The Arbitration Newsletter

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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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FORM OVER SUBSTANCE
(What is "imperfect execution"?)
9 U.S.C. §10(a)(4)

***Stage Stores, Inc. v. Gunnerson*, 477 S.W.3d 848 (Tex. App.—Houston [1st Dist.] 2015, no pet.)**

A sole arbitrator awarded $515,100 for a termination payment and $14,957.04 for COBRA costs to Jon Gunnerson ("Gunnerson") against his former employer Stage Stores, Inc. ("Stage"). Stage moved to vacate the award. Gunnerson moved to confirm. The 61st District Court, Harris County, Texas, confirmed Gunnerson's award and denied Stage's request to vacate.[2] Stage appealed to the Houston First Court of Appeals (the "Court of Appeals"), which reversed the trial court's judgment with a lengthy concurrence by Justice Harvey Brown and remanded the dispute to the arbitrator to address one of Stage's key defenses.[3] Justice Evelyn V. Keyes dissented in a separate opinion.[4]

The dispute arose when Gunnerson resigned from Stage on July 2, 2012.[5] In his resignation, Gunnerson invoked the "Good Reason" termination clause of his employment contract.[6] Gunnerson worked for Stage as a senior executive for six years.[7] In February of 2010, Gunnerson was promoted to Senior Vice President Director of Stores for the Houston Division and entered into an employment contract with Stage that contained an arbitration provision.[8] The employment contract's arbitration provision did not specify a form for the arbitration award but invoked the Federal Arbitration Act ("FAA") and the Commercial Arbitration Rules of the American Arbitration Association (2009).[9]

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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 Tave Parker Doty, a third-year law student at Texas A&M University School of Law, for her research and drafting assistance.

[2] Stage Stores, Inc. v. Gunnerson, No. 201321878, 2013 WL 7157537, at *1 (Tex. Dist. June 28, 2013).

[3] Stage Stores, Inc. v. Gunnerson, 477 S.W.3d 848 (Tex. App.—Houston [1st Dist.] 2015, no pet.).

[4] *Id.* at 873.

[5] *Id.* at 852.

[6] *Id.*

[7] *Id.*

[8] *Id.*

[9] *Id.* at 856-57.

This chosen termination method entitled Gunnerson to receive certain termination benefits but required Gunnerson to give "advance notice [to Stage] of the grounds supporting good reason and an opportunity to cure."[10]

Upon receiving Gunnerson's resignation letter, Stage refused to pay the termination benefits Gunnerson was entitled to under the "Good Reason" clause.[11] Gunnerson subsequently filed an arbitration demand to challenge Stage's refusal to pay.[12] The parties selected an arbitrator, who issued a "Report of Preliminary Hearing and Scheduling Order" that noted the parties agreed the form of the award would be a "reasoned award."[13] After the arbitrator's initial award, Gunnerson was entitled to recover his attorneys' fees and costs.[14] The parties submitted briefing on Gunnerson's attorney's fees and costs, and the arbitrator issued a final award.[15] The final award included the costs and attorney's fees awarded.[16] The final award is four pages in length, contains a statement of jurisdiction, identifies the parties, states the issues, recites procedural facts, and contains the arbitrator's rulings and damage awards.[17]

Stage's appeal to the Court of Appeals claims the arbitrator's award was not a "reasoned award" because it did not address[18] Gunnerson's failure to satisfy the required notice and opportunity to cure provision of the employment contract.[19] Gunnerson argued this was not one of Stage's key defenses, but the Houston Court of Appeals determined "Stage sufficiently identified and argued the matter in the arbitration proceeding and that the matter was significant enough to merit some reasoning in the award."[20]

The key issue before the Court of Appeals was whether or not the arbitration award was reasoned.[21] The parties had agreed the arbitration award would be a "reasoned award" but did not define or provide any detail about what constituted a "reasoned award."[22] The Court of Appeals noted that "judicial review of an arbitration award is extraordinarily narrow and we vacate an arbitration award only in very unusual circumstances."[23] Further, challenges to an arbitration award are reviewed under a "heavy presumption" that favors confirming the award, and all doubts are resolved in favor of arbitration.[24] The Court of Appeals also noted its "review is a determination of whether the '[a]ward [is] so deficient that it warrant[s] sending the parties back to square one.'"[25]

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[10] *Id.*
[11] *Id.*
[12] *Id.*
[13] *Id.*
[14] *Id.* at 853.
[15] *Id.*
[16] *Id.*
[17] *Id.*
[18] *Id.* at 860.
[19] *Id.*
[20] *Id.* at 861.
[21] *Id.* at 855.
[22] *Id.*
[23] *Id.* at 854 (citing Oxford Health Plans LLC v. Sutter, 133 S.Ct. 2064, 2068 (2013); Rain CII Carbon, LLC v. ConocoPhillips Co., 674 F.3d 469, 471–72 (5th Cir. 2012)).
[24] *Id.* at 855 (citing Cat Charter, LLC v. Schurtenberger, 646 F.3d 836, 842 (11th Cir. 2011)).
[25] *Id.* (quoting *Cat Charter*, 646 F.3d at 842 (edits in original)).

The Court of Appeals decided the arbitrator imperfectly executed her powers so "that a mutual, final, and definite award upon the subject matter submitted was not made"[26] and then sent the award back to the arbitrator based on an exemption to the common law doctrine of *functus officio.*[27] An exception to the *functus officio* doctrine exists for a court to remand an award to the arbitrator with instructions to clarify the award's ambiguity; the court then rules on a challenge to the arbitration award's enforcement after the ambiguity is resolved.[28] Thus, if a court determines an exception to the *functus officio* doctrine exists so that an arbitration award "(1) contains a mistake apparent on the face of the award, (2) is ambiguous in its scope or implementation, or (3) fails to completely adjudicate the matters raised in arbitration, then the court must remand the matter to the arbitrator for a clarification or completion of the award."[29]

The Court of Appeals chose to define what constituted a "reasoned award" in this appeal. The employment agreement's arbitration provision did not require a reasoned arbitration award, but the parties' agreement to a reasoned award is reported in the "Report of Preliminary Hearing and Scheduling Order" from the arbitration records.[30] Rule 42(b) of the Commercial Arbitration Rules of the American Arbitration Association provided "The arbitrator need not render a reasoned award unless the parties request such an award in writing prior to the appointment of the arbitrator or unless the arbitrator determines that a reasoned award is appropriate."[31] The Court of Appeals determined that "the arbitrator's notation in the scheduling order that the parties agreed to a reasoned award functions either as the consent of the arbitrator to amend the rules or as a determination by the arbitrator that a reasoned award was appropriate."[32]

Texas state courts had not previously defined "reasoned award," but the Eleventh and Fifth Circuits had provided guidance. The Eleventh Circuit defined "reasoned award" as "something short of findings and conclusions but more than a simple result."[33] The Fifth Circuit followed the Eleventh Circuit's opinion and held that "the detail and specificity required of a reasoned award falls between a standard award and findings of fact and conclusions of law."[34] The Court of Appeals considered the Eleventh and Fifth Circuits' opinions and held that "the detail and specificity required of a reasoned award falls between a standard award and findings of fact and conclusions of law."[35] The Court of Appeals further held that "a reasoned award is 'an award that is provided with or marked by the detailed listing *or mention of* expressions or statements offered as a justification of . . . the decision of the Panel' or arbitrator."[36]

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[26] *Id.* at 855; 9 U.S.C. ¶10(a)(4).
[27] *Id.* at 856 (quoting Brown v. Witco Corp., 340 F.3d 209, 218 (5th Cir. 2003) ("[A] common law rule that bars an arbitrator from revisiting the merits of an award once the award has been issued.").
[28] *Id.* at 855–56 (citing *Brown*, 340 F.3d at 216, 218).
[29] *Id.* (citing *Brown*, 340 F.3d at 216, 219; Murchison Capital Partners v. Nuance Commc'ns, Inc., 760 F.3d 418, 423 (5th Cir. 2014).
[30] *Id.* at 856.
[31] *Id.* at 856–57 (citing Am. Arbitration Ass'n, Commercial Arbitration Rules and Mediation Procedures R–42(b) (2009)).
[32] *Id.* (citing Am. Arb. Arbitration Ass'n, Commercial Arbitration Rules and Mediation Procedures R–1(a), R–42(b) (2009)).
[33] *Id.* at 858 (citing *Cat Charter*, 646 F.3d at 844).
[34] *Id.* (citing Rain CII Carbon, LLC v. ConocoPhillips Co., 674 F.3d 469, 473–74 (5th Cir. 2012)).
[35] *Id.*
[36] *Id.* at 859 (quoting *Cat Charter*, 646 F.3d at 844)(emphasis in original).

The Court of Appeals found the arbitrator's award summarized all of the parties' main arguments, except one of Stage's defenses, and provided four specific rulings.[37] The Court of Appeals noted that "[g]enerally, this award contains the same amount of explanation as those upheld in *Cat Charter* and *Rain CII Carbon*."[38] The pertinent part of the *Cat Charter* award was six paragraphs, which summarized the claims asserted and which party won "by the greater weight of the evidence," and identified the total money to be paid, including damages, fees, costs, and interest.[39] The award in *Rain CII Carbon* was eight pages in length, and the argument for vacatur "hinge[d] on the summary nature of the arbitrator's statement that, based upon all of the evidence, he found that the initial price formula should remain in effect."[40] The *Rain CII Carbon* court rejected the argument because it "ignore[d] that the preceding paragraph thoroughly delineate[d] Rain's contention that Conoco had failed to show that the initial formula failed to yield market price, a contention that the arbitrator obviously accepted."[41] Ultimately, the Court of Appeals held that "the award generally conforms with the requirements for an award to be reasoned but that the award's failure to provide any reasoning regarding Stage's third contention prevents a determination that the award is reasoned."[42] The Court of Appeals found that when an exception to the *functus officio* doctrine arises, such as when an arbitration award is ambiguous or fails to completely adjudicate matters raised in arbitration, the award must be remanded back to the arbitrator for clarification of the "award's particular ambiguities."[43]

In her dissent, Justice Keyes argued that the arbitration award sufficiently fulfilled the requirements to be a "reasoned award." Justice Keyes also argued that the majority and concurrence "mistake an *argument*, which need not be addressed in a reasoned award, and an *issue*, which must be disposed of in a reasoned award—as was done here."[44] Justice Keyes points out that "[o]nly a *defense* was not mentioned, and that defense was necessarily rejected by the disposition of the encompassing issue."[45] The majority's opinion, according to Justice Keyes, is "to pervert the ends of federal arbitration as stated by the United States Supreme Court in *Hall Street v. Mattel*, and as recognized by the Eleventh Circuit in *Cat Charter*, and to impose on arbitrations subject to the FAA heightened state court standards of review of reasoned arbitration awards that are clearly improper under, and superseded by, controlling federal law."[46]

OBSERVATIONS

1. The parties apparently agreed to a reasoned award based on the arbitrator's early scheduling order.[47]

[37] *Id.* at 859–60.
[38] *Id.* at 860.
[39] *Id.* (citing *Cat Charter*, 646 F.3d at 840–41).
[40] *Id.* (citing *Rain CII Carbon*, 674 F.3d at 474).
[41] *Id.* (citing *Rain CII Carbon*, 674 F.3d at 474).
[42] *Id.* at 863.
[43] *Id.* (citing Brown v. Witco Corp., 340 F.3d 209, 216, 218–19 (5th Cir. 2003)).
[44] *Id.* at 873 (emphasis in original).
[45] *Id.* (emphasis in original).
[46] *Id.* at 877–78.
[47] *Id.* at 856.

2. The Houston First Court of Appeals created a new way for an arbitrator to imperfectly execute her powers - failing to adequately address an affirmative defense raised by the losing party in the arbitration.

3. The Houston First Court admitted its analysis of whether the award was a reasoned award was "form" over "substance"[48] and that its review was limited to "the form" of the award not "the substance of the award."[49]

4. Yet the FAA vacatur ground cited by the Court required that the arbitrator's "imperfectly executed [powers] fail to produce "a mutual, final, and definite award upon the subject matter submitted."[50]

5. The Court assumed without reason that the award was ambiguous[51] regarding the notice and cure provision defense asserted by the employer. This assumed ambiguity then allowed the Court to find an exception to the *functus officio* doctrine that sent the award back to the arbitrator to deal with the notice and cure defense.

6. Justice Harvey Brown's concurrence argues for vacatur of the award, not remand to the arbitrator, because the award was not a reasoned award. Justice Brown then composes a short compilation of assorted non-authoritative, unsurprising, general observations about what constitutes a reasoned award.

7. Had this appeal been decided on "substance" and not "form,"[52] applying the standard of review stated by the Court,[53] coupled with Justice Higley's numerous favorable observations about the award,[54] it is likely that the trial court's confirmation of this award would have been affirmed.

[48] *Id.* at 859.
[49] *Id.*
[50] *Id.* at 855; 9 U.S.C. §10(a)(4).
[51] *Id.* at 855-56.
[52] *Id.* at 859.
[53] *Id.* at 854-55.
[54] *Id.* at 857, 859-60.