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

JUSTICE HECHT delivered the opinion of the Court, in which JUSTICE O'NEILL, JUSTICE WAINWRIGHT, JUSTICE JOHNSON, JUSTICE WILLETT, and JUSTICE GUZMAN joined.

JUSTICE WILLETT filed a concurring opinion.

CHIEF JUSTICE JEFFERSON filed a dissenting opinion, in which JUSTICE MEDINA and JUSTICE GREEN joined.

The issue in this case is whether the Texas General Arbitration Act (TAA)[1] allows an appeal from a trial court's order that denies confirmation of an arbitration award and instead, vacates the award and directs that the dispute be arbitrated anew. We hold that it does and accordingly affirm the judgment of the court of appeals.[2]

I

Petitioner East Texas Salt Water Disposal Company, an oilfield service business, employed respondent Richard Leon Werline, an experienced petroleum engineer, as its Operations Manager under a written Employment Agreement. If the Company materially breached the Agreement,

[1] TEX. CIV. PRAC. & REM. CODE §§ 171.001-.098. All references to the TAA are to these provisions.

[2] 209 S.W.3d 888, 901 (Tex. App.–Texarkana 2006).

Werline had the right to terminate and receive two years' salary as severance pay. A little over halfway into the Agreement's five-year term, Werline gave notice of termination and demanded severance pay, claiming that the Company had changed his position and stripped him of his duties. The Company denied that it had breached the Agreement and contended that Werline had simply quit. As required by the Agreement, Werline and the Company submitted their dispute to "final and binding" arbitration. They selected an AAA arbitrator, who, after a three-day hearing, found for Werline and awarded him severance pay ($244,080.00), stipulated attorney fees ($28,272.50) and expenses ($11,116.76), and costs ($9,535.73).

The Company petitioned the district court to vacate, modify, or correct the award, and Werline counterclaimed for confirmation. The Company did not assert in its petition, and made no effort to establish, any of the grounds for vacating, modifying, or correcting an arbitration award under the TAA.[3] Rather, the Company argued that the award was so contrary to the evidence that it was arbitrary and capricious and therefore the arbitrator must have been biased. Although Werline objected that these were not statutory grounds for vacating an arbitration award, he and the Company submitted the verbatim record of the arbitration hearing to the court and proceeded to argue their dispute all over again.

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[3] *Id*. at 898 n.13 ("We note East Texas has not alleged any grounds [for vacatur] under the TAA.").

The grounds for vacating an award are set out in section 171.088(a), which states: "On application of a party, the court shall vacate an award if: (1) the award was obtained by corruption, fraud, or other undue means; (2) the rights of a party were prejudiced by: (A) evident partiality by an arbitrator appointed as a neutral arbitrator; (B) corruption in an arbitrator; or (C) misconduct or wilful misbehavior of an arbitrator; (3) the arbitrators: (A) exceeded their powers; (B) refused to postpone the hearing after a showing of sufficient cause for the postponement; (C) refused to hear evidence material to the controversy; or (D) conducted the hearing, contrary to Section 171.043, 171.044, 171.045, 171.046, or 171.047, in a manner that substantially prejudiced the rights of a party; or (4) there was no agreement to arbitrate, the issue was not adversely determined in a proceeding under Subchapter B, and the party did not participate in the arbitration hearing without raising the objection."

The grounds for modifying or correcting an award are set out in section 171.091(a), which states: "On application, the court shall modify or correct an award if: (1) the award contains: (A) an evident miscalculation of numbers; or (B) an evident mistake in the description of a person, thing, or property referred to in the award; (2) the arbitrators have made an award with respect to a matter not submitted to them and the award may be corrected without affecting the merits of the decision made with respect to the issues that were submitted; or (3) the form of the award is imperfect in a manner not affecting the merits of the controversy."

The court's judgment denied confirmation and vacated the arbitration award, holding that "the material factual findings in the Award are so against the evidence . . . that they manifest gross mistakes in fact and law".[4] The judgment also ordered that the matter be "re-submitted to arbitration by a new arbitrator with the sole issue before that Arbitrator being whether or not there was a material breach of the Employment Agreement by ETSWD [the Company] consistent with the findings in this Judgment." Those findings were:

- "There is no evidence to support a finding of a material breach of any provision of the Employment Agreement";
- "[A]n assignment of new and/or additional duties for Werline . . . was . . . not a material breach of the Employment Agreement";
- "The change in Werline's title . . . was not a material breach of the Employment Agreement";
- "There is no evidence to support a finding that . . . a material breach was committed by the Board of Directors, officers, or representatives of ETSWD with regard to Werline and the Employment Agreement"; and
- "Werline voluntarily resigned his employment with ETSWD".

Thus, the do-over the court ordered was to be one in which every material fact, and even the result itself, were already conclusively established against Werline.

Werline appealed. The court of appeals held that it had jurisdiction to consider the appeal,[5] that there was evidence to support the award,[6] and that "[t]he arbitrator did not err so egregiously as

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[4] The court's judgment also stated that "[t]he Arbitrator . . . exceeded his authority by not limiting his findings and award to those issues contractually established in the Employment Agreement", even though the Agreement called for arbitration of "any disagreement . . . under any provision", and the arbitrator found that Werline was entitled to severance pay under the "Employer Breach" provision of the Agreement. The Company does not argue on appeal that the arbitrator exceeded his authority by deciding issues outside the contractual scope of arbitration.

[5] 209 S.W.3d at 896.

[6] *Id*. at 901. The court commented: "We are not convinced an arbitration award can be reviewed for legal sufficiency of the evidence. . . . However, it is not necessary for us to decide this issue since . . . there is clearly more than a scintilla of evidence supporting the arbitrator's award." *Id*. at 898 n.14. We, of course, express no opinion on the subject.

to imply bad faith or a failure to exercise honest judgment".[7] Accordingly, the court reversed the trial court's judgment and rendered judgment confirming the award.[8]

The Company petitions for review on one ground only: that the court of appeals had no jurisdiction over the appeal under section 171.098(a) of the TAA.

II

Section 171.098(a) states:

> A party may appeal a judgment or decree entered under this chapter or an order:
> (1) denying an application to compel arbitration . . . ;
> (2) granting an application to stay arbitration . . . ;
> (3) confirming or denying confirmation of an award;
> (4) modifying or correcting an award; or
> (5) vacating an award without directing a rehearing.

The district court's judgment expressly denied confirmation of Werline's arbitration award and was thus appealable under subsection (3).

But the Company argues that the statute cannot be read so simply or so literally. Rather, the Company contends, subsection (5) implies (though it does not state) that a court order vacating an award *and* directing a rehearing is *not* appealable, and that implication creates an exception to subsection (3), so that an order denying confirmation and therefore appealable under subsection (3) is rendered not appealable by subsection (5) if it also vacates the award and directs a rehearing. For several reasons, we disagree.

First: The court's judgment denying confirmation of the arbitration award fits squarely under subsection (3). The judgment is not insulated from appellate review expressly conferred under subsection (3) merely because the trial court also vacated the award and directed a rehearing. In

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[7] *Id*. at 901. Although the Company did not assert any statutory basis for vacating the award, the court held that the common law, in addition to the TAA, allows an arbitration to be set aside for "(1) fraud; (2) misconduct; or (3) such gross mistake as would imply bad faith and failure to exercise honest judgment." *Id*. at 898 (citing *Riha v. Smulcer,* 843 S.W.2d 289, 292 (Tex. App.–Houston [14th Dist.] 1992, writ denied)). We express no opinion on this issue.

[8] 209 S.W.3d at 901.

denying Werline's request for confirmation of the award, the district court made clear that it rejected the award and all bases on which it rested. The court went so far as to hold that the material facts the parties had vigorously disputed in the first arbitration should all be established against Werline in the second arbitration.

When an arbitration award is unclear or incomplete or contains an obvious error, a limited rehearing to correct the problem is but a preface to determining confirmation, not a decision on the issue. If, for example, the arbitrator's award required clarification or interpretation,[9] a rehearing for that limited purpose would not necessarily be a denial of confirmation of the award, but merely a deferral of final ruling until the arbitration was complete. When rehearing is necessary for the issue of confirmation to be fully presented, vacatur pending rehearing is not appealable, not because the order falls outside subsection (5), but because it falls outside subsection (3) and the rest of section 171.098(a).

Second: The Company's argument requires that subsection (5) operate as an exception to subsection (3), even though it provides a separate basis for appeal. In essence, the Company reads subsection (3) to allow an appeal from an order denying confirmation *unless* it also vacates the award and directs rehearing. But section 171.098(a) is a disjunctive list of orders that *can* be appealed; it does not list orders that *cannot* be appealed. The five subsections are connected by "or". To equate

"denying confirmation . . . or . . . vacating an award without directing a rehearing"

with

denying confirmation . . . but not if . . . vacating an award and directing a rehearing

[9] *See*, *e.g.*, *Forsythe Int'l, S.A. v. Gibbs Oil Co.*, 915 F.2d 1017, 1020 (5th Cir. 1990), *citing Hanford Atomic Metal Trades Council, AFL-CIO v. Gen. Elec. Co.*, 353 F.2d 302, 307-308 (9th Cir. 1965) ("We share the view of the district court that the opinion required clarification and interpretation. We also share the view of the district court that this was a task to be first performed by the arbitration committee and not the court, and that the court properly remanded the matter to the arbitration committee for such clarification and interpretation."); *Hartford Steam Boiler Inspection and Ins. Co. v. Underwriters at Lloyd's and Cos. Collective*, 857 A.2d 893, 905-906 (Conn. 2004).

is a strange reading of the word "or". Instead of two separate categories of appealable orders, the Company argues there should be but one smaller category. The proper construction of section 171.098(a) gives full, literal effect to subsections (3) and (5) both. An order denying confirmation can be appealed, just as subsection (3) provides, including a denial of confirmation in the form of a vacatur with rehearing; and an order vacating an arbitration award without directing rehearing can be appealed, just as subsection (5) provides.

Third: Because Texas law favors arbitration,[10] judicial review of an arbitration award is extraordinarily narrow.[11] The right of appeal provided by section 171.098(a) assures that a trial court does not exceed the limitations on its authority to review an arbitration award. Those limitations would be circumvented if re-arbitration could be ordered for reasons that would not justify denying confirmation, and appeal thereby delayed. As the United States Court of Appeals for the Fifth Circuit has observed: "Such a result would disserve the policies that promote arbitration and restrict judicial review of awards."[12] And where, as here, the parties have agreed to "final and binding" arbitration only for the Company to be given a Mulligan, their right to contract is also subverted.

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. A new trial occurs in the court that granted the motion; the rehearing here is not before the trial court but a separate tribunal, a new arbitrator. The district court's order is more like remanding an

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[10] *Prudential Sec., Inc. v. Marshall*, 909 S.W.2d 896, 898 (Tex. 1995) (per curiam) ("Arbitration of disputes is strongly favored under federal and state law.") (citing, e.g., *Moses H. Cone Mem'l Hosp. v. Mercury Constr. Corp.*, 460 U.S. 1, 24-25 (1983)).

[11] *CVN Group, Inc. v. Delgado*, 95 S.W.3d 234, 238 (Tex. 2002) ("[W]e have long held that 'an award of arbitrators upon matters submitted to them is given the same effect as the judgment of a court of last resort. All reasonable presumptions are indulged in favor of the award, and none against it.'" (quoting *City of San Antonio v. McKenzie Constr. Co.*, 150 S.W.2d 989, 996 (Tex. 1941) ("The courts will not overthrow an award such as this, except in a very clear case.")).

[12] *Forsythe Int'l, S.A. v. Gibbs Oil Co.*, 915 F.2d 1017, 1020 (5th Cir. 1990).

administrative decision to the agency for further proceedings, which is ordinarily appealable.[13] A still closer analogy would be to Texas appellate procedure. An appellate court may direct a trial court to take corrective action while the appeal remains pending to allow proper presentation of the appeal,[14] and that directive is not appealable. But an appellate court judgment remanding a case to the trial court for a new trial is certainly appealable. Similarly, an order vacating an arbitration award and directing rehearing for the limited purpose of correcting, clarifying, or completing the arbitration to allow proper presentation of issues relating to confirmation is not appealable, while an order requiring a new arbitration is as final a decision as an appellate court's remand of a case to a trial court for a new trial, and therefore appealable.

Fourth: The law in other states does not require that we embrace the Company's argument. The TAA provides that it "shall be construed to effect its purpose and make uniform the construction of other states' law applicable to an arbitration."[15] Other states appear to differ in whether an appeal should be allowed in the situation here presented, although many cases are far from clear. In New York, where there is no statute governing appeals in arbitration cases specifically, an appeal would be allowed.[16] One other state, West Virginia, has no specific statute. The Uniform Arbitration Act[17]

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[13] *See*, *e.g.*, TEX. GOV'T CODE §§ 2001.174 (allowing remand after judicial review in certain administrative cases) and 2001.901 (allowing appeal); *see also R. R. Comm'n of Tex. v. Home Transp. Co.*, 654 S.W.2d 432 (Tex. 1983), and *R.R. Comm'n of Tex. v. Vidaurri Trucking, Inc.*, 661 S.W.2d 94 (Tex. 1983) (both holding final, for purposes of appeal, a trial court remand to an agency, even with certain conditions or reservations, under former TEX. REV. CIV. STAT. ANN. art. 6252-13a, § 19(e), a statutory predecessor to TEX. GOV'T CODE § 2001.174).

[14] TEX. R. APP. P. 44.4 ("[I]f the trial court's erroneous action or failure or refusal to act prevents the proper presentation of a case to the court of appeals . . . and . . . the trial court can correct its action or failure to act . . . , the court of appeals must direct the trial court to correct the error [and] will then proceed as if the erroneous action or failure to act had not occurred.").

[15] TEX. CIV. PRAC. & REM. CODE § 171.003.

[16] *In re Baar & Beards, Inc.*, 282 N.E.2d 624, 625 (N.Y. 1972) ("An order vacating an arbitration award and directing a new arbitration before new arbitrators is final and appealable.").

[17] UNIF. ARBITRATION ACT § 19(a), 7 U.L.A. 739 (1956) ("An appeal may be taken from: (1) An order denying an application to compel arbitration made under Section 2; (2) An order granting an application to stay arbitration made under Section 2(b); (3) An order confirming or denying confirmation of an award; (4) An order modifying or correcting an award; (5) An order vacating an award without directing a rehearing; or (6) A judgment or decree entered pursuant

or the Revised Uniform Arbitration Act[18] provision regarding appeals has been adopted in thirty-four other states and the District of Columbia,[19] and two other states have similar provisions.[20] But even in these thirty-seven jurisdictions with similar statutory language, the decisions directly addressing this issue fail to reach any sort of consensus. Courts in seven states — California,[21] Kentucky,[22] Maine,[23] Nebraska,[24] Nevada,[25] North Carolina[26] and South Dakota[27] — and in the District of

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to the provisions of this act.").

[18] REV. UNIF. ARBITRATION ACT § 28(a), 7 U.L.A. 94 (2000) ("An appeal may be taken from: (1) an order denying a [motion] to compel arbitration; (2) an order granting a [motion] to stay arbitration; (3) an order confirming or denying confirmation of an award; (4) an order modifying or correcting an award; (5) an order vacating an award without directing a rehearing; or (6) a final judgment entered pursuant to this [Act].").

[19] ALASKA STAT. § 09.43.550; ARIZ. REV. STAT. ANN. § 12-2101.01; ARK. CODE ANN. § 16-108-219; COLO. REV. STAT. § 13-22-228; DEL. CODE ANN. tit. 10, § 5719; D.C. CODE § 16-4427; FLA. STAT. § 682.20; HAW. REV. STAT. § 658A-28; IDAHO CODE ANN. § 7-919; IND. CODE § 34-57-2-19; IOWA CODE § 679A.17; KAN. STAT. ANN. § 5-418; KY. REV. STAT. ANN. § 417.220; ME. REV. STAT. ANN. tit. 14, § 5945; MASS. GEN. LAWS ch. 251, § 18 and ch. 150C, § 16; MINN. STAT. § 572.26; MO. REV. STAT. § 435.440; MONT. CODE ANN. § 27-5-324; NEB. REV. STAT. § 25-2620; NEV. REV. STAT. § 38.247; N.J. STAT. ANN. § 2A:23B-28; N.M. STAT. § 44-7A-29; N.C. GEN. STAT. § 1-569.28; N.D. CENT. CODE § 32-29.3-28; OKLA. STAT. tit. 12, § 1879; OR. REV. STAT. § 36.730; 42 PA. CONS. STAT. § 7320; S.C. CODE ANN. § 15-48-200; S.D. CODIFIED LAWS § 21-25A-35; TENN. CODE ANN. § 29-5-319; UTAH CODE ANN. § 78B-11-129 (amended, in 2003, at (f), to "a final judgment entered pursuant to this chapter"); VT. STAT. ANN. tit. 12, § 5681; VA. CODE ANN. § 8.01-581.016; WASH. REV. CODE § 7.04A.280; WYO. STAT. ANN. § 1-36-119.

[20] A Mississippi statute that applies only to arbitration under construction contracts uses UAA language. MISS. CODE ANN. § 11-15-141. A California statute uses language similar to the UAA. CAL. CIV. PROC. CODE § 1294 ("An aggrieved party may appeal from: (a) An order dismissing or denying a petition to compel arbitration. (b) An order dismissing a petition to confirm, correct or vacate an award. (c) An order vacating an award unless a rehearing in arbitration is ordered. (d) A judgment entered pursuant to this title. (e) A special order after final judgment.").

[21] *Long Beach Iron Works, Inc. v. Int'l Molders & Allied Workers Union of N. Am., Local 374*, 103 Cal. Rptr. 200 (Cal. Ct. App. 1972); *accord Kamboj v. Schofield*, No. C048320, 2005 Cal. App. Unpub. LEXIS 5944, 2005 WL 1581255 (Cal. Ct. App. July 7, 2005).

[22] *Paul Miller Ford, Inc. v. Craycraft*, Nos. 2005-CA-000634-MR and 2005-CA-000692-MR, 2005 Ky. App. LEXIS 152, 2005 WL 1593418 (Ky. Ct. App. July 8, 2005).

[23] *Me. Dep't of Transp. v. Me. State Employees Ass'n*, 581 A.2d 813 (Me. 1990); *Crowley-King v. Kennebec Valley Radiology, P.A.*, 580 A.2d 687 (Me. 1990).

[24] *Neb. Dep't of Health & Human Servs. v. Struss*, 623 N.W.2d 308 (Neb. 2001).

[25] *Karcher Firestopping v. Meadow Valley Contractors, Inc.*, 204 P.3d 1262 (Nev. 2009).

[26] *In re Arbitration Between the State of N.C. & Davidson & Jones Constr. Co.*, 323 S.E.2d 466 (N.C. Ct. App. 1984).

[27] *Double Diamond Constr. v. Farmers Coop. Elevator Ass'n*, 656 N.W.2d 744 (S.D. 2003).

Columbia[28] have dismissed appeals from orders similar to the order in this case providing both for vacatur and a rehearing. Courts in four states — Arizona,[29] Massachusetts,[30] Tennessee[31] and Utah[32] — have not. Courts in at least two states — Minnesota[33] and Missouri[34] — have gone both ways. Six states have statutes more like the FAA.[35] Courts in one of those states — Ohio — appear to allow appeals when the federal courts would.[36] Two other states have statutes more like the FAA but in limited contexts.[37] Three states have statutes allowing appeals in arbitration cases as in other

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[28] *Connerton, Ray & Simon v. Simon*, 791 A.2d 86 (D.C. 2002) (per curiam).

[29] *Wages v. Smith Barney Harris Upham & Co.*, 937 P.2d 715 (Ariz. Ct. App. 1997).

[30] *Fazio v. Employers' Liab. Assur. Corp.*, 197 N.E.2d 598 (Mass. 1964); *Bernard v. Hemisphere Hotel Mgmt., Inc.*, 450 N.E.2d 1084 (Mass. App. Ct. 1983).

[31] *Boyle v. Thomas*, No. 02A01-9601-CV-00022, 1997 Tenn. App. LEXIS 807, 1997 WL 710912 (Tenn. Ct. App. Nov. 17, 1997).

[32] *Hicks v. UBS Fin. Servs.*, No. 20080950-CA, 2010 Utah App. LEXIS 20, 2010 WL 375564 (Utah Ct. App. Feb. 4, 2010).

[33] *Kowler Assocs. v. Ross*, 544 N.W.2d 800 (Minn. Ct. App. 1996) (dismissing appeal); *Safeco Ins. Co. v. Goldenberg*, 435 N.W.2d 616 (Minn. Ct. App. 1989) (allowing appeal).

[34] *Crack Team USA, Inc. v. Am. Arbitration Ass'n*, 128 S.W.3d 580 (Mo. Ct. App. 2004) (dismissing appeal); *Air Shield Remodelers, Inc. v. Biggs*, 969 S.W.2d 315 (Mo. Ct. App. 1998) (allowing appeal); *Nat'l Ave. Bldg. Co. v. Stewart*, 910 S.W.2d 334 (Mo. Ct. App. 1995) (allowing appeal).

[35] CONN. GEN. STAT. § 52-423 ("An appeal may be taken from an order confirming, vacating, modifying or correcting an award, or from a judgment or decree upon an award, as in ordinary civil actions."); LA. REV. STAT. ANN. § 9:4215 ("An appeal may be taken from an order confirming, modifying, correcting, or vacating an award, or from a judgment entered upon an award, as from an order or judgment in an action."); N.H. REV. STAT. ANN. § 542:10 ("An appeal may be taken from an order confirming, modifying, correcting, or vacating an award, or from a judgment entered upon an award as in the case of appeals from the superior to the supreme court."); OHIO REV. CODE ANN. § 2711.15 ("An appeal may be taken from an order confirming, modifying, correcting, or vacating an award made in an arbitration proceeding or from judgment entered upon an award."); R.I. GEN. LAWS § 10-3-19 ("Any party aggrieved by any ruling or order made in any court proceeding as authorized in this chapter may obtain review as in any civil action, [including] an order confirming, modifying or vacating an award . . . ."); WIS. STAT. § 788.15 ("An appeal may be taken from an order confirming, modifying, correcting or vacating an award, or from a judgment entered upon an award, as from an order or judgment in an action.").

[36] *Cleveland Police Patrolmen's Ass'n v. Cleveland*, 668 N.E.2d 548 (Ohio Ct. App. 1995) (allowing appeal when trial court ordered re-arbitration of the only claim made, distinguishing *Stewart v. Midwestern Indem. Co.*, 543 N.E.2d 1200 (Ohio 1989) (disallowing appeal when trial court remanded for panel to complete arbitration by considering claim not previously decided)).

[37] MD. CODE ANN., CTS. & JUD. PROC. § 3-2B-08 (appeals from international commercial arbitrations); MICH. COMP. LAWS § 600.5082 (appeals from arbitrations in domestic relations cases).

civil cases.[38] Of these, one, Alabama,[39] would apparently allow an appeal like the one before us. Thus, the seventeen 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. As a result, to "make uniform the construction of other states' law" on the subject before us, as the TAA mandates,[40] is beyond our power. We honor the statute's spirit by making matters no worse than they already are.

Two courts of appeals have concluded that an appeal should not be allowed in this situation, and to that extent, we disapprove them.[41]

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In sum: The district court's order denied confirmation, expressly and effectively, and was thus made appealable by the literal text of the TAA. The judgment of the court of appeals is accordingly

Affirmed.

Nathan L. Hecht
Justice

Opinion delivered: March 12, 2010

[38] ALA. CODE § 6-6-15 ("Either party may appeal from an award . . . . as in other cases."); GA. CODE ANN. § 9-9-16 ("Any judgment or any order considered a final judgment under this part may be appealed . . . ."); 710 ILL. COMP. STAT. 5/18 ("Appeals may be taken in the same manner, upon the same terms, and with like effect as in civil cases.").

[39] *Jenks v. Harris*, 990 So. 2d 878 (Ala. 2008).

[40] TEX. CIV. PRAC. & REM. CODE § 171.003.

[41] *Thrivent Fin. for Lutherans v. Brock*, 251 S.W.3d 621 (Tex. App.–Houston [1st Dist.] 2007, no pet.); *Stolhandske v. Stern,* 14 S.W.3d 810, 815 (Tex. App.–Houston [1st Dist.] 2000, pet. denied); *Prudential Sec., Inc. v. Vondergoltz,* 14 S.W.3d 329 (Tex. App.–Houston [14th Dist.] 2000, no pet.).