The Arbitration Newsletter

(Published by Whitaker Chalk Swindle & Schwartz PLLC)
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July, 2016

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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]

ARBITRATION PRESUMPTIONS AND DUE PROCESS

JERRY WRIGHT AND STACI WRIGHT v. GREGORY S. MENTA
2016 Tex. App. LEXIS 5995
(Tex. App. – Dallas June 6, 2016)[2]

In *Wright v. Menta* patent inventorship and submission of alleged privileged attorney billing records for *in camera* inspection by the arbitrator prompted both statutory[3] and due process[4] complaints in support of the losing party's motion to vacate. Other issues submitted to the arbitrator included whether an oral agreement was created between the parties regarding a redesigned face protector and ownership of the redesigned product after a federal court magistrate ruled that the inventorship issue was exclusively reserved to federal court jurisdiction but sent back to arbitration all the other issues.[5] The trial court confirmed the arbitrator's clarified award[6] that included $962,830.27 in damages and $595,079.47 in attorneys' fees to Menta. The Dallas Court of Appeals affirmed.[7]

The losing parties raised four issues on appeal: (1) the award for attorney's fees was based on *ex parte* evidence in violation of Texas Civil Practice and Remedies Code §§171.088(a)(3)(D) and 171.047; (2) the award was impermissibly vague and included interests in patents without evidence; (3) the award included attorney's fees for patent inventorship outside state court jurisdiction and the parties' arbitration agreement; and (4) the trial court unconstitutionally

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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.

[2] Memorandum Opinion. Tex. R. App. P. 47.2(a) and 47.4.

[3] Tex. Civ. Prac. & Rem. Code §§171.047; 171.088(a)(3)(A); and 171.088(a)(3)(D).

[4] 2016 Tex. App. LEXIS 5995, *16-17.

[5] 2016 Tex. App. LEXIS 5995, *1-2.

[6] Tex. Civ. Prac. & Rem. Code §171.054(a)(2) and (b). The arbitrator responded to "post-hearing motions" and removed Staci Wright as a "liable party" and included specific patent and patent application numbers related to the redesigned face protector but did not "change the decision on the merits or modify the monetary awards." 2016 Tex. App. LEXIS 5995, *3.

[7] 2016 Tex. App. LEXIS 5995, *3.

delegated to the arbitrator the trial court's duty to rule on objections to confirmation of the award and the motion to vacate.[8]

The Dallas Court of Appeals cited the mandatory obligation of the trial court to confirm the award – "shall confirm the award" – when no "grounds are offered for vacating, modifying, or correcting an award under Section 171.088 or 171.091."[9] The Court also stated its standard of review of an arbitration award as "de novo" and explained that it would "indulge presumptions in favor of the award and none against it."[10]

The *ex parte* evidence argument arose because the winning party submitted both attorney affidavits and billing records to the arbitrator for consideration of the award of attorneys' fees. But the submission of the billing records was limited to the arbitrator's *in camera* review and not shown to the other side who objected to the arbitrator and later to the trial court, both of whom overruled the objections and did not order disclosure of the billing records to the objecting party (who was the losing party). The objecting parties relied on Texas Civil Practice and Remedies Code §§171.088(a)(3)(D) and 171.047 claiming they were denied the rights described in §171.047 and the kind of arbitration hearing described in §171.088(a)(3)(D). They did not get a fair hearing because of the arbitrator's alleged consideration of this ex parte evidence without disclosure to them and opportunity to be heard on the ex parte evidence. The Dallas Court of Appeals concluded after a review of the record on appeal and the arbitrator's two rulings on the objections to this ex parte evidence[11] that the rights of the objecting parties had not been "substantially prejudiced" and ruled against the appellants.

The Dallas Court of Appeals quickly disposed of the appellants' second appeal point.[12] There is no "statutory basis allowing us to vacate an arbitration award for vagueness," the Court stated.[13] The Court also stated it could find no authority for vacating an award for vagueness. Furthermore, the Court viewed the vagueness argument related to "undefined interests in patents" as a "mistake-of-law" argument for which the Court could not vacate an award.[14]

Appellants' third point of error returned to attorneys' fees awarded by the arbitrator claiming that the arbitrator awarded attorneys' fees for "substantial work on inventorship claims," and, therefore, the arbitrator exceeded his powers.[15] The Court cited the parties' post-dispute Rule 11 agreement, the arbitrator's findings, the arbitrator's disclaimer of any consideration of patent inventorship, and relied on the unrebutted presumption that the arbitrator's award of attorneys' fees was only for claims properly submitted to him in overruling appellants' third point of error.[16]

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[8]2016 Tex. App. LEXIS 5995, *5 fn2. The trial court remanded the Wrights "objections" to the award to the arbitrator who overruled the objections, after which the trial court confirmed the award.

[9]Tex. Civ. Prac. & Rem. Code §171.087; *see also Hoskins v. Hoskins*, 2016 Tex. LEXIS 386, *11-12 (Tex. May 20, 2016).

[10]2016 Tex. App. LEXIS 5995, *4; citing both *CVN Group*, 95 S.W.3d 234, 238 (Tex. 2002) and *Humitech Development Corp. v. Perlman*, 424 S.W.3d 782, 790 (Tex. App. – Dallas 2014, no pet.).

[11]2016 Tex. App. LEXIS 5995, *12.

[12]*Id.* at *13-14.

[13]*Id.*

[14]*Id.*

[15]*Id.* at *14-16; citing Tex. Civ. Prac. & Rem. Code §171(a)(3)(A)

[16]2016 Tex. App. LEXIS 5995, *15-16.

The trial court did not unconstitutionally delegate its duty by remanding the amended award to the arbitrator to rule on the losing parties' objections to the award. Texas Civil Practice and Remedies Code §171.054(a) and (b) grant authority to the arbitrator to modify or correct an award when requested either by a party or the court. The appellants did not make a request of the arbitrator to modify or correct the award before taking their objections to the trial court. The trial court based on Texas Civil Practice and Remedies Code §§171.054 and 171.091(a) have ample authority to remand appellants' objections to the arbitrator.

OBSERVATIONS

1. Most of this appeal could have been prevented by the arbitrator refusing to consider any evidence not disclosed to the opposing party, although the opinion leaves the impression that the arbitrator gave the *in camera* evidence little or no consideration in the attorneys' fee award.

2. A more specific recitation of what documents the arbitrator considered rather than "the records submitted" may also have helped prevent or temper the losing parties' appeal.

3. The arbitrator recited a lengthy number of factors considered by the arbitrator in determination of the attorneys' fees award.[17]

4. The conduct of the final hearing was a central issue in this case with Texas Civil Practice and Remedies Code §§171.043-.047 brought into play by incorporation in §171.088(a)(3)(D).

5. The Dallas Court of Appeals seemed concerned about the *in camera* inspection of billing records that were not provided to the opposing parties and commented *sua sponte* about the "misconduct" vacatur ground in Texas Civil Practice and Remedies Code §171.088(a)(2)(C) although not raised by the appellants but the Court found no unfair conduct and no unjust or unfair proceeding conducted by the arbitrator.[18]

6. The Court's citation to Texas Civil Practice and Remedies Code §171.087[19] sounds like but doesn't cite *Hoskins v. Hoskins*[20] but does cite a case that recognized Texas common law vacatur grounds now overruled by *Hoskins*.[21]

[17]*Id.* at *12; see also *Anderson v. Perry Equipment Corp.*, 945 S.W.2d 817, 818 (Tex. 1997) and Texas Disciplinary Rules of Professional Conduct 1.04.
[18]2016 Tex. App. LEXIS 9559, *9-11.
[19]*Id.* at 4.
[20]2016 Tex. LEXIS 386 (Tex. May 20, 2016).
[21]*Humitech Development Corp. v. Perlman*, 424 S.W.3d 782, 791 (Tex. App. – Dallas 2014, no pet.).