

## Texas Case Law

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DORFMAN v. MAX INTL., 05-10-00776-CV (Tex.App.-Dallas 5-5-2011)

BARBARA DORFMAN AND 2177681 ONTARIO LTD., Appellants v. MAX  
INTERNATIONAL, LLC, Appellee.

No. 05-10-00776-CV

Court of Appeals of Texas, Fifth District, Dallas.

Opinion Filed May 5, 2011.

On Appeal from the 192nd Judicial District Court, Dallas County,  
Texas, Trial Court Cause No. 10-04387.

Before Justices MURPHY, FILLMORE, and MYERS.

### MEMORANDUM OPINION

Opinion By Justice MURPHY.

Contending Max International, LLC's promise to arbitrate is illusory, Barbara Dorfman and 2177681 Ontario Ltd. appeal the trial court's dismissal of their case in favor of arbitration. We affirm the trial court's order.

### Background

Dorfman and Ontario were independent contractors with Max, a network marketing company. After Max sent Dorfman an official letter of termination asserting Dorfman violated Max's policies and procedures, Dorfman and Ontario filed suit against Max alleging various claims that included breach of contract. Max responded with a general denial and a motion to compel arbitration, relying on section 8.3 of Max's statement of policies and procedures. That section provides in relevant part:

**Any controversy or claim arising out of or relating to the Agreement, or the breach thereof, shall be settled by arbitration administered by the American Arbitration Association under its Commercial Arbitration Rules, and judgment on the award rendered by the arbitrator may be entered in any court having jurisdiction thereof.**

Associates waive all rights to trial by jury or to any court. . . . This agreement to arbitration shall survive any termination or expiration of the Agreement.

(Emphasis in original.) Section 8.4 provides further that all matters relating to arbitration are to be governed by the Federal Arbitration Act (FAA).

The "Agreement" referenced in the quoted arbitration provision is defined as collectively referring to four documents-the policies and procedures themselves, the "MAX Associate Application and Agreement," "the MAX Plan," and "the MAX Business Entity Application (if applicable)." The policies and procedures also provide that they are "incorporated into, and form an integral part of, the Max Associate Agreement."

Dorfman and Ontario opposed arbitration, asserting among other arguments that Max's promise to arbitrate was illusory because Max reserved the right to amend the policies and procedures at any time in its "sole and absolute discretion." Specifically, Dorfman and

Ontario pointed to section 1.3 of the policies and procedures, which states in relevant part:

Because federal, state, and local laws, as well as the business environment, periodically change, MAX reserves the right to amend the Agreement and its prices in its sole and absolute discretion. By signing the Associate Agreement, an Associate agrees to abide by all amendments or modifications that MAX elects to make. Amendments shall be effective upon notice to all Associates that the Agreement has been modified.

The trial court granted Max's motion to compel arbitration and dismissed the case without prejudice. This appeal followed.

#### Discussion

Whether an arbitration agreement is enforceable is subject to de novo review. *In re Labatt Food Serv., L.P.*, [279 S.W.3d 640](#), [643](#) (Tex. 2009) (orig. proceeding). A party seeking to compel arbitration under the FAA must (1) establish the existence of a valid arbitration agreement; and (2) show that the claims asserted are within the scope of the agreement. *In re AdvancePCS Health L.P.*, [172 S.W.3d 603](#), [605](#) (Tex. 2005) (orig. proceeding) (per curiam). In determining the validity of agreements to arbitrate that are subject to the FAA, we generally apply state contract-law principles governing the formation of contracts. *In re Palm Harbor Homes, Inc.*, [195 S.W.3d 672](#), [676](#) (Tex. 2006) (orig. proceeding) (citing *First Options of Chicago, Inc. v. Kaplan*, [514 U.S. 938](#), [944](#) (1995)).<sup>[fn1]</sup>

On appeal, Dorman and Ontario argue that because Max "could clearly have amended or deleted the arbitration agreement at any time," Max's promise to arbitrate was illusory, rendering the agreement to arbitrate without mutuality of obligation. See *J.M. Davidson, Inc. v. Webster*, [128 S.W.3d 223](#), [235](#) (Tex. 2003) (Schneider, J., dissenting) ("[I]f the terms of a promise make performance optional, the promise is illusory and cannot constitute valid consideration.") (citing *Light v. Centel Cellular Co. of Tex.*, [883 S.W.2d 642](#), [645](#) (Tex. 1994)); see also *In re 24R, Inc.*, [324 S.W.3d 564](#), [567](#) (Tex. 2010) (orig. proceeding) (per curiam) ("A promise is illusory if it does not bind the promisor, such as when the promisor retains the option to discontinue performance.").

Like other contracts, arbitration agreements must be supported by consideration, in other words, mutuality of obligation. *Palm Harbor Homes*, [195 S.W.3d at 676](#); *Fed. Sign v. Tex. S. Univ.*, [951 S.W.2d 401](#), [408](#) (Tex. 1997) *superseded by statute on other grounds as stated in Gen. Servs. Comm'n v. Little-Tex Insulation Co.*, [39 S.W.3d 591](#), [593](#) (Tex. 2001). "In the context of stand-alone arbitration agreements, binding promises are required on both sides as they are the only consideration rendered to create a contract." *AdvancePCS*, [172 S.W.3d at 607](#). When, however, an arbitration clause is part of an underlying contract, the rest of the parties' agreement provides the consideration. *Id.* (citing *In re FirstMerit Bank, N.A.*, [52 S.W.3d 749](#), [757](#) (Tex. 2001) (orig. proceeding)); see *Emerald Tex. Inc. v. Peel*, [920 S.W.2d 398](#), [402](#) (Tex. App.-Houston [1st Dist.] 1996, no writ) ("There is no requirement that a separate identifiable consideration be segregated and attributable to the arbitration provision; it was part of the entire bundle of rights the Peels acquired, along with the house."); see also *Frequent Flyer Depot, Inc. v. Am. Airlines, Inc.*, [281 S.W.3d 215](#), [224](#) (Tex. App.-Fort Worth 2009, pet. denied)

("[M]utuality in each clause of a contract is not required when consideration is given for the contract as a whole.").

Here, the policies and procedures and the other documents referenced were incorporated by reference into the "Max Associate Agreement." See *In re 24R*, [324 S.W.3d at 567](#) ("Documents incorporated into a contract by reference become part of that contract."). Section 8.3 of the policies and procedures, which contained the arbitration provision, also was not a stand-alone agreement. It was identified expressly as part of a broader agreement defined to include four documents. Of the documents referenced as part of the "Agreement," the record before us contains only the policies and procedures. Dorfman and Ontario do not contest the validity of the underlying documents or argue they lack consideration. Accordingly, we accept their implicit admission the underlying "Agreement" is a contract supported by sufficient consideration and therefore conclude the arbitration provision contained therein is enforceable. See *Palm Harbor Homes*, [195 S.W.3d at 676-77](#); *AdvancePCS*, [172 S.W.3d at 607](#); see also *Gables Cent. Constr., Inc. v. Atrium Cos.*, No. 05-07-00438-CV, 2009 WL 824732, at \*2 (Tex. App.-Dallas Mar. 31, 2009, pet. filed and abated) (mem. op.) (purchase orders provided consideration for arbitration agreements contained therein); *Neatherlin Homes, Inc. v. Love*, No. 13-06-328-CV, 2007 WL 700996, at \*6 (Tex. App.-Corpus Christi Mar. 8, 2007, orig. proceeding) (mem. op.) (underlying contract "constituted valid consideration for the arbitration agreement"); *Jim Walter Homes, Inc. v. Ayers*, No. 09-05-226-CV, 2005 WL 3006844, at \*2 (Tex. App.-Beaumont Nov. 10, 2005, orig. proceeding) (mem. op.) (per curiam) (underlying contract provided necessary consideration for arbitration agreement).

#### Conclusion

We conclude the trial court did not err by granting Max's motion to compel arbitration. [\[fn2\]](#) We affirm the trial court's order.

[fn1] Although the policies and procedures provide that the law of the state of Utah shall govern all other matters relating to or arising from the policies and procedures, neither party has argued either that contract law regarding the state of Utah should be applied or that Utah's law differs substantially from that of Texas. Accordingly, we will apply the contract-law principles of Texas. See *Johnson v. Structured Asset Servs., LLC*, [148 S.W.3d 711](#), [720](#) (Tex. App.-Dallas 2004, no pet.).

[fn2] We also issue a decision today in *Edward "Ted" Budd v. Max International, LLC*, No. 05-10-00986-CV. Although the parties present similar arguments, the facts and records of the two cases are distinguishable. Notably in *Budd*, the record did not reflect that Max had any policies and procedures in place at the time Mr. Budd became a Max associate. Additionally, the record in *Budd* contained several subsequent amendments to the policies and procedures that affected the Court's analysis of the arbitration agreement itself.