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Texas Supreme Court Holds Arbitrator Must Decide Questions Of Arbitrability Absent Evidence That Delegation Clause Is Itself Unconscionable

Client Alert | April 9, 2024

***Lennar Homes of Tex. Inc. v. Rafiei*, No. 22-0830** – Decided April 5, 2024 **In a unanimous per curiam opinion, the Texas Supreme Court held on Friday that when an arbitration agreement contains a clause delegating questions of arbitrability to the arbitrator, an unconscionability challenge must be supported with specific evidence showing that the cost of arbitrating any arbitrability issues is itself excessive. Because the plaintiff's evidence went only to the overall costs of arbitration, the Court found no basis to conclude that the delegation clause was itself unconscionable.**

> *"[T]he record fails to support a finding that the parties' delegation clause is itself unconscionable due to prohibitive costs to adjudicate this threshold issue in arbitration."* Per curiam

Background:

Rafiei bought a house from Lennar Homes. The purchase contract required the parties to submit their disputes to arbitration and delegated decisions about the arbitrability of disputes to the arbitrator. Rafiei later sued for personal injuries that he attributed to improper installation of a garbage disposal. Lennar moved to compel arbitration, and Rafiei opposed the motion, arguing that the agreement was unconscionable because arbitration was prohibitively expensive. In support of his unconscionability challenge, Rafiei submitted the AAA fee schedules and affidavits from himself and his attorney. The trial court denied Lennar's motion, and the Fourteenth Court of Appeals affirmed.

Issue:

When an arbitration agreement delegates arbitrability issues to an arbitrator, may a court deny a motion to compel arbitration on unconscionability grounds absent evidence that the delegation provision is itself excessively costly?

Court's Holdings:

No. "When an agreement delegates arbitrability issues to an arbitrator," the only question for the court in an unconscionability challenge is whether the cost of arbitrating the "delegated threshold issue of unconscionability is excessive, standing alone." Rafiei failed to "show that the delegation provision itself is unconscionable" as the supporting affidavits discussed only "the cost to arbitrate the overall dispute"—not "the cost to arbitrate the arbitrability question." Nor did he present evidence of how the AAA fee schedule "would be applied to resolve the unconscionability challenge" itself. He also failed to establish that he could "afford litigation but not arbitration." So the Court found no basis to set aside the delegation clause on unconscionability grounds. It refrained from deciding, however, whether the arbitration agreement as a whole was unconscionable

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because that issue was “reserved for the arbitrator.”

What It Means:

- The Court continues to uphold the enforceability of arbitration agreements. When an agreement contains a delegation clause, a court’s inquiry on a motion to compel arbitration is “narrow.” Courts will order arbitration absent proof that the “delegation clause is itself unconscionable.”
- Plaintiffs challenging arbitration agreements on unconscionability grounds face an uphill climb in Texas. They must adduce “specific evidence” showing (1) “the relevant costs between litigating in court and in arbitration”; and (2) their lack of “ability to pay the difference in such costs.” And if the agreement contains a delegation clause, plaintiffs must “estimate the actual costs associated with arbitrating the arbitrability question”—not the costs of the overall arbitration.

The Court’s opinion is available here. Gibson Dunn’s lawyers are available to assist in addressing any questions you may have regarding developments at the Texas Supreme Court. Please feel free to contact the following practice leaders:

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