To: Buddy Low

From: Lonny Hoffman

Re: Authentication of Arbitral Awards

Date: March 17, 2008

Introduction

You asked me to consider language that might be used as an alternative to the amendment to Texas Rule of Evidence 902 Manuel Newburger has proposed to the Texas Supreme Court Advisory Committee. I do so below. I first summarize and discuss the issue, and offer some commentary about it, based on initial research that I did into the question.

My bottom line conclusion is that the proposed amendment appears to be neither needed nor appropriate. I discuss both of these points below, before getting to some possible alternative formulations.

Summary of Issue

The SCAC has been asked to consider a new rule of evidence concerning authentication of arbitration awards. The Texas Arbitration Act has numerous provisions about venue and about enforcement of awards but, according to proponents of this rule amendment, there have been some disputes as to authentication of arbitration awards in court.

Is An Amendment Necessary?

Proponents of this amendment have offered no examples or further explanation for why a problem exists and why, therefore, their proposed reform is necessary. As a result, it is difficult to know either the extent or nature of the problem. As part of my work on this issue, I spoke with four different people, each of whom has extensive experience with arbitration [one, a long time judge on a court in a state where arbitration awards were routinely brought to him to enforce; the second, a lawyer in Texas who does work both for plaintiffs and defendants (though, predominantly plaintiffs) in arbitrations; the third, a law professor whose area of specialty is arbitration; and the fourth, a law professor whose area is also arbitration who spent many years as general in house counsel at the AAA). None of these people had even once had a situation where the authentication of the award proved problematic. [I should add a fifth expert view because Frank Evans also reports that he could recall no instances when authentication was a problem. See email from Elaine Carlson to SCAC subcommittee members, March 17, 2008.].

The former non-Texas state court judge did recount one occasion when there was a dispute as to what was the correct award (apparently the arbitrator had modified his award and

the debate turned on which was the correct award to enter); but this example seems to prove the point that there isn't an authentication gap problem, as the judge noted. This particular problem wasn't dealt with as an authentication issue. Rather, it was handled like any other challenge to the validity of the award: through substantive attack as the statute provides. And the complaint about the law in Texas being raised here does not seem to be that the Texas General Arbitration Act lacks sufficient mechanisms for raising this kind (or other kinds) of substantive attacks on the validity or correctness of an award.

What Does the Current Law Provide?

Now, having said that no problem may warrant reform, it is still necessary to look at the point proponents raise that there may be a gap in the existing law. Proponents argue that the Texas General Arbitration Act (TGAA, Ch. 171 of the Civil Practice & Remedies Code) does not contain a provision that expressly deals with the question of authentication. This issue is not clear, however. It seems to depend on how you read the statute.

CP & RC 171.053 does provide as follows:

> § 171.053. ARBITRATORS' AWARD.
> (a) The arbitrators' award must be in writing and signed by each arbitrator joining in the award.
> (b) The arbitrators shall deliver a copy of the award to each party personally, by registered or certified mail, or as provided in the agreement.
> (c) The arbitrators shall make the award:
> (1) within the time established by the agreement to arbitrate; or
> (2) if a time is not established by the agreement, within the time ordered by the court on application of a party.
> (d) The parties may extend the time for making the award either before or after the time expires. The extension must be in writing.
> (e) A party waives the objection that an award was not made within the time required unless the party notifies the arbitrators of the objection before the delivery of the award to that party.

Then, there is 171.081. This section that gives the court jurisdiction to enforce an arbitration award and render judgment on it.

> § 171.081. JURISDICTION. The making of an agreement described by Section 171.001 that provides for or authorizes an arbitration in this state and to which that section applies confers
> jurisdiction on the court to enforce the agreement and to render judgment on an award under this chapter.

That jurisdiction is invoked by the procedure in 171.082:

§ 171.082. APPLICATION TO COURT; FEES.
(a) The filing with the clerk of the court of an application for an order under this chapter, including a judgment or decree, invokes the jurisdiction of the court.
(b) On the filing of the initial application and the payment to the clerk of the fees of court required to be paid on the filing of a civil action in the court, the clerk shall docket the proceeding as a civil action pending in that court.

Finally, assuming that the jurisdiction has been properly invoked, 171.087 provides the statutory payoff:

§ 171.087. CONFIRMATION OF AWARD. Unless grounds are offered for vacating, modifying, or correcting an award under Section 171.088 or 171.091, the court, on application of a party, shall confirm the award.

These statutory sections, thus, arguably provide (explicitly, if not at least implicitly) that an award is authenticated for purposes of the TGAA when it complies with 171.053—that is, when it is in writing and is signed—and is then submitted as part of the 171.082 application for an enforcement order. Doing so, according to 171.081, "confers jurisdiction on the court to enforce the agreement and to render judgment on [the arbitration] award."

Contrasting Arbitration Awards With Domestication of Foreign Judgments

For judicial judgments from non-Texas courts, there are specific provisions that deal with how one domesticates them. *See* Ch. 35, Tex Civ. Prac & Rem. C. And under Rule 902(2) of the Texas Rules of Evidence, these judgments are self-authenticating. [There are also separate provisions about domesticating a judgment from another country (Ch. 36, Tex. Civ. Prac. & Rem. C.) and separate TRE rules on proving up the authenticity of these public records (TRE 902(3)]. So, if there are these rules about authenticating public documents and domesticating foreign judgments for enforcement in Texas, why it might be asked aren't there comparable provisions for proving up a private arbitration award?

This perhaps raises a related issue: How important is self-authentication anyway? If, as the experts I spoke with indicated, authentication challenges almost never arise, that might suggest no reform is needed. But what is the answer to the argument that even though such challenges rarely arise, that's no reason not to have a simple rule so that the party seeking enforcement doesn't have to jump through any unnecessary hoops in the rare instance in which there is an authentication challenge? Indeed, proponents might contend that if there is any substantive challenge to the award (including a challenge that the award being proferred is not, in fact, authentic), then the TGAA provides the opponent an opportunity to make that substantive challenge in the course of the enforcement case. So, it might be asked, what harm is there in having a rule that would make private arbitration awards self-authenticated, just like public judicial judgments.

Is Self-Authentication Appropriate?

One answer may be that there is simply but fundamentally a difference between private arbitration awards and public judicial orders. With public records, like foreign judgments, there is a degree of confidence we have about them that may explain why the TRE allow them to be self-authenticated. Perhaps there are (explicit or unstated) concerns that no such presumption of authenticity should extend to private arbitration awards.

This answer may just be another way of saying that the authenticity of arbitration awards may rarely be challenged but, because there isn't a self-authentication rule, the burden rests appropriately with the party trying to get a court to enforce the award to prove up its validity in all respects. Authenticity is one of those respects but certainly not the only respect that we should care about. So, we don't give a presumption of authenticity to private arbitration awards and, thus, leave for resolution the question of their ultimate validity to the substantive challenges, if any, made in the course of the proceeding brought by the party seeking to enforce the award.

Finally, I'll make the point that because there does not seem to be a problem under Texas law now, we should seriously consider whether any unintended signal would be sent by any reform of the rules. That is, since the law seems to permit something close to (if not exactly) self authentication by virtue of the existing TGAA requirements (see above), it is possible some courts might interpret any reform to add the proposed authentication language as a sign that arbitration awards are to be given an even greater presumption of validity. This would be especially problematic if such a signal were read to suggestion a greater presumption of substantive validity. Perhaps this is a farfetched reading, but we ought not to rule out the possibility that some might argue—and some courts might agree—that this unnecessary change could be read in this fashion to give it some purpose. At a minimum, it would spawn wasteful and unnecessary litigation until this issue was resolved.

The Proposal, and Some Alternatives

The proponents have offered a rule amendment whereby a "simplified affidavit", as they put it, by the arbitrator or an officer of the arbitration body conducting the arbitration would be sufficient. They would add a section to Rule 902 of the TRE to accomplish this.

If the Court were inclined to see a need for an authentication mechanism, one alternative might be to treat private arbitration awards like domestic public documents not under seal. That is, like 902(2). This section provides:

> 2) Domestic Public Documents Not Under Seal. A document purporting to bear the signature in the official capacity of an officer or employee of any entity included in paragraph (1) hereof, having no seal, if a public officer having a seal and having official duties in the district or political subdivision of the officer or employee certifies under seal that the signer has the official capacity and that the signature is genuine.

Or, perhaps the somewhat more cumbersome process under 902(3) for foreign public records would be more appropriate. The additional steps presumably provide some greater procedural protections, given that courts are going to be less familiar with and, thus, perhaps appropriately more cautious before accepting, a foreign public record. That, arguably, more closely fits the model of private arbitration awards. This section provides:

> 3) Foreign Public Documents. A document purporting to be executed or attested in an official capacity by a person, authorized by the laws of a foreign country to make the execution or attestation, and accompanied by a final certification as to the genuineness of the signature and official position (A) of the executing or attesting person, or (B) of any foreign official whose certificate of genuineness of signature and official position relates to the execution or attestation or is in a chain of certificates of genuineness of signature and official position relating to the execution or attestation. A final certification may be made by a secretary of embassy or legation, consul general, consul, vice consul, or consular agent of the United States, or a diplomatic or consular official of the foreign country assigned or accredited to the United States. If reasonable opportunity has been given to all parties to investigate the authenticity and accuracy of official documents, the court may, for good cause shown, order that they be treated as presumptively authentic without final certification or permit them to be evidenced by an attested summary with or without final certification. The final certification shall be dispensed with whenever both the United States and the foreign country in which the official record is located are parties to a treaty or convention that abolishes or displaces such requirement, in which case the record and the attestation shall be certified by the means provided in the treaty or convention.

So, a new rule about private arbitration awards that sought to track 902(3) might look something like this:

> **11) Private Arbitration Awards.** A document purporting to be executed or attested in an official capacity of a private arbitrator, and accompanied by a certification as to the genuineness of the signature and official position (A) of the arbitrator, or (B) of any official of the arbitration body conducting the arbitration whose certificate of genuineness of signature and official position relates to the execution or attestation. All parties must be given reasonable opportunity to investigate the authenticity and accuracy of the private arbitration award.

Conclusion

Having put together some alternative formulations, I say again in conclusion that my initial research suggests that no amendment is needed and that a change to allow for self-authentication may not be appropriate, given the fundamental differences that exist between private arbitration awards and public judicial records.