The Arbitration Newsletter

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

April, 2014

****

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]

****

STANDARD OF REVIEW FOR INTERLOCUTORY APPEALS OF FAA CASES?

DELFINGEN v. VALENZUELA, 407 S.W.3D 791 (TEX. APP.—EL PASO 2013, no pet.)

Prior to September 1, 2009, whether the TAA or the FAA applied was relevant to determining an appellate court's jurisdiction when a party complained of an order denying arbitration—mandamus[2] was the proper remedy when the FAA governed, while interlocutory appeals was the procedure under the TAA.[3] Effective September 1, 2009, Section 51.016 of the Texas Civil Practices & Remedies Code ("TCPRC") provides for the interlocutory appeal of a trial court's denial of a motion to compel arbitration under the FAA.[4] Now the issue is determining the appropriate standard of review in FAA cases for interlocutory appeals of a trial court's order denying a motion to compel arbitration.

"The Texas Supreme Court has not specifically addressed the appropriate standard of review for interlocutory appeals under [TCPRC] Section 51.016 of an order denying a motion to compel arbitration."[5] Texas intermediate appellate courts are split on the standard of review for such appeals under the Texas Arbitration Act ("TAA").[6] In interlocutory appeals of orders denying motions to compel arbitration under the TAA, some Texas appellate courts have held that a trial court's procedural unconscionability finding or any legal conclusion is to be reviewed *de novo* and any related fact findings thereto under a "no evidence" standard.[7] Other Texas

---

[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.

[2] Courts review mandamus proceedings using an abuse of discretion standard. Under that standard, "we defer to the trial court's factual determinations if they are supported by evidence, but we review the trial court's legal determinations de novo." *In re Labatt Food Serv., L.P.*, 279 S.W.3d 640, 643 (Tex. 2009).

[3] *Jack B. Anglin Co. v. Tipps,* 842 S.W.2d 266, 272—73 (Tex. 1992); *In re Labatt Food Serv., L.P.,* 279 S.W.3d 640, 643 (Tex. 2009); *Cotton Commercial USA, Inc. v. Clear Creek ISD*, 387 S.W.3d 99, 103 n. 3 (Tex. App.—Houston [14th Dist.] 2012, no pet.).

[4] *Id.*

[5] *Delfingen v. Valenzuela*, 407 S.W.3d 791, 799 (Tex. App.—El Paso 2013, no pet.); *citing* Tex. Civ. Prac. & Rem. Code Ann. § 51.016 (West Supp. 2012).

[6] *Id.*; Tex. Civ. Prac. & Rem. Code § 171.098.

[7] *Delfingen,* 407 S.W.3d at 799; citing *McReynolds v. Elston,* 222 S.W.3d 731, 739 (Tex. App.—Houston [14th Dist.] 2007, no pet.); *Tri-Star Petroleum Co. v. Tipperary Corp.,* 107 S.W.3d 607, 616 (Tex. App.—El Paso 2003, pet. denied); *Wetzel v. Sullivan, King & Sabom P.C.*, 745 S.W.2d 78, 79 (Tex. App.—Houston [1st Dist.] 1988, no

appellate courts have held that a trial court's denial of a motion to compel arbitration under the TAA should be reviewed under the abuse of discretion standard when the trial court's order involves both factual determinations and legal conclusions (sometimes called the mixed question of law and fact).[8] Under this standard, the appellate court defers to the trial court's factual determinations supported by the evidence and reviews legal conclusions *de novo.*[9]

In *Delfingen v. Valenzuela*, the El Paso Court of Appeals determined that the appropriate standard of review for an interlocutory appeal of an order denying a motion to compel arbitration under the FAA was *de novo* for the trial court's legal conclusions and an abuse of discretion standard for the trial court's fact findings.[10] In *Delfingen,* an employer filed a motion to compel arbitration after an employee brought suit for wrongful termination.[11] The employee argued that the arbitration agreement was procedurally unconscionable because even though the employer knew she was unable to read English, the arbitration agreement was never explained to her in Spanish and she was rushed to sign the document.[12] The trial court agreed with the employee and denied the motion to compel arbitration.[13] The employer brought an interlocutory appeal.[14]

On appeal, the parties agreed that unconscionability is a question of law subject to *de novo* review but disagreed about what standard of review should be applied to the trial court's relevant fact findings.[15] The employer argued that appellate review of a trial court's fact findings should be under a no evidence or legal sufficiency standard.[16] The employer argued that it met its initial burden of showing that an agreement to arbitrate existed and the claim at issue was within the arbitration agreement's scope so the burden shifted to the employee to establish her defense of procedural unconscionability.[17] The employer argued that the employee failed to introduce sufficient evidence to support the unconscionability defense.[18] The employee conversely argued that abuse of discretion is the appropriate standard of review and the appellate court must defer to the trial court's fact findings if they are supported by the record.[19]

---

writ.). *See also In re Trammell,* 246 S.W.3d 815, 820 (Tex. App—Dallas 2008, no pet.) ("When reviewing the trial court's factual determination under the no-evidence standard, an appellate court must credit the favorable evidence if a reasonable fact-finder could and disregard the contrary evidence unless a reasonable fact-finder could not. [citations omitted] An appellate court will sustain a no-evidence point of error when: (1) the record discloses a complete absence of evidence of vital fact; (2) the court is barred by rules of law or of evidence from giving weight to the only evidence offered to prove a vital fact; (3) the evidence offered to prove a vital fact is no more than a mere scintilla; or (4) the evidence establishes conclusively the opposite of the vital fact.").

[8] *Delfingen*, 407 S.W.3d at 799 (citing *Chambers v. O'Quinn,* 305 S.W.3d 141, 146 (Tex. App.—Houston [1st Dist.] 2009 pet. denied)); *Pony Express Courier Corp. v. Morris*, 921 S.W.2d 817, 820 (Tex. App.—San Antonio 1996, no writ).

[9] *Delfingen*, 407 S.W.3d at 799.

[10] *Delfingen*, 407 S.W.3d at 800.

[11] *Id.* at 794.

[12] *Id.*

[13] *Id.* at 795.

[14] *Id.* at 796.

[15] *Id.* at 798.

[16] *Id.*

[17] *Id.* at 797 ("Once the party seeking to compel arbitration proves that a valid arbitration exists, a presumption attaches favoring arbitration and the burden shifts to the party resisting arbitration to establish a defense to enforcement.").

[18] *Id.*

[19] *Id.*

The court explained that mixed questions of law and fact are subject to "review for abuse of discretion" that requires the appellate court to "defer to the trial court's factual determinations **supported by the record** and review legal conclusion *de novo*."[20] The appellate court "does not engage in its own factual review, but decides whether the **record supports** the trial court's resolution of factual matters."[21] Under an abuse of discretion standard, the appellate court "determines whether the trial court properly applied the law to the facts in reaching its legal conclusion," but with no deference to the trial court "on questions of law."[22]

The court observed that it was presented with a mixed question of law and fact in *Delfingen* as to whether the arbitration agreement was procedurally unconscionable.[23] Unconscionability is a question of law; however, the determination of the facts relevant to the question of unconscionability is a question for the trial court not the appellate court.[24] Thus, the court followed the intermediate appellate courts who determined that the abuse of discretion standard should be used when reviewing mixed questions of law and fact in interlocutory appeals of this nature.[25] The court was also persuaded by the fact that this standard had been previously applied in a non-arbitration setting where a Texas appellate court faced an unconscionability defense.[26]

The court also looked at the Texas Supreme Court's decision in *Perry Homes v. Cull*.[27] The Supreme Court in *Perry Homes* held that the court must defer to a trial court's fact findings if they are supported by the evidence, but does not have to defer to the trial court on questions of law.[28] The court in *Delfingen* affirmed the trial court's order denying the motion to compel arbitration because it had to accept "the trial court's finding that [the employer] did not explain, discuss, or translate the arbitration agreement" and concluded that the trial court *could have* found that the employer "affirmatively misled" the employee about the nature and significance of the arbitration agreement.[29] Therefore, the appellate court deferred to the trial court's fact findings concluding there was no abuse of discretion in its denial of the motion to compel arbitration.[30]

Even though the court in *Delfingen*, made a distinction between the no evidence standard of review and the abuse of discretion standard of review, the Fifth Court of Appeals, in *Sidley Austin Brown & Wood, LLP v. J.A. Green Development Corp.*, observed in *dicta* that the no evidence standard was the same as the abuse of discretion standard of review.[31] So the issue of what appropriate standard of review in FAA cases for TCPRC Section 51.016 interlocutory

---

[20] *Id.* at 799 (emphasis added).
[21] *Id.* at 799-800.
[22] *Id.* at 800.
[23] *Id.* at 797, 800.
[24] *Id.* at 798; (citing *Besteman v. Pitcock*, 272 S.W.3d 777,778 (Tex. App.—Texarkana 2008, no pet.)).
[25] *Id.* at 800 (citing *Cleveland Const. Inc. v. Levco Const. Inc.*, 359 S.W.3d 843, 851 (Tex. App.—Houston [1st Dist.] 2012, pet. dism'd); *Garcia v. Huerta*, 340 S.W.3d 864, 869 (Tex. App.—San Antonio 2011, pet. denied)).
[26] *Id.* (citing *Ski River Dev., Inc. v. McCalla*, 167 S.W.3d 121, 136–67 (Tex. App.—Waco 2005, pet. denied).
[27] *Id.*
[28] *Perry Homes v. Cull*, 258 S.W.3d 580, 597–98 (Tex, 2008).
[29] *Delfingen*, 407 S.W.3d at 803.
[30] *Id.*
[31] *Sidley Austin Brown & Wood, LLP v. J.A. Green Dev. Corp.* 327 S.W.3d 859 (Tex. App—Dallas 2010, no pet.).

appeals of an order denying a motion to compel arbitration applies remains unanswered or may not constitute a live question!

OBSERVATIONS

1. There does appear to be a difference between the "no evidence" and the "abuse of discretion" standards of review, contrary to the one sentence *dicta* in *Sidley Austin.*

2. The "no evidence" or "legal sufficiency" standard of review requires that the appellate court "credit the favorable evidence if a reasonable fact-finder could and disregard the contrary evidence unless a reasonable fact-finder could not."[32]

3. The "abuse of discretion" standard, as explained in *Delfingen*, requires the appellate court when faced with a mixed question of law and fact (i) to defer "to the trial court's factual determinations **supported by the record** and reviews legal conclusions *de novo*,"(ii) to not "engage in its own factual review but decides whether the **record supports** the trial court's resolution of factual matters," (iii) not to "disturb" the trial court's evidentiary findings, (iv) to determine "whether the trial court properly applied the law to the facts in reaching its legal conclusion, and (v) not to "defer to the trial court on questions of law."[33]

4. Four times in *Delfingen*, the court uses the phrase "supported by the record" to describe the appellate court's abuse of discretion standard of review. The use of this phrase begs the question of what is the difference between the "no evidence/legal sufficiency" standard of review and the "abuse of discretion" standard of review.

5. Is there also a possible FAA preemption issue lurking in this standard of review discussion, by which a state contract common law standard of review could become a bar to an otherwise enforceable arbitration agreement for which the opposing party did not establish a defense with sufficient evidence in the trial court?

---

[32] *In re Trammell*, 246 S.W.3d 815, 820 (Tex. App.—Dallas 2008, writ denied) (citing *Kroger Tex. Ltd. v. Suberu*, 216 S.W.3d 788, 793 (Tex. 2006); *Marathon Corp. v. Pitzner*, 106 S.W.3d 724, 727 (Tex. 2003)) ("An appellate court will sustain a no-evidence point of error when: (1) the record discloses a complete absence of evidence of a vital fact; (2) the court is barred by rules of law or of evidence from giving weight to the only evidence offered to prove a vital fact; (3) the evidence offered to prove a vital fact is no more than a mere scintilla; or (4) the evidence establishes conclusively the opposite of the vital fact.").

[33] *Delfingen*, 407 S.W.3d at 799-800 (emphasis added).