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ARBITRATION AGREEMENT ENFORCED

Employers routinely enter into agreements with employees in which each agrees to arbitrate potential employment disputes. However, what happens when an employer retains a unilateral right to interpret, clarify, and periodically revise existing company policies? More on point, does this unrestricted right render the arbitration agreement illusory?

Many companies may be pleasantly surprised to know that in Texas, provisions that preserve an employer's right to make certain unilateral changes do not necessarily invalidate the arbitration agreement. Specifically, the Court of Appeals of Houston addressed this issue in *Aspen Tech., Inc. v. Shasha*, 2008 Tex. App. Lexis 2864 (Tex. App—Houston March 2008).

THE FACTS

Abe Shasha began his employment with Aspen Technology, Inc. in December 2001. At that time, Shasha signed an agreement in which he and Aspen agreed to arbitrate any and all disputes or controversies that might arise, including employment disputes. On October 28, 2005, Shasha signed a second agreement in which both parties agreed that any legal action against Aspen would be settled exclusively by arbitration before a three-member panel in Boston, Massachusetts, in accordance with the commercial arbitration rules of the American Arbitration Association.

In May 2006, Shasha resigned from his position with Aspen and soon thereafter filed suit against Aspen asserting contract and tort claims. Aspen filed a Motion to Compel Arbitration relying on both arbitration agreements. Shasha argued that the second arbitration agreement was unenforceable because (1) the clause was illusory given that Aspen allegedly retained a unilateral, unrestricted right to terminate this arbitration agreement and (2) the clause imposed such exorbitant costs on Shasha that it was substantively unconscionable.

The trial court granted Aspen's Motion to Compel, ordered all claims to arbitration and ultimately signed an order in which it compelled arbitration in Houston, Texas, with a single arbitrator under the first agreement.

The case was appealed and the Houston Court of Appeals heard this case and addressed two key issues:

1. Was the arbitration clause in the second agreement illusory?

Shasha asserted that Aspen retained a unilateral, unrestricted right to terminate the arbitration provision in the second agreement based on language in the agreement that permitted Aspen to unilaterally interpret, clarify, and revise the existing incentive compensation plan

Specially, Shasha alleged (1) that the clause was illusory because Aspen retained a right to terminate the arbitration agreement and (2) that the clause was substantively unconscionable because it imposed excessive costs on Shasha.

The Houston Court of Appeals, however, concluded that under the unambiguous language of the second agreement, Aspen did not retain a unilateral, unrestricted right to modify or terminate the arbitration provision. The Court asserted that even assuming that Aspen could review the agreement and make revisions from time to time, this is not equivalent to stating that the employer has a unilateral, unrestricted right to terminate the arbitration provision in the agreement. The Court relied on the language of the agreement which explicitly provided that any additional terms or conditions, or verbal or written agreements between Shasha and Aspen, would not apply unless explicitly agreed to and approved in a signed writing by both parties. Therefore, that arbitration provision, as a matter of law, was not illusory. The Court of Appeals further held that the cases on which Shasha relied were not on point and, thus, concluded that the trial court abused its discretion.

2. Was the arbitration clause in the second agreement substantively unconscionable?

The Court of Appeals began by stating that a party seeking to invalidate an arbitration agreement on the ground that arbitration would be prohibitively expensive bears the burden of providing specific evidence showing a likelihood that he or she would incur excessive arbitration costs. Shasha argued that the second agreement required that the AAA conduct the arbitration and that this necessarily made it more expensive to administer. The Houston Court of Appeals found no such requirement, but instead ruled that the provision simply stated that arbitration shall be in accordance with the commercial rules.

Importantly, the Court stated that even presuming that the AAA would administer the arbitration and that the costs and fees would be allocated equally, Shasha's projected costs of \$15,162 plus his expense of traveling to Boston would not be unconscionable. The Court of Appeals considered that Shasha was asserting a claim of \$300,000 and \$500,000 and that his base salary was \$120,000 before entering the second agreement.

WHAT DOES THIS MEAN TO EMPLOYERS IN TEXAS?

There are at least two important points to take away from this case:

1. Even where an employer retains a unilateral right to interpret, clarify, and periodically revise existing company policies or plans, Texas courts seem to be reluctant to find that such a clause renders the arbitration agreement illusory. Texas courts are looking to the unambiguous language of the agreement.
2. This decision demonstrates a reluctance to find an agreement substantively unconscionable just because the employee's projected costs seem relatively high. Courts seem to look into the value of an employee's claim and the damages the employee is claiming. Often times, Plaintiffs make claims for an exorbitant amount of money. Thus, this can be a factor that Defendants can point out to the Court when a Plaintiff raises the cost issue.

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