IN THE SUPREME COURT OF THE STATE OF NEVADA

ADESA NEVADA, LLC, A NEVADA LIMITED LIABILITY COMPANY; ADESA, INC., A DELAWARE CORPORATION; GOWAN ROAD LLC, A NEVADA LIMITED LIABILITY COMPANY; AND GOWAN & BRUCE LLC, A NEVADA LIMITED LIABILITY COMPANY,
Appellants,
vs.
ARFA CONTRACTING CO., INC., A FOREIGN CORPORATION,
Respondent.

No. 63806

FILED

FEB 26 2015

TRACIE K. LINDEMAN
CLERK OF SUPREME COURT
BY S. Young
DEPUTY CLERK

ORDER VACATING AND REMANDING

This is an appeal from a district court order denying a motion to compel arbitration. Eighth Judicial District Court, Clark County; Gloria Sturman, Judge.

Appellant Adesa Nevada, LLC, appeals from the district court's refusal to compel arbitration between Adesa and respondent Arfa Contracting Company. Adesa argues that the district court erred because it based its refusal on a belief that arbitration would be inefficient. We agree.

This court reviews a district court's order denying a motion to compel arbitration de novo. *See Clark Cnty. Pub. Emps. Ass'n v. Pearson*, 106 Nev. 587, 590, 798 P.2d 136, 137 (1990). "The function of this court neither includes nor contemplates the resolution of evidentiary

matters . . . ." *Buchanan v. Buchanan*, 90 Nev. 209, 216, 523 P.2d 1, 5-6 (1974).

As an initial matter, Arfa argues that Adesa waived any right to arbitration. Whether a party has waived a right to arbitrate "is generally a question of fact." *Nev. Gold & Casinos, Inc. v. Am. Heritage, Inc.*, 121 Nev. 84, 89, 110 P.3d 481, 484 (2005). Here, it is undisputed that Adesa knew of its right to arbitrate, but the parties dispute whether Adesa acted inconsistently with that right and whether such actions caused any prejudice to Arfa. *See id.* at 90, 110 P.3d at 485 ("[W]aiver may be shown when the party seeking to arbitrate (1) knew of [its] right to arbitrate, (2) acted inconsistently with that right, and (3) prejudiced the other party by [its] inconsistent acts."). Because the district court did not make any findings of fact regarding waiver, we cannot determine whether Adesa waived any right to arbitration. *See id.* at 89-90, 110 P.3d at 484-85; *Buchanan*, 90 Nev. at 216, 523 P.2d at 5-6.

Next, the parties dispute whether the district court found that an enforceable arbitration clause exists. Whether parties agreed to arbitration is a question of fact. *See May v. Anderson*, 121 Nev. 668, 672, 119 P.3d 1254, 1257 (2005) ("[T]he question of whether a contract exists is one of fact . . . ."); *see also* NRS 38.219(2) ("The court shall decide whether an agreement to arbitrate exists."). Neither of the district court's written orders contains findings regarding whether the parties agreed to an arbitration clause or whether any defenses to enforcement might apply. Contrary to the parties' assertions, the district court's oral statements at the hearings in this matter similarly fail to indicate the district court's findings on this issue. Rather than making findings, the district court questioned "whether the contract is really even enforceable" and reserved

that question for another day by denying Adesa's motion to compel arbitration without prejudice. Therefore, we conclude that the district court failed to make this essential factual finding, *see* NRS 38.219(2); *May*, 121 Nev. at 672-73, 119 P.3d at 1257, and we cannot make such a finding on appeal. *See Buchanan*, 90 Nev. at 216, 523 P.2d at 5-6.

Finally, the district court failed to determine which arbitration clause, if any, applied. The contract documents contained three separate arbitration clauses. Two arbitration clauses provided that disputes would be resolved through binding arbitration, whereas the third arbitration clause gave Arfa the unilateral right to decide whether disputes would be arbitrated or litigated. Adesa argued in the district court and argues on appeal that this unilateral arbitration clause is unconscionable and therefore unenforceable. Whether a contractual provision is unconscionable is a mixed question of law and fact. *D.R. Horton, Inc. v. Green*, 120 Nev. 549, 553, 96 P.3d 1159, 1162 (2004). Here, the district court heard no evidence and made no findings regarding unconscionability. We therefore cannot decide the legal issues related to unconscionability and cannot determine whether the unilateral arbitration clause is unenforceable. *See id.*

Because the district court failed to make necessary factual findings on these issues, we cannot determine whether the district court properly denied Adesa's motion to compel arbitration. On remand, the district court should consider whether an evidentiary hearing would assist it in making these essential factual findings.[1]

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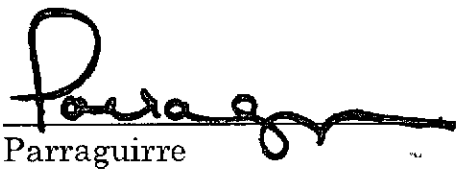
[1]Based on our disposition of this matter, we need not address the parties' remaining arguments on appeal. *Hernandez v. Bennett-Haron*, 128 Nev. ___, ___ n.8, 287 P.3d 305, 317 n.8 (2012).

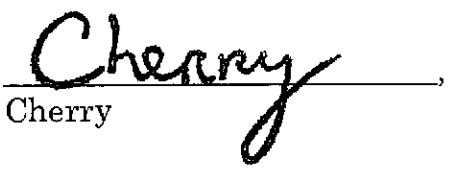
Accordingly, we

ORDER the judgment of the district court VACATED AND REMAND this matter to the district court for proceedings consistent with this order.



Parraguirre, J.

Douglas, J.



Cherry, J.

cc: Hon. Gloria Sturman, District Judge
Craig A. Hoppe, Settlement Judge
Snell & Wilmer, LLP/Las Vegas
Peel Brimley LLP/Henderson
Eighth District Court Clerk