The Arbitration Newsletter

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

March 2021

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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]

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Circumstances Make A Difference

Daspit Law Firm, PLLC v. Herman[2]

The trial court's denial of a law firm's motion to compel was affirmed by the Dallas Court of Appeals based on procedural unconscionability.[3] The plaintiff, Herman, contacted the defendant, Daspit Law Firm, and met with a non-lawyer employee of the law firm for a less than ten minutes consultation regarding a car wreck injury.[4] After the short, rushed meeting, Herman signed a document that the law firm employee assured him was not a contract.[5] The document contained an arbitration clause that adopted the Texas Arbitration Act and the AAA Commercial Arbitration Rules "then in effect."[6] Herman testified that he left the meeting not knowing that he had hired the law firm to represent him.[7] Three days later, Herman emailed the law firm stating that he would not be needing their services.[8] That same day, an attorney from the firm called and told Herman that he would take the case, to which Herman responded that he was hiring different counsel.[9] Herman later hired another law firm.[10]

When the second law firm contacted Herman's insurer to file a claim, the insurer wrote a check to the plaintiff, the plaintiff's second law firm, and the first law firm.[11] The first law firm had claimed a thirty-five percent interest in the case with the insurance company and also filed a notice-

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[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 Jared Hendrix, a third-year law student at Texas A&M University School of Law, for his research and drafting assistance.

[2] Daspit Law Firm, PLLC v. Herman, No. 05-19-00615-CV, 2020 Tex. App. LEXIS 6847 (Tex. App.—Dallas Aug. 25, 2020, no pet.).

[3] *Id.* at *1.

[4] *Id.* at *2.

[5] *Id.*

[6] *Id. at* *11.

[7] *Id.* at *2–3.

[8] *Id.* at *3.

[9] *Id.* at *3–4.

[10] *Id.* at *4.

[11] *Id.*

of-lien with the other driver's insurer.[12] The second law firm then filed suit against the driver who caused the wreck, and the parties settled after discovery and mediation.[13] After the settlement, the second law firm requested a copy of the first law firm's retainer agreement, a copy of the case file, and documented expenses.[14] When the first law firm ignored the request, the second law firm filed a declaratory judgment on whether the first law firm's contract with the plaintiff was valid and, if so, what a reasonable fee would be for the first law firm's alleged representation.[15] Upon receiving notice of the default judgment hearing, the first law firm responded, produced a copy of the attorney-client agreement, and filed an answer to the lawsuit along with a motion to abate the lawsuit and compel arbitration.[16]

The trial court denied the motion to compel arbitration in a summary hearing.[17] The first law firm then filed the instant interlocutory appeal arguing that the trail court abused its discretion in denying the motion to compel.[18] The Dallas Court of Appeals looked at whether the trial court's factual determinations were supported by the evidence.[19]

Herman claimed on appeal that he did sign the attorney-client agreement during his short consultation with the first law firm.[20] That agreement required arbitration of "[a]ny and all disputes, controversies, claims or demands arising out of or relating to this agreement or any provision hereof, the providing of legal services by attorneys to client or in any way relating to the relationship between attorneys and client."[21]

The first law firm argued that the trial court erred in determining the issue of arbitrability because arbitrability was "clearly and unmistakably delegated" to the arbitrator.[22] The appeals court recognized that while the issue of arbitrability is normally decided by the court, the issue may be delegated to the arbitrator if "the agreement evidences a clear and unmistakable intention that the arbitrator[] will have the authority to determine the scope of arbitration."[23] The first law firm argued on appeal that the Commercial Arbitration Rules delegated the issue to the arbitrator; however, the first law firm did not identify the specific rule and did not present evidence to the trial court of which rules were "then in effect."[24] Therefore, the first law firm's claim that questions of arbitrability were delegated to the arbitrator were waived on appeal.[25]

The first law firm then argued that the trial court erred in determining that both the contract and the arbitration provision were unconscionable.[26] The appeals court noted that "[u]nconscionable contracts, whether relating to arbitration or not, are unenforceable under Texas law."[27] While

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[12] *Id.*
[13] *Id.*
[14] *Id.*
[15] *Id.* at *5.
[16] *Id.*
[17] *Id.* at *6.
[18] *Id.*
[19] *Id.* at *7.
[20] *Id.* at *8.
[21] *Id.* at *7.
[22] *Id.* at *11.
[23] *Id.* (quoting Saxa Inc. v. DFD Architecture Inc., 312 S.W.3d 224, 229 (Tex. App.—Dallas 2010, pet. denied)).
[24] *Id.* at *12.
[25] *Id.*
[26] *Id.* at *13.
[27] *Id.*

questions of whether an agreement as a whole is unconscionable are determined by the arbitrator, "[t]he trial court may determine whether an arbitration provision is unconscionable."[28] In doing so, courts consider four factors:

1. the entire atmosphere in which the agreement was made;

2. the alternatives, if any, available to the parties at the time the contract was made;

3. whether the contract was illegal or against public policy; and

4. whether the contract is oppressive or unreasonable.[29]

Looking at the circumstances surrounding adoption of the agreement, the court found some evidence of unconscionability.[30] Herman claimed he did not know that the agreement he signed contained an arbitration provision and that the first law firm's employee was impatient and did not explain the document.[31] Additionally, the employee's statement that the document was not a contract was a "materially misleading statement."[32] Under the Texas Disciplinary Rules of Professional Conduct, attorneys are required to ensure that their non-attorney employees do not make misleading statements.[33] The appeals court held that these circumstances could have led the trial court to determine that "[the client] had no reason to believe the document was a contract at all, much less that it was an arbitration agreement."[34]

The appeals court found that even though the arbitration agreement was prominently spelled out on the same page that the client signed and would have been "immediately apparent" to the client, there was sufficient evidence for the trial court to conclude that the client was "tricked into the document's execution" and that the client did not have adequate time to read the document.[35] Moreover, just as the arbitration provision should have been apparent to the client, the provision should have been apparent to the first law firm's employee who represented to the client that the document was not a contract.[36] The appeals court held that, taken together, the facts presented constituted sufficient evidence upon which the trial court could reasonably conclude that the first law firm's conduct towards the client "was sufficiently shocking to constitute procedural unconscionability concerning the arbitration agreement."[37]

Having overruled each of the first law firm's issues, the appeals court affirmed the trial court's order denying the first law firm's motion to compel arbitration.[38]

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[28] *Id.* at *14.
[29] *Id.* (citing Delfingen US-Tex., L.P. v. Valenzuela, 407 S.W.3d 791, 798 (Tex. App.—El Paso 2013, no pet.)).
[30] *Id.* at *13–15.
[31] *Id.* at *15.
[32] *Id.* at *15–16.
[33] *Id.* at *15.
[34] *Id.* at *16.
[35] *Id.* at*17–18.
[36] *Id.* at *18.
[37] *Id.* at *19.
[38] *Id.*

OBSERVATIONS

1. Lawyers who insist on clients agreeing to arbitrate future disputes with the lawyer should draft carefully and explain fully the arbitration agreement before the client is asked to sign.[39]

2. As with any contract, an arbitration agreement can be revoked for either procedural or substantive unconscionability.[40]

3. Both the FAA and the TAA also provide that arbitration agreements may "only [be revoked] on a ground that exists at law or in equity for the revocation of a contract."[41]

4. Both the FAA and the TAA look to applicable state law contract principles for possible revocation of arbitration agreements.

5. The U.S. Supreme Court has repeatedly required that arbitration agreements governed by the FAA should be treated under state contract principles as any other contract.

[39] *But see* Royston, Rayzor, Vickery & Williams, LLP v. Lopez, 467 S.W.3d 494, 504-06 (Tex. 2015).
[40] Tex. Civ. Prac. & Rem. Code §171.022.
[41] *Id.* at §171.001(b); 9 U.S.C. §2 ("such grounds as exist at law or in equity for the revocation of any contract.").