IN THE SUPREME COURT OF TEXAS

NO. 07-0135

EAST TEXAS SALT WATER DISPOSAL COMPANY, INC., PETITIONER,

v.

RICHARD LEON WERLINE, RESPONDENT

ON PETITION FOR REVIEW FROM THE
COURT OF APPEALS FOR THE SIXTH DISTRICT OF TEXAS

Argued January 16, 2008

CHIEF JUSTICE JEFFERSON, joined by JUSTICE MEDINA and JUSTICE GREEN, dissenting.

The Texas General Arbitration Act (TAA) permits a party to appeal an order "confirming or denying confirmation of an award" or "vacating an award without directing a rehearing." TEX. CIV. PRAC. & REM. CODE § 171.098(a)(3),(5). In this case, the trial court vacated an arbitration award and also refused to confirm it. Had the trial court stopped there, the order would have been final and appealable. But the court also ordered a rehearing. That order makes the trial court's judgment interlocutory and, in line with almost all decisions in Texas and beyond, ineligible for appeal. By refusing to dismiss the appeal, the Court disregards a clear statutory mandate and goes against the weight of those decisions that have addressed the issue. I respectfully dissent.

I. The trial court's interlocutory order lacks finality under the TAA.

The TAA appeals provision, adopted verbatim in 1965 from the Uniform Arbitration Act, authorizes appeals of certain trial court orders, even if they are interlocutory, as long as they have attributes of finality. *See* TEX. CIV. PRAC. & REM. CODE § 171.098(a); HANDBOOK OF THE NATIONAL CONFERENCE OF COMMISSIONERS ON UNIFORM STATE LAWS, prefatory note, 162 (1955) (stating "[t]he Section on Appeals is intended to remove doubts as to what orders are appealable and to *limit appeals prior to judgment to those instances where the element of finality is present*" (emphasis added)). The interlocutory order at issue here, which mandated a rehearing of Werline's claims, lacks any "element of finality." We must abide by the Legislature's decision to exempt from appeal those cases that are bound to be reheard. *See Ogletree v. Matthews*, 262 S.W.3d 316, 319 n.1 (Tex. 2007) ("Texas appellate courts have jurisdiction only over final orders or judgments unless a statute permits an interlocutory appeal."); *cf. Tex. A&M Univ. Sys. v. Koseoglu*, 233 S.W.3d 835, 841 (Tex. 2007) (observing that we strictly construe the general interlocutory appeals statute as "'a narrow exception to the general rule that only final judgments are appealable'" (quoting *Bally Total Fitness Corp. v. Jackson*, 53 S.W.3d 352, 355 (Tex. 2001))).

II. The Court's holding conflicts with the majority of courts to examine the issue.

The TAA requires Texas courts to construe the act to "effect its purpose and make uniform the construction of other states' law applicable to an arbitration." TEX. CIV. PRAC. & REM. CODE § 171.003. Section 171.098 is identical to section 19 of the Uniform Arbitration Act, so we look not only to Texas cases but also to those from courts in other states that have adopted section 19. *Compare id.* § 171.098(a), *with* UNIF. ARBITRATION ACT § 19, 7 U.L.A. 739 (1956). The majority

of Texas courts of appeals that have considered the issue have concluded that an order denying confirmation of an award, while also vacating and directing a rehearing, is not appealable. *See Thrivent Fin. for Lutherans v. Brock*, 251 S.W.3d 621, 627 (Tex. App.—Houston [1st Dist.] 2007, no pet.); *Prudential Sec., Inc. v. Vondergoltz*, 14 S.W.3d 329, 331 (Tex. App.—Houston [14th Dist.] 2000, no pet.). *But see* 209 S.W.3d 888, 895. This is the identical conclusion reached by the state supreme courts that have considered the question. *See, e.g., Me. Dep't of Transp. v. Me. State Employees Ass'n*, 581 A.2d 813, 815 (Me. 1990) (stating that "[t]o allow a party to appeal before the rehearing by simply filing a motion to confirm, a motion that would be denied by the court in conjunction with its order vacating the award and directing a rehearing, would be to circumvent [provisions equivalent to TAA (a)(5)]"); *Karcher Firestopping v. Meadow Valley Contractors, Inc.*, 204 P.3d 1262, 1265-66 (Nev. 2009) (holding that such an order is not "sufficiently final to be suitable for appellate review"); *Double Diamond Constr. v. Farmers Coop. Elevator Ass'n of Beresford*, 656 N.W.2d 744, 746 (S.D. 2003) (noting that the language "without directing a rehearing" in the Nebraska statute is "meaningful and not superfluous" (internal quotations omitted)). Intermediate appellate courts in other UAA jurisdictions have come to the same conclusion. *See, e.g., Connerton, Ray & Simon v. Simon*, 791 A.2d 86, 88 (D.C. 2002) (holding that "[w]hen it is apparent that an order confirming or denying confirmation of an arbitration award does not represent the conclusion of the proceeding on the merits, it lacks the quality of finality . . . and is not appealable"); *Kowler Assocs. v. Ross*, 544 N.W.2d 800, 802 (Minn. Ct. App. 1996) (ruling that "when a rehearing is directed, appellate review is premature because the arbitration process has not been completed").

The Nevada Supreme Court examined the caselaw on both sides of the issue and held:

> [W]e find the decisions concluding that appellate courts lack jurisdiction to review orders denying confirmation of an arbitration award and vacating the award while directing a rehearing better reasoned and more persuasive. In particular, we agree with the various courts that have concluded that the plain language of their version of [the UAA], which provides for an appeal from orders vacating an arbitration award without directing a rehearing, bars appellate review of orders vacating an award while directing a rehearing, even if the order also denies confirmation of the award, which, on its own, would be appealable under a statute analogous to [the UAA]. As noted in these decisions, because in this matter the district court directed a rehearing, permitting appellate review at this point would render [the UAA's] "without directing a rehearing" language superfluous.
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> Further, we agree with the conclusion reached by several courts that the statutory structure providing for appeals from arbitration-related orders, when read as a whole, is designed to permit appeals only from orders that bring an element of finality to the arbitration process. Here, the district court's order vacating the arbitration award and remanding for supplemental proceedings extended, rather than concluded, the arbitration process, and has not been identified by [the UAA] as sufficiently final to be suitable for appellate review. Accordingly, finding no statutory basis for an appeal from the district court order, we conclude that this court lacks jurisdiction over this appeal.

Karcher, 204 P.3d at 1265-66.

The Court asserts that "jurisdictions, other than Texas, that have considered whether to allow appeal in a situation like the one in this case appear about evenly divided on the issue," ___ S.W.3d at ___, but the case law in fact leans the other way. *See* Stephen K. Huber, *State Regulation of Arbitration Proceedings: Judicial Review of Arbitration Awards by State Courts*, 10 CARDOZO J. CONFLICT RESOL. 509, 576 (2009) (noting that states may require re-arbitration with an appeal of the initial order awaiting completion of the arbitration process and observing that "most states have in fact adopted precisely this approach"). Of the cases enumerated by the Court, almost all are distinguishable and most were decided a decade or more ago.

The Court's reliance on a New York case, *In re Baar & Beards, Inc.*, is beside the point, because New York has no statute governing appeals in arbitration cases. The court in *Baar* turned to state common law to resolve the issue, and its analysis is therefore inapplicable for our purposes. *See In re Baar & Beards, Inc.*, 282 N.E.2d 624, 625 (N.Y. 1972). The Arizona and Missouri cases are also inapposite because both of those states, by statute, authorize general appeals from orders granting new trials, which is not so in Texas. *Compare Fruehauf Corp. v. Carrillo*, 848 S.W.2d 83, 84 (Tex. 1993) ("An order granting a new trial is an unappealable, interlocutory order."), *with Wages v. Smith Barney Harris Upham & Co.*, 937 P.2d 715, 719 (Ariz. Ct. App. 1997), *and Nat'l Ave. Bldg. Co. v. Stewart*, 910 S.W.2d 334, 338 (Mo. Ct. App. 1995) (noting that Missouri practice is distinguishable because "[The Missouri statute] specifically authorizes an appeal 'from any order granting a new trial' in any civil case"). Furthermore, as noted by the Court, Missouri case law has in fact come out both ways. *See, e.g.*, *Crack Team USA, Inc. v. Am. Arbitration Ass'n*, 128 S.W.3d 580, 583 (Mo. Ct. App. 2004) (dismissing appeal).

Although the Court cites a Massachusetts case that appears to allow an appeal from an order that denies confirmation and directs a rehearing, the case never discusses the nature of the interlocutory order, or the authority on which it grants the appeal. *See Fazio v. Employers' Liab. Assurance Corp.*, 197 N.E.2d 598, 600 (Mass. 1964). More recent Massachusetts decisions have directly addressed the issue of orders to vacate with a rehearing (without denying confirmation), and have denied the right of appeal—without even citing *Fazio*. *See Suffolk County Sheriff's Dep't v. AFSCME Council 93*, 737 N.E.2d 1276, 1277 (Mass. App. Ct. 2000) (holding that the ordering of a rehearing caused the judgment to not be final and appealable); *School Comm. of Quincy v. Quincy*

Educ. Ass'n, 491 N.E.2d 672, 673-74 (Mass. App. Ct. 1986) ("Since the order was one which contemplated a further hearing, it was not appealable.").

The Court also points to a recent Utah court of appeals decision allowing for appeal. However, in that case, the court was required to do so because of state precedent interpreting the Utah constitutional provision authorizing appeals, not because the UAA mandated such a result. *See Hicks v. UBS Fin. Servs., Inc.*, No. 20080950-CA, 2010 Utah App. LEXIS 20, at *16-*17 (Utah Ct. App. Feb. 4, 2010) (noting that a "majority" of courts have dismissed such appeals, while a "minority" have allowed them).

A few cases do, in fact, support the Court's interpretation: an unpublished appellate case out of Tennessee, which provides no jurisdictional analysis, *Boyle v. Thomas*, No. 02A01-9601-CV-00022, 1997 Tenn. App. LEXIS 807, at *5 (Tenn. Ct. App. Nov. 14, 1997); and a Minnesota decision which, as noted by the Court, ___ S.W.3d at ___, is one of two Minnesota cases that come to opposite conclusions: one permitting appeal without discussing jurisdiction, *Safeco Ins. Co. v. Goldenberg*, 435 N.W.2d 616, 621 (Minn. Ct. App. 1989), and the other disallowing appeal because it "would be inconsistent with the rules of statutory interpretation and the statutory prohibition against appeals from orders directing a rehearing," *Kowler*, 544 N.W.2d at 801. Thus, it is accurate to say that the majority of states that have arbitration statutes comparable to ours have concluded that there is no appeal from an order that vacates an award, directs a rehearing, and denies confirmation. Even more compelling is the fact that every other Texas appellate decision concerning this issue, with the exception of the court of appeals' opinion in this case, has interpreted it the same way. *See Thrivent*, 251 S.W.3d at 627; *Stolhandske v. Stern*, 14

S.W.3d 810, 813 (Tex. App.—Houston [1st Dist.] 2000, pet. denied); *Vondergoltz*, 14 S.W.3d at 331.

The TAA directs us to construe its provisions so as to "make uniform the construction of other states' law applicable to an arbitration"; we come closer to that mandate by holding that an interlocutory order that directs a rehearing may not be appealed.

III. Precedent and statutory interpretation instruct us to treat an order vacating an award and directing a rehearing as the functional equivalent of an order granting a new trial.

The Court takes issue with the analogy drawn between the district court's order in this case and the granting of a motion for new trial. ___ S.W.3d at ___ ("The Company argues that the district court's order should not be appealable because it was like granting a motion for new trial in a case, which is not appealable. But the analogy does not fit.").

Whether the Court can find a more fitting analogy is beside the point: both precedent and the statute itself direct us to treat much of the process as we would a civil trial, and "an order vacating an arbitration award and directing a rehearing is the functional equivalent of an order granting a new trial." *Stolhandske*, 14 S.W.3d at 814; *see also Bison Bldg. Materials, Ltd. v. Aldridge*, 263 S.W.3d 69, 75 (Tex. App.—Houston [1st Dist.] 2006, pet. granted) (holding that order to vacate award and order new arbitration "'is the functional equivalent of an order granting a new trial'" and therefore not subject to direct appellate review (quoting *Stolhandske*, 14 S.W.3d at 814)); *Thrivent*, 251 S.W.3d at 623 (same); *Me. Dep't of Transp.*, 581 A.2d at 815 (holding that barring appeal from an order that vacates an arbitration award and directs a rehearing "is consistent with the

policy of barring an immediate appeal from the granting of a new trial in a civil case"); *Minn. Teamsters Pub. & Law Enforcement Employees Union, Local No. 320 v. County of Carver*, 571 N.W.2d 598, 599 (Minn. Ct. App. 1997) (holding that order vacating award and ordering rehearing is analogous to order granting new trial).

Notably, the TAA looks to civil court procedure to define how parties are to conduct multiple aspects of the arbitration and appeals process, including the taking of oaths, TEX. CIV. PRAC. & REM. CODE § 171.049, depositions, *id*. § 171.050(b), subpoenas, *id*. § 171.051(d), witness fees, *id*. § 171.052, notice requirements, *id*. § 171.093, service of process for subsequent applications, *id*. § 171.095(a), and, most relevant of all, appealing orders: "The appeal shall be taken in the manner and to the same extent as an appeal from an order or judgment in a civil action," *id*. § 171.098(b). Because the appeal must be taken "in the same manner" and "to the same extent" as an appeal from a judgment in a civil action, we have no discretion to ignore the interlocutory character of the trial court's rehearing order.

IV. The concurrence observes that the Court's result "mirrors what the result would be under federal law" but ignores the substantive differences between the FAA and the TAA.

This case concerns only the Texas Arbitration Act, not its federal counterpart, which perhaps explains why the Court rejects JUSTICE WILLETT's proposal to conflate the two. *See* Huber, *supra*, at 577 ("Neither the Supreme Court nor any federal court of appeals have seriously suggested, let alone decided, that [the FAA appeals provision] supplants different state law in state courts."). Where parties agree to abide by state rules of arbitration, and where the dispute is not preempted by the FAA, courts apply state law, even when it differs from the FAA. *Ford v. Nylcare Health Plans*

of the Gulf Coast, Inc., 141 F.3d 243, 248 (5th Cir. 1998) ("'Where . . . the parties have agreed to abide by state rules of arbitration, enforcing those rules according to the terms of the agreement is fully consistent with the goals of the FAA, even if the result is that arbitration is stayed where the [FAA] would otherwise permit it to go forward.'" (quoting *Volt Info. Scis., Inc. v. Bd. of Trs. of Leland Stanford Junior Univ.*, 489 U.S. 468, 479 (1989))). The TAA prohibits appeal of an order "vacating an award without directing a rehearing"; the FAA omits "without directing a rehearing" from its appellate provision. *Compare* 9 U.S.C. § 16, *with* TEX. CIV. PRAC. & REM. CODE § 171.098(a)(5). That the Court's interpretation leads to an identical result under both statutes only highlights the fact that the words "without directing a rehearing" are now superfluous under Texas law. *See Vondergoltz*, 14 S.W.3d at 331 ("To hold [that an appeal was allowed] would render the language 'without directing a rehearing' without effect and would elevate form over substance . . . ."); *see also First Am. Title Ins. Co. v. Combs*, 258 S.W.3d 627, 631 (Tex. 2008) (holding that a court must interpret the words of a statute "according to their common meaning in a way that gives effect to every word, clause, and sentence" (internal quotations omitted)).

The Court and the concurrence rewrite the TAA to make it consistent with the FAA, even though the TAA explicitly differs. This is contrary to the TAA's plain language as well as its mandate—that we construe it "to effect its purpose and make uniform the construction of *other states*' law applicable to an arbitration." TEX. CIV. PRAC. & REM. CODE § 171.003 (emphasis added); *see also* TEX. GOV'T CODE § 311.028 ("A uniform act included in a code shall be construed to effect its general purpose to make uniform the law of those states that enact it."). Texas, not federal, law governs this case, and that law is clear: a party may not appeal an order that grants rehearing.

V. Section 171.098(a)(5) is uniformly interpreted to prohibit appeals when a rehearing is granted.

The concurrence also argues that "subsection (5) allows an appeal when a rehearing is not granted," but does not *"dis*allow every appeal when a rehearing *is* granted." ___ S.W.3d at ___. Instead, the concurrence crafts an exception for a vacatur with rehearing that "amounts to a denial of confirmation." *Id.* at ___. This interpretation sidesteps the statute's plain language, further eviscerating subsection (5)'s policy that disallows an appeal when an order, which grants a rehearing, is interlocutory. Even the court of appeals in this case rejected such an argument, conceding that "[u]nder the plain language of the statute, a party can appeal the denial of an application to confirm an arbitration award, but cannot appeal an order which vacates an award and directs a rehearing." 209 S.W.3d at 893. Furthermore, the concurrence's argument contradicts every other court's construal of the statute. *See Thrivent*, 251 S.W.3d at 622-23; *J.D. Edwards World Solutions Co. v. Estes, Inc.*, 91 S.W.3d 836, 839-40 (Tex. App.—Fort Worth 2002, pet. denied)*; Poole v. USAA Cas. Ins. Co.*, No. 14-99-00740-CV, No. 14-99-01056-CV, 2000 Tex. App. LEXIS 6825, at *3-*4 (Tex. App.—Houston [14th Dist.] Oct. 12, 2000, pet. denied) (not designated for publication); *Vondergoltz*, 14 S.W.3d at 331. Finally, this argument is contrary to the prevailing view among state courts outside of Texas as well, which have held that an order vacating an award and directing a rehearing (without denying confirmation) is not final and appealable. *See City of Fort Lauderdale v. Fraternal Order of Police, Lodge No. 31*, 582 So. 2d 162, 162-63 (Fla. Dist. Ct. App. 1991) (holding that a rehearing order is interlocutory and not appealable); *Carner v. Freedman*, 175 So. 2d 70, 71 (Fla. Dist. Ct. App. 1965) (holding that an appeal from an order vacating an award while

directing a rehearing is an appeal "improvidently taken"); *Max Rieke & Bros., Inc. v. Van Deurzen & Assocs., P.A.*, 118 P.3d 704, 706-08 (Kan. Ct. App. 2005) (holding that a rehearing order was not final or appealable); *Crack Team*, 128 S.W.3d at 583 (holding that Missouri's version of 171.098(a)(5) "implicitly bars appeals from orders that direct a rehearing"); *Neb. Dep't of Health and Human Servs. v. Struss*, 623 N.W.2d 308, 314 (Neb. 2001) (finding an order directing a rehearing premature for review); *Boyce v. St. Paul Prop. & Liab. Ins. Co.*, 618 A.2d 962, 969 n.4 (Pa. Super. Ct. 1992) (holding that Pennsylvania's equivalent of 171.098(a)(5) implies that "an appeal cannot be taken from an order vacating an arbitration award *and directing a rehearing*"); *Double Diamond Constr.*, 656 N.W.2d at 746 (holding that "when a rehearing is ordered the decision to vacate is not appealable").

VI. Conclusion

The Court and the concurrence fear that a trial court can avoid confirmation by simply ordering rearbitration until the court likes the result, or one or both parties have given up. I share that concern. But a trial court's rehearing order does not confer jurisdiction where the Legislature has said none exists. Appellate jurisdiction should not hinge on whether the trial court, in conjunction with an order vacating an award and directing rehearing, denies rather than dismisses as moot a motion to confirm. *See Me. Dep't of Transp.*, 581 A.2d at 815 (noting that a trial court "should not even consider a motion to confirm once the court has granted a motion to vacate, because vacating an arbitration award renders determination of a motion to confirm the award moot"). The TAA does not authorize an appeal of an order that directs a rehearing. I would reverse the court of appeals' judgment and dismiss the appeal. Because the Court does otherwise, I

respectfully dissent.

Wallace B. Jefferson
Chief Justice

OPINION DELIVERED: March 12, 2010