has a routine practice of transmitting the contract. For example, noting the full performance under the contract and the seller's evidence that buyers are routinely mailed an arbitration agreement as part of a standard credit materials package, a Minnesota federal district court held that a computer buyer was bound to arbitrate claims under a "'shrinkwrap' accept-or-return" agreement. In *Wold v. Dell Fin. Servs., L.P.*,[6] the shrinkwrap "accept or return" contract sent as part of credit materials in connection with the purchase of a Dell computer bound the purchaser even after the loan was paid off. When Wold sued for violations of the Fair Credit Reporting Act and for credit defamation, Dell Financial Services successfully moved to compel arbitration. The court rejected Wold's argument that he had never received the agreement in light of the business practice and noted that so-called "shrinkwrap" agreements, sent to a remote buyer for review after the sale with an opportunity to reject within a reasonable time, are generally considered enforceable.[7]

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[4] *Kirleis v. Dickie McCarry & Chilicote, PC.*, 2009 WL 750415 (3d Cir. March 24 2009),

[5] Comment 1 to Section 6 of the RUAA provides: "Subsection (a), being the same as Section 1 of the Uniform Arbitration Act ("UAA"), is intended to include arbitration provisions contained in the bylaws of corporate or other associations as valid and enforceable arbitration agreements. Courts that have addressed whether arbitration provisions contained in the bylaws of corporate or other associations are enforceable under the UAA have unanimously held that they are."

[6] *Wold v. Dell Fin. Servs., L.P.*, 2009 WL 397235 (D. Minn. Feb. 17, 2009).

[7] *See, e.g., Hill v. Gateway* 2000, *Inc*., 105 F.3d 1147 (7th Cir. 1997).

What is a Writing or A Record

As *Wold* illustrates and *Kirleis* and *14 Penn Plaza* make clear, issues of agency, authority, alter ego, and third-party beneficiary, may yield controlling documents that will impact the right to arbitrate and the parties who enjoy that right. A writing need not be signed, bur there must be evidence of a binding agreement; the standard of required proof varies according to state law.

Who is Bound to Arbitrate

The parties to the agreement are not the only ones who may be bound or take advantage of an arbitration agreement. In *Idearc Media Corp v. Encore Marketing Group,*[8] Idearc contracted with Encore to sell internet advertising on Superpages.com to small and medium sized companies. Encore's commission was based on monthly net sales. Encore cooked the books, creating fictitious sales to generate commissions. Idearc alleged that the President and other officers of Encore were personally involved and it sued alleging fraud, unjust enrichment, conspiracy to defraud and other claims many of which overlapped with claims against the corporation. The contract between Idearc and Encore contained an arbitration provision and Encore successfully moved to compel arbitration. The Encore executives who were not party to the agreement then moved to compel arbitration of the claims against them. Relying on an earlier Fifth Circuit decision,[9] the court noted that there are two circumstances under which nonsignatories can compel arbitration under the doctrine of equitable estoppel: (1) when a signatory to the agreement must rely on the terms of that written agreement to assert its claims against the nonsignatory; or (2) when a signatory to the contract raises allegations of substantially interdependent and concerted misconduct by the nonsignatory and one or more of the signatories to the contract.

In *Idearc,* the first test did not apply, because many of the claims were not dependent upon the contractual duties. But the court held that the second test did apply because Idearc generally alleged acts against the defendants as a group, intermixing allegations against signatory and nonsignatories to a degree that made arbitration appropriate in light of the fact that the conduct was committed by the Encore employees as a result of the agreement signed by Encore. For that reason, the nonsignatories were permitted to compel arbitration of their claims.

The Second Circuit provided a detailed examination of the estoppel analysis in *Sokol Holdings, Inv. v. BMB Munai, Inc.,*[10] making clear that the fact that the subject matter of the dispute was intertwined with the contract providing for arbitration was a necessary but insufficient basis for finding a matter arbitrable. There must also be a relationship

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[8] *Idearc Media Corp v. Encore Marketing Group,* 2009 WL 129379 (N.D. Tex. Jan. 20, 2009).

[9] *Grigson v. Creative Artists Agency L.L.C.,* 230 F.3d 524, 527-28 (5th Cir. 2000).

[10] *Sokol Holdings, Inv. v. BMB Munai, Inc*., 532 F.3d 354, 361 -62 (2d. Cir 2007).

among the parties that supports an implied factual conclusion that the party against whom enforcement is sought consented to extend its agreement to arbitrate beyond the initial parties or that it would be inequitable not to do so.

What Law Applies

Although state law (usually the law of the state specified in the contract that contains the arbitration agreement) typically governs issues of contract formation, it should be noted that the Supreme Court in *14 Penn Plaza* applied federal law to construe the Federal Arbitration Act and to determine that collective bargaining agreements could establish a binding obligation for union members to arbitrate statutory claims. The equitable estoppel arguments reflected in *Idearc* and *Sokol Holdings* allude to basic equity principles without specifying state law. The advocate is well-advised to think about this issue and the consequences for the case.

Who Decides

The cases discussed here are court decisions. Under longstanding principles, *Buckeye Check Cashing, Inc. v. Cardegna*[11] and *Prima Paint Corp. v. Flood & Conklin Mfg. Co.*,[12] the formation of the contract as a whole is for the arbitrator. But the issue of whether an arbitration agreement has been formed is for the court unless the rules adopted by the parties, such as the Rules of the American Arbitration Association specify that the issue is for the arbitrator. Under the Federal Arbitration Act, when a party seeks to compel arbitration, the court must satisfy itself as to the existence of an arbitration agreement. 9 U.S.C §3. Therefore, while the validity or existence of an arbitration agreement is for the arbitrator, whether a given party is bound by or may invoke the arbitration clause, will likely be for the court.

All of these issues arose out of the ostensibly simple question –did you agree to arbitrate?

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[11] *Buckeye Check Cashing, Inc. v. Cardegna*, 546 U.S. 440 (2006).
[12] *Prima Paint Corp. v. Flood & Conklin Mfg. Co.*, 388 U.S. 395 (1967).