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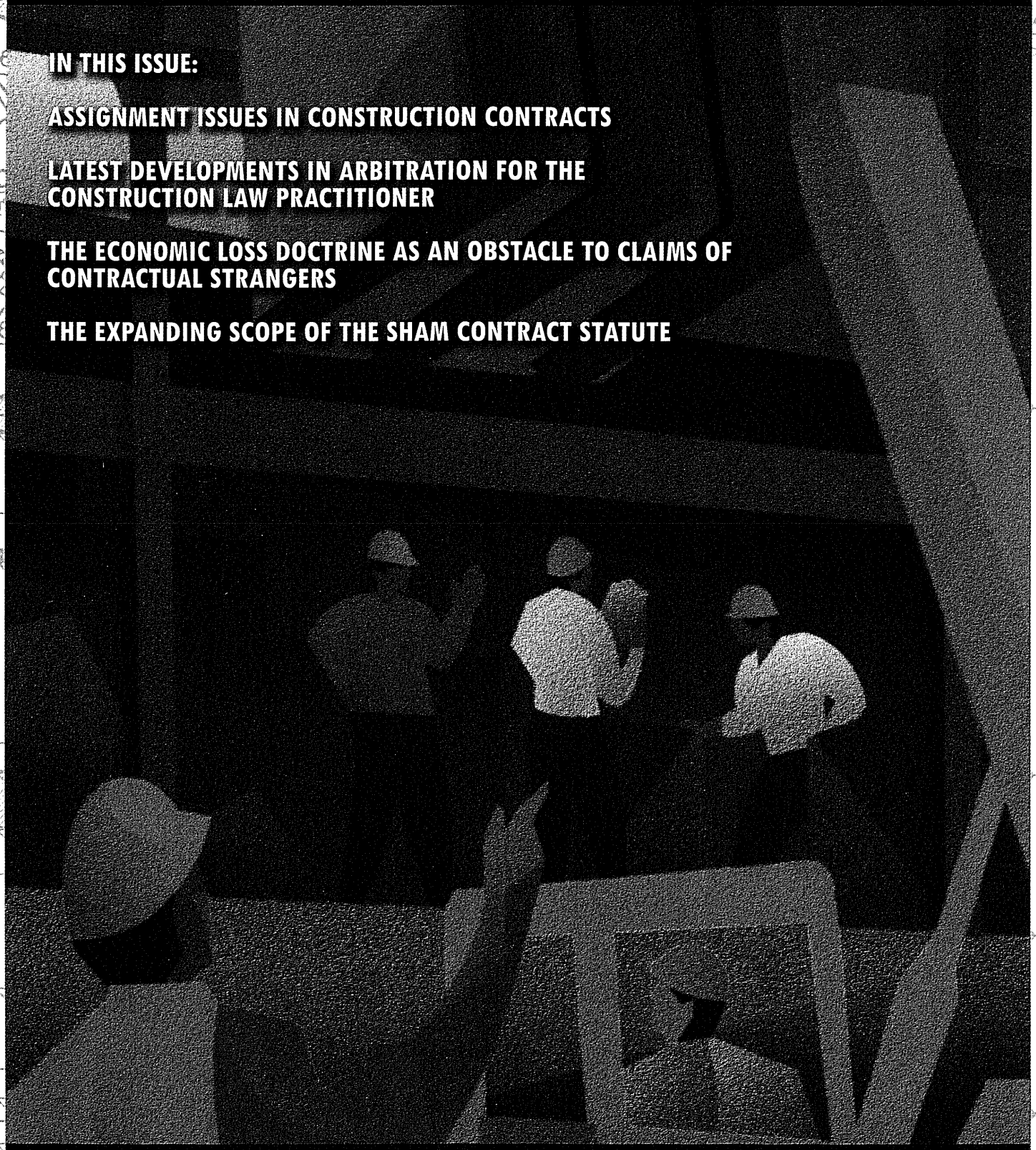

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CONSTRUCTION LAW JOURNAL

Volume 12, Number 2

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The Construction Law Journal is published semi-annually by the Construction Law Section of the State Bar of Texas with the assistance of students from South Texas College of Law. The purpose of the Journal is to publish well-researched, scholarly articles concerning matters of interest in the practice of Construction Law. The Journal Editors invite the submission, for publication consideration, of any original manuscript addressing topics within the area of Construction Law.

Anyone interested in submitting an article should contact one of the Editors, Gregory Cokinos at Cokinos, Bosien & Young, 1221 Lamar, 16th Floor Houston, Texas 77010 or (713) 535-5500 or Allison Snyder, Porter Hedges, 1000 Main Street, 36th Floor, Houston, Texas 77002 or (713) 226-6622. Manuscripts for publications must be typed double-spaced with footnotes. Articles should be submitted electronically in either WordPerfect or Word format.

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BY: LIONEL M. SCHOOLER[1]

LATEST DEVELOPMENTS IN ARBITRATION FOR THE CONSTRUCTION LAW PRACTITIONER

The law of arbitration in construction matters continues to evolve as demonstrated by recent judicial and administrative activity. This article reports on the latest developments, including cases addressing the following issues of interest:

·Rights of Non-Signatories to Compel Arbitration;

·Waiver of the Right to Compel Arbitration;

·Surety's Ability to Compel Arbitration of Performance Bond Issues;

·Requiring Pre-Hearing Discovery Before Deciding Arbitrability;

·Enforceability of Arbitration Agreements;

·Court-Referred Arbitration vs. Party-Agreed Arbitration;

·Dealing with Interplead Funds in Arbitration;

·Determining Collateral Estoppel Effect of Prior Award;

·Standards for Vacatur Based Upon Evident Partiality;

·Limits on Trial Court Authority to Award Attorney's Fees in Reviewing Arbitration Award; and

·Appealability of an Arbitration Order.

The article concludes with a discussion of the latest changes to the American Arbitration Association's Construction Industry Rules.

G. T. LEACH BUILDERS V. SAPPHIRE V.P.: NON-SIGNATORIES' RIGHT TO COMPEL ARBITRATION; WAIVER OF RIGHT TO ARBITRATE

By far, the most recent, significant arbitration development for construction law practitioners was the Texas Supreme Court's decision in *G. T. Leach Builders v. Sapphire V.P.*, which reiterated the limits on compelling arbitration by non-signatories, and clarified what litigation conduct can trigger waiver of the right to compel arbitration.[2]

BACKGROUND OF THE DISPUTE

A luxury condominium project being constructed by a developer was damaged by a hurricane midway through construction.[3] The conduct of work on the project was covered under an AIA A-111 and A-201.[4]

After attempting unsuccessfully to obtain insurance proceeds to cover its losses, the developer sued its insurance brokers, claiming that they allowed a builders' risk insurance policy to lapse prior to the hurricane. [5] Later, the insurance brokers designated as responsible third-parties, the general contractor, two subcontractors, an engineering contractor, and one of its principals. The developer then amended its pending claims to add as defendants all of those designated by the insurance brokers as responsible third-parties.[6]

CLAIMS OF THE PARTIES

Thus, there were pending disputes between the developer and the general contractor, as well as between the developer and several subcontractors. The subcontractors claimed that the developer had agreed to arbitrate its claims against them, as well as its claims against the general contractor.[7]

The agreement between the developer and the general contractor contained an arbitration clause.[8] The general

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[2] 458 S.W.3d 502, 531 (Tex. 2015).

[3] *Id.* at 509.

[4] *Id.*

[5] *Id.*

[6] *Sapphire V.P.*, 458 S.W.3d at 509.

[7] *Id.* at 510.

[8] *Id.*

contractor moved to compel arbitration pursuant to the terms of that agreement, but only after submitting to the court, where the lawsuit was pending, pretrial motions for a continuance and partial relief, and participating in discovery for six months.[9] The other defendants (the insurance brokers and subcontractors) moved to compel arbitration on the basis of the same arbitration clause (to which they were not signatories), and on the basis of the terms of the subcontractor agreements with the general contractor (which the developer never signed).[10]

The lower courts denied all motions to compel arbitration.[11]

THE RULING IN LEACH V. SAPPHIRE

A. COMPELLING ARBITRATION

The Texas Supreme Court reversed in part and affirmed in part the denial of the motions. [12]

As between the general contractor and the developer, the Court found a valid agreement to arbitrate, thus reversing the decision to deny the general contractor's motion to compel arbitration. Concerning the application of the contractual limitations period (i.e. any arbitration claim that was subject to a statute of limitations defense was barred if not initiated before running of the statute), the Court held that such an issue was for the arbitrators to decide.[13]

As between the developer and the subcontractors/ engineer, the Court found no agreement to arbitrate.[14] The arbitration agreement stated in part that an arbitration proceeding could include "parties other than the Owner, Contractor, a Subcontractor and other persons."[15] While the Court recognized that sometimes "a person who is not a party to an agreement can compel arbitration with one who is, and vice versa," the Court held that in this case, neither law nor equity required the developer to arbitrate its claims with the subcontractors.[16] The developer was not seeking direct benefits from the contract it signed with the general contractor as to others, or seeking direct benefits from the contract the subcontractors signed that the developer did not.[17]

Finally, the Court acknowledged that the agreement between the subcontractors and the general contractor did contain an enforceable arbitration clause, but held that that clause did not ***mandate*** arbitration of all disputes.[18]

B. REJECTING WAIVER OF THE RIGHT TO ARBITRATE

The Court next addressed the developer's contention that the general contractor, by its conduct, waived the right to compel arbitration.[19] The developer urged waiver because the general contractor: (a) filed a request for a continuance in the trial court and then agreed to a trial date; (b) filed motions for relief with the trial court; and (c) participated in six months of discovery, including designating expert witnesses.[20]

The Court rejected all of these contentions.[21]

Moving for a continuance and agreeing to a trial date did not constitute waiver, to the Court, because the motion was a joint motion, and because agreeing to a trial date, standing alone, did not qualify as an express waiver.[22] Furthermore, filing motions for relief before the trial court did not constitute waiver, to the Court, because these related to a compulsory counterclaim, a motion to transfer venue, a motion to designate responsible third parties, and a motion to abate, all of which the Court characterized as "defensive" in nature, and not a "substantial invocation of the judicial process" to an opponent's detriment.[23] Finally, the Court found that participating in the discovery process did not equate to waiver, because the general contractor only responded to discovery requests from other parties, and its initial serving of a request for disclosures only

[9] *Id.*
[10] *Id.*
[11] *Sapphire V.P.*, 458 S.W.3d at 510.
[12] *Id.* at 532.
[13] *Id.* at 516.
[14] *Id.* at 524.
[15] *Id.* at 525.
[16] *Sapphire V.P.*, 458 S.W.3d at 523.
[17] *See id.*
[18] *Id.*
[19] *See id.* at 514.
[20] *Id.*
[21] *Sapphire V.P.*, 458 S.W.3d at 514.
[22] *Id.*
[23] *Id.* at 513.

constituted seeking basic information about the case.[24]

WAIVER OF RIGHT TO ARBITRATE

The continuing controversy over waiver of the right to compel arbitration arose in *Tuscan Builders, L.P. v. 1437 SH6 L.L.C.*[25] The underlying case involved commercial construction. The owners sued the builder for construction defects in June 2012.[26] The builder responded to the lawsuit, but did not mention the existence of any arbitration clause.[27] In November 2012, the builder sued subcontractors who worked on the project, seeking indemnification (per the terms of each subcontractor's agreement).[28] The owners then also sued the subcontractors.[29] The subcontractors answered the lawsuit, requested a jury trial, and pursued written discovery; they also sought the right to inspect the property in question.[30]

Such an inspection occurred, and the builder participated in the inspection. In January 2013 (about two months before trial), the builder joined a request for a continuance "to conduct further discovery."[31] Trial was reset to September 2013. In June 2013, the builder and other parties moved to extend the mediation deadline to obtain additional information "concerning components" of the builder's damages claim through responses to interrogatories, answers to requests for admissions, and depositions of various builder representatives.[32]

In July 2013, after the discovery deadlines passed, the builder moved to compel arbitration.[33] The trial court denied the motion on the basis of waiver.[34] On appeal, the Houston First Court of Appeals affirmed.[35] While the court recognized a "strong presumption against waiver," it nevertheless determined that the builder knew all along about the existence and potential applicability of the arbitration clause, which was contained in an agreement it drafted.[36] The court further stated that it was conceivable the owners would not have known of or spotted such a clause because of the manner in which the main agreement incorporated another document that included the arbitration clause (a document not attached by the builder).[37] Finally, the court determined that the builder's extensive litigation actions enhanced its discovery efforts, to the det-riment of the owners.[38]

SURETY'S ABILITY TO COMPEL ARBITRATION OF PERFORMANCE BOND ISSUES

The Fort Worth Court of Appeals, in *Granite Re Inc. v. Jay Mills Contracting, Inc.*, evaluated the propriety of a surety's compelling arbitration as a non-signatory.[39]

In this case, a municipality hired a general contractor to oversee a project.[40] The general contractor hired a subcontractor to perform the work under a "Design/Build" subcontract.[41] This agreement contained an arbitration clause, which provided in part, that the general contractor or the subcontractor could be the "claimant" in arbitration.[42] The agreement further stated that "there were no third party beneficiaries to the agreement," and that the agreement would not cover a "claim for contribution or indemnity asserted by the general contractor in a suit against a party with whom the general contractor did not have an enforceable arbitration agreement."[43]

24 *Id.* at 514.
25 438 S.W.3d 717 (Tex. App.—Houston [1st Dist.] 2014, no pet.).
26 *Id.* at 719.
27 *Id.*
28 *Id.*
29 *Tuscan Builders, L.P.*, 438 S.W.3d at 720.
30 *Id.*
31 *Id.*
32 *Id.*
33 *Id.*
34 *Tuscan Builders, L.P.*, 438 S.W.3d at 720.
35 *Id.* at 720.
36 *Id.* at 721–22.
37 *Id.* at 722.
38 *Id.* at 723.
39 No. 02-14-00357-CV, 2015 WL 1869216 (Tex. App.—Fort Worth, Apr. 23, 2015, no pet.).
40 *Id.* at *1.
41 *Id.*
42 *Id.* at *2.
43 *Id.* at *4.

As part of the agreement, the subcontractor was to furnish a performance bond.[44] The performance bond incorporated the work order between the general contractor and the subcontractor that incorporated the terms of the agreement.[45] Work on the project began, but the general contractor later alleged that the subcontractor abandoned the project.[46] Therefore, the general contractor sued the subcontractor and the surety on the bond for completion costs and for damages claimed by the municipality.[47] The subcontractor then filed for bankruptcy, leaving only the surety as a defendant in the lawsuit.[48]

The surety moved to compel arbitration on the basis of the arbitration clause in the agreement.[49] The general contractor challenged this motion on the basis that there was no arbitration clause in the performance bond, and the general contractor only had an indemnity claim against the surety, not a claim within the scope of the agreement.[50] The trial court denied the surety's motion to compel arbitration, but the court of appeals reversed.[51]

The court of appeals found that the work order in question clearly incorporated the agreement, including the arbitration clause.[52] The general contractor's claim against the surety necessarily related to the subcontractor's failure to perform fully.[53] The court thus held that the general contractor's indemnity claim was not exempted from arbitration.[54]

OBTAINING PRE-HEARING DISCOVERY BEFORE ARBITRABILITY IS DECIDED; SCOPE OF ARBITRATION CLAUSE

The Dallas Court of Appeals confronted the issue of whether pre-hearing discovery can be conducted before arbitrability is determined in *In Re Susan Newell Custom Home Builders, Inc.*[55] This case arose from a construction dispute between a home owner and a homebuilder, who had an agreement which contained an arbitration clause.[56]

The homeowner sued the builder in court, alleging that the builder and certain of its employees (the principal and the bookkeeper) intentionally sent false invoices for payment.[57] The builder and the individuals sued in the lawsuit (none of the latter of whom were signatories to the agreement) all moved to compel arbitration.[58] The agreement containing the arbitration clause specified that "except for any equitable remedies," disputes arising out of or related to performance under the agreement would be arbitrated.[59]

The trial court granted the builder's motion to compel arbitration, but did not rule upon the individual defendants' companion motion to compel, holding instead that the parties would be entitled to conduct depositions of the individuals on the subject of their alleged "fraudulent or criminal conduct."[60]

The individual defendants sought relief by mandamus, which the court of appeals granted.[61] The court found that the discovery in question went directly to the merits of the claims, not to the issue of arbitrability.[62] It ruled that the issue of the scope of the arbitration clause (that is, whether or not to require arbitration of claims of fraud) was for the arbitrator to decide.[63] The trial court was therefore directed to stay, rather than dismiss, the claims pending arbitration.[64]

44 *Jay Mills Contr., Inc.*, 2015 WL 1869216 at *2.
45 *Id.*
46 *Id.*
47 *Id.*
48 *Id.*
49 *Jay Mills Contr., Inc.*, 2015 WL 1869216 at *2.
50 *Id.*
51 *Id.*
52 *Id.* at *4.
53 *Id.*
54 *Jay Mills Contr., Inc.*, 2015 WL 1869216 at *5.
55 420 S.W.3d 459 (Tex. App.—Dallas 2014, no pet.).
56 *Id.* at 460.
57 *Id.*
58 *Id.*
59 *In Re Susan Newell*, 420 S.W.3d at 461.
60 *Id.* at 460.
61 *Id.*
62 *Id.* at 461–62.
63 *Id.* at 462.
64 *In Re Susan Newell*, 420 S.W.3d at 463.

ENFORCEABILITY OF AGREEMENT TO ARBITRATE: BATTLE OF THE DOCUMENTS

In *TRC Environmental Corp. v. LVI Facility Services., Inc.*, the Fifth Circuit confronted the issue of the enforceability of an agreement to arbitrate in a construction dispute.[65]

A contractor was hired to decommission a power plant.[66] The contractor hired a subcontractor to complete various tasks, including asbestos removal.[67] The agreement between these two parties called for the resolution of disputes "in accordance with the Project Agreement," if a dispute arose under Contract Documents (which contained no arbitration clause).[68] If the dispute between the parties did not so arise, then the parties were to make a good faith effort at mutual resolution; failing that, the parties were to decide disputes "by alternate dispute resolution procedures as mutually agreed," and in the absence of such agreement, the dispute would be "decided by an arbitrator per Construction Industry Rules."[69] A dispute arose over the subcontractor's performance, and in response to a lawsuit filed by the general contractor, the subcontractor moved to compel arbitration.[70] The district court held that the claim in question arose under the Contract Documents, which did not require arbitration.[71]

On appeal, the Fifth Circuit affirmed this ruling.[72] It found that for the particular dispute in question, there was no contractual requirement to arbitrate.[73]

ENFORCEABILITY OF AGREEMENT TO ARBITRATE: INCORPORATION OF ARBITRATION CLAUSE

The Fourteenth Court of Appeals adjudicated a dispute arising from a commercial construction project in *LDF Construction, Inc. v. Texas Friends of Chabad Lubavitch, Inc.*[74] In this case, a property owner hired a general contractor to perform remodeling and repairs to a commercial building.[75] The agreement between the parties consisted of AIA Doc Nos. A101 and A201.[76] Although there was no arbitration clause in the A101, the A201 contained Section 4.6 pertaining to resolving disputes in arbitration after first trying to mediate.[77] The contract documents specifically incorporated the A201.[78]

A dispute arose concerning the quality of the work performed.[79] The property owner sued the contractor and, in response, the contractor moved to compel arbitration.[80] The property owner objected to arbitration on the basis that it had not seen or agreed to anything about arbitration in the A201 document until after the lawsuit was filed, nor had it been provided anything from the contractor indicating that any dispute was subject to arbitration.[81]

The trial court denied the motion, citing the lack of sophistication of the property owner, the fact that the contractor had drafted the agreement, the absence of any binding arbitration clause within the contract itself, and the lack of any incorporation of the arbitration clause in the contract.[82]

65 612 Fed. Appx. 759 (5th Cir. 2015).
66 *Id.* at 760.
67 *Id.*
68 *Id.*
69 *Id.*
70 *TRC Env't Corp.*, 612 Fed. Appx. at 760.
71 *Id.* at 760.
72 *Id.* at 762.
73 *Id.*
74 459 S.W.3d 720 (Tex. App.—Houston [14th Dist.], no pet.).
75 *Id.* at 723.
76 *Id.* at 726.
77 *See id.*
78 *Id.*
79 *See LDF Constr.*, 459 S.W.3d at 723.
80 *Id.*
81 *See id.* at 725–26.
82 *Id.* at 727–28.

The court of appeals reversed this decision.[83] It held that the contract in question specifically incorporated the A201, including the subject arbitration clause.[84] The court also held that the contract did not need to mention the arbitration clause in particular within the four corners of the contract, nor did there need to be attached to it a copy of the arbitration clause.[85] It found the alleged ignorance or lack of sophistication of the property owner irrelevant, because of the doctrine of enforcing an agreement based upon "knowing and accepting what one signs."[86] Finally, the court stated that there was no evidence that the contractor had actually "drafted" something as opposed to merely using a form, and there was not any evidence that the contractor tricked or misled an allegedly unsophisticated property owner.[87]

IMPACT OF COURT-REFERRED ARBITRATION UNDER TEXAS CIVIL PRACTICE AND REMEDIES CODE CHAPTER 154

In a suit involving repairs to a condominium, *Beldon Roofing Company v. Sunchase IV Homeowners' Association, Inc.*, a homeowners' association hired a roofing company to repair hurricane damage.[88] The agreement consisted of three documents, each of which specified that any dispute between the parties would be arbitrated under the Federal Arbitration Act in accordance with the American Arbitration Association Construction Industry Rules.[89]

The roofing company later asserted that it had not been paid for its work on the project, and filed suit in 2009 to recover the sums it claimed to be owed.[90] The lawsuit requested that the trial court "order and administer arbitration of claims" to the extent set forth in the applicable agreement.[91] The homeowners' association denied the veracity of the account, claimed that the arbitration clause was not supported "by independent consideration," and countersued for damages.

Eighteen months later (in December 2010), the parties entered into an agreed order, signed by the court, which stated that "issues raised, including issues of arbitrability, would be resolved by and referred to arbitration pursuant to Texas Civil Practice and Remedies Code Chapter 154."[92] The order also stated that the Texas Rules of Civil Procedure would apply to such proceeding.[93] The trial court later (in September 2011) appointed another judge to conduct the arbitration.[94]

Nothing happened until May 2013, when, at a status hearing, the trial court set a hearing for the arbitration in November 2013.[95] Eventually, the roofing company moved to require arbitration in accordance with the agreement (i.e. selection of three neutral construction industry experts to serve as a panel pursuant to the American Arbitration Association's Construction Industry Rules).[96] A responsible third party (the roofing materials manufacturer) was then added to the case, the roofing company dismissed its claims, and the homeowners' association was realigned as a plaintiff, suing the two defendants.[97]

In May 2014, the roofing company again sought to compel arbitration pursuant to the agreement, and eventually requested either arbitration or a jury trial.[98] The arbitrator previously "designated" and assigned by the trial court denied this request.[99] The court of appeals affirmed this ruling.[100]

The court noted that Chapter 154 of the Texas Civil Practice and Remedies Code provides for non-binding arbitration, authorizing a court to designate such a

83 *Id.* at 731.
84 *LDF Constr.*, 459 S.W.3d at 731.
85 *Id.*
86 *Id.* at 732.
87 *Id.*
88 No. 13-14-00343-CV, 2015 WL 3523157 (Tex. App.—Corpus Christi June 4, 2015, no pet.) (not designated for publication).
89 *Id.* at *1.
90 *Id.*
91 *Id.*
92 *Id.*
93 *Beldon Roofing Co.*, 2015 WL 3523157 at *1.
94 *Id.*
95 *Id.* at *2.
96 *Id.*
97 *Id.*
98 *Beldon Roofing Co.*, 2015 WL 3523157 at *2.
99 *Id.*
100 *Id.* at *8.

procedure, and affording a party ten days to object to such a referral.[101] The parties to such a proceeding may stipulate that it will be "binding."[102]

In this case, the roofing company had not objected within ten days to participate in the proposed process but, instead, had signed what amounted to a Rule 11 agreement to participate in the Chapter 154 arbitration proceeding.[103] The court therefore determined that the Texas Arbitration Act (Texas Civil Practice and Remedies Code Chapter 171) did not govern this proceeding, because of its significant differences with Chapter 154.[104] Even so, the court held that the roofing company could not withdraw from the Chapter 154 process once having agreed to it.[105] Finally, the court held that the Federal Arbitration Act did not preempt an agreement between the parties to arbitrate using procedures different from Federal Arbitration Act procedures.[106]

DEALING WITH INTERPLEAD FUNDS IN ARBITRATION

In a dispute over interplead funds, the United States Court of Appeals for the Fifth Circuit addressed a significant arbitration issue in *Auto Parts Manufacturing Mississippi, Inc. v. King Construction of Houston, L.L.C.*, involving the interplay between arbitration and interpleader, and the extent to which the parties' involvement in the litigation process constituted a waiver of the right to compel arbitration.[107]

DISPUTE BETWEEN LANDOWNER AND GENERAL CONTRACTOR

In this factually-convoluted case, a landowner contracted with a general contractor to construct an auto parts factory in Mississippi.[108] The general contractor contracted with a subcontractor to provide services and materials for the project.[109] A dispute arose between the general contractor and the subcontractor over the quality of work performed and payments allegedly due.[110] When the dispute could not be informally resolved, the subcontractor formally notified the landowner of the payment dispute, thus requiring the landowner to hold (retain) disputed funds under the terms of its contract with the general contractor.[111]

In response to this notice, the landowner initiated an interpleader action in federal court in Mississippi against the general contractor and the subcontractor, asking the court to permit the tender of funds into the court registry and to enjoin any party from seeking further recovery against it for any of the disputed funds.[112]

DISPUTE BETWEEN GENERAL CONTRACTOR AND ITS COUNSEL

The general contractor's attorney then sued the landowner in California, alleging that the general contractor's failure to pay legal fees owed to the lawyer was caused by the landowner's action.[113] The attorney asserted a lien so as to prevent payment of any of the disputed funds to the general contractor, and further claimed that his lien "took priority over any other lien claim" against the general contractor.[114] The engagement agreement between the attorney and the general contractor required arbitration of any fee dispute.[115]

ARBITRABILITY OF DISPUTE

The landowner succeeded in getting the California action stayed, and moved successfully to join the attorney to the interpleader action in Mississippi, after which the landowner was discharged from the case.[116] The general contractor and the attorney then sought to suspend the remaining interpleader proceeding in Mississippi so that

101 *See id.* at *4.
102 *Id.*
103 *Beldon Roofing Co.*, 2015 WL 3523157 at *4.
104 *See id.*
105 *See id.* at *6–7.
106 *Id.* at *8.
107 782 F.3d 186 (5th Cir. 2015).
108 *Id.* at 188.
109 *Id.*
110 *Id.*
111 *Id.*
112 *Auto Parts Mfg. Miss., Inc.*, 782 F.3d at 188.
113 *Id.* at 189.
114 *Id.*
115 *Id.*
116 *Id.*

their dispute could be arbitrated.[117] However, the district court denied the motion to compel arbitration, because these two parties had substantially invoked the judicial process to the detriment of the subcontractor, given that the subcontractor had not agreed to arbitrate any dispute, and that the dispute in question was beyond the scope of the arbitration clause.[118]

On appeal, the Fifth Circuit affirmed.[119] The court principally focused upon the fact that the entire interpleader dispute could not be compelled to arbitration, since the subcontractor had never agreed to arbitrate with the general contractor; and since the landowner had likewise never agreed to arbitrate any dispute, the court further found that the district court had properly accepted the disputed funds and discharged the landowner.[120] Thus, the court ruled that the only remaining issue, the adjudication of entitlement to the interplead funds, was left to the district court.[121]

COLLATERAL ESTOPPEL EFFECT OF PRIOR ARBITRATION AWARD

The First Court of Appeals, in *Casa Del Mar Association, Inc. v. Gossen Livingston Associates, Inc.*, considered the issue of the collateral estoppel effect of a prior arbitration award.[122]

A dispute arose between a condominium association and an architectural firm over the proposed design of a building.[123] In a prior arbitration, the homeowners' association sued the architect and contractor, but the arbitration panel dismissed the architect on the basis that the architect had not agreed to arbitrate.[124] That arbitration panel further held that the complained of construction problems were not construction deficiencies or design defects but rather, primarily the result of choices made by the association.[125] The arbitration panel thus held the association 70% liable and the contractor 30% liable on the issues in question.[126]

In the subsequent lawsuit filed by the association against the architectural firm, the trial court granted summary judgment for the architectural firm on the basis of the decision in the prior arbitration.[127] The court of appeals affirmed this judgment.[128] The court found that the prior arbitration award had conclusive effect on the parties as to all matters of fact and law submitted to the arbitrators, unless the issue was not actually decided or not necessary to the award.[129]

The court held that in the prior arbitration, the panel had found that the architectural firm's design was not used, and that the contractor was partly responsible for construction issues.[130] The court thus held that the determination of these ultimate issues in favor of the architectural firm barred the subsequent lawsuit by the association.[131]

VACATUR BASED UPON EVIDENT PARTIALITY; CHALLENGE TO ARBITRATOR DISCLOSURES

In a construction case, the Dallas Court of Appeals confronted the issue of evident partiality of an arbitrator in *Meritage Homes, L.L.C. v. Ruan.*[132] The underlying case involved a homeowner/homebuilder dispute.[133] In response to the homeowner's lawsuit complaining about the square footage of the construction, the homebuilder moved to compel arbitration.[134]

An arbitration was conducted pursuant to the American Arbitration Association's (AAA) Construction Industry Rules, but was not administered by the AAA.[135] The

117 *Auto Parts Mfg. Miss., Inc.*, 782 F.3d at 189.
118 *Id.* at 189–90.
119 *Id.* at 198.
120 *See id.* at 196–98.
121 *Id.* at 198.
122 434 S.W.3d 211 (Tex. App.—Houston [1st Dist.] 2014, pet. denied),
123 *Id.* at 214.
124 *Id.* at 216.
125 *Id.*
126 *Id.* at 217.
127 *Casa Del Mar Ass'n, Inc.*, 434 S.W.3d at 218.
128 *Id.* at 222.
129 *Id.* at 221–22.
130 *Id.* at 222.
131 *Id.*
132 No. 05-13-00831-CV, 2014 WL 4558772 (Tex. App.—Dallas Sept. 16, 2014, pet. denied).
133 *Id.* at *1.
134 *Id.*
135 *Id.*

arbitrator indicated at the beginning of the hearing (which occurred twenty months after the initial management conference) that he had met counsel for the homeowners before, and conducted arbitrations in which that counsel represented claimants.[136] The homebuilder's counsel sought further information in the wake of this disclosure, but only inquired if the prior arbitrations involved "square footage issues."[137] The arbitrator replied in the negative.[138] The homebuilder's counsel then announced "no objection."[139]

The arbitrator then proceeded to conduct the hearing, and later entered an award in favor of the homeowners, who moved to confirm the award.[140] The homebuilder's counsel inquired of the arbitrator, after the award had been entered, about the nature of his prior contacts with the homeowners' counsel.[141] The arbitrator responded that since the American Arbitration Association was not administering the case, he considered that its disclosure rules were waived.[142] Nevertheless, he disclosed that he had conducted at least one arbitration and one mediation with the homeowners' counsel.[143]

The homebuilder thus challenged the award on the basis of evident partiality, claiming that the arbitrator failed to disclose all prior professional dealings with homeowners' counsel, and particularly challenging the arbitrator's "last-minute, untimely disclosure" at the beginning of the hearing.[144] The trial court denied the homebuilder's challenge and confirmed the award.[145]

The court of appeals affirmed.[146] It ruled that the failure of the arbitrator to provide details at the beginning of the hearing about his prior contacts with homeowners' counsel did not equate to evident partiality.[147] It declined to construe the arbitrator's conduct here as equivalent to evidently partial arbitrator conduct in prior cases involving wholesale failures to make disclosures, or to reveal the existence of long-standing social and professional relationships with counsel.[148]

LIMITS ON COURT AUTHORITY TO AWARD ATTORNEY'S FEES

In a residential construction defect case, *D.R. Horton Texas, Ltd. v. Bernhard*, the parties had an agreement which contained an arbitration clause stating that, "Each party shall bear the fees and expenses of its counsel."[149] In the arbitration that followed, the arbitrator granted relief to the homeowners, including an award of attorney's fees.[150]

The trial court upheld the award and then included in its judgment a further award of attorney's fees in the event of an appeal.[151] The court of appeals modified and affirmed the judgment as modified.[152] The court of appeals first ruled that the arbitrator did not exceed his authority by awarding attorney's fees to the homeowners.[153] The homeowners sought to recover attorney's fees in the original lawsuit filed, and the builder did not except to the issue when seeking to compel arbitration.[154] To the court, the arbitrator determined legitimately that under the Residential Construction Liability Act, attorney's fees constituted economic damages, and therefore concluded that the issue had been properly submitted to the arbitrator in accordance with Section 171.048 of the Texas Arbitration Act.[155]

However, the court felt differently about the trial

136 *Id.*

137 *Ruan*, 2014 WL 4558772 at *1.

138 *Id.*

139 *Id.*

140 *Id.*

141 *Id.*

142 *Ruan*, 2014 WL 4558772 at *2.

143 *See id.* at *1–2.

144 *Id.* at *2.

145 *Id.* at *3.

146 *Id.* at *8.

147 *Ruan*, 2014 WL 4558772 at *7.

148 *Id.* at *2–3, *5–6 (addressing the reasoning of the trial court first, then explaining its own reasoning).

149 423 S.W.3d 532, 533 (Tex. App.—Houston [14th Dist.] 2014, pet. denied).

150 *Id.*

151 *Id.*

152 *Id.* at 537.

153 *Id.* at 535–36.

154 *Bernhard*, 423 S.W.3d at 535.

155 *Bernhard*, 423 S.W.3d at 535–36 ("The [Residential Construction Liability Act] authorizes an award of attorney's fees for the Bernhards as economic damages, thus satisfying a condition for the arbitrator to award attorney's fees."); *see* Texas Arbitration Act, TEX. CIV. PRAC. & REM. CODE ANN. § 171.048(c); *see also* TEX. PROP. CODE ANN. § 27.004(g)(6) (West 2013).

court's inclusion of an award of attorney's fees on appeal. To the court, that ruling had the effect of impermissibly modifying the arbitration award by providing for additional relief.[156] The court held there was no basis under the Texas Arbitration Act to modify an award in that manner.[157]

APPEALABILITY OF AN ARBITRATION ORDER IN A CONSTRUCTION CASE

In *Southwestern Electric Power Company. v. Certain Underwriters at Lloyds of London*, the United States Court of Appeals for the Fifth Circuit recently addressed an important issue of the appealability of a question of arbitrability in the context of a construction insurance coverage dispute.[158]

The insured sued the insurer, contending that it had purchased insurance in connection with construction of a power plant.[159] The insurer moved to compel arbitration under the United Nations Convention on Recognition and Enforcement of Foreign Arbitral Awards.[160] The district court granted the motion to compel arbitration pursuant to the Convention and administratively closed the case.[161] The insured then lodged an appeal to the Fifth Circuit, challenging the granting of the motion to compel arbitration.[162]

The Fifth Circuit dismissed the appeal, stating that it lacked appellate jurisdiction.[163] It first noted that the appellant did not seek discretionary review of the decision below pursuant to 28 U.S.C. Section 1292(b).[164] It noted that the Convention specifically precluded an appeal from an interlocutory order.[165] The court then addressed a central issue raised by the insured, which was whether the court could exercise appellate jurisdiction in light of the fact that the district court had closed the case administratively and, thus, had issued a "final judgment," cloaking the decision below with finality for purposes of 28 U.S.C. Section 1292(b).[166]

The Fifth Circuit rejected the insured's theory. Instead, the court held that the order in question was interlocutory because the district court had only closed the case "pending arbitration," that is, the district court had clearly signaled that the case could be reopened later once the arbitration process was completed.[167] The court therefore decided that appellate jurisdiction was lacking.[168]

CHANGES TO THE AMERICAN ARBITRATION ASSOCIATION'S CONSTRUCTION ARBITRATION RULES

Given the frequency with which construction parties include the American Arbitration Association Construction Industry Rules in arbitration clauses, the following chart highlights recent changes to those Rules that will potentially have an impact upon construction practitioners in arbitration.[169]

156 *Bernhard*, 423 S.W.3d at 536.
157 *Id.* at 536–37.
158 772 F.3d 384 (5th Cir. 2014).
159 *Id.* at 385.
160 *Id.* (citing Convention on Recognition and Enforcement of Foreign Arbitral Rewards, 9 U.S.C. §§ 201–307 (2014)).
161 *Sw. Elec. Power Co.*, 772 F.3d at 385.
162 *Id.* at 385–86.
163 *Id.* at 388.
164 *Id.* at 386–387.
165 *Id.* at 386–87 (citing 9 U.S.C. § 208).
166 *Sw. Elec. Power Co.*, 772 F.3d at 387.
167 *Id.*
168 *Id.* at 388.
169 JAMS Construction Arbitration Rules can be found at www.jamsadr.com/rules-construction-arbitration; CPR Construction Rules can be found at www.cpradr.org.

Rule	Topic	Comment
R-7	Consolidation/ Joinder	Given the complex relationships frequently involved in construction arbitration, the AAA now provides that requests for consolidation or joinder must be submitted before appointment of the "Merits" Arbitrator. Such a request must be accompanied by supporting reasons provided to all parties to the arbitration and to all potential parties sought to be joined. Parties to the arbitration then have ten days after receipt by which to respond to such request. Failure to respond can be deemed a waiver of any objection to joinder. If the joinder pertains to a potential party that is not a party to an ongoing arbitration, then the party requesting joinder must comply with Rule 4(a) as to service of the claims. Finally, the AAA now has authority to stay any other arbitration that will be affected by joinder.
R-10	Mediation	If a case contains a claim or counterclaim exceeding $100,000, the parties are required to mediate their dispute (whether through the AAA or as otherwise agreed). If the agreement does not mandate mediation, a party to the arbitration may unilaterally opt out of the mediation requirement.
R-19	Disclosure	A party's failure to disclose a potential conflict can result in the waiver of such objection to service by the Arbitrator.
R-23	[New] Preliminary Management Hearing	The need for effective case management has prompted the AAA to update the tools available to arbitrators to achieve such a goal, commencing with the arbitrator's authority to schedule as promptly as possible a preliminary management hearing, to which the parties and their representatives can attend, either in person or by telephone. The Rule incorporates a checklist of 20 items potentially to be addressed during the preliminary hearing depending upon the complexity of the dispute. The Rule further requires the Arbitrator to issue a written order as to any decisions or agreements reached during this hearing.
R-24	Pre-Hearing Exchange and Production of Information	Paragraph (b)(1) addresses the exchange of documents in a party's possession or control on which they intend to rely and (b)(2) requires parties to update their exchanges of such documents as their existence becomes known to them. Paragraph (b)(3) requires parties to respond to reasonable document requests if the documents are in their possession or custody, or it is reasonable to assume that such documents exist; are not readily available to the other party; and are relevant and material to the outcome of the dispute. Paragraph (b)(4) addresses document exchange or production when these materials are monitored in electronic format, and provides that such information should be produced in the manner most convenient and economical for the producing party.
R-25	Enforcement Power of the Arbitrator	To ensure a fair and efficient process, new Rule R-25 addresses orders involving confidential information and documents, imposes reasonable search parameters for electronically stored information, and allows for allocating costs of document production. The Rule further authorizes the power to address willful non-compliance with any order, and the power (consonant with applicable law) to issue other types of enforcement orders.
R-32	Absence of Party	This new Rule permits the arbitrator to proceed in the absence of a party or a representative, so long as due notice has been provided. Even with such absence, the arbitrator is precluded from making an award solely on the basis of this default, but rather must require the present party to submit sufficient evidence in a process deemed appropriate by the arbitrator.

Rule	Topic	Comment
R-34	Dispositive Motions	This new Rule authorizes an arbitrator to permit such motions that dispose of all or part of a claim, but such motions must be submitted in writing.
R-36	Evidence by Affidavit; Post-Hearing Filing of Evidence	An arbitrator is now empowered to disregard a written statement or expert report where such witness fails to appear for examination at the hearing. The Rule further empowers the Arbitrator, at the request of a party, to provide for compulsion of or accommodation of attendance by a witness or expert who cannot appear at the hearing.
R-39	Emergency Measures of Protection	This new Rule authorizes the AAA to appoint within 24 hours an arbitrator specifically appointed to address any written request for emergency interim relief, applicable to any contract entered into as of the effective date of the amendments.
R-45	Streamlined Pre-Hearing Determinations	R-45(b) now authorizes the Chair of the Panel (absent objection) to resolve or to designate to another panelist to resolve disputes related to the exchange of information or procedural matters without the need for full participation by all panelists.
R-60	Sanctions	This new Rule authorizes an arbitrator to order sanctions for failure to comply with an order or obligations under the Rules, provided that any sanction cannot be in the form of a default award, and further provided that if the sanction limits a party's participation in the proceeding, the arbitrator must explain in writing the reason for the order. The Rule further affords to any party subject to a sanction request the right to respond before sanctions can be imposed.
F-1	Fast Track	Cases involving claims of $100,000 or less can now be slated for "fast track" treatment; and cases involving disputes up to $25,000 can now be presumed to be eligible for a "documents only" hearing.

CONCLUSION

Recent cases have revealed the following developments in the arbitration of construction-related disputes: the extent to which non-signatories can compel arbitration; the waiver of the right to compel arbitration; the procedures and the timetable to be followed in adjudicating arbitrability; the extent to which an arbitration process can resolve the disposition of interplead funds; the impact of a prior award on a present dispute; and the limits of post-proceeding review of an arbitration award.

It is anticipated that courts will continue to grapple with the challenges presented by non-signatories seeking to compel arbitration by claims of waiver, attacks on the involvement of the neutral in the process, and the limits of post-proceeding review of an award, particularly a trial court's ability to interject additional relief into a judgment or otherwise attempt to revise the outcome of an award.