The Arbitration Newsletter

(Published by Whitaker Chalk Swindle & Schwartz PLLC)
(John Allen Chalk, Sr., Editor)

September, 2018

****

The Arbitration Newsletter is published periodically by Whitaker Chalk Swindle & Schwartz PLLC, Fort Worth, Texas, to explore the rapidly developing law and practice of commercial arbitration both in the U.S. and other countries.[1]

****

EXPANDED JUDICIAL REVIEW UNCERTAINTY?
Belfiore Developers, LLP v. Sampieri[2]

Did the parties agree to expanded judicial review in their arbitration agreement that stated: "The decision of the arbitrators must be based on and consistent with Texas law ..."?[3] The Houston [First District] Court of Appeals exercised expanded judicial review to reverse and render a trial court's vacatur order while giving lip service to the de novo standard of review for arbitration awards and claiming not to decide the expanded judicial review construction question.[4]

The Court acknowledged, however, that "the limits of an arbitrator's power is determined by agreement of the parties" (quoting *Nafta Traders*).[5] And then assumed "without deciding" that the parties intended to limit the arbitrator's power by the phrase "consistent with Texas law."[6] With this legerdemain the Court proceeded to review the award for reversible error (i.e., expanded judicial review) without construing the parties' arbitration agreement that required an award "must be based on and consistent with Texas law." We are left with the question of what language is required in an arbitration agreement to create expanded judicial review.[7]

---

[1] Nothing in The Arbitration Newsletter is presented as or should be relied on as legal advice to clients or prospective clients. The sole purpose of The Arbitration Newsletter is to inform generally. The application of the comments in The Arbitration Newsletter to specific questions and cases should be discussed with the reader's independent legal counsel. My thanks to Morgan Parker, a third-year law student at Texas A&M University School of Law, for her research and drafting assistance.

[2] No. 01-17-00847-CV, 2018 Tex. App. LEXIS 1671 (Ct. App—Houston [1st Dist.] March 6, 2018, no pet.) (mem. opp.).

[3] *Id.* at *4-5, *9, and *11 (Although the parties' arbitration agreement did not expressly adopt an arbitration law, both Appellant and Appellee cited the Texas Arbitration Act as the arbitration law of the case.).

[4] *Id.* at **11, 13, and 24.

[5] *Id.* at *11.

[6] *Id.*

[7] *See* Framing v. BBL Builders, L.P., 2016 Tex. App. LEXIS 6352, *7 (Tex.App. –Dallas June 15, 2016, pet. filed, abated due to bankruptcy stay) (Error of law in admitting or excluding evidence not an acceptable basis for vacating an award.); Baker Hughes Oilfield Operations, Inc. v. Hennig Products Co., 164 S.W.3d 438, 443 (Tex.App. – Houston [14 Dist.], no pet.) ("Any error of law made by the arbitrators, however, cannot be reviewed by a court confirming the award."); Crossmark, Inc. v. Hazor, 124 S.W.3d 4322, 434 (Tex. App. – Dallas 2004, pet. denied) (Error of law regarding the failure to apply a state law contract construction principle by the arbitrator is not reviewable by a court confirming an award.").

The *Belfiore* case arose from a condo purchase dispute in which the purchase agreement contained an arbitration clause calling for AAA Construction Rules to apply and the decision to be "based on and consistent with Texas law."[8] The critical issue was the enforceability of the liquidated damages provision under substantive Texas law. However, before that issue could be determined, the court first had to determine if it had the power under the arbitration agreement for substantive judicial review for errors of law.

The unreasonable penalty assertion in *Belfiore* arose out of multiple contracts for the purchase of luxury high-rise condominiums in Houston, Texas. In 2014 Belfiore Developers began construction on a twenty-six story luxury condominium project. The units were sold before construction began so that the new owners had the ability to customize their home with the help of designers and decorators.[9]

Sampieri signed purchase agreements for two units, and a separate customization agreement for one unit for an additional cost of $618, 898.[10] The contracts required a 20% "initial payment" on both condos; Sampieri deposited the payment with the title company pursuant to the purchase agreements, totaling slightly over $1 million dollars,[11] Sampieri failed to close on the condos and failed to pay Belfiore the remainder of the units' purchase price.[12] Pursuant to paragraph 17c of the purchase contracts, the liquidated damages clause, Belfiore notified Sampieri that it was terminating the purchase contracts and exercising its right to enforce the liquidated damages provision.

Disputing the validity of the liquidated damages clause, Sampieri filed a claim for arbitration. After a three day hearing, the Panel determined that Belfiore proved that Sampieri breached the purchase agreement, and that Sampieri, as the party with the burden of proof, failed to prove that the liquidated damages clause was unenforceable as a penalty.[13] Finding that the liquidated damages clause was enforceable under Texas law, the Panel awarded Belfiore the 20% initial payment amount.

Sampieri filed a motion to vacate the award in trial court, arguing that the panel exceeded its authority under the purchase agreements because their decision was not consistent with Texas law, citing Texas Civil Practice and Remedies Code § 171.088(a)(3)(A).[14] Sampieri claimed that the arbitration clause, by requiring the award to be "based on and consistent with Texas law," expanded judicial review of the award pursuant to the decision in *Nafta Traders*.[15] Sampieri claimed that the award was inconsistent with Texas law because it enforced a liquidated damages clause that was unenforceable as a penalty.[16] In other words, Sampieri claimed that the Panel made a mistake of law when finding the clause enforceable. In deciding the case, the Court of Appeals "assume[d] without

---

[8] *Id.* at *1-5.
[9] *Id.* at *19.
[10] *Id.* at *2-3.
[11] *Id.* at *2.
[12] *Id.* at *3.
[13] *Id.* at *8.
[14] *Id.* at **10-11.
[15] *Id.* at **9-12 (citing Nafta Traders, Inc. v. Quinn, 339 S.W.3d 84 (Tex. 2011)).
[16] *Belfiore*, 2018 Tex. App. LEXIS 1671, at *8-9.

deciding"[17] the judicial review expansion question, choosing to focus on the "dispositive" issue of the liquidated damages clause's enforceability.[18]

The Court of Appeals held that the liquidated damages clause was valid because Sampieri, as the party with the burden of proof, failed to show that the liquidated damages amounted to a penalty.[19] Because the liquidated damages provision was consistent with Texas law, the arbitration panel did not exceed its authority under the purchase agreement.[20] The Court reversed the trial court's order to vacate the award, and rendered judgement confirming the award.

OBSERVATIONS

1. This case underscores the *Nafta Traders* legacy of expanded judicial review of arbitration awards under the TAA, although not available under the Federal Arbitration Act.[21]

2. This case leaves us with uncertainty as to the language required in an arbitration clause that would trigger expanded judicial review under the TAA.

3. This case is another good reason for parties to expressly adopt the FAA in arbitration agreements if expanded judicial review is not intended by the parties.

4. The clause "based on and consistent with Texas law" in the parties' arbitration agreement may have been intended simply to adopt Texas substantive law, but its use in the arbitration clause also appears to have prompted selection of the TAA as the arbitration law and thereby raised implicitly the expanded judicial review issue based on *Nafta Traders*.

---

[17] *Id.* at *13.

[18] In deciding to bypass the judicial expansion issue, the court relied on the reasoning in *Nafta Traders* where the Court held that the TAA allows parties to agree that the arbitrator has no authority to reach a decision based on reversible error. *Nafta Traders*, 339 S.W.3d at 95-97. By so agreeing, parties allow for expanded judicial review of the arbitration award for reversible errors of law. *Id.* at 97.

[19] *Belfiore*, 2018 Tex. App. LEXIS 1671, at *24.

[20] *Id.*

[21] Hall Street Associates, L.L.C. v. Mattel, Inc., 552 U.S. 576, 128 S.Ct. 1396, 170 L.Ed2d 254 (2008).