IN THE SUPREME COURT OF TEXAS

NO. 06-1084

BISON BUILDING MATERIALS, LTD., PETITIONER,

v.

LLOYD K. ALDRIDGE, RESPONDENT

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

JUSTICE HECHT filed a dissenting opinion, in which JUSTICE MEDINA and JUSTICE WILLETT joined.

As the Court acknowledges,[1] when the Federal Arbitration Act[2] ("the FAA") affords appellate review that Texas law does not, state-court review may be available by mandamus.[3] The Court holds that the FAA would not allow an appeal from the trial court's order in this case. I disagree and therefore respectfully dissent.

[1] *Ante* at ___.

[2] 9 U.S.C. §§ 1-16.

[3] *See In re Gulf Exploration, LLC*, 289 S.W.3d 836, 841-843 (Tex. 2009) (in conditionally granting relief, the Court concluded that the court of appeals erred in granting mandamus relief to a party complaining of a trial court order compelling arbitration because that party failed to establish that it had an inadequate remedy by appeal; the Court distinguished *In re Poly-America*, 262 S.W.3d 337, 352 (Tex. 2008), in part because it involved conflicting legislative mandates); *Jack B. Anglin Co. v. Tipps*, 842 S.W.2d 266, 271-273 (Tex. 1992).

Bison Building Materials, Ltd., a non-subscriber, paid Aldridge, its employee, medical and wage replacement benefits under its insurance plan in exchange for Aldridge's written waiver of his "right to file a legal action . . . for any and all damages sustained" because of his injury. After receiving some $80,000 in benefits, Aldridge asserted damage claims against Bison and demanded arbitration, having agreed under the FAA to arbitrate claims for work-related injuries. In the arbitration, Bison argued that the post-injury waiver barred Aldridge's claims. Aldridge alleged that he did not recall signing the waiver, but if he did sign it, he did not understand it. The arbitrator found that Aldridge signed the waiver and so dismissed, with prejudice, his attempt to arbitrate a claim for common law damages.

Aldridge then sued Bison to have the arbitration award set aside. Aldridge moved for summary judgment, and in response, Bison moved for confirmation. They both argued for a standard of review — "that applied by an appellate court reviewing a decision of a trial court sitting without a jury" — provided for in their arbitration agreement but not in the FAA.[4] The trial court apparently applied that standard in issuing the following order:

ORDER

> Pending before the Court are the motion for summary judgment in action to set aside arbitration award filed by plaintiff Lloyd K. Aldridge ("Aldridge") and the motion to confirm arbitration award filed by defendant Bison Building Materials, Ltd. ("Bison"). By these motions, the parties ask this Court to review the arbitrator's August 24, 2004, Final Award which grants Bison's motion to dismiss arbitration. By the arbitrator's award, he concluded that (1) the post-injury waiver at issue

[4] The United States Supreme Court has since held that the FAA's grounds for vacating or modifying an arbitration award cannot be enlarged by agreement. *Hall St. Assocs., L.L.C. v. Mattel, Inc*., 552 U.S. 576, 578 (2008).

precluded Aldridge from pursuing a common law negligence claim for damages resulting from his on-the-job accident; and (2) Aldridge did sign the post-injury waiver.

Having considered the submissions and the applicable law, the Court determines that the motions should be GRANTED in part and DENIED in part as follows.

The Court finds that, as a matter of first impression, that both the Texas Supreme Court decision *Storage & Processors, Inc. v. Reyes*, 134 S.W.3d 190 (Tex. 2004) (holding that Texas' strong public policy for Workers' Compensation favors even a radical extension of the doctrine to less-than-total-exculpation waivers where workers are involved) and the fair notice requirements described therein are properly applied to a post-injury waiver. The Court further finds that the post-injury waiver is ambiguous as to whether the right to arbitration is forfeited. Thus, the Final Award of dismissal is VACATED in PART, solely as to the arbitrator's finding that the post-injury waiver precludes arbitration because there are fact questions on:

(1) Is the post-injury waiver enforceable. That is, (a) does the waiver satisfy the fair notice requirements and, if not, (b) did both parties have actual knowledge of the terms of the waiver agreement. If the answer to these two questions is "no," the waiver is unenforceable. Even if the waiver is enforceable, there is a fact question on:

(2) Do the ambiguous terms of the waiver preclude this action seeking arbitration.

The arbitration award is CONFIRMED as to the finding that Aldridge signed the post-injury waiver.

The record does not reflect what further proceedings, if any, the trial court contemplated, or whether either party requested clarification.

Instead, both appealed. A divided court of appeals dismissed the case for want of jurisdiction.[5] The court held that the appealed order contemplated rehearing by the arbitrator[6] and therefore was not final,[7] that the Texas Arbitration Act ("the TAA") did not provide for interlocutory appeal,[8] and that any right of appeal provided by the FAA was irrelevant because "'federal procedure does not apply in Texas courts, even when Texas courts apply the [FAA].'"[9]

Irrespective of whether the court of appeals' construction of the TAA was correct, it does not allow an appeal in this case because, as the Court holds, it is inapplicable.[10] An agreement to arbitrate a claim for personal injury, like Aldridge's, is outside the scope of the TAA unless the agreement is made on advice of counsel and signed by the parties' attorneys.[11] That did not happen here. But the court of appeals neglected to consider whether the FAA would allow an appeal of a

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[5] 263 S.W.3d 69, 76 (Tex. App.–Houston [1st Dist.] 2006).

[6] *Id*. at 74 ("Though the Order does not expressly direct a rehearing, by identifying remaining issues, it necessarily contemplates resolution of those issues by way of a rehearing.").

[7] *Id*. at 73 ("The Order here does not contain finality language or otherwise state that it is a final judgment. Nor does it dispose of all claims and parties. In fact, it does the exact opposite — it states that 'fact questions' remain regarding whether the post-injury waiver is enforceable and whether the ambiguous terms of the waiver preclude the arbitration. Thus, the Order does not dispose of all the parties' claims; rather, it contemplates continuing resolution through the arbitration process and is interlocutory per se under [*Lehmann v. Har-Con Corp.*, 39 S.W.3d 191 (Tex. 2001)]. " (citation, internal quotation marks, and brackets omitted)).

[8] *Id*. at 74-76.

[9] *Id*. at 73 (quoting *Jack B. Anglin Co. v. Tipps,* 842 S.W.2d 266, 272 (Tex. 1992)).

[10] *Ante* at ___.

[11] TEX. CIV. PRAC. & REM. CODE § 171.002(a)(3), (4), (c).

federal court's order like the one in this case. If so, a Texas state court would allow review by mandamus.[12]

The FAA states that "[a]n appeal may be taken from . . . an order . . . confirming or denying confirmation of an award or partial award, or . . . modifying, correcting, or vacating an award . . . ."[13] The order in this case expressly confirms the arbitration award "as to the finding that Aldridge signed the post-injury waiver" and vacates it "in part, solely as to the arbitrator's finding that the post-injury waiver precludes arbitration". The confirmation is insignificant; a finding that Aldridge signed the waiver does not, by itself, support dismissal of his claim. On the other hand, the vacatur "in part" is effectively in full; the arbitrator's award dismissing Aldridge's claim is reversed. The order denies confirmation of the award and vacates it. Thus, the order is one that may be appealed under the FAA.

The Court reaches the contrary conclusion because the order "seeks completion of an arbitration and sends the dispute to the same arbitrator",[14] but this is simply not true. The order does not "seek" to have the arbitration completed. It does not remand the dispute to the same arbitrator (if he is still available), or for that matter, to any arbitrator. The order does not suggest, much less direct, rehearing, and the record does not reflect that any further arbitration proceedings have been conducted or even requested in the nearly six years since the order was signed.

The Court bases its conclusion on three cases. The first, *Wall Street Associates, L.P. v.*

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[12] *Jack B. Anglin*, 842 S.W.2d at 271-273.

[13] 9 U.S.C. § 16(a)(1)(D)-(E).

[14] *Ante* at ___.

Becker Paribas Inc., has nothing to say about the appealability of post-award orders.[15] In *Rich v. Spartis*, the Second Circuit, without questioning its jurisdiction over an appeal from an order confirming an arbitration award in part and vacating it in part, remanded the case to the district court with directions to order the arbitration panel to state the basis for its award.[16] The district court complied and reinstated its original decision,[17] and the Second Circuit.[18] In the third case, *Landy Michaels Realty Corp. v. Local 32B-32J*, an arbitrator found that an employer had breached a collective bargaining agreement and awarded the union substantial damages.[19] The employer sued to vacate the award.[20] The district court confirmed the award's determination of breach, but the parties agreed that damages had been miscalculated, and the court remanded the dispute for the arbitrator to redetermine damages.[21] The Second Circuit dismissed the appeal for want of jurisdiction, indicating that the FAA does not permit appeal of an "order remanding a case to the

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[15] 27 F.3d 845 (2d Cir. 1994).

[16] 516 F.3d 75, 78-84 (2d Cir. 2008) (the district court vacated the damages part of the award; the court of appeals remanded to the district court with directions to order the arbitration panel "to specify whether the Worldcom trading losses . . . represented in all, part, or none of the lump-sum Award . . . .").

[17] *Rich v. Salomon Smith Barney, Inc. (In re WorldCom, Inc. Sec. Litig.)*, Nos. 02 Civ. 3288(DLC), 05 Civ. 3913(DLC), 2008 U.S. Dist. LEXIS 104440 (S.D.N.Y. Aug. 11, 2008) (the district court issued orders requiring the arbitration panel to specify the basis for its damages award and, after a show cause order, the panel responded that compensatory award was solely for Worldcom losses; the district court therefore reinstated its original decision vacating in part and confirming in part the arbitration panel's award).

[18] *Rich v. Spartis*, 307 F. App'x 475, 476-478 (2d Cir. 2008) (affirming, on appeal after the remand, the district court's reinstatement of its original decision).

[19] 954 F.2d 794, 795 (2d Cir. 1992).

[20] *Id.*

[21] *Id.*

same arbitration panel for clarification of its award".[22] The court noted that the Fifth Circuit had made the same observation in *Forsythe International, S.A. v. Gibbs Oil Co.*[23] But the order appealed in *Forsythe* had vacated an award and remanded the dispute for arbitration before a different panel, and the court allowed the appeal, explaining:

> While the district court's order commanded further arbitration, it also nullified the decision of an arbitration panel. If an order remanding the case to a different arbitration panel renders a vacatur unreviewable, parties to arbitration could never determine whether the district court acted within the narrow statutory limits governing vacatur of the original award. Such a result would disserve the policies that promote arbitration and restrict judicial review of awards.[24]

More recently, in *Bull HN Information Systems, Inc. v. Hutson*, the First Circuit first noted that the appeal from the district court's order denying confirmation of the arbitrator's "Phase 1" award fell squarely within FAA § 16(a)(1)(D), which permits an appeal from an order "'denying an award or *partial* award,'"[25] before addressing whether a remand – in that part of the district court's order vacating the award and remanding the entire matter to a new arbitrator – would nonetheless render the order a nonappealable interlocutory order. The First Circuit rejected that idea, observing that courts "'routinely assume . . . that an order vacating an arbitrator's decision but remanding for

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[22] *Id.* at 797 (emphasis in original).

[23] 915 F.2d 1017, 1020 n.1 (5th Cir. 1990).

[24] *Id.* at 1020.

[25] 229 F.3d 321, 327-328 (1st Cir. 2000) (quoting 9 U.S.C. § 16(a)(1)(D) (emphasis added)) (the court observed that the arbitrator's "Phase 1 Award could be characterized as a partial order because it contemplates further arbitration proceedings in Phase 2").

additional arbitration is appealable under [FAA] § 16(a)(1)(E) . . . .'"[26]

> The reasoning of those courts is persuasive, and we hold that an order of the district court which vacates and remands an arbitral award is not thus made an interlocutory order. Allowing the appeal furthers the "pro-arbitration policy designed to expedite confirmation of arbitration awards" articulated by Congress when it amended the FAA to allow appeal from certain orders concerning arbitration. This is not like an order remanding to the arbitrator merely for clarification. A remand for a new arbitration proceeding, unlike an unappealable interlocutory order within the scope of § 16(b), does not offend "the policies disfavoring partial resolution by arbitration," but instead encourages finality and completeness. [27]

The rule from these cases is that an order remanding a dispute to an arbitrator for clarification of his award is not appealable, but an order remanding a dispute for a new arbitration before a new arbitrator is. The cases do not specifically consider the appealability of an order remanding for a new arbitration before the same arbitrator, though the *Hutson* analysis implies that such an order would also be appealable. Other cases have reached that conclusion.[28] The Court tries to shoehorn this case into the latter category, but it can do so only by rewriting the trial court's order

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[26] *Id.* at 328 (quoting *Perlman v. Swiss Bank Corp. Comprehensive Disability Prot. Plan*, 195 F.3d 975, 980 (7th Cir. 1999), and citing *Jays Foods, L.L.C. v. Chem. & Allied Prod. Workers Union, Local 20*, 208 F.3d 610, 613 (7th Cir. 2000), *Virgin Islands Hous. Auth. v. Coastal Gen. Constr. Servs. Corp.*, 27 F.3d 911, 914 (3d Cir. 1994), and *Forsythe*, 915 F.2d at 1020). In *Virgin Islands Housing Authority*, 27 F.3d at 914, the district court's order did not specify whether the hearing on remand was to be conducted by the original arbitrator, but, even if it had, the court would not have deemed the order interlocutory within the scope of 9 U.S.C. § 16(b); the court was "not convinced by the dictum in *Forsythe* that appealability in situations of this nature should be determined by whether the remand is to the original or a new arbitrator. Rather, the distinction is whether the additional hearing is ordered merely for purposes of clarification – an order that would not be appealable – or whether the remand constitutes a re-opening that would begin the arbitration all over again."

[27] *Id.* (citations omitted).

[28] *HCC Aviation Ins. Grp., Inc. v. Emp'r Reinsurance Corp.*, 243 F. App'x 838, 842 & n.5 (5th Cir. 2007); *see also Jays Foods*, 208 F.3d at 612-613 (the court, to cut the procedural knot that it had created, explained that it was wrong, given the 1988 changes to the FAA, when it concluded that a trial court order vacating the arbitrator's decision was not immediately appealable because the order remanded the case to the arbitrator; the same arbitrator on remand, emphasizing that he disagreed, bowed to what he thought was the district court's implicit command to rule for the company).

to direct a remand to the same arbitrator, something it simply does not do. Even if the shoe fit, the cases cited do not deny appealability to an order requiring an arbitration Mulligan, even before the same arbitrator.

I would hold that an order like the one in this case can be appealed under the FAA and thus can be reviewed by mandamus in Texas courts. Had the trial court applied the restrictive standard of review prescribed by the FAA as it should have,[29] confirmation would have been required. I would therefore direct the trial court to vacate its order and instead confirm the arbitration award. Because the Court does not do so, I respectfully dissent.

Nathan L. Hecht
Justice

Opinion delivered: August 17, 2012

[29] *Hall St. Assocs., L.L.C. v. Mattel, Inc.*, 552 U.S. 576, 578 (2008).