When Do Superseding Contracts Impact the Right to Arbitrate?

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Readers of this series on ADR in the *Legal Intelligencer* over past years have undoubtedly been struck by the strong presumption in favor of the arbitrability of disputes under both the Federal Arbitration Act ("FAA") and the decisions of state courts.

But often parties are called upon to sign contractual renewals of earlier contracts. These may involve leases, loan documents, credit cards, brokerage accounts, wireless phones and a host of other matters.
When this occurs, do the provisions in the earlier contracts as they applied to arbitration survive the execution of the renewal contracts?

This issue was recently considered by the Eleventh Circuit in a dispute between RBC, a North Carolina bank that was acquired by PNC Bank, and customers of RBC. (*Dasher v. RBC Bank*, USC.A, 11th Circuit, decided February 10, 2014). The court's opinion provides interesting insights into both this issue and contract interpretation under state law generally.

Dasher involved a class action in which the account holders alleged that RBC had charged excessive fees in breach of the account agreement. While the parties were engaging in discovery relating to RBC's motion to compel arbitration, it was acquired by PNC. New account agreements were issued to all of the customers of RBC. The old account agreement with RBC contained a provision requiring the arbitration of disputes. The new agreement with PNC made no reference to arbitration.

In affirming the district court's denial of RBC's motion to compel arbitration, the court of appeals held that, "When, under state law, parties agree to supersede an old contract by forming a new one, basic contract principles require us to look only to the new agreement for evidence of the parties' intent. Looking to the new agreement here, the parties ' silence provides no evidence that they agreed to be bound to arbitrate their disputes."

In reaching this conclusion, the court rejected several interesting arguments made by RBC in support of its demand for arbitration. These were:

1. That the FAA's presumption of arbitrability should apply. The court disagreed noting that "the presumption of arbitrability applies *only* where a validly formed and enforceable arbitration agreement is ambiguous about whether it covers the dispute at hand". Here, however, the dispute centered on whether the parties had an arbitration agreement at all, in which case the presumption does not apply.
2. That there is, in fact, a validly formed enforceable arbitration agreement with RBC, PNC's predecessor. In rejecting this argument, the court noted that originally RBC and its successor, PNC, had the right to change any parts of the RBC agreement; and, that in its new agreement, "the amendment clause stipulated that ' the most current version of the Agreement *supersedes all prior versions* and will at all times govern' ". (Emphasis added by the court). Because all of the parties had expressed a clear and definite intent that the new agreement superseded the old, RBC's right to arbitration could only be found under the PNC agreement.
3. That silence alone in the new PNC agreement could not invalidate the RBC arbitration agreement; rather, clear, explicit language is required to waive an express arbitration provision. In rejecting this argument, the court determined "that this case does not involve *waiver* of an arbitration provision at all; rather it involves superseding the entire agreement containing an

arbitration provision and replacing that provision with silence." The court understood waiver situations to involve a still-valid underlying prior agreement that may create ambiguity as to whether the arbitration provisions survived with respect to still valid provisions of the earlier agreement. The situation here, however, involves an entirely invalid underlying prior agreement as to which all of the provisions in the prior agreement were eliminated, *including the arbitration provision.*

The court further acknowledged opinions cited by RBC from both the second and third circuits, as well as from district courts, that state that arbitration can be superseded only if it is *specifically* eliminated by the superseding agreement. The court agreed that on their face, the language in those cases appeared to support RBC's contention. Nonetheless, it drew a critical distinction. It noted that " in each case cited by RBC, the prior agreement remained effective to some extent for various reasons, whereas here, the prior agreement is *entirely* superseded." It characterized those cases as essentially involving "attempted waivers of the earlier agreement's arbitration provision, notwithstanding the superseding language". It concluded that if the second agreement only partially supersedes the prior agreement, amends it or waives some but not all of its provisions, the question that must be addressed is whether the arbitration provision was among those that were superseded, amended or waived. An entirely superseding agreement, however, will render the arbitration's clause in the superseded agreement ineffective even when the superseding agreement is silent on arbitration.

4. That there was a termination clause in the original RBC agreement; it provided that transactions initiated prior to the termination of the agreement would not be affected by its termination and would continue to be subject to its terms, including, presumably, the arbitration provisions. This argument

was similarly rejected on the ground that the termination provision relates to parties *ending* their contractual relationship. What is involved here, however, is an agreement to continue the relationship under a new agreement. When PNC acquired all of RBC's rights to choose between the two, it essentially replaced the RBC agreement with the PNC agreement so that no part of the RBC agreement continued. The court found this to be a meaningful distinction between termination and supersession.

5. That the facts giving rise to the dispute arose while the RBC agreement was in effect. Accordingly, the dispute should be subject to arbitration under its terms, and the superseding PNC agreement should only apply prospectively, not retroactively to govern interactions between the parties in the past. While cases were cited to support this argument, the court rejected them because it found the terms of the new PNC agreement provided that, " the most current version of the Agreement supersedes all prior provisions and will *at all times govern* " (Emphasis added by the court). It read " *at all times*", to necessarily include the past present and future. Thus, the new PNC agreement "governs this dispute even though the facts giving rise to it occurred in the past." Moreover, these provisions should be construed against the drafter banks which could have used the phrase, "begin to govern" rather than "at all times". But, RBC relinquished this right to PNC, which retroactively eliminated that right.
6. That if the RBC Agreement "is superseded for purposes of eliminating the arbitration provision, it should also be superseded for purposes of eliminating the provisions Dasher alleges were breached." The court decided, however, that the bank's customers were not barred from bringing their claims under the prior agreement because the alleged violations charging excessive fees took place when that agreement was still effective; this is distinguishable from RBC's claim that it had a right to seek arbitration

because when it was making that claim, the earlier agreement granting that right was no longer effective.

The court's analysis of each of the arguments presented should put parties on notice that problems that may arise when contracts providing for arbitration are renewed, modified, superseded, or amended. The wording in these new agreements may determine whether the rights to seek arbitration survived when the new agreement took effect.

Accordingly, particular care should be taken to assure that the language with respect to resolution of disputes, past, present and future is clear and precise in renewal contracts to avoid later confusion as to the rights parties may have in seeking a particular forum or procedure to resolve the matter.