The Arbitration Newsletter

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(John Allen Chalk, Sr., Editor)

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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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NEW EMPLOYEE ELECTRONIC ONBOARDING and PROCEDURAL UNCONSCIONABILITY

H-E-B, LP v. Saenz, 2021 Tex. App. LEXIS 8283 (Houston [First District], Oct. 12, 2021, pet. filed)

This Federal Arbitration Act ("**FAA**") case stems from an interlocutory appeal from a state court order denying a motion to compel arbitration.[2] The Employee argued that a arbitration clause located in a Work Injury Benefit Plan was procedurally unconscionable because the clause was in English but she speaks Spanish and the store managers did not provide her an opportunity to ask questions before signing the agreement that included the arbitration clause.[3] However, the appellate court reversed the trial court finding[4] no procedural unconscionability because: (1) "a party to a written agreement is presumed to have read and understood its contents;" (2) "illiteracy in English is insufficient to establish procedural unconscionability when a translation has been provided;" and (3) undisputed proof that the employee failed to ask questions during a workplace orientation meeting conducted in that employee's language.[5]

Procedural unconscionability as a principle prevents oppression and unfair surprise absent fraud, misrepresentation, or deceit.[6] Procedural unconscionability must be applied to the arbitration clause, not the contract that contains the arbitration clause.[7] Simply because there is evidence of gross disparity of bargaining position does not automatically create procedural

[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 Madeline Bergstrom, a third-year law student at Texas A&M University School of Law, for her research and drafting assistance.

[2] *H-E-B, LP v. Saenz*, 2021 Tex. App. LEXIS 8283, *1 (Houston [First District] Oct. 12, 2021, pet. filed), *citing* Tex. Civ. Prac. & Rem. Code § 51.016.

[3] 2021 Tex. App. LEXIS 8283, *2-3.

[4] *Id.* *19-20 (And compelled the parties to arbitration.).

[5] *Id.* at *9-11.

[6] *Id.* at *10, *citing In re Palm Harbor Homes, Inc.*, 195 S.W.3d 672, 679 (Tex. 2006).

[7] *Id.* at *9-10.

unconscionability.[8] Likewise, lack of understanding the significance of signature, party unsophistication, illiteracy if arbitration clause is explained in party's language, and willingness to provide answers to questions will not result in a finding of procedural unconscionability.[9]

In this case, the employee did not argue that a valid arbitration clause did not exist.[10] Her claim, rather, was that she was misled when completing the new hire paperwork, did not understand the forms, and was told they concerned an attendance policy.[11] However, this evidence was rebutted by H-E-B's representative who explained the H-E-B new employee onboarding process, the "security procedure" used,[12] the provision to the employee of the arbitration clause in Spanish, and the Spanish orientation training provided to the employee also attended by the testifying H-E-B representative.[13]

The employee's primary language is Spanish, and she alleged that she does not understand English.[14] In a previous case, procedural unconscionability prevailed when the employee (1) was illiterate in English; (2) an arbitration agreement was not made available in Spanish; and (3) the court found that the employee was misled and told the arbitration clause related to an attendance policy.[15] However, these facts did not exist in this case. Testimony from H-E-B indicated that the arbitration clause itself was provided both in English and Spanish to the employee.[16] As well, there was testimony that showed that Saenz attended new hire training at H-E-B that was conducted in Spanish, discussed the arbitration clause, and Saenz was offered the opportunity to ask questions about the paperwork in Spanish.[17]

The appellate court relied on *Aerotek, Inc. v. Boyd* in its review of the H-E-B electronic onboarding of new employees and found that "the efficacy of [H-E-B's] security procedure" provided an acceptable electronic signature for the employee in question.[18] H-E-B claimed that the electronic New Hire Paperwork was e-mailed to employee's son who assisted her with completing the paperwork as she had difficulty with the technology.[19] However, the H-E-B system required the new hire paperwork to be completed by her and provided her with a unique, secret credential.[20] H-E-B introduced in the trial court the electronic New Hire Paperwork electronically signed by the employee.[21]

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[8] *Id.* at *10-11, *citing In re Halliburton Co.*, 80 S.W.3d 566, 572 (Tex. 2002) ("Because an employer has a general right under Texas law to discharge an at-will employee, it cannot be unconscionable, without more, merely to premise continued employment on acceptance of new or additional employment terms.").
[9] *Id.* at *10-12, citations omitted.
[10] *Id.* at *10-11, *citing In re McKinney*, 165 S.W.3d 833, 835 (Tex. 2005).
[11] *Id.* at *12.
[12] *Id.* at *13-16; Texas Business & Commerce Code §§322.009(a) and 322.002(13) (Texas Uniform Electronic Transactions Act).
[13] *Id.* at *15-16.
[14] *Id.* at *2-3.
[15] *Id.* at *11; *citing Delfingen US-Tex., L.P. v. Valenzuela*, 107 S.W.3d 791-802 (Tex. App.—El Paso 2013, no pet.).
[16] *Id.* at *16-17.
[17] *Id.* at *5, 18-19.
[18] *Id.* at *13-16; *see also supra* footnote 10.
[19] *Id.* at *4-5.
[20] *Id.*
[21] *Id.* at *5.

OBSERVATIONS

1. Procedural unconscionability is an affirmative defense for which the burden of proof shifts to the party opposing arbitration once the arbitrability questions of validity and scope are established by the movant.

2. The "summary" nature of the motion to compel hearing can become a jury trial[22] when unconscionability *inter alia* is claimed as an affirmative defense to the motion to compel.

3. Both the Texas Uniform Electronic Transactions Act[23] and the Federal Electronic Signatures in Global and National Commerce Act[24] have provided additional avenues for the unconscionability defense to motions to compel arbitration, especially the "efficacy" of the "security procedure" for electronic signatures to arbitration agreements.

4. The motion to compel hearing in this case was factually contested with direct questioning by the trial judge of the employee who opposed the motion to compel.

5. The trial court record also contained the trial judge's credibility assessment of the employee in question.

6. This case as of the Newsletter date is petition-for-review pending.

[22] 9 U.S.C. §4.
[23] Tex. Bus. & Com. Code ch. 322.
[24] 15 U.S.C. ch 96 (2000).