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# Fla. Case Provides Practicum On Arbitrability

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The Middle District of Florida recently, in U.S. Surety Co. v. Edgar, provided a practicum on arbitrability jurisprudence under the Federal Arbitration Act, answering key questions about (1) whether nonsignatories to an arbitration agreement may be bound to the terms of the agreement, (2) the proper scope of an arbitration agreement, and (3) the feasibility of proceeding simultaneously with arbitrable and nonarbitrable claims in their respective fora. In so doing, the Edgar court reminded that arbitration under the FAA "is a matter of consent, not coercion, and parties are generally free to structure their arbitration agreements as they see fit." **The Edgar Facts**
The Edgar case revolved around an unsuccessful aquatic ecosystem restoration project awarded by the U.S. Army Corps of Engineers to plaintiff Paul Howard Construction Co., a marine and dredging construction company. To complete the project, PHCC contracted with defendant Global Egg Corp., which, as a contractor specializing in dredging activities, agreed to provide equipment and manpower to perform the dredging and related work (Global agreement). That agreement provided for arbitration of "All claims, disputes and other matters in question between Global Egg and Howard ...." As part of its undertaking, PHCC obtained a performance bond from plaintiff U.S. Surety Co., and, in addition, PHCC agreed to pay Global in exchange for Global furnishing the necessary equipment to the project site (purchase order agreement). Global, in turn, rented the equipment from an equipment vendor. Within a year of beginning work, Global fell behind on payments to its vendor, and, based on anemic dredging progress, the Corps issued a stop work order and default notice to PHCC. Global also accused PHCC of breaching the Global agreement due to failures to make payments under the purchase order agreement (termination notice), and, in lieu of terminating the Global agreement, sought as a workout both access to necessary dredging equipment and payment under PHCC's performance bond of unpaid amounts due under the purchase order agreement. Around this same timeframe, the state of New York dissolved Global's corporate charter, unbeknownst to PHCC and USSC, due to tax law violations. USSC, as surety, then entered into a settlement agreement with Global concerning the Global-PHCC dispute, under which USSC paid money directly to Global and to Global's equipment vendor to purchase for Global's use a dredge and related equipment. Global's now-former president, Joseph Edgar, signed in his "official" capacity. Despite these efforts, the corps terminated PHCC's contract for the restoration project and directed USSC to devise a responsive plan for completion of the work under the performance bond.

Meanwhile, Edgar and Global began discreetly removing the dredging and related equipment at the project site without USSC's knowledge or consent, and PHCC and USSC ultimately filed an eight-count complaint in federal court. The USSC claims revolved around the validity of the settlement agreement and the ownership rights of the equipment purchased pursuant to that agreement — fraud in the inducement, negligent misrepresentation, rescission, personal liability, civil theft and conversion. The PHCC claims involved the rights and obligations under the Global agreement — breach of contract and indemnity. **The Edgar Backdrop: "[A]rbitration is Strictly a Matter of Contract."**

Long before Edgar, the judiciary viewed arbitration agreements as ousting the courts of jurisdiction and, thus, often refused to enforce them. The FAA memorializes a legislative intent to quash such judicial hostility and to recognize the "desirability of arbitration as an alternative to the complications of litigation." To that end, Congress designed the act principally "to place arbitration agreements 'upon the same footing as other contracts.'" In reviewing the defendants' motion to compel arbitration and stay proceedings, the Edgar court naturally assumed the FAA's contract-centric approach, first highlighting that "written agreements to arbitrate controversies … shall be valid, irrevocable and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract." The court then held that the Global agreement's arbitration clause was not enforceable against nonsignatory USSC under ordinary state-law contract principles and that, likewise, the scope of the arbitration clause was unambiguously restricted to resolving disputes between PHCC and Global. **Nonsignatory Parties**

After granting the motion to compel arbitration with respect to PHCC and Global — both signatories to the Global agreement — the court addressed whether the arbitration clause could also be enforced against USSC in light of its status as a nonsignatory to that agreement. "[A] party ordinarily will not be compelled to arbitrate unless that party has entered into an agreement to do so,"[8] the court reiterated, unless some other principle of contract or agency law would permit it, such as (1) incorporation by reference, (2) assumption, (3) agency, (4) veil-piercing or alter-ego, or (5) estoppel. Although the defendants did not explicitly argue that any such "other principle" existed, they did attempt to bootstrap the incorporation by reference doctrine by asserting that the settlement agreement referenced the termination notice, which, in turn, referenced the Global agreement. The court rejected this argument, holding that "[a] document may be incorporated by reference in a contract if the contract specifically describes the document and expresses the parties' intent to be bound by its terms." Here, the settlement agreement had "incorporated by reference" the termination notice, but not the Global agreement (and its arbitration clause). **The Scope of the Arbitration Clause**

The defendants also argued, to no avail, that the broad scope of the arbitration clause justified applying it to USSC. To this, the court cited Eleventh Circuit precedent holding that "broad arbitration clauses cannot be extended to compel parties to arbitrate disputes they have not agreed to arbitrate." The court concluded that the plain language of the arbitration clause unambiguously limits the scope of its application only to disputes "between Global Egg and Howard." The FAA policy favoring arbitration in the face of ambiguity is irrelevant if the express language of the arbitration

clause thus restricts its application to disputes between the two signatories, (1) even if the clause does not specifically exclude disputes involving USSC and (2) even if the parties to which the clause is applicable are determinable only through defined terms. **Feasibility of Proceeding with Litigation**

When the Edgar court denied the plaintiffs' motion to stay proceedings, it found that PHCC's arbitrable and USSC's nonarbitrable claims were capable of independent resolution with no risk of duplicative proceedings and/or preclusive effect. "[C]ourts generally refuse to stay proceedings of nonarbitrable claims when it is feasible to proceed with the litigation." Whether Global breached the Global agreement would be inconsequential in determining whether Edgar and Global wrongfully removed equipment belonging to USSC or whether Edgar negligently and fraudulently misled USSC into entering the settlement agreement. **The Teachings of Edgar**

To mitigate the risk of unintended court interpretations of arbitration agreements, practitioners would be wise to review the foundational tenets of the FAA — and draft accordingly. Arbitration agreements should be drafted and negotiated with the deliberation and meticulousness afforded other material terms of the contracts in which they are embedded. Edgar provides a reasonable starting point. Naming or defining the specific parties to be bound by the arbitration agreement is one option, as is including an exclusionary third-party beneficiary clause to foreclose the possibility of nonparties demanding arbitral rights. A second option is to tailor the scope of the arbitration agreement to only encompass certain types of disputes and to expressly exclude other types. Additionally, parties entering subsequent agreements, such as settlement agreements, should be explicit about which prior agreements they intend to incorporate, perhaps referencing specific provisions of those prior agreements, e.g., arbitration clauses. None of this is to say boilerplate is unacceptable or bad. However, one should be willing to live by the expanses to which a court may interpret and apply such unrefined terms. *Originally published by Law360 (subscription required).*