



## Case Summaries April 14, 2023

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### OPINIONS

#### ARBITRATION

Arbitrability

*Totalenergies E&P USA, Inc., v. MP Gulf of Mexico, LLC*, \_\_\_ S.W.3d \_\_\_, 2023 WL \_\_\_ (Tex. April 14, 2023) [[21-0028](#)]

This case answers the question of whether parties who incorporate the American Arbitration Association rules into their contract delegate the question of arbitrability to the arbitrator.

MP Gulf of Mexico and Total E&P owned an oil-and-gas processing system that serviced leases in the Gulf of Mexico. The parties signed two contracts to govern the system, the System Operating Agreement and the Cost Sharing Agreement. The dispute began when MP Gulf demanded that Total E&P pay certain costs incurred under the Cost Sharing Agreement. Total E&P refused and sued for a declaration construing that agreement. MP Gulf, however, initiated an arbitration proceeding before the AAA based on a provision in the System Operating Agreement stating that “any dispute or controversy aris[ing] between the Parties out of this Agreement . . . shall be submitted to arbitration . . . in accordance with the rules of the AAA.” MP Gulf argued that this provision, which incorporated the AAA rules, required the AAA arbitrator to decide whether the parties agreed to submit their controversy to arbitration.

The trial court granted Total E&P’s motion to stay the arbitration. The court of appeals reversed, holding that by agreeing to arbitrate before the AAA and in accordance with its rules, the parties delegated the arbitrability issue to the arbitrator.

The Court affirmed. Usually, courts determine the validity or scope of an arbitration agreement in a contract, but parties can agree to delegate those disputes to arbitrators. The Court agreed with the majority of other courts that, as a general rule, an agreement to arbitrate in accordance with the AAA or similar rules constitutes clear and unmistakable evidence that the parties agreed to delegate issues of arbitrability. And although parties can contractually limit their delegation of arbitrability to only certain claims, the Court concluded that the agreements did not do so here. The delegation provision incorporated the AAA rules, and nothing in that provision or in those rules limited the scope of the delegation.

Justice Bland filed a concurring opinion. She agreed with the majority opinion but would also affirm on the ground that the parties agreed to arbitrate the underlying

controversies in this case.

Justice Busby filed a dissenting opinion. He would hold that the language of the contracts indicates that the parties did not intend to empower an arbitrator to decide whether the contractual preconditions to arbitration have been met. The arbitration provision states that the power to decide what claims are arbitrable only belongs to arbitrators if the preconditions are met. And even if the AAA rules apply, the rules' delegation language is not exclusive and thus does not deprive courts of the power to address the scope issue. For either of those reasons, he would hold that the court of appeals erred by failing to address the issue of the scope of the arbitration clause.

## INSURANCE

### Incorporation by Reference

*ExxonMobil Corp. v. Nat'l Union Fire Ins. Co.*, \_\_\_ S.W.3d \_\_\_, 2022 WL \_\_\_ (Tex. Apr. 14, 2023) [[21-0936](#)]

At issue in this case is whether an umbrella insurance policy incorporates the payout limits of an underlying service agreement.

ExxonMobil entered into a service agreement with Savage Refinery Services, under which Savage was required to obtain liability insurance for its employees and to name Exxon as an additional insured. Savage obliged and obtained five different policies. National Union Fire Insurance Company underwrote two of them—a primary policy and an umbrella policy. After two Savage employees were severely injured during a workplace accident, Exxon settled with both for about \$24 million, some of which National Union paid under its primary policy. National Union denied Exxon coverage under its umbrella policy, however, so Exxon sued for breach of contract. The trial court granted Exxon summary judgment, but the court of appeals reversed, holding that Exxon was limited to only primary coverage because the umbrella policy incorporated the primary policy's definition of "additional insured," which in turn was "informed by" the coverage limits spelled out in the service agreement.

The Supreme Court reversed. The Court began by noting the longstanding principles that insurance policies can incorporate extrinsic contracts, but only if they clearly do so, and that such extrinsic contracts will be referred to only to the extent required by the incorporation, but no further. Based on those principles, the Court concluded that National Union's umbrella policy incorporated the primary policy only for the purpose of identifying who was insured. The Court also rejected National Union's argument that Exxon was not entitled to coverage under the umbrella policy because that policy expressly disclaimed "broader coverage" than the primary policy. "Interpreting 'broader coverage' to refer to payout limits," the Court explained, "would give the umbrella policy a self-defeating meaning," and nothing in the policy's text required a "departure from the settled understanding that umbrella policies provide greater limits for *the risks already covered* by primary policies." The Court accordingly reversed and remanded for further proceedings in light of Exxon's status as an insured under National Union's umbrella policy.