Journal of Dispute Resolution

Volume 1997 | Issue 2 Article 6

1997

Arbitration Agreements: Standard of Review, Interpretation and Who Is Bound - KenAmerican Resources, Inc. v. International Union, United Mine Workers of America

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Arbitration Agreements: Standard of Review, Interpretation and Who is Bound

KenAmerican Resources, Inc. v. International Union, United Mine Workers of America

I. INTRODUCTION

In *KenAmerican Resources, Inc. v. International Union, United Mine Workers of America*,[1] the United States Court of Appeals for the District of Columbia Circuit found that a corporation which did not sign an arbitration agreement entered into by an individual who owned both that company, KenAmerican Resources, Inc., and the company that was clearly bound to the arbitration agreement, Ohio Valley Resources, Inc., was not bound by the arbitration agreement.[2] This was because the agent who signed the agreement, Robert Murray, was not acting on KenAmerican's behalf.[3]

II. FACTS AND HOLDING

Robert Murray is the sole owner and served as the President and Chief Executive Officer of Ohio Valley Resources, Inc., and Coal Resources, Inc.[4] Ohio Valley Resources is the parent company of three other Ohio Valley companies.[5] The International Union, United Mine Workers of America ("the Union") represents the employees of the Ohio Valley companies.[6] Coal Resources wholly owns seven other KenAmerican companies including KenAmerican Resources, Inc. ("KRI").[7] The employees of KenAmerican are not members of the Union which represents the employees of Ohio Valley companies.[8]

In 1993, after a long strike, the Union and Bituminous Coal Operators Association, Inc. ("the Association"), a multi-employer bargaining group, which did not bargain for Ohio Valley companies, reached an agreement ("the Association Agreement").[9] One of the concerns discussed during the negotiations was that some

1. 99 F.3d 1161 (D.C. Cir. 1996).
2. *Id.*
3. *Id.* The unionized Ohio Valley companies were bound by the arbitration agreement because Robert Murray, the companies' president and chief executive officer, signed the agreement as an agent on their behalf. The nonunion KenAmerican companies, in which Robert Murray also owns a substantial share of stock, was not so clearly bound by the agreement. The question of whether KenAmerican was bound was the subject of the dispute in this case. *Id.*
4. *Id.* at 1162.
5. *Id.*
6. *Id.*
7. *Id.*
8. *Id.*
9. *Id.*

companies may operate both union and nonunion mines; this arrangement allowed the companies to avoid the requirements of previous collective bargaining agreements by operating nonunion mines.[10] The Union was concerned that the effect of this activity, if continued, would result in the loss of jobs for union employees. As such, the Union and the Association agreed to limit the use of employees who were not members of the Union.[11] The Association Agreement included a Memorandum of Understanding Regarding Job Opportunities ("MOU") under which "each signatory was to sign as a limited agent of its nonsignatory parent" and subsidiary operations obligating "those nonunion members of a family corporate structure to offer three out of every five new classified job openings to qualified laid-off or active miners from the signatory company's bargaining unit."[12] Furthermore, the MOU required arbitration of any dispute arising thereunder.[13]

The Ohio Valley companies, prior to the Union's strike against the Association, signed a "me too" agreement with the Union under which the company was required to adopt any "agreement which came out of the industry-wide negotiations."[14] After the Association Agreement had been executed, KRI was incorporated as a subsidiary of Coal Resources to operate a coal mine.[15] The resulting jobs were not offered to Union workers which prompted the Union to claim that KRI "failed to perform its obligations under the MOU."[16] As a result, the Union initiated arbitration proceedings against the Ohio Valley and KenAmerican companies.[17] The KenAmerican Companies argued that the Ohio Valley Companies did not represent the KenAmerican Companies in the negotiations resulting in the agreement and that Murray, Chief Executive Officer of both corporations, was acting only in his capacity of Chief Executive Officer of Ohio Valley companies.[18] Therefore, KRI was not bound by the MOU and was not required to arbitrate the dispute.[19]

The arbitrator, in resolving the question of arbitrability of the dispute, decided that when Murray signed the agreement as the President of Ohio Valley companies, he was himself a "parent" and all of his companies, including the KenAmerican companies, were covered by the MOU.[20] As such, the arbitrator required compliance with the MOU by the KenAmerican Companies.[21]

The district court granted summary judgment to the Union enforcing the arbitration award.[22] Murray and the KenAmerican companies appealed, arguing that they never agreed to be bound to the terms of the MOU.[23] As a result, there was no agreement between the parties to arbitrate disputes regarding interpretation of the

10. *Id.*
11. *Id.*
12. *Id.*
13. *Id.*
14. *Id.*
15. *Id.*
16. *Id.*
17. *Id.*
18. *Id.*
19. *Id.*
20. *Id.*
21. *Id.*
22. *Id.* at 1163.
23. *Id.*

MOU.[24] Thus, asserted KenAmerican, the "district [court] judge erroneously deferred to the arbitrator on the issue of arbitrability."[25]

The United States Court of Appeals for the District of Columbia held that federal courts must decide *de novo* whether parties intended to arbitrate a dispute unless the parties unmistakably agreed to arbitrate the issue and that the district court erred in deferring to the arbitrator on the issue of arbitrability and in determining that KenAmerican companies and Murray were bound by the MOU.[26]

III. LEGAL BACKGROUND

A. Standard of Review

The Federal Arbitration Act ("FAA") expresses a federal policy favoring arbitration agreements.[27] The FAA was enacted to ensure that private agreements to arbitrate are enforced according to their terms.[28] Arbitration agreements, like other contracts, must be intentionally entered into and the interpretation of the terms and the scope of the agreement is dictated by the intent of the parties upon entering into the agreement.[29] Issues that are to be decided by an arbitrator, rather than a court, are to be determined by both the contractual intent of the parties upon executing the arbitration agreement and the terms of the agreement.[30] Any conflicts which arise as to the "arbitrability" of an issue is a question for the courts to decide.[31]

Courts have interpreted the FAA as accepting the application of contract law principles to arbitration agreements.[32] Since one generally cannot be held to terms which were not placed in a contract or agreed to by the parties, a party to an arbitration agreement cannot be required to submit to the arbitration of any dispute which he or she has not agreed to submit to arbitration.[33]

In deciding whether a dispute is one which the parties agreed to arbitrate, the Supreme Court has held that "unless the parties clearly and unmistakably provide otherwise, the question of whether the parties agreed to arbitrate an issue is to be

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24. *Id.*

25. *Id.* The second argument put forth by Murray and KenAmerican companies was that the arbitration agreement, as interpreted by the arbitrator, was unenforceable because it violated § 8(e) of the National Labor Relations Act. *Id. See also* 29 U.S.C. § 158(e) (1994).

26. *Id* at 1164-1165.

27. *See* 9 U.S.C. § 2 (1994). "A written provision in...a contract evidencing a transaction involving commerce to settle by arbitration a controversy thereafter arising out of such contract or transaction... shall be valid, irrevocable, and enforceable, save on such grounds as exist at law or equity for the revocation of any contract." *Id.*

28. *See* Volt Information Sciences, Inc. v. Board of Trustees of Leland Stanford Junior University, 489 U.S. 468, 479 (1989).

29. *See* Mastrobuono v. Shearson Lehman Hutton, Inc., 514 U.S. 52 (1995).

30. *Id.*

31. *Id.* An "arbitrability" issue is a question of whether the arbitration agreement provides that the dispute is to be settled by arbitration or whether such an interpretation of the agreement would be contrary to the intent of the parties upon entering the agreement.

32. AT&T Technologies, Inc. v. Communications Workers of America, 475 U.S. 643, 648 (1986).

33. *Id.*

decided by the court, not the arbitrator."[34] The Supreme Court, in later cases, explained this statement as a limitation on the liberal federal policy favoring arbitration; however, any doubts concerning the *scope* of arbitrable issues should be resolved in favor of arbitration.[35] Therefore, if the issue is whether the parties have agreed to arbitrate a particular procedural or substantive question and the parties have not clearly expressed an intent for arbitration of such issues, then the issue is one for the courts to decide.[36] However, when an issue is not arbitrability and one which the parties have clearly intended to arbitrate, the issue is presumptively arbitrable and is left to the discretion of the arbitrator.[37]

The issue of what is the appropriate standard of review to be applied to an arbitrator's decision about arbitrability was addressed by the United States Supreme Court in *First Options of Chicago, Inc. v. Kaplan*.[38] The Court observed that although the question is a narrow one, it is one that has certain practical importance.[39] This is because a party who does not agree to arbitrate is generally entitled to a court decision on the merits of the dispute, but a party who has agreed to arbitrate has essentially relinquished the practical value of that right.[40]

The Court in *Kaplan* found that the standard of review to be applied to an arbitrator's decision as to the arbitrability of a dispute depended on whether the parties agreed to arbitrate the dispute.[41] Therefore, the Court explained, the question of who has the primary power to decide arbitrability turns on what the parties agreed about the matter.[42] If the parties "clearly and unmistakably" agreed to submit the arbitrability question itself to arbitration, then, according to the Court, the standard for reviewing the arbitrator's decision about the matter should not differ from the standard courts apply when they review any other matter that parties have agreed to arbitrate.[43] That is, the court should give considerable leeway to the arbitrator and only set aside his decision in very narrow circumstances.[44] If the parties did not agree to submit the arbitrability question to arbitration, then the court should decide the question *de novo*.[45] The Court further explained, in order to decide whether the parties intended to arbitrate a particular matter, the court should apply general state contract law principles.[46]

34. *Id.*
35. *See* Moses H. Cone Memorial Hosp. v. Mercury Constr. Corp., 460 U.S. 1, 24-25 (1983).
36. *AT&T*, 475 U.S. 643, 649 (1986).
37. *Id.* at 649-650.
38. 514 U.S. 938 (1995).
39. *Id* at 942.
40. *Id.*
41. *Id.* at 943.
42. *Id.*
43. *Id.*
44. *Id.*
45. *Id.*
46. *Id.* at 944.

B. Parties to the Agreement

An arbitration agreement is a contractual agreement between the parties; therefore, "a party cannot be required to submit to arbitration any dispute which he has not agreed to submit."[47] Although an arbitration agreement may not be read so broadly as to include parties and disputes that were clearly not meant to be a part of the agreement, "[i]t does not follow, however, that under the [Federal Arbitration] Act an obligation to arbitrate attaches only to one who has personally signed the written arbitration provision."[48] The Second Circuit has been especially broad in its application and has held that a nonsignatory may be bound to an arbitration agreement if so dictated by the ordinary principles of contract and agency law.[49] In *Thomson-CSF, S.A. v. American Arbitration Ass'n.*,[50] the Second Circuit recognized five traditional bases for binding nonsignatories to arbitration agreements.[51]

The first theory recognized in *Thomson* is that a nonsignatory may be bound to an arbitration agreement by way of the doctrine of incorporation by reference.[52] This doctrine would likely be applicable when the parties have an existing arbitration agreement which covers certain areas of disputes, and the parties later enter into a separate contractual agreement that references the arbitration agreement in a way that incorporates it into the subsequent contract.[53] This is generally a factual question to be determined by the fact finder in a particular case.[54]

The second basis for binding a nonsignatory party to an arbitration agreement is by using the conduct of the party to show that they assumed the obligation to arbitrate.[55] The primary question here is whether the parties at any time manifested an intent to be bound by an arbitration agreement as determined by the party's actions.[56]

A third means used by the Second Circuit to bind a nonsignatory party to an arbitration agreement is through veil piercing/alter ego theory.[57] Under this theory, the relationship between the parent and subsidiary corporations is considered to determine if it is sufficiently close so as to hold one legally accountable for the actions of the other.[58] In *Thomson*,[59] the court stated that the presence of a corporate relationship, standing alone, will not suffice to pierce the corporate veil and thereby allow the court to hold the nonsignatory bound to an arbitration agreement.[60]

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47. United Steelworkers of America v. Warrior & Gulf Navigation Co., 363 U.S. 574, 582 (1960).
48. Fisser v. International Bank, 282 F.2d 231, 233 (2d Cir. 1960); *see also* Deloitte Noraudit A/S v. Deloitte Haskins & Sells, 9 F.3d 1060, 1064 (2d Cir. 1993).
49. McAllister Bros., Inc. v. A & S Transp. Co., 621 F.2d 519, 524 (2d Cir. 1980).
50. 64 F.3d 773 (2d Cir. 1995).
51. *Id.*at 776.
52. *Id* at 777.
53. *Id.*
54. *See* Import Export Steel Corp. v. Mississippi Valley Barge Line Co., 351 F.2d 503, 505-06 (2d Cir. 1965); Matter of Arbitration Between Keystone Shipping Co. and Texport Oil Co., 782 F.Supp. 28, 31 (S.D.N.Y. 1992).
55. *Thomson*, 64 F.3d at 777.
56. *Id.*
57. *Id.*
58. *Id.*
59. *Id.*
60. *Id. See also* Keystone Shipping, 782 F.Supp. at 30-32.

Nevertheless, a court will pierce the corporate veil in two situations. First, in order to prevent fraud on the part of either of the corporations.[61] Second, when the parent dominates and controls the subsidiary corporation.[62] According to the court, one factor to consider in determining whether a parent corporation dominates or controls its subsidiary is whether the parent and the subsidiary demonstrate a virtual abandonment of separateness.[63] This may include such things as whether there are any separate bank accounts and offices, whether the corporations are run by the same officers, whether they deal in arms length transactions with each other and whether they are treated as separate profit centers.[64]

A final method for holding bound a nonsignatory to an arbitration agreement is by estoppel.[65] In *Deloitte Noraudit A/S v. Deloitte Haskins & Sells,*[66] a foreign accounting firm was held bound to an arbitration agreement that was part of a settlement permitting another accounting firm to use the name "Deloitte".[67] The court held that by knowingly using the name, and making use of the beneficial parts of the agreement, the accounting firm was estopped from avoiding the arbitration clause even though it had never signed the agreement.[68]

IV. INSTANT DECISION

On appeal, KenAmerican Resources, Inc., offered two arguments to support its position that it was not bound by the agreement entered into by Robert Murray and the Union to arbitrate any disputes arising from the Association Agreement, and specifically, the MOU.[69] KenAmerican's first argument was that it never agreed to the MOU and the district court judge erroneously gave deference to the arbitrator's determination that it had.[70] Its second argument was that the Association Agreement, as it was interpreted by the arbitrator, was in violation of the National Labor Relations Act.[71]

The court first discussed the issue of arbitrability of the dispute between the parties.[72] Relying on *AT&T Technologies, Inc. v. Communications Workers of America,*[73] the court observed that the well settled rule in federal courts is that when deciding issues of arbitrability, the court must decide *de novo* whether the parties

61. *Thomson,* 64 F.3d at 777; *see also* Carte Blanche Pte., Ltd. v. Diners Club Int'l, Inc., 2 F.3d 24, 26 (2d Cir. 1993).
62. *Thomson,* 64 F.3d at 777.
63. *Id.*
64. *Id. See also* Wm. Passalacqua Builders, Inc. v. Resnich Developers S., Inc., 933 F.2d 131, 139 (2d Cir. 1991).
65. *Thomson,* 64 F.3d at 778.
66. 9 F.3d 1060, 1064 (2d Cir. 1993).
67. *Id.*
68. *Id.*
69. *KenAmerican,* 99 F.3d at 1163.
70. *Id.*
71. *Id.* Specifically, the appellants argued that the arbitrator's interpretation violated § 8(e) of the National Labor Relations Act.
72. *Id.*
73. 475 U.S. at 649.

intended a particular dispute to be arbitrated unless the evidence unmistakably indicates that the parties intended the particular issue to be decided by the arbitrator.[74] In other words, if the parties are in disagreement as to whether they have entered into an arbitration agreement at all, then, the issue is to be resolved by the court without any deference to be given to the view of the arbitrators as to the arbitrability of the issue.[75]

The court in *KenAmerican* found that the parties were not in disagreement as to the above-stated precedent and rules.[76] The dispute stemmed from the fact that the district court judge determined that the Ohio Valley companies "clearly and unmistakably" agreed to submit to binding arbitration any dispute arising out of the Association Agreement and the MOU.[77] Upon this basis, the district court then gave "great deference" to the arbitrator's interpretation of the MOU, including the word "parent."[78] From this the district court judge found that KenAmerican was bound by the arbitration agreement entered into by the Union and Robert Murray.[79]

The court in this case completely rejected the reasoning of the district court and its ultimate conclusions.[80] This court found that the Ohio Valley companies' agreement to arbitrate certain disputes in no way indicated that KenAmerican also agreed to arbitrate similar disputes.[81] Moreover, the court found that the question of whether KenAmerican was bound to arbitrate disputes was itself an arbitrability issue to be decided by the court.[82] Therefore, the court determined any deference given to the arbitrator in making this determination was erroneous.[83]

In determining whether Murray's signing of the agreement bound KenAmerican to the agreement, the court applied federal common law of contracts.[84] The Union argued that KenAmerican was bound by the Association Agreement because Murray was acting as a principal of KenAmerican and, by signing the agreement on its behalf, obligated it to conform to the terms of the agreement.[85] The court focused on the "me too" agreement entered into in early 1993.[86] The court found that the "me too" agreement, which was very explicit and detailed in its descriptions, covered only the holdings of the Ohio Valley companies.[87] Because of the precise and explicit language used in the Association Agreement, the court determined that no

74. *KenAmerican*, 99 F.3d at 1163.
75. *See* National R.R. Passenger Corp. v. Boston & Maine Corp., 850 F.2d 756, 761 (D.C. Cir. 1988) (*quoting* Brotherhood of Teamsters and Auto Truck Drivers Local No. 70 v. Interstate Distributor Co., 832 F.2d 507, 510 (9th Cir. 1987)); A.T. Massey Coal Co., Inc. v. International Union, United Mine Workers of America, 799 F.2d 142, 146 (4th Cir. 1986), *cert. denied*, 481 U.S. 1033 (1987).
76. *KenAmerican*, 99 F.3d at 1163.
77. *Id.*
78. *Id.*
79. *Id.*
80. *Id.*
81. *Id.*
82. *Id.*
83. *Id.*
84. *Id.* at 1164.
85. *Id.*
86. *Id.*
87. *Id.*

other companies or entities were intended to be bound by the agreement --especially Murray personally or the KenAmerican companies.[88]

Therefore, the court concluded by finding that the district court had erred in deferring to the judgment of the arbitrator as to the arbitrability issue in this case.[89] Moreover, the court, based on the facts of the case, found that Murray's signing the Association Agreement in no way bound KenAmerican to the agreement or its obligation to arbitrate disputes arising from it.[90] The court found it sufficient that Murray took certain actions to modify the MOU and made subsequent modifications before he signed them to provide that he was acting as a limited agent of the Ohio Valley Companies.[91]

Because of the court's finding on the arbitrability issue it found it unnecessary to consider KenAmerican's second argument that the arbitrator's interpretation of MOU violated the National Labor Relations Act.[92]

V. COMMENT

Due to the decision in *AT&T Technologies, Inc. v. Communications Workers of America,*[93] the correct standard of review and the proper deference to provide the arbitrator on arbitrability issues were fairly easy to determine and apply to *KenAmerican*. Because the issue of this dispute was whether or not KRI was bound by the arbitration agreement, it is obvious that there is no unmistakable indication that the parties intended to arbitrate whether or not KRI was a party to the arbitration agreement.[94] The court in this case accurately recognized, unlike the district court, that the question of whether KenAmerican was bound to the arbitration agreement was the arbitrability issue in this case, unlike the district court.[95] Because it never expressly agreed to the MOU, it would be a far stretch to say that it "clearly and unmistakably"[96] agreed to be bound to the arbitration clause contained therein. As such, the court's de novo review of the arbitrability issue and its criticism of the district court's "great deference" to the arbitrator's determinations were logically and rationally decided.

The court's determination that KenAmerican was not bound by the arbitration agreement is not nearly as persuasive as it may have been if it had considered more of the factors set out in *Thomson-CSF, S.A. v. American Arbitration Ass'n.*[97] The court merely applied general contract principles in its determination and declined to look at other circumstances that may have indicated that it was understood that KenAmerican was to be bound. The court looked at the terms of the agreement that

88. *Id.*
89. *Id* at 1164-65.
90. *Id.*
91. *Id.*
92. *Id.* at 1165.
93. 475 U.S. 649.
94. *AT&T Technologies,* 475 U.S. at 649.
95. *KenAmerican Resources, Inc.,* 99 F.3d at 1163.
96. *AT&T Technologies,* 475 U.S. at 649.
97. 64 F.3d at 76.

stated the Ohio Valley Companies were included in the agreement and that nonsignatories were not to be bound to the agreement. Because nowhere in the agreement did it state that KRI or Murray himself was bound by the agreement, the court determined that there was no basis to conclude that they were bound. Although this might be a rational determination on these facts alone, there were other factors that, if considered, would have made the case appear less cut and dry.

First, the court failed to take notice of the fact that the MOU stated that each signatory was to sign as a limited agent of its nonsignatory parent and its nonsignatory subsidiaries.[98] This phrase alone would appear to indicate that KenAmerican was intended by the parties to be bound.

The court's analysis and reasoning did not consider many of the factors for holding a nonsignatory bound to an arbitration agreement as other circuits, especially the Second Circuit,[99] have. For a court to make a full and accurate determination of whether a party, especially a corporation owned by one of the parties actually signing the agreement on behalf of another of his corporations, is truly bound to an arbitration agreement, it is probably necessary to consider more than just the terms on the face of the agreement.

Although it may be that Murray took great efforts to exclude himself and other nonsignatories from the arbitration agreement, under the piercing of the veil approach,[100] the surrounding facts and circumstances may have indicated that, in fact, and for all objective purposes, he was also acting on behalf of both companies. The court in this case appeared to give little credence to the fact that Murray was the chief executive officer of both the Ohio Valley Companies and Coal Resources, Inc., which is the parent corporation of KenAmerican Companies and the apparent authority that comes with his position. The court did not analyze the nature of the operations of these corporations to determine if, in fact, they were essentially operating as a single entity. This may have proved fruitful given that all these companies appear to be operating in the coal industry.[101] Furthermore, it is not all that clear from the facts as presented in the case the KRI was not using Murray to act on its behalf. The modifications Murray makes to the agreements before signing them do not explicitly exclude KRI. Given the nature of his relationship with this company, it is likely that the Union considered KRI in fact to be a signatory to the agreement. The most blatant and convincing fact that this may have been the case is that both companies are controlled by the same individual.

Given the broad policy of the FAA favoring arbitration agreements, it appears that the court did not give enough consideration to factors outside the written agreement.[102]

Although it is not clear which is the best approach, the court's approach of solely looking at the face of an agreement to determine who is bound could have serious ramifications if followed widely. Although an entity may not have expressly intended to be bound by the terms of such an agreement, facts and circumstances

98. *KenAmerican*, 99 F.3d at 1162.
99. *Thomson*, 64 F.3d at 776.
100. *See supra* note 50.
101. *Id.*
102. *See supra* note 27.

outside the agreement may warrant holding them to it. The failure of the court to consider these surrounding circumstances will likely increase the amount of litigation by removing the applicability of an arbitration clause. Also, parties that reasonably rely on an agent's implied authority to act on behalf of another corporation might find that the agreement they thought they had reached is in fact meaningless as to particular parties. The court sacrifices broad application of arbitration agreements for clarity. As a consequence, in a situation such as this one where one individual has the capacity to represent more than one organization and there is a question as to who is to be bound, as always, it is best to err on the side of caution and explicitly state which parties are and are not bound.

VI. CONCLUSION

Although the District of Columbia Circuit has essentially drawn a clear line in an otherwise potentially muddy landscape, what is not so clear is that this is the best result. Circumstances other than the terms of the arbitration agreement itself may indicate that nonsignatories were in fact intended parties to an arbitration agreement. The court's failure to consider these factors may lead to unnecessarily restrictive interpretations of arbitration agreements that are not necessarily what the parties intended.

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