HOW PREPARING FOR AN ARBITRATION IS DIFFERENT THAN PREPARING FOR TRIAL — INCLUDING DISCOVERY

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INTRODUCTION:

Arbitration – the mere mention of the word often elicits extreme reactions among lawyers. With the explosion in the number of arbitration proceedings in recent years, it is almost impossible to avoid arbitration in a robust trial practice. Some lawyers love arbitration. Some have had difficult or bad experiences in arbitrations. Some simply fail to see the virtues of arbitration. In this paper, the authors take the position that arbitration has the potential to be a good thing – possibly (dare we say) even a *very* good thing if done well.

The purpose of this paper is to provide practical information, case law and tips to assist trial lawyers to transition into arbitration experts and realize the benefits of arbitration for their clients. This paper will discuss the enforceability of arbitration agreements (spoiler alert – they are almost always enforceable), whether non-signatories can be required to arbitrate their claims, describe several of the arbitration forums that are available, analyze who determines issues of arbitrability, discuss some pros and cons of the arbitration process, identify several hybrid forms of arbitration that have been developed in recent years, and last, analyze recent case law addressing what to do if the arbitration award does not turn out as planned.

A. Enforceability of Arbitration Clauses

1. Introduction

Generally, if there is a valid agreement to arbitrate the claims and the dispute in question falls within the scope of the arbitration clause, Texas law will likely allow a party to force the dispute into arbitration.

There is a strong presumption under both the Texas Arbitration Act (TAA) and the Federal Arbitration Act (FAA) in favor of arbitration. While there have been some cases that nibble around the edges of this standard, those are exceptions and not the rule. This article is not meant to be a comprehensive study of the law of arbitrability of disputes in Texas, but rather examines a few cases that may be of interest to practitioners on that issue. For a comprehensive analysis of the case law, please see Karl Bayer's article entitled *Arbitration: The Privatization of the Third Branch of Government*.

2. The United States Supreme Court Typically Favors Arbitration Clauses

a. Barriers to arbitration are disapproved.

The Supreme Court decision, *Preston v. Ferrer*, disapproves of barriers to the enforcement of a mandatory arbitration clause.[1] In this case, Ferrer, who appears on television as "Judge Alex," and Preston, an entertainment industry attorney, had a contract that required arbitration of "any dispute . . . relating to the [contract's] terms . . . or the breach, validity, or legality thereof . . . in accordance with AAA rules." Preston claimed that fees were allegedly due him under the terms of the contract, and invoked the arbitration clause. Ferrer then petitioned the California Labor Commissioner for a determination that the contract was invalid and unenforceable under California's Talent Agencies Act (the "Act"), because Preston had acted as a talent agent without the required license.[2] Ferrer then sought an injunction in court preventing Preston from proceeding before the arbitrator.[3] The state court denied Preston's motion to compel arbitration and enjoined Preston from proceeding before the arbitrator "unless and until the Labor Commissioner determines that . . . she is without jurisdiction over the disputes between Preston and Ferrer."[4]

While the decision of the trial court was being appealed, the United States Supreme Court reaffirmed that challenges to the validity of a contract providing for arbitration ordinarily should be considered by an arbitrator, not a court.[5] After the trial court's decision in favor of Ferrer was affirmed by the California appellate courts, the United States Supreme Court reversed the ruling. The Supreme Court held that Section 2 of the FAA declares a national policy favoring arbitration of claims that parties contract to settle in that manner. That national policy applies in state as well as federal courts and forecloses state legislative attempts to undercut the enforceability of arbitration agreements.[6]

The Supreme Court relied on *Buckeye* to resolve the dispute. The contract between Preston and Ferrer clearly evidenced a transaction involving commerce, so the FAA applied.[7] The Supreme Court went on to find that procedures under the Act conflicted with the FAA's dispute resolution regime in two basic respects: first, the Act granted the Labor Commissioner exclusive jurisdiction to decide an issue that the parties agreed to arbitrate, and second, the Act imposes prerequisites to enforcement of an arbitration agreement that are not applicable to contracts generally.[8] The Supreme Court stated in its holding:

When parties agree to arbitrate all questions arising under a contract, the FAA supersedes state laws lodging primary jurisdiction in another forum, whether judicial or administrative.[9]

b. Class actions and consumer claims.

In *AT&T Mobility LLC v. Concepcion*, the Supreme Court held that the FAA pre-empted California's "Discover Bank rule," which provided that class-action waivers in consumer contracts were unconscionable in cases where a party with a supposed superior bargaining power was alleged to have cheated large numbers of consumers out of individually small sums of money.[10] In *Concepcion*, the cell phone contract between the Concepcions and AT&T required arbitration of all disputes but did not permit class action arbitration.[11] The Concepcions' lawsuit concerned phone sales tax charges, and their case was consolidated with an already-pending class action on the same issue.[12] The trial court and the Ninth Circuit followed the 2005 *Discover Bank* decision and held that the arbitration provision was unconscionable under California law.[13]

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[1] *Preston v. Ferrer*, 128 S.Ct. 978; 169 L.Ed. 2d 917 (2008).
[2] *Id*. at 982.
[3] *Id*.
[4] *Id*.
[5] *Buckeye Check Cashing, Inc. v. Cardegna*, 546 U.S. 440, 126 S.Ct. 1204, 163 L.Ed. 2d 1038 (2006).
[6] *Id*. at 983.
[7] *Id*.
[8] *Id*. at 985.
[9] *Id*. at 988.
[10] *AT&T Mobility LLC v. Concepcion*, 131 S. Ct. 1740; 179 L. Ed. 2d 742 (2011). The Discover Bank rule comes from *Discover Bank v. Superior Court*, 36 Cal.4th 148 (2005), which related to an arbitration clause in a credit card agreement.
[11] *Id*. at 1742.
[12] *Id*.
[13] *Id*.

In holding for AT&T, the Supreme Court reiterated the federal policy favoring arbitration and reversed the Ninth Circuit, and ruled in favor of AT&T's request for arbitration:

The overarching purpose of the FAA . . . is to ensure the enforcement of arbitration agreements according to their terms so as to facilitate streamlined proceedings. Requiring the availability of classwide arbitration interferes with fundamental attributes of arbitration and thus creates a scheme inconsistent with the FAA.[14]

The Court concluded that class-wide claims are not suited for arbitration based on informality of procedures and lack of review on what could be "bet the company" claims, and that the California Discover Bank rule was therefore pre-empted by the FAA.[15]

Two years after *Concepcion*, the Supreme Court issued a similar ruling as applied to federal statutory law. In *American Express Co. v. Italian Colors Restaurant*, a class of restauranteurs sued American Express claiming that the credit card company violated the Sherman Act; the Supreme Court ruled that the contractual waiver of class arbitration at issue was enforceable even if the expense of pursuing the claims on an individualized basis would be prohibitive.[16] The Supreme Court stuck with its opinion in *Concepcion* that "the FAA's command to enforce arbitration agreements trumps any interest in ensuring the prosecution of low-value claims."[17]

On December 14, 2015, the Supreme Court decided *DIRECTV, Inc. v. Imburgia*, 193 L. Ed. 2d 365, 2015 U.S. LEXIS 7999, upholding a class action waiver in DIRECTV's contract with its customers. Amy Imburgia and Kathy Greiner sued DIRECTV for early termination fees they claimed violated California law. They sought class action status. Their contract with DIRECTV had a clause containing a class action waiver, but said "if the law of your state" makes the waiver of class arbitration unenforceable, then the entire arbitration provision is unenforceable. The contract also stated that the arbitration provision would be governed by the FAA.

The California Court of Appeals held that California law made the class action waiver unenforceable, so it refused to enforce the arbitration clause. The Supreme Court reversed. In an interesting division, Justice Breyer wrote the majority opinion and Justices Thomas and Ginsburg wrote separate dissenting opinions. Justice Breyer reaffirmed the Court's holdings in *Concepcion* and *Italian Colors* by stating that California's interpretation of the phrase "law of your state" in the contract did not put arbitration contracts on equal footing with all other contracts. As a result, the Court of Appeals' ruling violated the FAA.

Justice Ginsburg wrote a strong dissent stating that the majority opinion was another blow to consumer protection statutes that are designed to allow consumers to pursue class action suits for claims that otherwise would not be economical to assert. She also noted that Justice Breyer dissented from the majority opinion in *Concepcion.*

c. What happens if the arbitration clause does not have a class action waiver?

In *Stolt Nelson v. Animalfeeds International Corporation*, 559 U.S. 662 (2010), the Supreme Court held imposing class action on parties who had not agreed to authorize it is inconsistent with the FAA. Interestingly though, if AAA rules are specified in the arbitration clause and there is no express waiver of class actions, the arbitrator decides whether or not a claim may proceed as a class. There may not be any meaningful review of the arbitrator's decision if the arbitrator does not exceed his or her authority.

d. The Court upholds an arbitration clause in a nursing home agreement.

On May 15, 2017, the Supreme Court upheld an arbitration clause in a nursing home agreement in *Kindred Nursing Centers v. Clark*, 2017 U.S. Lexis 2948. Beverly Wellner held a power of attorney for her husband Joe, which gave Beverly the authority to "in my name, place and stead," to (among other things) "institute legal proceedings" and make "contracts of every nature in relation to both real and personal property." Janis Clark held a power of attorney for her mother Olive Clark that gave Janis "full power…to transact, handle, and dispose of all matters affecting me and/or my estate in any possible way," including the power to "draw, make, and sign in my name any and all…contracts, deeds, or agreements."

Joe and Olive moved into a nursing home with Beverly and Janis using their powers of attorney to complete the paperwork. Each of them signed an arbitration agreement on behalf of their respective relatives. After Joe and Olive passed away one year after entering the nursing home, Beverly and Janis sued Kindred, the owner of the nursing home, for negligent care in Kentucky state court. Kindred moved to compel arbitration, but the trial court denied the motion. The court of appeals affirmed. The Kentucky Supreme Court consolidated the cases and affirmed the holding of the trial court that the arbitration agreements were invalid. The Court reasoned that a power of attorney could not entitle a representative to enter into an arbitration agreement without specifically saying so. The Court labeled this holding as the "clear-statement rule."

The Supreme Court reversed holding that the clear-statement rule violated the Federal Arbitration Act by singling out arbitration agreements for disfavored treatment. Relying on *Concepcion*, the Court held that the Act preempts any state rule that discriminates on its face against arbitration or that covertly accomplishes the same objective by disfavoring contracts that have the defining features of arbitration agreements. The clear-statement rule fails to put arbitration agreements on an equal plane with other contracts. By requiring an explicit statement before an agent can relinquish her principal's right to go to court and receive a jury trial, the court did exactly what the Supreme Court has barred: adopt a legal rule hinging on the primary characteristics of an arbitration agreement.

e. The next battleground?

It appears the next big battleground will be over employment claims. For example, in *D.R. Horton, Inc.*, the Fifth Circuit reversed a ruling by the National Labor Relations Board ("NLRB") and held that arbitration agreements that waive an employee's right to pursue class and collection claims in all forums do not violate the National Labor Relations Act.[18]

The NLRB struck down a similar arbitration class action waiver clause in a case involving Murphy Oil, and the Fifth Circuit affirmed its ruling in the *D.R. Horton* case.[19] In *Murphy Oil*, the Court noted that

[14] *Id*. at 1748.
[15] *Id.* at 1751-53.
[16] *Am. Exp. Co. v. Italian Colors Rest.*, 133 S. Ct. 2304, 2308, 186 L. Ed. 2d 417 (2013).
[17] *Id*. at 2312 n. 5.
[18] *D.R. Horton, Inc.*, 737 F. 3d 344 (5th Cir. 2013).
[19] *Murphy Oil USA, Inc. v. Nat'l Labor Relations Bd.*, 2015 U.S. App. LEXIS 18673 (Oct. 26, 2015).

several sister circuits either indicated or expressly agreed with the Fifth Circuit's *D.R. Horton* ruling.[20]

In the last two weeks of 2015, the NLRB issued sixteen rulings holding that employers violate the National Labor Relations Act when their mandatory arbitration clauses require employees to waive the right to pursue class and collective actions involving employment claims even if there is a provision allowing workers to opt out of the waiver. One such employer, 24 Hour Fitness USA, Inc., has appealed the NLRB's ruling to the Fifth Circuit. As a result, there will be a third opinion from the Fifth Circuit on this issue.

There are numerous legal battles being fought nationwide on whether employees can be compelled to arbitrate their claims and whether class action waivers are enforceable under different employment rules and statutes.

f. What is next?

In October 2015, the Consumer Financial Protection Bureau issued draft rules that are designed to prevent financial companies from barring their customers from filing class action litigation as a condition of obtaining credit cards or checking accounts. The proposed rules are expected to draw heavy opposition from the U.S. Chamber of Commerce and other business groups, and the outcome of this process will be covered in an update to this paper.

3. The Texas Supreme Court also Typically Enforces Arbitration Provisions, Unless it is Used to Gain an Unfair Advantage or has been Waived.

The Texas Supreme Court's strong presumption in favor of arbitration is illustrated in *The Fredericksburg Care Company, L.P. v Perez*, which compelled a medical malpractice claim to arbitration.[21]

Fredericksburg operates a nursing home that specializes in providing long-term care to patients. Elisa Zapata was a patient at Fredericksburg at the time of her death. Her beneficiaries sued Fredericksburg for negligent care and wrongful death. Fredericksburg moved to compel arbitration based on an arbitration clause contained in an agreement that Zapata signed prior to her admission into the nursing home.

It was undisputed that the arbitration clause in the pre-admission agreement did not comply with Section 74.451 of the Texas Civil Practice and Remedies Code in that the agreement to arbitrate a health care liability claim was not set forth in bold-type with 10 point font to conspicuously warn the patient of several important rights. In support of its motion to compel arbitration, Fredericksburg argued that the Federal Arbitration Act preempted Section 74.451.

In response, the beneficiaries argued that Section 74.451 was part of a state law enacted for the purpose of regulating the business of insurance and fell within the scope of the McCarran-Ferguson Act (MFA) which trumped preemption under the FAA. The beneficiaries contended Congress created an exemption for preemption for any Federal law that could be "construed to invalidate, impair, or supersede any law enacted by any State for the purpose of regulating the business of insurance." The trial court denied Fredericksburg's motion to compel arbitration, and the court of appeals affirmed in an interlocutory appeal.

It was uncontested in the Supreme Court that Fredericksburg's pre-agreement notice did not comply with Section 74.451. After a lengthy discussion, the Texas Supreme Court concluded that Section 74.451 was not a law enacted by the Texas Legislature for the purpose of regulating the business of insurance. Section 74.451 applies to agreements to arbitrate health care liability claims between patients and health care providers. As a result, the MFA does not exempt Section 74.451 from preemption by the FAA. The Texas Supreme Court concluded that the FAA preempts Section 74.451 and Fredericksburg's motion to compel arbitration should have been granted.

The opinion has garnered a large amount of controversy. The case remains pending with the Texas Supreme Court on a motion for rehearing. The Texas Trial Lawyers Association, the Texas Association of Defense Counsel and the Texas Chapter of the American Board of Trial Advocates have urged the court in amicus briefs to reconsider the holding. The thrust of these briefs is that the Texas Supreme Court needs to support fully the principle of trial by jury. Regardless of the outcome on the motion for rehearing, this decision is illustrative of the Texas Supreme Court's strong presumption in favor of arbitration.

In *Royston, Rayzor, Vickery & Williams, LLP v. Lopez*, 467 S.W. 3d 494 (Tex. 2015), the Texas Supreme Court upheld a clause in a fee agreement that required all claims to be arbitrated, except for claims made by the firm for the recovery of its fees and expenses. Lopez hired the law firm to represent him in a suit for divorce from his alleged common law wife who won $11 million in the lottery. The law firm filed suit for divorce on behalf of Lopez, and the trial court ordered the parties in the divorce suit to mediation. The case settled, and Lopez later sued the law firm claiming the firm induced him to accept an inadequate settlement. The firm moved to compel arbitration, and the trial court denied the application.

The law firm filed an interlocutory appeal and a mandamus proceeding. The court of appeals affirmed the trial court's refusal to order arbitration and denied mandamus relief. The court of appeals held that the arbitration clause was so one-sided, it was substantively unconscionable and unenforceable.

The Texas Supreme Court reversed. First, the court reiterated the standard for determining procedural and substantive unconscionability from *In re Palm Harbor Homes, Inc.*, 195 S. W. 3d 672 (Tex. 2006) as follows: "[S]ubstantive unconscionability refers to the fairness of the arbitration provision itself, whereas procedural unconscionability refers to the circumstances surrounding adoption of the arbitration provision." The Texas Supreme Court held that the arbitration clause was not unconscionable. A valid arbitration agreement existed and the claims in question were within the scope of the agreement, so a presumption arose in favor of arbitrating those claims. The party opposing arbitration (Lopez) had the burden to prove a defense to arbitration. Lopez relied solely on the arbitration clause within the fee agreement, and the court found that proof was inadequate.

The Texas Supreme Court also held that the arbitration agreement was not so one-sided as to be unconscionable just because certain claims are excepted from those to be arbitrated. In other words, an agreement that requires arbitration of one party's claims, but does not require arbitration of the other party's claims is not so one-sided as to be unconscionable. The Texas Supreme Court also held that the arbitration provision does not unduly burden Lopez's substantive rights merely because it requires some, but not all, claims between the parties to be arbitrated. As a result, the

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[20] *See Walthour v. Chipio Windshield Repair, LLC*, 745 F. 3d 1326, 1336 (11th Cir. 2014); *Richards v. Ernst & Young, LLP*, 744 F. 3d 1072, 1075 n.3 (9th Cir. 2013), cert. denied, 135 S. Ct. 355, 190 L. Ed. 2d 249 (2014); *Owen v. Bristol Care, Inc.*, 702 F. 3d 1050, 1053-55 (8th Cir. 2013); *Sutherland v. Ernst & Young, LLP*, 726 F. 3d 290, 297 n.8 (2nd Cir. 2013).

[21] *The Fredericksburg Care Co., L.P. v Perez*, 2015 Tex. LEXIS 221 (Tex. Mar. 6, 2015).

agreement was not so grossly one-sided so as to be unconscionable.

The Supreme Court also refused to impose, as a matter of public policy, a legal requirement that attorneys explain to prospective clients, either orally or in writing, arbitration provisions in attorney-client employment agreements. Lopez relied on Opinion 586 of the Professional Ethics Committee in support of this argument, which suggested that Disciplinary Rule 1.03(b) applies when a lawyer asks a prospective client to agree to binding arbitration in an engagement agreement and as such, the lawyer should explain the advantages and disadvantages of binding arbitration the lawyer reasonably believes necessary for the client to make an informed decision. Prospective clients who enter such contracts are legally protected to the same extent as are other contracting parties from, for example, fraud, misrepresentation, or deceit in the contracting process. Prospective clients who sign attorney client employment contracts containing arbitration provisions are deemed to know and understand the contract's content and are bound by their terms on the same basis as are other contracting parties. The court stated that nothing in its decision is intended to diminish or address any applicable ethical obligations of the law firm, but rather is intended to address legal obligations between the parties.

Justice Guzman wrote a concurring opinion stating that the Disciplinary Rules do not speak directly to arbitration agreements or the guidelines for attorneys to discharge their ethical responsibilities to fully and fairly discuss arbitration agreements with their clients. She wrote that the rulemaking process and not a judicial opinion was the best way to formulate these guidelines.

Lastly, the Texas Supreme Court held that the arbitration agreement was not illusory. The agreement would be illusory if it bound one party to arbitrate while allowing the other to choose whether to arbitrate. The fact that the scope of the arbitration provision binds parties to arbitrate only certain disagreements does not make it illusory. Further, the fact that an arbitration clause is one-sided does not make it illusory. The mutually binding promises to arbitrate all disputes except for the firm's claims for fees and expenses, as well as the underlying contract, provide sufficient consideration for the arbitration provision.

In Re U.S. Home Corporation, was the first of two Texas Supreme Court decisions to address arbitration of contracts involving home builders.[22] In this case, two couples brought claims on behalf of themselves and others similarly situated, alleging that their homes were built without shower pans.[23] The purchasers conceded that their sales contracts contained broad arbitration clauses governed by the FAA, and did not dispute that their claims fell within the scope of those clauses. The purchasers raised seven contract defenses to enforcement, five of which were cited by the trial court in refusing to compel arbitration. The Supreme Court found that there was no evidence to support any of the seven grounds and granted mandamus relief to compel arbitration of the disputes.[24]

The Texas Supreme Court first addressed the trial court's finding that the arbitration clauses were contracts of adhesion and thus procedurally unconscionable.[25] The purchasers were able to prove only that U.S. Home refused to contract with them unless they agreed to arbitration, and the Texas Supreme Court found that that was not enough to create a contract of adhesion.

Second, the trial court found that the arbitration agreements were procured by fraud. There was no evidence presented by the plaintiffs of any misrepresentations, *scienter* or reliance, but only that the arbitration clause was on the back side of their single sheet contract. The Texas Supreme Court held that like any other contract clause, a party cannot avoid the impact of arbitration clause by merely failing to read it.[26]

The trial court also found that the arbitration clauses were not supported by mutual consideration, which the Texas Supreme Court found was belied by the fact that both parties agreed to arbitration.

Fourth, the trial court found arbitration would be unduly burdensome and costly. The Texas Supreme Court cited rulings of the United States Supreme Court that require a party to prove that he or she will actually be charged excessive arbitration fees. The only evidence presented by the plaintiffs was a schedule of the AAA's usual fees, and the Texas Supreme Court found that this was insufficient to carry the plaintiffs' burden.[27]

Fifth, the trial court found that mediation was a condition precedent to arbitration, and since mediation had not occurred, then arbitration could not be compelled. The Texas Supreme Court agreed that the contracts contemplated mediation before arbitration, but there was no indication that they intended to dispense with arbitration if mediation did not occur first. The Texas Supreme Court went on to hold that the plaintiffs alleged no damage from U.S. Home's failure to invoke mediation first, and that the plaintiffs were not in a position to complain because they had not requested mediation themselves.[28]

The plaintiffs also argued that they did not have to arbitrate with the individual defendants because only U. S. Home signed the agreement containing the arbitration clause. The Supreme Court held that none of the individuals had a duty to supply shower pans but for the purchasers' contracts with U.S. Home. As a result, because the non-signatories' liability arises from and must be determined by reference to the parties' contract rather than general obligations imposed by law, the suit is subject to the contract's arbitration provisions.[29]

As a result of all of the foregoing, the Texas Supreme Court held that the disputes were subject to binding arbitration.

In *Perry Homes v. Cull*, the Texas Supreme Court held that the Culls who purchased a home from Perry Homes had waived the right to compel arbitration.[30] The Culls bought their home from Perry Homes in 1996 paying $233,730.00. They also purchased a warranty, which contained a broad arbitration clause providing that all disputes that the Culls might have against Perry Homes or the warranty companies were subject to the FAA and would be submitted to the AAA for determination.

Over the next several years, the home suffered serious structural and drainage problems. After not obtaining satisfaction from Perry Homes or the warranty companies, the Culls sued in October, 2000. The warranty companies (but not Perry Homes) immediately requested arbitration, and the Culls opposed it. No one ever pressed for a ruling on the motion to compel arbitration from the trial court.

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[22] *In Re U.S. Home Corp.*, 236 S.W. 3d 761 (Tex. 2007).
[23] *Id*. at 763.
[24] *Id*.
[25] *Id*. at 764.
[26] *Id*.
[27] *Id*.
[28] *Id*.
[29] *Id*. at 765.
[30] *Perry Homes v. Cull*, 258 S.W. 3d. 580 (Tex. 2008).

After most of the discovery was completed and the case was set for trial, the Culls changed their minds about litigating and then asked the trial court to compel arbitration under the same grounds that the warranty companies had argued. The trial judge "reluctantly" ordered arbitration, because the defendants had not shown any prejudice from litigating the dispute in court for 14 months. The order compelling arbitration was signed on December 6, 2001, four days before the case was set for trial. The defendants then filed petitions for mandamus contesting the order compelling arbitration, first in the court of appeals, and then with the Texas Supreme Court, both of which were denied without an opinion within a few days.

After a year in arbitration, on December 24, 2002, the arbitrator awarded the Culls $800,000.00, including restitution of the purchase price of their home, mental anguish damages, exemplary damages, and attorneys' fees. The defendants then moved to vacate the award, again arguing in part that the case should never have been sent to arbitration after so much activity in court. The trial court overruled this objection, confirmed the award, and entered judgment. The court of appeals affirmed the award after deleting a duplicative award of interest.

The Culls first argued that it was too late to review the trial court's order referring the case to arbitration. Initially, they argued that the pre-arbitration mandamus proceedings established the law of the case. The Texas Supreme Court rejected this argument and held that mandamus is a discretionary writ and its denial without comment on the merits cannot deprive another appellate court from considering the matter in a subsequent appeal. Since the earlier mandamus petitions were denied without comment on the merits, the Texas Supreme Court's review was not foreclosed.

The Culls next argued that an order compelling arbitration can only be reviewed before arbitration occurs. The Texas Supreme Court then cited to several of its own decisions as well as the United States Supreme Court that reviewed orders compelling arbitration after an arbitration had already been conducted. The Texas Supreme Court also cited Section 16 of the FAA, which expressly prohibits pre-arbitration appeals. This provision was added in 1998 to prevent arbitrations from bogging down in preliminary appeals.

The Texas Supreme Court also distinguished between a review of the trial court's initial referral to arbitration from a review of the arbitrator's final award. As held by the United States Supreme Court, courts conduct an ordinary review of an initial referral to arbitration, but only a deferential review of an arbitrator's final award. The court acknowledged that a post-arbitration review of the decision to refer a case to arbitration may create a huge waste of the parties' resources, but if a review iss available before arbitration, then parties may also waste resources appealing every referral when a quick arbitration might settle the matter.

The Culls next argued that waiver of arbitration by litigation conduct is an issue to be decided by arbitrators rather than by the courts. The court stated that both it and federal courts have held that waiver is a question of law for the court to determine.

The Culls argued that *Howsam v. Dean Witter Reynolds*[31] held that arbitrators should decide allegations of waiver, delay or a like defense to arbitrability. The court distinguished this holding and held that although the federal courts do not defer to arbitrators when waiver is a question of litigation conduct, federal courts consistently do so when waiver concerns limitations periods or of particular claims or defenses, which were the issues decided in *Howsam*.

Then the court tackled the issue of when the litigation process was substantially invoked. The Court initially stated that because of the strong presumption against waiver of arbitration, the hurdle on this issue is a high one, and that the court had never previously found a waiver. In fact, the cases held that the parties did not waive arbitration by:

- filing suit;
- moving to dismiss a claim for lack of standing;
- moving to set aside a default judgment and requesting a new trial;
- opposing a trial setting and seeking to move the litigation to federal court;
- moving to strike an intervention and opposing discovery;
- sending eighteen interrogatories and nineteen requests for production;
- requesting an initial round of discovery, noticing (but not taking) a single deposition, and agreeing to a trial resetting; or
- seeking initial discovery, taking four depositions, and moving for dismissal based on standing.

The court had previously held that allowing a party to conduct full discovery, file motions going to the merits, and seek arbitration only on the eve of trial would be sufficient to constitute a waiver. The issue in this case is what if only two of these three factors are met? The court determined that waiver must be decided on a case-by-case basis and the court should look to the totality of the circumstances in making that determination, including factors such as:

- when the movant knew of the arbitration clause;
- how much discovery has been conducted;
- who initiated it;
- whether it related to the merits rather than arbitrability or standing;
- how much of it would be useful in arbitration; and
- whether the movant, sought judgment on the merits.

Ultimately, the court found that the answer to most questions regarding arbitration flows inexorably from the fact that arbitration is a matter of contract between the parties. Like any other contract right, the right to arbitrate can be waived if the parties agree instead to resolve a dispute in court. Such waiver can be implied from a party's conduct, although that conduct must be unequivocal. In close cases, the strong presumption against waiver should govern.

The next issue determined by the court was whether a showing of prejudice is necessary to show that a party had waived its rights to go to arbitration. The court acknowledged eight prior decisions requiring a showing of prejudice, and refused to reconsider that requirement.

In deciding the ultimate issue in the case, the court found without question that the Culls substantially invoked the litigation process. After listing the numerous motions and discovery proceedings that had occurred, the court found that the Culls never moved for arbitration until after the discovery process concluded.

The court's finding that since the Culls initially objected to arbitration and then insisted on it after the defendants acquiesced in litigation, they were able to get extensive discovery under one set of rules and then sought to arbitrate the case under another set of rules. This manipulation of the litigation process for the advantage of the Culls and to the detriment of the

[31] *Howsam v. Dean Witter Reynolds*, 537 U.S. 79 (2002).

defendants is precisely the kind of inherent unfairness that constitutes prejudice under federal and state law. As a result, the court vacated the arbitration award and remanded the case to the trial court for a prompt trial.

Recently, the Texas Supreme Court revisited the issue of waiver and ultimately held that the party opposing arbitration had not substantially invoked the judicial process so as to cause a waiver of the arbitration clause.

In *Richmont Holdings v. Superior Recharge Sys.*, 455 S.W.3d 573 (Tex. 2014), the issue of waiver was addressed twice by the trial court, twice by the Fort Worth Court of Appeals, and twice by the Texas Supreme Court. Like many buy/sale transactions, the underlying business transaction contained an Asset Purchase Agreement (with an arbitration clause) and an employment agreement (with a covenant not to compete but no arbitration clause).

Litigation ensued in two counties. The Denton County trial court denied a motion to compel arbitration, and the court of appeals affirmed the denial of the motion to compel arbitration on a separate ground that the employee claims were not within the scope of the arbitration clause. The Texas Supreme Court's first opinion remanded the case to the court of appeals at 392 S.W.3d 633 (Tex. 2013).

On remand the court of appeals found waiver based on facts that included a motion to transfer venue, failure to respond to discovery and a delay in moving to compel arbitration. *Richmont Holdings v. Superior Recharge Sys.*, 453 S.W.3d 443, 446 (Tex. App.—Fort Worth 2013). On appeal to the Texas Supreme Court a second time, the court said it had often found no waiver of an arbitration clause because of the strong presumption against waiver,[32] and in this particular case, the court noted that merely filing suit, moving to transfer, engaging in minimal discovery, and delay alone, when considered as a whole, do not approach substantial invocation of the judicial process so as to warrant a waiver. Thus the case was remanded to the trial court for further proceedings.[33]

4. A Recent Decision from the Fifth Circuit Shows that an Arbitration Clause Will Not Be Enforced for Claims Outside the Scope of the Whole Agreement

In *Jones v. Halliburton Co.*, the Fifth Circuit affirmed the trial court's ruling that granted in part and denied in part a motion to compel arbitration by Halliburton.[34] By way of background, in 2004, Ms. Jones began working for Halliburton as an administrative assistant. She alleged that while employed by Halliburton and its subsidiary, KBR in Houston, she was sexually harassed by her direct supervisor.[35] Subsequently, Ms. Jones signed a contract with a subsidiary of KBR agreeing to work as an IT customer support analyst in Baghdad, Iraq. The employment agreement contained an arbitration clause stating in part that "any and all claims that you might have against your employer related to your employment, including your termination, and any and all personal injury claims arising in the workplace you have against a parent or an affiliate of your employer, must be submitted to binding arbitration instead of to the court system."[36]

After beginning work at Camp Hope, in the "Green Zone" of Baghdad in July, 2005, Ms. Jones was housed in predominantly male barracks, and almost immediately began complaining about sexual harassment. After no action was taken, Ms. Jones alleged that she was drugged and brutally raped by several Halliburton/KBR employees.[37]

Ms. Jones subsequently filed an arbitration proceeding and then a lawsuit. In the trial court, Ms. Jones asserted several defenses opposing enforcement of the arbitration provision, including that the defendants fraudulently induced her to enter into the arbitration agreement included in the contract. The court held that when deciding whether an arbitration provision is valid, the court may only consider issues relating to the making and performance of the agreement to arbitrate, and not claims of fraudulent inducement of the contract generally. Only if an arbitration clause is attacked on an independent basis can the court decide the dispute; otherwise, general attacks on the agreement are for the arbitrator to determine. Since Ms. Jones did not attack the arbitration clause on an independent basis, her fraud in the inducement claim had to be decided by the arbitrator.

Ms. Jones also argued in the trial court that enforcement of the arbitration provision was unconscionable. Under Texas law, unconscionability includes two aspects: (1) procedural unconscionability, which refers to the circumstances surrounding the adoption of the arbitration provision, and (2) substantive unconscionability, which refers to the fairness of the arbitration provision itself. Under Texas law, arbitration agreements are not inherently unconscionable, even if they are considered to be contracts of adhesion. Ms. Jones argued that the agreement was procedurally unconscionable because of the gross disparity of bargaining power between the defendants and herself. The court held that while that contention alone is insufficient to make a claim for procedural unconscionability, the court considered Ms. Jones's claim to be another offshoot of her fraud in the inducement defense to the employment contract as a whole, which had to be determined by the arbitrator.

Ms. Jones also argued substantive unconscionability, which requires proof that the clause involved is so one sided that it is unconscionable under the circumstances existing when the parties made the contract. The court found that the Texas Supreme Court had upheld the exact arbitration provision at issue against an attack on the basis of substantive unconscionability because it had terms that protected the employee in the arbitration process.[38] The court went on to reject Ms. Jones's claims in this regard and her other arguments that the arbitration clause was unenforceable.

The court found that even though the arbitration clause was extremely broad, several of Ms. Jones's claims, including vicarious liability for assault and battery, intentional infliction of emotional distress arising out of the assault, negligent hiring, retention, and supervision of the employees involved in the assault,

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[32] In the *Richmont Holdings* case, the Texas Supreme Court in Footnote 1 gives an excellent summary of cases it has considered and found no wiaver of right of arbitration. *Richmont Holdings v. Superior Recharge Sys.*, 453 S.W.3d 443, 445 (Tex. App.—Fort Worth 2013).

[33] *See El Paso Healthcare System, Ltd. v. Green*, 485 S.W.3d 227 (Tex. App.-El Paso 2016) (vacated pursuant to Texas Rule of Appellate Procedure 56.3 at *El Paso Healthcare System, Ltd. v. Green*, 111016 TXSC, 16-0259, for a rare intermediate appellate court decision that found waiver of arbitration because a party substantially involved judicial procedure.

[34] *Jones v. Halliburton Co.*, 583 F.3d 228 (5th Cir. 2009).

[35] *Id.* at 231.

[36] *Id.*

[37] *Id.*

[38] *See In re Halliburton Co.*, 80 S.W. 3d 566, 572 (Tex. 2002).

and false imprisonment, all fell outside the scope of the arbitration clause because *these were not claims related to her employment*. The court specifically found that the sexual assault in plaintiff's bedroom was not a personal injury claim arising in the workplace. This was despite the fact that the defendants provided plaintiff with her housing. The court therefore denied the motion to compel arbitration of these claims. This holding was affirmed by the Fifth Circuit.[39]

5. Compelling Non-Signatories into Arbitration[40]

Simply because a party did not sign an arbitration agreement does not mean that the party cannot be compelled to arbitrate his or her claim. Federal courts, applying ordinary principles of contract and agency law, have held that so long as there is some written agreement to arbitrate, a non-signatory may be bound to submit to arbitration. Six theories for binding a non-signatory have been recognized: (a) incorporation by reference; (b) assumption; (c) agency; (d) veil-piercing/alter ego; (e) estoppel; and (f) third-party beneficiary.[41] These theories are described below:

a. Incorporation by Reference

Incorporation by reference, as the name suggests, allows parties to incorporate the terms of an earlier agreement.[42] An arbitration clause in an earlier agreement can be incorporated into a subsequent contract with the use of express incorporation language.[43] Texas courts have found, that "[t]he specific language used [to incorporate a prior agreement containing an arbitration clause] is not important so long as the contract signed by the [non-signatory] plainly refers to another writing. An arbitration agreement is not invalid or unenforceable merely because it is contained in a document incorporated into the contract by reference."[44]

b. Assumption

A party may be bound by an arbitration clause if its subsequent conduct indicates that it is assuming the obligation to arbitrate.[45] Thus, assumption can be implied from a party's conduct.[46] A party waives its right to object to arbitration once it participates in an arbitration; however, what constitutes participation, and at what point the party has demonstrated its implied assent to arbitration is unclear, as the courts give little guidance regarding these issues.[47] However, to the extent a party participates in arbitration to contest the issue of arbitrability, such conduct does not constitute a waiver to object to arbitration.[48]

c. Agency

Ordinary principles of agency law may be called upon to bind a non-signatory to an arbitration agreement.[49] An agent with authority can bind its non-signatory principal to an arbitration agreement.[50] An agency relationship may be demonstrated by "written or spoken words or conduct, by the principal, communicated either to the agent or to the third party."[51] The agent must have been acting within the scope of the agency relationship when he signed the contract on behalf of the principal.[52] Further, for this theory to apply the relationship must be relevant to the legal obligation in dispute.[53] Additionally, because a signatory is entitled to a presumption of independence,[54] the party seeking to bind a principal has the burden to prove that the signatory signed the agreement as an agent.[55]

d. Veil-Piercing/Alter Ego

Although a corporate relationship or affiliation alone has been held insufficient to bind a non-signatory to an arbitration agreement,[56] there are circumstances where a corporation may be bound by an agreement entered into by its subsidiary.[57] This occurs "when their conduct demonstrates a virtual abandonment of separateness."[58] The corporate veil may be pierced only if: "(1) the owner exercised complete control over the corporation with respect to the transaction at issue and

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[39] *Id.* at 241.

[40] This article addresses whether non-signatories can be forced to arbitrate their claims and does not address whether non-signatories can compel parties who are signatories to agreement to arbitrate their claims. Generally, it is harder for non-signatories to compel arbitration. For more detail on this topic, please refer to the following cases: *Crawford Prof'l Drugs Inc. v. CVS Caremark Corp.*, 748 F.3d 249 (5th Cir. 2014); *Grigson v. Creative Artists Agency*, 2010 F.3d 524, 527 (5th Cir. 2000); *Meyer v. WMCO-GP, LLC*, 211 S.W.3d 302 (Tex. 2006).

[41] *Arthur Anderson LLP v. Carlisle*, 556 U.S. 624, 630 (2009); *G.T. Leach Builders, LLC v. Sapphire V.P., LP*, 458 S.W.3d 502, 523 (Tex. 2014).

[42] *See In re Raymond James & Associates, Inc.*, 196 S.W.3d 311, 318 (Tex. App.—Houston [1st Dist.] 2006, no pet.).

[43] *See e.g., J.S. & H Constr. Co. v. Richmond County Hosp. Auth.*, 473 F.2d 212, 213-16 (5th Cir. 1973) (finding a construction subcontract was incorporated by reference into the "General Conditions" of the prime contract between the owner and general contractor requiring a non-signatory to arbitrate his claims).

[44] *In re Raymond James & Associates, Inc.*, 196 S.W.3d at 318.

[45] *Piggly Wiggly Operators' Warehouse, Inc. v. Piggly Wiggly Operators' Warehouse Independent Truck Drivers Union Local No. 1*, 611 F.2d 580, 583-84 (5th Cir. 1980); *Firstlight Fed. Credit Union v. Loya*, 08-14-00282-CV, 2015 WL 5841505 (Tex. App. —El Paso Oct. 7, 2015, no. pet. h.) (holding that "when an employer notifies an at-will employee of an arbitration agreement and informs the employee that continuing to work after notice constitutes the employee's agreement to the arbitration agreement, the employee's conduct in continuing to work is acceptance of the terms of the agreement as a matter of law).

[46] *See e.g., Gvozdenovic v. United Air Lines, Inc.*, 933 F.2d 1100, 1103 (2d Cir. 1991) (affirming the dismissal of a petition to vacate an arbitral award where petitioners "participated voluntarily and actively in the arbitration process"); *Piggly Wiggly Operators' Warehouse, Inc.*, 611 F.2d at 583-84 (affirming arbitral decision against employer where both parties submitted issues to arbitrator without objection, despite it not being required by the parties' collective bargaining agreement).

[47] *Id.*

[48] *See First Options of Chicago v. Kaplan*, 514 U.S. 938, 946 (1995) ("[M]erely arguing the arbitrability issue to an arbitrator does not indicate a clear willingness to arbitrate that issue . . . .")

[49] *Brudas S.A.P.I.C. v. Government of Turkmenistan*, 345 F.3d 347,357 (5th Cir. 2003).

[50] *Id*. ("If [defendant] indeed signed the [agreement at issue] as the [non-signatory's] agent, the [non-signatory] would be bound by the [agreement's] arbitration clause.")

[51] *Id*. (citing *Hester Int'l Corp. v. Federal Republic of Nigeria*, 879 F.2d 170, 176 (5th Cir. 1989)).

[52] *Id*.

[53] *Ace Am. Ins. Co. v. Huntsman Corp.*, 255 F.R.D. 179, 194 (S.D. Tex. 2008).

[54] *Brudas*, 345 F.3d at 356.

[55] *Id*.

[56] *See, e.g., In re Trammel*, 246 S.W.3d 815, 820 (Tex. App.—Dallas 2008, no pet.) ("[A] corporate relationship is generally not enough to bind a non-signatory to an arbitration agreement.").

[57] *Adres Holding Corp. v. Villaje Del Rio, Ltd*., 09-CA-127, 2009 WL 2252251, at *3 (W.D. Tex. July 24, 2009).

[58] *Id.*

(2) such control was used to commit a fraud or wrong that injured the party seeking to pierce the veil."[59]

e. Estoppel

Equitable Estoppel is the most common doctrine under which non-signatories are sought to be compelled into arbitration. Under direct benefit estoppel, "a non-signatory plaintiff seeking the benefits of a contract is estopped from simultaneously attempting to avoid the contract's burdens, such as the obligation to arbitrate disputes."[60] The underlying principle behind this doctrine is that a "nonparty [to a contract] cannot both have his contract and defeat it too."[61] The Supreme Court of Texas has determined that a non-signatory is bound to arbitrate under direct benefit estoppel where: (1) the non-signatory pursues a claim "on the contract" or (2) the non-signatory seeks and obtains substantial benefits from the contract.[62] Thus, non-signatories generally must arbitrate claims arising from the contract, but not claims arising from other general legal obligations.[63]

f. Third-Party Beneficiary

A non-signatory may be bound by an arbitration clause if the party is a third-party beneficiary to a contract which contains an arbitration clause. "A-third party beneficiary is 'one for whose benefit the contract was made' and 'not one who is benefited only incidentally by the performance of the contact.'"[64] Texas law presumes that parties to an agreement "contracted for themselves unless it clearly appears that they intended a third party to benefit from the contract."[65] Third-party beneficiary status cannot be created by implication.[66] Thus, to be considered a third-party beneficiary, the contract at issue must clearly and fully spell out the non-signatory's third-party beneficiary status.[67]

6. Who Decides Issues of Arbitrability?

"Arbitrability" refers to whether an agreement is subject to arbitration. Several issues encompass arbitrability, but arguably some of the most critical issues are whether the court or the arbitrator should decide the validity and scope of an arbitration agreement.[68]

a. Who Decides the Validity of an Arbitration Agreement?

Before any dispute can be sent to arbitration, parties must prove that an agreement to arbitrate exists. An agreement to arbitrate may not exist for several reasons, such as forgery, lack of mental capacity, or lack of authority.[69] Who decides the question of arbitrability turns on the agreement of the parties.

Implicit to understanding whether an agreement to arbitrate exists is the concept of "separability." Separability is a legal doctrine established by the United States Supreme Court in *Prima Paint Corp. v. Flood & Conklin Mfg. Co.* that allows an arbitration agreement to be considered separate and independent from the underlying contract in which it is contained.[70] Therefore, under the separability doctrine, the invalidity of the underlying contract will not impact the arbitration clause, and the invalidity of the arbitration clause will not render the underlying contract invalid.

On more than one occasion, the United States Supreme Court has concluded that, absent clear and unmistakable evidence that the parties agreed to arbitrate the issue of arbitrability,[71] the question of whether parties are bound by an arbitration clause is a gateway issue for the court.[72] In *First Options of Chicago, Inc. v. Kaplan*, the Court analyzed whether two appellants, who signed an arbitration agreement in their representative capacities as owners of a company, were bound to arbitrate in their individual capacities.[73] The Court held that whether the appellants were bound by the arbitration agreement was a question for the court, absent clear evidence of an agreement between the parties to submit the question to arbitration.[74] The Court noted that because the issue of whether parties agreed to submit to arbitration is a question of basic contract law, it would be unfair to assume that the parties intended the arbitrator to address such a question.[75]

Similar to the Supreme Court, the Fifth Circuit has also held that the court should decide whether an agreement to arbitrate exists. In *Will-Drill Resources Inc. v. Samson Resources Co.*, the Fifth Circuit stated "that where a party attacks the very existence of an agreement, as opposed to its continued validity or enforcement, the courts must first resolve that dispute."[76] The Fifth Circuit reasoned that "where the

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[59] *Id.* (citing *Gardemal v. Westin Hotel Co.*, 186 F.3d 588 (5th Cir. 1999)).

[60] *In re Kellogg Brown & Root, Inc.*, 166 S.W.3d 732, 739 (Tex. 2005).

[61] *In re Weekley Homes, L.P.*, 180 S.W.3d 127, 135 (Tex. 2005).

[62] *Id.* at 131-33; *Bridas*, 345 F.3d at 360.

[63] *Zinante v. Drive Elec., LLC*, 582 Fed. App'x 368, 370 (5th Cir. 2014) (holding that the non-signatory plaintiff was not bound to arbitrate her negligence or gross negligence claim because the sales contract for the allegedly defective product between the defendant and the third party was not relevant to her lawsuit); *In re Vesta Ins. Group, Inc.*, 192 S.W.3d 759, 761 (Tex. 2006) (holding that non-signatories may be bound to arbitrate a tortious interference claim, even though such a claim arises from both the contract and general law, because a tortious interference claim falls more "on the arbitration side of the scale.").

[64] *Zinante*, 582 Fed. App'x at 371 (citing *MCI Telecomm. Corp. v. Tex. Util. Elec. Co.*, 995 S.W.2d 647, 651 (Tex. 1999)).

[65] *Id.*

[66] *Id.*

[67] *Id. See, e.g., Nationwide of Bryan Inc. v. Dyer*, 969 S.W.2d 518, 520 (Tex. App.—Austin 1998, no pet.) (compelling a non-signatory wife of a signatory to arbitrate breach of contract and related claims because she derived her standing to sue *from the contract* that contained the arbitration clause).

[68] Other issues might include what claims are incapable of being arbitrated, whether a tribunal has jurisdiction over an arbitration dispute, when arbitration agreements must comply with state procedural laws, and whether a party is bound by any award issued as a result of an arbitration proceeding.

[69] *See, e.g., In re Morgan Stanley & Co., Inc.*, 293 S.W.3d 182, 185–86 (Tex. 2009) (lack of mental capacity); *Opals on Ice Lingerie v. Body Lines Inc.*, 320 F.3d 362, 370 (2d Cir. 2003) (forgery); *Sphere Drake Ins. Ltd. v. All Am. Ins. Co.*, 256 F.3d 587, 591–92 (7th Cir. 2001) (lack of authority).

[70] *Prima Paint Corp. v. Flood & Conklin Mfg. Co.*, 388 U.S. 395, 402–403 (1967) (compelling arbitration despite determining that the underlying contract was illegal and void under state law); *see In re Morgan Stanley & Co., Inc.*, 293 S.W.3d at 185–86 (clarifying that under the separability doctrine, the underlying contract can impact the arbitration clause if there is a challenge to both the contract and the arbitration clause, such as the drafter of both provisions lacked the requisite mental capacity).

[71] *See* Section 6 (c) *supra*.

[72] *See, e.g., First Options of Chi., Inc. v. Kaplan*, 514 U.S. 938, 944 (1995). *See also Howsam v. Dean Witter Reynolds, Inc.*, 537 U.S. 79, 83 (2002).

[73] *First Options of Chi., Inc.*, 514 U.S. at 940–41.

[74] *Id.* at 944–46.

[75] *Id.* at 945.

[76] *Will-Drill Resources Inc. v. Samson Resources Co.*, 352 F.3d 211, 219 (5th Cir. 2003).

very existence of an agreement is challenged, ordering arbitration could result in an arbitrator deciding that no agreement was ever formed. Such an outcome would be a statement that the arbitrator never had any authority to decide the issue."[77]

Essential to the holding in *Will-Drill* is the Fifth Circuit's clarification that the court should not be responsible for deciding every issue of arbitrability. Rather, "where parties have formed an agreement which contains an arbitration clause, any attempt to dissolve that agreement by having the *entire agreement* declared voidable or void is for the arbitrator."[78] Therefore, the Fifth Circuit suggests that general attacks on the contract as a whole are for the arbitrator, and independent attacks only on the arbitration clause are for the court.

While the Texas Supreme Court has not distinguished attacks on the contract as a whole versus attacks on the arbitration clause, it has followed the federal courts in holding that the court should decide whether an agreement to arbitrate exists absent a clear and unmistakable agreement otherwise.[79] In both *In re Labatt Food Service, L.P.* and *In re Weekley Homes*, the Texas Supreme Court held that it is the court rather than the arbitrator that must decide whether an agreement to arbitrate exists, absent clear and unmistakable evidence that the parties intended the contrary.[80]

b. Who Decides the Scope of an Arbitration Agreement?

Separate from whether an agreement to arbitrate exists, before compelling arbitration, either the court or the arbitrator must also determine whether the alleged claims fall within the scope of the arbitration agreement.

In *AT&T Technologies Inc. v. Communication Workers of America*, the United States Supreme Court considered whether the arbitrator or the court was responsible for determining the scope of disputes subject to arbitration.[81] Specifically, the court set out to determine whether AT&T was bound to arbitrate grievances concerning employee layoffs.[82] The court held that "unless the parties clearly and unmistakably provide otherwise, the question of whether the parties agreed to arbitrate [a particular grievance] is to be decided by the court, not the arbitrator."[83] However, the court noted that in determining whether an issue is within the scope of an arbitration clause, the court should apply a presumption that the dispute is one that the parties agreed to arbitrate.[84]

Similarly, in *Smith v. Transportation Workers Union of America*, the Fifth Circuit held that "[w]hether a contract requires arbitration of a given dispute is a matter of contract interpretation and a question of law for the court."[85] While the Fifth Circuit acknowledged the Supreme Court's presumption in favor of arbitration, it noted that the court should not "stretch a contractual clause beyond the scope intended by the parties . . . ."[86]

c. Who Decides Gateway Issues of Arbitrability Based on an Agreement's Choice-of-Law Provision?

The issue of who decides the scope of an arbitration agreement may also be determined by the choice-of-law provision agreed upon by the parties and listed in the agreement.

i. The FAA

The FAA was enacted in 1925 and applies to most arbitration agreements. Even though the FAA does not use the term "arbitrability," it governs the enforceability of an agreement when the dispute involves interstate commerce. Parties may choose whether the FAA, state law, or other arbitration rules apply, but the FAA's purpose is to ensure that the provisions chosen by the parties are enforced.

If an arbitration agreement states that the FAA applies, the court will decide issues of arbitrability.[87] Under the FAA, the arbitrator's essential role is to swiftly resolve disputes, not take part in judicial review.

ii. TAA

Similar to the FAA, if an arbitration agreement states that the TAA applies, the court will decide issues of arbitrability. Under the TAA, the court *must* order parties to arbitrate their claims upon a showing that an agreement to arbitrate exists and is enforceable.[88]

iii. AAA Commercial Arbitration Rules

Unlike the FAA and the TAA, the AAA Rules grant the arbitrator the power to decide issues of arbitrability. Specifically, the AAA Rules grant the arbitrator the power to "rule on his or her own jurisdiction, including any objections with respect to the existence, scope or validity of the arbitration agreement or the arbitrability of any claim or counterclaim."[89]

Under Texas law, the AAA Rules will not govern an agreement where the FAA or the TAA would otherwise apply unless the parties can prove that they

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[77] *See id.*; *see also DK Joint Venture 1 v. Weyand*, 649 F.3d 310, 317 (5th Cir. 2011) (holding that a court does not "owe deference to the [arbitrator's] . . . determination of its own jurisdiction" when determining the existence of an arbitration agreement).

[78] *Will-Drill Resources, Inc.*, 352 F.3d at 218 (emphasis added).

[79] *See In re Labatt Food Serv., L.P.*, 279 S.W.3d 640, 643 (Tex. 2009); *In re Weekley Homes, L.P.*, 180 S.W.3d 127, 130 (Tex. 2005); *see also Leshin v. Olivia*, 2015 WL 4554333, at *4–5 (Tex. App.—San Antonio June 29, 2015, no pet.) (mem. op.); *Brock Servs., LLC v. Solis*, 2015 WL 5895083, at *2 (Tex. App.—Corpus Christi-Edinburg Oct. 8, 2015, no pet.); *Elgohary v. Herrera*, 405 S.W.3d 785, 790 (Tex. App.—Houston [1st Dist.] 2013, no pet.) (all holding that the court should decide whether an agreement to arbitrate exists absent clear and unmistakable evidence to the contrary).

[80] *See In re Labatt Food Serv., L.P.*, 279 S.W.3d at 643; *In re Weekley Homes, L.P.*, 180 S.W.3d at 130.

[81] *AT&T Techs., Inc. v. Commc'n Workers of Am.*, 475 U.S. 643, 649 (1986); *Hall St. Assocs., L.L.C. v. Mattel, Inc.*, 552 U.S. 576, 588 (2008).

[82] *AT & T Techs., Inc.*, 475 U.S. at 649.

[83] *Id.* at 649 (noting that the court should not rule on the merits of the underlying claims; even though, they have the authority to rule on whether the claims are arbitrable).

[84] *Id.* at 650.

[85] *Smith v. Transp. Workers Union of Am., AFL–CIO Air Transport Local 556*, 374 F.3d 372, 374 (5th Cir. 2004); *see Brock Servs.*, LLC, 2015 WL 5895083, at *2 (holding that the court typically determines whether the parties have agreed to arbitrate a specific issue; however, parties may contractually agree that the arbitrator determine all issues of arbitrability).

[86] *Id.* at 375 (quoting *Babcock & Wilcox Co. v. PMAC, Ltd.*, 863 S.W.2d 225, 230 (Tex. App.—Houston [14th Dist.] 1993, writ denied).

[87] 9 U.S.C. § 3 (stating that "upon being satisfied that the issue involved in such suit or proceeding is referable to arbitration under such an agreement," the court shall, on application of one of the parties, "stay the trial of the action until such arbitration has been had in accordance with the terms of the agreement . . . .").

[88] *See id.* § 171.021(a) (emphasis added) ("A court shall order the parties to arbitrate on application of a party showing: (1) an agreement to arbitrate; and (2) the opposing party's refusal to arbitrate.").

[89] AAA R-7.

agreed to have the arbitrator decide issues of arbitrability.[90] The AAA has approved and published sample clauses that have been interpreted by courts to clearly and unmistakably indicate that arbitrators will decide issues of arbitrability.[91]

7. Conclusion

As these cases show, if the claims alleged concern the subject matter of the contract that contains an arbitration clause, then the arbitration clause is likely to be enforced. Additionally, courts are inclined to require a non-signatory party to arbitrate his or her claim if one or more of the following theories discussed more fully above apply. From the Supreme Court of the United States down, the general consensus of courts is that there is a strong presumption in favor of enforcing arbitration provisions.

B. Arbitration Forums

There are several established arbitration forums available for just about every type of civil action. These forums, such as the American Arbitration Association, have refined their rules over the years to provide an efficient vehicle to process every part of a claim, from selecting the neutrals to ending the case after the final hearing. There are also specialized tribunals, such as the Financial Industry Regulatory Authority discussed below, which typically involves disputes with brokers or brokerage houses. When drafting an arbitration clause for an agreement, a quick review of the different forums and their rules may be well worth the extra effort if a claim arises down the road.

These three forums are described in Sections 1–3 below.

1. AAA (www.adr.org)

Obviously, AAA is the largest and best known of all arbitration forums. In one study, the AAA had less than 1,000 cases on its docket in 1960 and by 2002 that number had grown to 17,000.[92]

AAA has separate rules for commercial cases, consumer cases, construction cases, employment cases, other labor matters, government and consumer cases, as well as international matters. (*See* Tabs in www.adr.org). Under each of these broad topics, subtopics exist, each with their own of rules of procedure. For example, under the commercial tab, there are sixteen sub-categories of commercial cases with their own variations of the commercial rules.

Going through a detailed description of all the rules options available at AAA would be beyond the scope of this paper and is more easily researched by the practitioner on the AAA website.

With any arbitration forum, fees need to be budgeted up front. With the AAA, the filing fee increases as the amount in controversy increases. For example, with a $5 million commercial claim, there is an initial filing fee of $10,200.00 and a case service fee of $4,000.00. In addition, deposits are made in advance of the arbitration hearing to cover the fees for the arbitrators. With experienced neutrals who have relatively high hourly billing rates, these deposits can be very large. Further, a panel of three arbitrators will, of course, increase the cost threefold. Additionally, an arbitrator (or arbitrators) may refuse to hear a case if the fee deposits are not timely made. Usually, one party's failure to pay its portion of the fee deposit will result in the AAA inquiring as to whether the other side wishes to pay the entire fee and proceed with the hearing.

2. The Judicial Arbitration and Mediation Service ("JAMS") (www.jamsadr.com)

JAMS is another well-known arbitration and mediation service. Similar to AAA, it offers a number of different types of arbitration proceedings geared to different types of disputes, such as employment, consumer, class action, construction, and international matters.

As is the case with AAA, be mindful of the filing fees, which are significant. In addition, there are other fees that the practitioner should be aware of from the outset, including postponement fees.

3. International Institute for Conflict Prevention & Resolution ("CPR") (www.cpradr.org)

CPR is also another well-known arbitration and mediation service. In addition to rules that govern general civil disputes, CPR offers a wide array of rules for other types of cases, including employment arbitrations, international cross-border disputes, domain name disputes, mediation, and non-binding "mini-trials." CPR also offers appellate arbitration.

As with the AAA and JAMS, parties arbitrating with CPR have input into the selection of neutrals. Many other CPR rules are similar to those of the AAA and JAMS.

4. Financial Industry Regulatory Authority ("FINRA")

FINRA was created by a merger between the regulatory arms of the NASD and the New York Stock Exchange in July, 2007. FINRA arbitration involves disputes between:

a. Customers and brokers and brokerage houses (most customer account agreements contain arbitration clauses);

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[90] *See Drafting Dispute Resolution Clauses*, AMERICAN ARBITRATION ASSOCIATION 10, https://www.adr.org/aaa/ShowPDF?doc=ADRSTG_002540.

[91] *Id.* (suggesting that drafters use the following clause: Any controversy or claim arising out of or relating to this contract, or the breach thereof, shall be settled by arbitration administered by the American Arbitration Association in accordance with its Commercial Arbitration Rules, and judgment on the award rendered by the arbitrator(s) may be entered in any court having jurisdiction thereof); *see, e.g.*, *Petrofac, Inc. v. DynMcDermott Petroleum Operations Co.*, 687 F.3d 671, 675 (5th Cir. 2012) (stating that "[t]he arbitrator shall have the power to rule on his or her own jurisdiction, including any objections with respect to the existence, scope or validity of the arbitration agreement" clearly and unmistakably incorporates the AAA Rules); *Schlumberger Tech. Corp. v. Baker Hughes Inc.*, 355 S.W.3d 791, 803 (Tex. App.—Houston [1st Dist.] 2011, no pet.) (holding incorporation of AAA Rules clearly and unmistakably showed parties' intent to delegate issue of arbitrability to arbitrator); *Haddock v. Quinn*, 287 S.W.3d 158, 172 (Tex. App.—Fort Worth 2009, pet. denied) ("[E]xpress incorporation of rules empowering the arbitrator to decide arbitrability . . . clearly and unmistakably evidences the parties' intent to delegate issues of arbitrability to the arbitrator."). *Compare with Houston Refining, L.P. v. United Steel, Paper and Forestry, Rubber, Mfg.*, 765 F.3d 396, 410 (5th Cir. 2014) (stating that "[a]t arbitration, the parties shall reserve all rights to present any and all arguments and advance any and all defenses to them including, without limitation, arguments concerning whether or not an applicable collective bargaining agreement was in effect at the time that a particular grievance arose" does not clearly and unmistakably incorporate the AAA Rules).

[92] Marc Galanter, *The Vanishing Trial: An Examination of Trials and Related Matters in Federal and State Courts*, 1 J. Empirical Legal Stud. 459, 515 (2004).

b. Brokerage houses; and
c. Brokers and brokerage houses, including employment disputes.

While the filing fees for FINRA are higher than those in court, they are generally lower than the filing fees for AAA and JAMS arbitrations. While there is generally no deposit for arbitration fees in advance of the arbitration hearing, the arbitration award can assess these costs against one party or the other.

5. Private Arbitration

Parties can either agree without a prior agreement to arbitrate their disputes or the agreement between them can specify arbitration before a specific individual. Normally, these contract clauses will specify the rules to be applied by the private arbitrator. If not, there can be debate about whether rules of the AAA for example would apply or if the Federal Rules of Civil Procedure apply. Clearly, these are issues that are best spelled out in the arbitration agreement.

As set forth in the preceding paragraph, private arbitration can involve an arbitrator specified in the contract, one appointed by a court, or an arbitrator agreed to by the parties. There are also situations where each party will pick an arbitrator and those two arbitrators will pick a third arbitrator to hear the dispute (tripartite panels).

6. Delaware Rapid Arbitration Act (DRAA)

In May 2015, Delaware enacted the Delaware Rapid Arbitration Act (10 Del. C. Ch. 580) which made significant changes to the arbitration of business disputes and addressed major drawbacks of the traditional arbitration process.[93]

Some of the key changes imposed by the DRAA are: expedited appointment of an arbitrator (should parties disagree on an arbitrator); the arbitrator must issue a final award within 120 days of his/her acceptance of appointment, subject to a 60-day extension with the parties unanimous consent; allowing the arbitrator to decide the scope and arbitrability of issues; eliminating award confirmation proceedings; streamlining the challenge process; and allowing parties to preserve confidentiality with private arbitration appeals. These are a few of the expedited changes offered by the DRAA and parties may freely modify these through written agreement.[94]

The DRAA may not be ideal for all situations and, for some parties, its speedy disposition may be too risky and traditional arbitration proceedings may be safer route. Nevertheless, the DRAA may serve as a powerful tool for resolving business disputes in the right circumstances and Counsel should be familiar with its key changes, the requirements for invoking it, and issues to consider when drafting or customizing an agreement under the DRAA.[95]

C. Pros and Cons of Arbitration

This portion of the paper is designed to outline some of the issues involved with arbitration proceedings. It is not meant to include all issues, nor is it intended to discuss every nuance of the issues raised. Rather, it is intended to raise awareness and identify issues in order to assist lawyers in managing the process for their clients. More discussion will occur in the live presentation about each of these topics.

1. The Proceedings are Quicker

Depending on the forum, arbitration hearings can usually be scheduled within a few months of the filing of the arbitration complaint. This is obviously far quicker than a dispute would be heard in either state or federal court. Unfortunately, arbitrations seem to take longer to start than court proceedings due to the need to select an arbitrator. This process can take weeks or months. Advising clients about this possible delay is essential to managing expectations in arbitrations.

2. Selection of Arbitrator

Obviously, arbitrator selection is one of the most important decisions in the arbitration process. This process varies depending on the arbitration rules that apply. Generally, client involvement is preferable in this selection (just as clients would be involved in jury selection), and significant research should be conducted on the proposed arbitrators. Some organizations may allow specific questions to be answered by proposed arbitrators or requests for references related to arbitrators.

Parties may agree to party-appointed arbitrators or they may elect that the arbitrators be appointed by the organization. Most organizations (AAA, FAA, JAMS, CPR, etc.) allow parties to determine their own selection process. For example, in selecting a tripartite tribunal, the parties may agree that each party appoint one arbitrator and the two party-appointed arbitrators then select a neutral, third person to be the tribunal chair. Parties may also decide whether the party-appointed arbitrators will be neutral or non-neutral. If parties have not agreed to an appointment process or are unable to agree, most organizations have a selection process whereby a list of neutral arbitrators are provided to the parties by the organization. The parties may strike names from the list and rank the remaining names in order of preference and the organization will select the panel based on the party's preferences.

The most important note is to follow the agreed selection process. Arbitrators must be selected pursuant to the method specified in the parties' agreement.[96] An arbitration panel selected contrary to the contract-specified method lacks jurisdiction over the dispute. Accordingly, courts "do not hesitate to vacate an award when an arbitrator is not selected according to the contract-specified method."[97] When an arbitration agreement incorporates by reference outside rules, "the specific provisions in the arbitration agreement take precedence and the arbitration rules are incorporated only to the extent that they do not conflict with the express provisions of the arbitration agreement."[98] The FAA requires that if an agreement provides "a method of naming or appointing an arbitrator or arbitrators or an umpire, such method shall be followed." 9 U.S.C. § 5. Similarly, the AAA rules provide that "[i]f the agreement of the parties names an arbitrator or specifies a method of appointing an arbitrator, that designation or method shall be followed."[99]

Practical Tip: *If the agreement provides for a process of selecting an arbitration panel, follow that agreement exactly as it is written. If it conflicts with other rules, it will trump those rules. Any arbitrator that*

[93] Edward M. McNally & Joseph R. Slights, III, *A Primer on the Delaware Rapid Arbitration Act*, Prac. L. J., Oct.-Nov. 2015, at 25.
[94] *Id.* at 25-27.
[95] *Id.* at 25.
[96] *Brook v. Peak Int'l, Ltd.*, 294 F.3d 668, 672–73 (5th Cir. 2002).
[97] *Bulko v. Morgan Stanley DW, Inc.*, 450 F.3d 622, 625 (5th Cir. 2006).
[98] *Szuts v. Dean Witter Reynolds, Inc.*, 931 F.2d 830, 832 (11th Cir. 1991).
[99] AAA Commercial Arbitration Rules § 14 (1996), R–12 (2003).

is improperly selected could result in an award being vacated.

3. Generally, There is Less Discovery So the Cost of Handling an Arbitration is Lower Than It Would Be in Court

In most arbitration forums, discovery is limited to the exchange of documents and information (similar to interrogatories). There are certainly exceptions to this, and some cases can involve depositions across the country or around the globe.

Although some lawyers feel disadvantaged in not having the opportunity to depose the opposing party and critical witnesses in the case, the procedure harkens back to the days before liberalized discovery rules when lawyers routinely went to trial without taking depositions. Also, while permitted discovery is often limited, it is probably greater in scope than what a criminal defense attorney is able to obtain in defense of his or her client. Plainly, limited discovery is essential to lowering the cost of handling an arbitration case. Many lawyers and their clients choose to treat arbitration like litigation and engage in full, formal discovery and motion practice. Obviously, this undermines potential cost savings.

4. Relaxed Construction of Statutes of Limitations, Legal Remedies and Rules of Evidence; The Effect of Reasoned Awards

As we all know, statutory and common law remedies are governed by various statutes of limitation. Although motion practice is increasing in arbitration, in most arbitration forums, proceedings akin to a summary judgment are not available, and motions to dismiss are generally presented for the first time at the hearing on the merits.

Due to the format of many arbitrations in the past, arbitrators have not been generally required to be as concerned about strict formalities of either statutory or common law causes of action and decide cases on the basis of what they believe to be a fair result. Until a couple of years ago, reasoned awards were generally not prepared. Without a reasoned award (and usually without a transcript of the proceedings), the losing party had less to shoot at in a proceeding to challenge the arbitration award.

In recent years, reasoned awards have become an option in most arbitration forums and proceedings. While it is probably too soon to know the effect of reasoned awards on decisions made in arbitration proceedings, it is probably fair to say that arbitrators will have a greater concern about complying with the law as opposed to only worrying primarily about getting a fair and just result. In virtually all proceedings, the decision as to whether or not to require a reasoned award must be made before the arbitration hearing. That decision is an important one and is one of the biggest strategy decisions to be made by the practitioner in handling the proceeding.

In *Stage Stores, Inc. v. Gunnerson*, 477 S.W.3d 848, 863 (Tex. App. – Houston [1st Dist] 2015), the Houston Court of Appeals evaluated and then opined about the requirements of a reasoned award. The court held that an arbitrator's failure to provide any reasoning regarding one of the three key defenses prevented a determination that the award is reasoned when attorneys raised the defense in both opening and closing and both sides questioned one of the parties about the defense. *Id.* at 863. The court then held that the award was ambiguous and could not be enforced, but should be remanded back to the arbitrator under an exception to the doctrine of *functus officio* with instructions for the arbitrator to cure the ambiguity. *Id.* Upon completion of that task, the court ordered that the award be returned to the trial court for a final determination of whether the award should be confirmed or vacated. *Id*.

Further, rules of evidence are usually relaxed at the arbitration hearing. In some instances, arbitrators will allow the admission of affidavits at the arbitration hearing, with the caveat that they will consider the fact that the witness was not available for cross examination. Arbitrators generally are more liberal in allowing hearsay testimony and other testimony that would not be admissible in court. Once again, arbitrators will generally state that the nature of this testimony goes to the weight, not the admissibility of the testimony. Finally, arbitrators will also generally allow the testimony of an out-of-town or otherwise unavailable witness by telephone.

5. The TAA v. the FAA and Limited Rights of Appeal

Some critics of arbitration have argued that the lack of secondary review is one of arbitration's main shortcomings, thus, lawyers (generally on the defense side) have searched for a mechanism to provide expanded judicial review of an arbitrator's findings. The Supreme Court in *Hall Street Associates, LLC v. Mattel, Inc.*, held that the FAA's grounds for vacatur and modification "are exclusive" and cannot be "supplemented by contract."[100] In 2011, the Texas Supreme Court chose not to adopt such a restrictive reading of cases decided under the TAA. In *Nafta Traders, Inc. v. Quinn*, the Texas Supreme Court concluded that the TAA presents no impediment to an agreement that would limit the authority of an arbitrator in deciding a matter, thus potentially allowing for judicial review of an arbitration award for reversible error.[101]

In the *Nafta Traders* case, which involved an employment dispute, the parties' agreement, which was contained in the employee handbook, provided as follows:

> "In the event there is a dispute arising out of your employment relationship with the Company or its termination . . . , the parties agree to submit such dispute to binding arbitration in lieu of pursuing a trial in a court of law.

The arbitration will be conducted by the American Arbitration Association or other mutually agreeable arbitration service. The arbitrator will be selected by mutual agreement from a list of five, or through alternative strikes from a second list of five. In all other respects, the arbitration process will be conducted in accordance with the American Arbitration Association Employment Arbitration rules with each party's expenses therefrom to be borne by that party unless otherwise determined by the arbitrator.

The arbitrator shall be required to state in a written opinion the facts and conclusions of law relied upon to support the decision rendered. The arbitrator does not have authority (i) to render a decision which contains a reversible error of state or federal law, or (ii) to apply a cause of action or remedy not expressly provided for under existing state or federal law."[102]

[100] *Hall St. Assocs., LLC v. Mattel, Inc.*, 552 U.S. 576, 578, 128 S.Ct. 1396 (2008).

[101] *Nafta Traders, Inc. v. Quinn*, 339 S.W.3d 84 (Tex. 2011).

[102] *Nafta Traders, Inc. v. Quinn*, 339 S.W. 3d at 87 (emphasis added).

The handbook did not state whether federal or state law would apply.[103] Nafta moved to compel arbitration under the FAA and an agreed order compelling arbitration was signed by the district court.[104] An award was issued in favor of Quinn and Quinn moved the court to confirm the award under the TAA; Nafta moved to vacate the award under the FAA, TAA, common law and the provision in the arbitration section of the handbook arguing that by agreeing to these limits, the parties had agreed to expand the narrow scope of judicial review otherwise provided for under the TAA and FAA.[105] The district court entered a short order confirming the award, not indicating whether it was pursuant to the TAA or FAA or addressing the arguments made by Nafta, and Nafta appealed.[106]

After oral argument, but before the opinion had issued, the United States Supreme Court issued its decision in *Hall Street* as discussed above. The Dallas Court of Appeals applied the TAA in the Nafta Traders case, noting that neither party disputed that the TAA governed their arbitration on appeal.[107] However, the Dallas Court of Appeals held that the similarities between the two statutes weighed heavily in favor of construing the TAA as *Hall Street* had construed the FAA, and the court held that "parties seeking judicial review of an arbitration award covered under the TAA cannot contractually agree to expand the scope of that review and are instead limited to judicial review based on the statutory grounds enumerated in the statute."[108]

On appeal, the Texas Supreme Court held that the TAA permits parties to contractually agree to expanded judicial review of arbitration awards.[109] Further, the court held that "the FAA does not preempt enforcement of an agreement for expanded judicial review of an arbitration award enforceable under the TAA."[110]

If the practitioner is presented with an arbitration clause stating that the TAA applies and has provisions permitting expanded judicial review, these facts would likely affect strategy decisions on the following:

1) Whether or not a court reporter is used to transcribe the proceedings;
2) Whether or not to request a reasoned award; and
3) Whether or not a more strict compliance with the rules of evidence may be advisable or necessary.

In *Hoskins v. Hoskins,*[111] the Texas Supreme Court held that absent an arbitration clause containing a broader scope of review than is permitted by the TAA, parties may not invoke extra-statutory, common law vacatur grounds.[112] Contrary to the arbitration clause in *Nafta Traders,* the clause in *Hoskins* contained no restricition (either directly or indirectly) on the arbitrator's authority to issue a decision unsupported by the law. The adverse arbitration award was appealed on the ground that the arbitrator manifestly disregarded the law. Because manifest disregard of the law is not a statutory ground to challenge an award under the TAA, the award had to be confirmed.

The practice pointer is now clear. If the parties want to use the TAA and have a broader scope of review than is permitted by the TAA, that broader scope of review must be stated in the arbitration clause.

6. Compelling Appearance of Witnesses

Almost all arbitration forums have procedures for the issuance of subpoenas to compel the attendance of witnesses. Unfortunately, in the arbitration context, a subpoena issued by the arbitrators does not carry the force of law. In other words, if the witness does not appear after being served with a subpoena, there is generally nothing that the litigant can do about it without court assistance. In FINRA arbitrations, a subpoena will compel the attendance of a member of the securities industry, including a broker, his or her branch manager, and a compliance officer to appear at the hearing. Once again, a subpoena issued by the arbitrators is insufficient to compel someone outside the securities industry to appear at a FINRA arbitration.

There are proceedings whereby an arbitrator issues a subpoena and the litigant then files an action in court seeking to have the subpoena confirmed by the court, so that it then carries the force of law if it is ignored.

7. Hearing Procedure

The parties may either agree to pay for the use of a court reporter or one party or the other can pay a court reporter to transcribe the proceedings. If a challenge to the arbitration award is anticipated, it is almost always essential to have a transcript of the arbitration hearing for use in that proceeding.

At the arbitration hearing, generally speaking, parties will give an opening statement, witnesses are called and evidence is received, and then the parties give closing statements. Once again, there can be flexibility as to how these proceedings are conducted.

D. Alternative Arbitration Proceedings

In addition to standard arbitration proceedings described above, there are numerous variations, and more are seemingly being developed by the day. A few of these are described below:

1. High-Low Arbitration

This is also known as Bracketed Arbitration, and this is an arbitration where the parties agree in advance to the parameters within which the arbitrator may render his or her award. If the award is lower than the pre-set "low," the defendant will pay the agreed-upon low figure; if the award is higher than the pre-set "high," the plaintiff will accept the agreed-upon high; if the award is in between, the parties agree to be bound by the arbitrator's figure. The high and low figures **may or may not be revealed** to the arbitrator.

2. Baseball Arbitration

This is a form of binding arbitration first used in Major League Baseball. There, the player and the team each propose a salary figure for the next season, and the arbitrator must pick one or the other. Outside of the baseball context, each party proposes one and only one number, and the arbitrator must select one of the figures as the award.

3. Night Baseball Arbitration

Like baseball arbitration, this is a form of arbitration where the parties exchange their own determination of the value of the case, but the figures are not revealed to the arbitrator. The arbitrator will assign a value to the case and the parties agree to accept the high or low figure closest to the arbitrator's value.

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[103] *Id*. at 87-88.
[104] *Id.* at 88.
[105] *Id.*
[106] *Id.*
[107] *Id.*
[108] *Id.*
[109] *Id*. at 96-97.
[110] *Id.* at 101.
[111] *Hoskins v. Hoskins, No. 15-0046, 2016WL 2993929,at *5(Tex. May 20, 2016).*
[112] *Id.*

4. Non-Binding Arbitration

A procedure sometimes called "non-binding arbitration" is conducted much like a (binding) arbitration, except that when the arbitrator issues the award after the hearing, it is **not binding** on the parties and they do not give up their right to a jury trial. In that case, the arbitrator's award is merely an advisory opinion. Many cases go to settlement or (binding) arbitration after this phase, or they can choose to go to a trial.

5. Mandatory Arbitration

Also known as Judicial Arbitration or Court-Ordered Arbitration. This is a legislatively mandated or court administered scheme for the resolution of pending court cases (usually valued at under $50,000), utilizing informal rules of evidence and procedure in a non-binding, advisory arbitration process that is ordered by the court at an early stage of a lawsuit. The availability of this process depends upon local state laws or court procedures.

6. Barron Arbitration

In this type of arbitration, the parties engage in binding arbitration, and then after the hearing is over, the parties interview the arbitrator about his or her impressions of the case. The parties then attempt to negotiate a settlement, perhaps with the aid of a mediator. If no settlement is reached, the arbitrator enters an award.

7. Mediation/Arbitration (Med/Arb) and Arbitration/Mediation (Arb/Med)

The hallmark of these proceedings is that the same person acts as both a mediator and an arbitrator. In Med/Arb, a mediation is conducted first, and then if there is no settlement, a binding arbitration is conducted. In Arb/Med, the process is reversed.

These are controversial techniques, because the neutral acting as the mediator will interact with each side independently in private sessions and out of the presence of the other party. These private sessions cannot help but color the neutral's thinking about the dispute without the other side necessarily having knowledge of what has been imparted to the neutral in the mediation sessions. Arb/Med has somewhat fewer confidentiality concerns than are present in Med/Arb, because it allows the neutral after having heard the evidence in an arbitration proceeding to attempt to fashion a settlement that comports with the evidence that he or she heard.

E. Vacating Arbitration Awards

With an increasing number of arbitration proceedings in recent years, it is reasonable to expect that the number of motions to vacate the arbitration award will increase. It is important for attorneys practicing in this area of law, as well as lawyers serving as arbitrators, to keep up with the recent changes in arbitration law.

The two most common situations in which a party to arbitration decides to pursue vacatur is evident partiality of arbitrators and arbitrators who exceed their powers. This section will examine these two grounds, and others, under the statutes that are most significant to Texas attorneys: the TAA and the FAA, and as developed by case law.

1. Grounds for Vacating an Arbitration Award

Provisions concerning vacatur of arbitration awards under the TAA and the FAA are fairly similar.

a. TAA

Under the TAA, an arbitral award may be vacated 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 willful 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.[113]

Because Texas law favors arbitration, judicial review of an arbitration decision is extremely narrow, unless the parties agree to a broader scope of review.[114]

b. FAA

The FAA provides the following grounds for vacating arbitration awards:

(1) corruption, fraud, undue means;
(2) evident partiality or corruption in the arbitrators, or either of them;
(3) the arbitrators were guilty of misconduct in refusing to postpone the hearing, upon sufficient cause shown, or in refusing to hear evidence pertinent and material to the controversy; or of any other misbehavior by which the rights of any party have been prejudiced; or
(4) where the arbitrators exceeded their powers, or so imperfectly executed them that a mutual, final, and definite award upon the subject matter submitted was not made.[115]

c. Manifest Disregard Doctrine

Furthermore, in addition to the FAA reasons for vacating the arbitration award, some Circuits recognized the doctrine of manifest disregard as a judicially created common law ground for vacatur.[116] The courts define the manifest disregard test differently, but generally, the courts analyze whether the arbitrator did not follow a legal principle that was clearly defined and not subject to reasonable debate.[117]

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[113] TEX. CIV. PRAC. & REM. CODE ANN. § 171.088 (Vernon 1997).

[114] *East Tex. Salt Water Disposal Co. v. Werline*, 307 S.W.3d 267, 271 (Tex. 2010). *See also* the discussion of the *Nafta Traders* case, *supra*, at 10-11.

[115] 9 U.S.C. § 10(a) (2002).

[116] *See Wachovia Secs, LLC v. Brand*, 671 F.3d 472, 483 (4th Cir. 2012); *Coffee Beanery, Ltd. v. WW, L.L.C.*, 300 F. App'x 415, 419 (6th Cir. 2008); *Comedy Club, Inc. v. Improv W. Assocs.*, 553 F.3d 1277, 1290 (9th Cir. 2009).

[117] *See* Patrick Sweeney, *Exceeding Their Powers: A Critique of Stolt-Nielsen and Manifest Disregard, and a Proposal for*

While Third, Fourth, Sixth, and Ninth Circuits may apply the common law doctrine of "manifest disregard for law" in addition to the FAA grounds for vacating an arbitration award, in the First, Fifth, Seventh, Eighth, and Eleventh Circuit, the courts disregard the doctrine.[118]

However, as noted above, a 2008 United States Supreme Court decision in *Hall Street Associates, L.L.C. v. Mattel, Inc.*, indicates that the manifest disregard may no longer be recognized as a ground for vacatur under federal law.[119]

The doctrine of manifest disregard is not recognized as a ground for vacatur under the TAA as set forth in the 2016 Texas Supreme Court decision in *Hoskins v. Hoskins.*[120] The Court held that under the TAA "a party may avoid confirmation [of an arbitral award] only by demonstrating a ground expressly listed in section 171.088" of the TAA.[121] Since "manifest disregard [was] not an enumerated vacatur ground under section 171.088" the Court refused to consider it as a ground for vacatur.[122]

2. Grounds for Vacating the Arbitration Award under the TAA

a. Corruption, fraud, or other undue means

A court may vacate an arbitration award if it was procured by corruption, fraud, or other undue means. Yet, it is uncommon, and quite difficult to prove corruption, fraud or undue means because the complaining party has the burden of proof.[123]

In November 2014, the Dallas Court of Appeals Court construed the definition of undue means under the TAA in *AmeriPath, Inc. v. Hebert*, holding that "undue means" describes a purposeful behavior against another party and that under Texas and federal standard, the term indicates conduct that is immoral, illegal or otherwise in bad faith.[124] The court further noted that an award valuing a buyout of former employee's non-compete agreement was not obtained through undue means when the agreement misnamed the employer.[125]

b. Evident Partiality, Misconduct or Willful Misbehavior of the Arbitrator

The Code of Ethics for Arbitrators in Commercial Disputes, prepared jointly by the American Arbitration Association and American Bar Association, requires arbitrators to disclose any interest or relationship likely to affect impartiality or which might create an appearance of partiality.[126] Similar obligation can be found under the American Arbitration Association Commercial Arbitration Rules,[127] JAMS Comprehensive Arbitration Rules,[128] FINRA,[129] CPR[130] and ICC rules.[131]

In 1997, the Texas Supreme Court held in *Burlington N. R. Co. v. TUCO, Inc.* that a neutral arbitrator selected by the parties manifests evident partiality when the arbitrator fails to disclose facts which might in turn create a reasonable impression of the arbitrator's partiality in a reasonable observer.[132] In *TUCO*, the attorney for one of the parties referred a client to the neutral arbitrator, who in turn did not disclose the referral.

Evident partiality under the TAA may occur not only when the underlying bias is caused by a lucrative transaction, but also when there is evidence of an undisclosed adverse relationship with one of the parties' expert witnesses.

In *Mariner Financial Group v. Bossley*, decided in 2002, the Texas Supreme Court held that the arbitrator failed to disclose the relationship with one of the parties' expert witnesses who testified in a malpractice action against the arbitrator two years prior to the arbitration hearing.[133] The court granted vacatur.

In 2011, in *Karlseng v. Cooke*, the Dallas Court of Appeals vacated an award of approximately $22 million when the court established that the arbitrator did not disclose his personal relationship with an attorney representing one of the parties to the dispute and failed to make any effort to determine whether the nature of the relationship called for disclosure.[134]

The arbitrator disclosed that he had worked on several cases with the attorney for the appellee, but did not offer any disclosures as to the attorneys for the appellant. Yet, it became apparent that the arbitrator failed to disclose a close social, personal and professional relationship with an attorney for the appellant.[135] Furthermore, the arbitrator and the attorney acted as if they did not know each other.[136]

In *Port Arthur Steam Energy LP v. Oxbow Calcining LLC*, decided in January 2014, the Houston First Court of Appeals rejected the claim of evident partiality when the law firm, but not the lawyer, representing one of the parties was counsel to an

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Substantive Arbitral Review, 71 WASH. & LEE L. REV. 1571, 1575 (2014).

[118] Timothy Dyer, "*Manifest Disregard" Alive and Well?* 17 J. CONSUMER & COM. L. 82, 83 (2014); *see also Schafer v. Multiband Corp*., 551 Fed.Appx. 814, 815-816 (6th Cir. 2014).

[119] *Hall Street Assocs., L.L.C. v. Mattel, Inc*. 552 U.S. 576 (2008); *see also Woods v. P.A.M. Transp. Inc.-L.U.*, 440 Fed. Appx. 265, 269 (5th Cir. 2011) ("'manifest disregard for the law' is not an independent ground for either vacating or modifying arbitration awards under the FAA").

[120] *Hoskins v. Hoskins*, No. 15-0046, 2016 WL 2993929, at *5 (Tex. May 20, 2016).

[121] *Id.*

[122] *Id.*

[123] 21 RICHARD A. LORD, WILLISTON ON CONTRACTS § 57:131 (4th ed. 2014); *see also Anderson Bros. v. Parker Const. Co.*, 222 S.W. 677 (Tex. App.— Beaumont 1920, no writ) (providing a general standard for assessing fraud under the TAA, yet finding against the party seeking vacatur).

[124] *AmeriPath, Inc. v. Hebert*, 447 S.W.3d 319, 338 (Tex. App.—Dallas 2014, pet. denied) (citing cases decided by the Texas courts construing provisions of the FAA: *Good Times Stores, Inc. v. Macias*, 355 S.W.3d 240, 244 (Tex. App.—El Paso 2011, pet. denied); *Matter of Arbitration Between Trans Chem. Ltd. & China Nat'l Mach. Imp. & Exp. Corp.*, 978 F. Supp. 266, 304 (S.D. Tex. 1997)).

[125] *AmeriPath*, 447 S.W.3d at 338.

[126] CODE OF ETHICS FOR ARBITRATORS IN COMMERCIAL DISPUTES Canon I(C) (2004).

[127] COMMERCIAL ARBITRATION RULES AND MEDIATION PROCEDURES R. 17 (2013).

[128] JAMS COMPREHENSIVE ARBITRATION RULES R. 2(h) (2014).

[129] FINRA CODE OF ARBITRATION PROCEDURE R. 12405 (2011).

[130] CPR ADMINISTERED ARBITRATION RULES R. 7 (2013); *see also* CPR NON-ADMINISTERED ARBITRATION RULES R. 7 (2013).

[131] ICC RULES OF ARBITRATION Art. 13(2) (2012).

[132] *Burlington N. R. Co. v. TUCO, Inc*., 960 S.W.2d 629, 636 (Tex. 1997).

[133] *Mariner Fin. Grp., Inc. v. Bossley*, 79 S.W.3d 30, 33-34 (Tex. 2002).

[134] *Karlseng v. Cooke*, 346 S.W.3d 85, 86, 92 (Tex. App.—Dallas 2011, no pet.).

[135] *Id.* 88-94 (finding that the attorneys and their families were socializing for several years, invited each other to expensive dinners, attended a basketball game for which the tickets had $1200 face value, shared holiday recommendations, and exchange gifts, like a wine basket).

[136] *Id.* at 92.

unrelated party in litigation involving the arbitrator's law firm.[137]

Similarly in September 2014, the Dallas Court of Appeals in *Meritage Home of Texas, L.L.C. v. Ruan*, analyzed whether a non-disclosure of one arbitration and one mediation by the court-appointed arbitrator constituted a reason for vacating the arbitration award.[138] The dispute involved a claim against a construction company which homes allegedly had less square footage than represented to the buyers.[139] The party seeking vacatur (Meritage) alleged that the arbitrator failed to disclose mediation and three arbitrations with the other parties' lawyers during the pendency of the case.[140] However, the record showed that the arbitrator stated at the beginning of the hearing the case "has been around" for twenty months and since his appointment, he had one or two arbitrations involving one of the parties' lawyers.[141] In response, Meritage's lawyers asked whether previous proceedings involved the dispute over square footage, the arbitrator answered "I think they were all foundation," and no objections were made.[142] Only after the hearing Meritage requested a more detailed disclosure.[143] The court found that in cases of partial disclosure, it examines the undisclosed information and weighs it against what was disclosed to determine if the undisclosed information was trivial.[144] The court concluded that in light of the disclosures made by the arbitrator at the beginning of the hearing, there could not be a reasonable impression of the arbitrator's partiality to an objective observer.[145]

Also, in a 2014 case, *Forest Oil Corp. v. El Rucio Land & Cattle Co. Inc.* the Houston Court of Appeals held that the arbitrator did not violate his disclosure duties when the arbitrator was not aware that he was considered as a mediator in a related litigation.[146]

In February 2014, in *Morgan Keegan & Co., Inc. v. Dale*, the Dallas District Court denied a vacatur in a securities-based arbitration. Morgan Keegan sought to overturn a $1.4 million panel award on the basis of evident partiality.[147] The claim for vacating the arbitral award was based on alleged statement made by one of the arbitrators that she would "'ignore account agreements' because they only served to 'trap investors' and that the industry firms need to 'take greater responsibility' for all customer losses."[148]

c. Arbitrators Exceeded Their Powers

The Texas Supreme Court has stated that arbitrator's authority is derived from the arbitration agreement.[149] An arbitrator exceeds his powers when he decides matters not properly before him by departing from the arbitration agreement, "and, in effect, dispenses his own idea of justice that the award may be unenforceable."[150]

Between 2013 and 2014, Texas appellate courts declined to vacate an arbitration award based on a claim that the arbitrator exceeded his powers when the party alleged that:

- The arbitrator should not have awarded the mineral interest to the other party, while failing to prove that the arbitration agreement did not authorize the arbitrator to determine who owned the mineral interest of the properties in dispute.[151]
- The arbitrator departed from the interpretation and enforcement of the surface agreement when he rendered the declaratory relief and rewrote the agreement.[152] The court found that the arbitrator did not exceed his authority because he misinterpreted the contract and held that the only question that required assessment was whether "the award, however arrived at, is rationally inferable from the contract."[153]
- The arbitrator exceeded her power because the award had an effect restraining free speech in violation of the party's constitutional right.[154] The court limited the review of the award stating that if the agreement authorized the arbitrator to interpret the contract between the parties, the court would not interfere.[155]
- The arbitrator exceeded his powers because he did not enforce a rule requiring the parties to exchange documents before the hearing.[156] The Court disagreed and found that the JAMS' rules, under which the hearing was conducted, did not restrict arbitrator's authority.[157]
- The arbitrator exceeded his authority by awarding attorney's fees to a prevailing party despite the arbitration agreement's language stating "each party shall bear the fees and expenses of its counsel." The court denied vacatur because of language in the underlying Residential Construction Liability Act and noted the "exceeded powers" vacatur ground is not applicable, even where an arbitrator may have misinterpreted or misapplied law.[158]

d. Refusal to Hear Evidence Material to the Controversy

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[137] *Port Arthur Steam Energy LP v. Oxbow Calcining LLC*, No. 01-12-01165-CV, 2013 WL 5727544, at *6 (Tex. App.—Houston [1st Dist.] Oct. 22, 2013, no pet.).

[138] *Meritage Homes of Tex., L.L.C., v. Ruan*, No. 05-13-00831-CV, 2014 WL 4558772, at *4 (Tex. App.—Dallas Sept. 16, 2014, pet. filed) (mem. op.).

[139] *Id.* at *1.

[140] *Id.* at *2.

[141] *Id.* at *1.

[142] *Id.*

[143] *Id.* at *1-2.

[144] *Id.* at *3. "In cases such as the one before us, where part but not all of a relationship is disclosed, we examine the undisclosed information together against what was actually disclosed to determine whether the undisclosed information was trivial." *Id.* (citing *Burlington N. R. Co. v. TUCO, Inc.*, 960 S.W.2d 629, 637 (Tex. 1997) and *Tenaska Energy, Inc. v. Ponderosa Pine Energy, LLC*, 437 S.W.3d 518, 526-27 (Tex. 2014)).

[145] *Id.* at * 4.

[146] *Forest Oil Corp. v. El Rucio Land & Cattle Co., Inc.*, 446 S.W.3d 58, 81-82 (Tex. App.—Houston [1st Dist.] 2014), *affirmed* Tex. LEXIS 406, 60 Tex. Sup. Ct. J. 773 (April 28, 2017).

[147] John Council, *Vacatur Suits Supports "Bias" Claim With Dissent's Words*, 28 TEX. LAW. 1, 1 (Feb. 4, 2013).

[148] *Id.* at 15.

[149] *Gulf Oil Corp. v. Guidry*, 327 S.W.2d 406, 408 (Tex. 1959).

[150] *Centex/Vestal v. Friendship W. Baptist Church*, 314 S.W.3d 677 (Tex. App.—Dallas 2010, pet. denied).

[151] *Schuster v. Wild*, No. 13-13-00474-CV, 2014 WL 3804834, at *2 (Tex. App.—Corpus Christi July 31, 2014, no pet.).

[152] *Forest Oil*, 446 S.W.3d at 81.

[153] *Id.* at 82.

[154] *IQ Holdings, Inc. v. Villa D'Este Condo Owner's Ass'n, Inc.*, No. 01-11-00914-CV, 2014 WL 982844, at *5 (Tex. App.—Houston [1st Dist.] Mar. 13, 2014, no pet.).

[155] *Id.* at *5.

[156] *Humitech Dev. Corp. v. Perlman*, 424 S.W.3d 782, 792-93 (2014).

[157] *Id.* at 793.

[158] *D.R. Horton – Tex., Ltd. v. Bernhard*, 423 S.W.3d 532 (Tex. App. —Houston [14th Dist.] 2014, pet. denied).

In May 2016, the Texas Supreme Court declined to vacate an arbitration award in *Hoskins v. Hoskins* when the appellant asserted the arbitrators failed to hear evidence material to the controversy and demonstrated a manifest disregard of the law.[159] The appellant claimed that arbitrators refused to conduct a hearing on claims raised in the supplemental complaint.[160] The Court affirmed the lower court's ruling that lack of standing to challenge conveyances by the company, which was a ground asserted in the party's motion for summary judgment, was an element common to all of the claims.[161] Thus, the arbitrator could properly have dismissed the claims in the supplemental complaint relating to the company's conveyance of the two mineral estates on the ground that the party lacked standing to assert the claims.[162] The Court further found that manifest disregard is not a recognized ground for vacatur under the TAA since it is not "a ground expressly listed in section 171.088" of the TAA.[163]

e. Additional ground – specific statutory exception in the Texas Family Code

It is worth noting another ground for vacating an arbitration award available in family law cases. Under Section 153.0071(b) of the Texas Family Code, the court is authorized to decline an arbitrator's award when it is not in the best interest of the child.[164] The burden of proof is on the party seeking to avoid rendition of an order based on the arbitration award.[165]

3. Grounds for Vacating the Arbitration Award under the FAA

a. Corruption, Fraud or Undue Means

The Fifth Circuit has stated that a court must apply a three-prong test to determine whether an arbitration award is so affected by fraud: (1) the movant must establish the fraud by clear and convincing evidence; (2) the fraud must not have been discoverable upon the exercise of due diligence before or during the arbitration; and (3) the person challenging the award must show that the fraud materially related to an issue in the arbitration. It is not necessary to establish that the result of the arbitration would have been different if the fraud had not occurred.[166]

In March 2012, the Houston First Court of Appeals issued a memorandum opinion in *Petrobras Am., Inc. v. Astra Oil Trading NV* regarding the issue of fraud.[167] Petrobras asserted that the portion of the award ordering the company to pay the opponent approximately $156 million to indemnify it for paying part of Astra's debt owed to Paribas, was procured by fraud because Astra misrepresented to the arbitrators that it had made the payment.[168] Petrobras asserted that, since the arbitration hearing, Petrobras learned that "Astra Oil Trading had not paid the funds to BNP Paribas, but rather the funds had been wire transferred to BNP Paribas's account from the joint bank account of AOT Trading AG and AOT Holding Company Limited."[169] Petrobras asserted that Astra Oil acted as the guarantor on the line of credit with BNP Paribas, and therefore, indemnity obligation was independent from Astra's payment of the obligation.[170] Thus, because Astra Oil had not made the payment, it was not entitled to indemnity.[171] Another argument made by Petrobras in support of the fraud claim was that Astra had represented throughout the arbitration proceedings that it had repaid the funds to BNP Paribas.[172]

The court found that the party alleging fraud has the burden of proof and must establish that the improper behavior was "(1) not discoverable by due diligence before or during the arbitration hearing, (2) materially related to an issue in the arbitration, and (3) established by clear and convincing evidence."[173] The court rejected the fraud claim because Petrobras did not prove that the fraud was not discoverable on the exercise of due diligence before or during the arbitration.[174]

b. Evident Partiality of Arbitrators

In *Commonwealth Coatings*, the United States Supreme Court found that the arbitrators must tell the parties about any "substantial interest [they have] in a firm."[175] The Court declared that a connection between the neutral arbitrator and the prevailing party was significant when the arbitrator received $12,000 within the previous five years for services and projects connected with the project at issue.[176]

Commonwealth Coatings was a plurality opinion and the federal courts differ in their interpretation of the FAA provisions in light of this case.[177] The 1st, 2nd, 3rd, 4th, 5th, 6th, 7th, 8th, 10th and the District of Columbia's standard demands a showing of more than merely an appearance of bias and require the relationship to be more than trivial to justify vacating the arbitration award.[178] The Ninth Circuit requires the showing of a reasonable impression of partiality, while the Eleventh Circuit has held that evident partiality occurs when either an actual conflict exists, or when the arbitrator had the knowledge, yet failed to disclose information which a reasonable person would believe constitutes a conflict.[179]

The Texas Supreme Court vacated the arbitration award in *Tenaska Energy, Inc. v. Ponderosa Pine Energy, LLC*, when the court found that the arbitrator failed to disclose his relationship with one of the parties.[180] Specifically, the arbitrator disclosed that the law firm representing one party in the arbitration had recommended him as an arbitrator in three other arbitrations, but failed to disclose that all of his contacts at a 700-lawyer law firm were with the two attorneys that represented the party to the arbitration at issue.[181]

The Texas Courts of Appeals have found that following, undisclosed, circumstances justified

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[159] *Hoskins v. Hoskins*, No. 15-0046, 2016 WL 2993929, at *1 (Tex. May 20, 2016).
[160] *Id.* at *3.
[161] *Id.* at *6.
[162] *Id.* at *7.
[163] *Id.* at *5.
[164] TEX. FAM. CODE ANN. § 153.0071(b) (2007).
[165] *Id.*
[166] *Karaha Bodas Co. v. Perusahaan Pertambangan Minyak Dan Gas Bumi Negara*, 364 F.3d 274, 306-07 (5th Cir. 2004) (holding that Karaha's failure to reveal its political risk insurance policy did not amount to misconduct or fraud).
[167] *Petrobras Am., Inc. v. Astra Oil Trading*, NV, No. 01-11-00073-CV, 2012 WL 1068311, at *19 (Tex. App.—Houston [1st Dist.] Mar. 29, 2012, no pet.).
[168] *Id.* at *10.
[169] *Id.*
[170] *Id.*
[171] *Id.*
[172] *Id.*
[173] *Id.* at *18.
[174] *Id.* at *19.
[175] *Commonwealth Coatings v. Continental Casualty Co.*, 393 U.S. 145 (1968) (plurality opinion).
[176] *Id.* at 150.
[177] *See* Christopher D. Kratovil & Annie M. Johnson, *Evident Partiality*, 65 ADVOC. 52, 52 (citing Montez v. Prudential Sec., Inc. 260 F.3d 980, 983 (8th Cir. 2001).
[178] *Id.* at 54.
[179] *Id.* at 55.
[180] *See Tenaska Energy, Inc. v. Ponderosa Pine Energy*, LLC, 437 S.W.3d 518, 520, 524 (Tex. 2014).
[181] *Id.*

vacating the arbitral award:[182] (1) arbitrator held a position of lead counsel for one of the parties, six years prior to the arbitration,[183] (2) arbitrator's law firm was listed a party to the arbitration as a representative client on Martindale-Hubbell,[178]184 (3) Arbitrator's law firm represented a client who was in dispute with one of the parties to the arbitration,[185] (4) arbitrator's law firm represented an affiliate of one of the parties to the arbitration.[186]

Conversely, the following claims were rejected because the connection between the arbitrator and one of the parties to the hearing was a remote one: (1) the arbitrator was a friend of one of the partners in the law firm involved in arbitration, but the partner was not listed as counsel of record;[187] (2) arbitrator once represented a vendor who supplied materials to one of the parties;[188] (3) when the vice-president and general counsel of a related entity served on the AAA board of directors, but the arbitrator did not know the makeup of the board; (4) the party to the arbitration proceedings asserted bias based not on the lack of disclosure or behavior of the arbitrator, but on the final outcome of the hearing.[189]

In April 2013, the federal Western District Court, in *InfoBilling, Inc. v. Transaction Clearing, LLC* declined to find evident partiality when the arbitrator rented his offices in the same ten-story building as the attorney for Transaction Clearing, and received a $100 campaign contribution from the same attorney ten years prior to arbitration.[190] The Court held that the plaintiff discovered that the arbitrator and defendant's attorney occupied offices in the same building on the day of arbitration, but did not raise any objections, and that the amount of donation from the defendant's attorney was insignificant and took place in the distant past.[191] Additionally, the court rejected an allegation that an impression of bias could have been created when the attorney for Transaction Clearing served as a treasurer for the Commission for Judicial Reform Political Action Committee which frequently donates to the Bexar County Republican Party, which in turn donated $200.29 to the arbitrator's reelection campaign ten years prior to arbitration and found no significant relationship.[192]

c. Misconduct in Refusing to Postpone the Hearing

On January 9, 2015, the Northern District Court, Dallas Division, issued a memorandum opinion in *Group 32 Development & Engineering, Inc. v. GC Barnes Group, LLC*, denying Barnes's claim that the arbitrators were guilty of misconduct in refusing to postpone the hearing and thus violated the party's due process rights because the arbitrators failed to send a proper notice of arbitration hearing according to the AAA rules.[193] The court held that an arbitration award will not be vacated if the parties had either an actual or constructive notice of the hearing, and found that Group 32 provided enough evidence that Barnes had at least constructive notice of the arbitration proceeding.[194] The court held that under AAA Rule 31, the arbitration may proceed in the absence of any party who, after due notice, failed to attend the hearing or fails to obtain the postponement.[195]

d. Refusal to Hear the Evidence

In June 2014 the Fifth Circuit in *Why Nada Cruz, L.L.C. v. Ace American Ins. Co.* declined to find that the arbitrator prejudiced the party to arbitration by failing to hear evidence showing the reasons for the eight-month delay between the district court's order compelling arbitration and appellant's arbitration demand.[196] The court held that the arbitrator was authorized to decline to consider untimely submitted evidence and that the appellant had the opportunity to address the issue of delay in his response brief.[197]

In April 2016 the Second Circuit Court of Appeals confirmed an arbitration award in *National Football League Management Council v. National Football League Players Association* holding that the Commissioner of the NFL, while acting as arbitrator, acted within the authority granted to him by the collective bargaining agreement in refusing to hear evidence.[198] While the Players Association contended that they were "deprived of fundamental fairness when the Commissioner chose not to hear evidence on whether [the Commissioner] improperly delegated his disciplinary authority," the court concluded the Commissioner had acted within the "broad discretion afforded" him as arbitrator.[199] The court further found that the Commissioner acted within his power in adjudicating "the propriety of his own conduct" regarding the delegation issue and that had "the parties wished to restrict the Commissioner's authority, they could have fashioned a different agreement."[200]

e. Other Misconduct

In April 2014, the San Antonio Court of Appeals decided in *SSP Holdings Ltd. P'ship v. Lopez* did not

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[182] *See Kratovil & Johnson, Evident Partiality* 65 ADVOC. 52, 57 (2013).
[183] *Tex. Commerce Bank v. Universal Technical Inst. of Tex., Inc.*, 985 S.W.2d 678 (Tex. App.—Houston [1st Dist.] 1999, pet. dism'd w.o.j.).
[184] *J.D. Edwards World Solutions Co. v. Estes, Inc.*, 91 S.W.3d 836 (Tex. App.—Fort Worth 2002, pet. denied).
[185] *Judd v. Texakoma Oil & Gas Corp.*, No. 05-99-00039-CV, 2000 WL 19534, at *2, (Tex. App.—Dallas Jan. 13, 2000, no pet.).
[186] *Amoco D.T. Co. v. Occidental Petroleum Corp.*, 343 S.W.3d 837 (Tex. App.—Houston [14th Dist.] 2011, pet. denied).
[187] *Am. Allied Secs., Inc. v. Am. Gen. Secs., Inc.*, No. 14-99-01082-CV, 2000 WL 1357209, at *2-3 (Tex. App.—Houston [14th Dist.] Sept. 21, 2000, no pet.).
[188] *BPA Fabrication, Inc. v. Jamak Fabrication, Inc.*, No. 01-98-00765-CV, 1999 WL 977819, at *6 (Tex. App.—Houston [1st Dist.] Oct. 28, 1999, no pet.).
[189] *W. Dow Hamm III Corp. v. Millenium Income Fund, L.L.C.*, No. 01-12-00313-CV, 2013 WL 978263, at *6 (Tex. App.—Houston [1st Dist.] Mar. 1, 2013, pet denied).
[190] *InfoBilling, Inc. v. Transaction Clearing, LLC*, No. SA-12-CV-01116-DAE, 2013 WL 1501570, at *3-4 (W.D. Tex. Apr. 10, 2013).
[191] *Id.* at *3-4.
[192] *Id.* at *4.
[193] *Grp. 32 Dev. & Eng'g, Inc. v. GD Barnes Grp., LLC*, No. 3:14-CV-2436-B, 2015 WL 144082, at *6-7 (Tex. N.D. 2015).
[194] *Id.* at *6.
[195] *Id.*
[196] *Why Nada Cruz, L.L.C. v. Ace Am. Ins. Co.*, 569 F. App'x 339, 343 (5th Cir. 2014) (specifying that the appellant attempted to submit that "during that [eight-month] period, his counsel had three trials and went on summer vacation; ACE changed counsel; the parties discussed alternatives to submitting the arbitration to the AAA; and the parties had several discussions regarding the wording of the arbitration demand and the payment of filing fees.").
[197] *Id.*
[198] *Nat'l Football League Mgmt. Council v. Nat'l Football League Players Ass'n*, 820 F.3d 527, 532 (2nd Cir. 2016). The court noted that while the collective bargaining agreement at issue here was governed by the LMRA, "the federal courts have often looked to the [FAA] for guidance in labor arbitration cases." *Id.* at 545 n.13 (citing *United Paperworks Int'l Union v. Misco, Inc.*, 484 U.S. 29, 40 n.9, 108 S.Ct. 364).
[199] *Id.* at 547-548.
[200] *Id.* at 548.

find that the arbitrators engaged in improper conduct that would justify a vacatur.[201] The first of the alleged reasons for misconduct included the lack of explanation for the award in contravention of the provision in the employee benefit plan that required the arbitrators to provide a brief, written opinion addressing the issues before them.[202] The court held that "arbitrator[s] need not explain [their] decision; therefore, in a typical arbitration where no specific form of award is requested, arbitrators may provide a 'standard award' and simply announce a result."[203] Because the arbitration agreement did not define "opinion," nor use any modifiers, such as "reasoned," the award issued by the arbitrators sufficiently explained their decision and, in fact, constituted a brief, written opinion."[204] Several of the alleged misconducts involved the arbitrators ignoring the trial court's order that Stripes initiate a second arbitration by submitting the entirety of the dispute to arbitration rather than defensive issues only.[205] The court found that, "To constitute misconduct requiring vacation of an award, an error in the arbitrator's determination must be one that is not simply an error of law, but which so affects the rights of a party that it may be said that [s]he was deprived of a fair hearing."[206] The court explained that a party had to show that the arbitration panel engaged in misconduct because it ignored the trial court's order and that such misconduct deprived the party of a fair hearing.[207] The court then stated that the trial court did not order a submission of the "entirety of the dispute" and nothing in the order deprived the party of any of its available defenses.[208]

f. Arbitrators Exceeded Their Powers

In a 2010 *Stolt-Nielsen S.A. v. AnimalFeeds International Corp.* case, the United States Supreme Court vacated the arbitration award because the arbitrators exceeded their power by allowing class arbitration.[209] Both parties of this maritime contract case stipulated that that the contract was silent on the matter of admissibility of class arbitration.[210] Because parties have a right to specify with whom and which matters they want to arbitrate, absent some showing of consent, class arbitration is impermissible. "[A] party may not be compelled under the FAA to submit to class arbitration unless there is a contractual basis for a conclusion that the parties agreed to do so.[211] Therefore the Court held that the arbitrators exceeded their power because instead of relying on and interpreting the arbitration agreement, the arbitrators "imposed [their] own conception of sound policy."[212]

In *Oxford Health v. Sutter*, a 2013 United States Supreme Court case, the Court decided that the arbitrator did not exceed his powers because the parties intended for the arbitrator's construction of their arbitration agreement.[213] The issue was whether an arbitrator erred in treating Sutter's claim as class arbitration.[214] The Court held that as long as "an arbitrator makes a good faith attempt to interpret a contract, even serious errors of law or fact will not subject his award to vacatur."[215] Unlike in Stolt-Nielsen, the parties never agreed on the meaning of the contract.[216] The Court held that "[o]nly if 'the arbitrator act[s] outside the scope of his contractually delegated authority"—issuing an award that "simply reflect[s] [his] own notions of [economic] justice" rather than "draw[ing] its essence from the contract"—may a court overturn his determination."

In *Americo Life, Inc. v. Myer,* in 2014, the Texas Supreme Court addressed the issue of arbitrators exceeding their powers, under the FAA and found that because the arbitration panel was selected contrary to the contract-specified method, it lacked jurisdiction over the dispute.[217] The court specified that the arbitrators derive their power only from arbitration agreements and therefore, if the arbitrators were not selected according to these agreements, the courts should not hesitate to vacate an award.[218] The court examined the agreement to determine parties' intent concerning the selection of arbitrators.[219] In their agreement, parties specified arbitrator's qualifications and provided a list of requirements, namely that each arbitrator must be a "knowledgeable, independent business person or professional."[220] Americo argued the court of appeals improperly added "impartial" to the parties' list of qualifications. Myer countered that because "independent" and "impartial" are essentially synonymous.[221] Having concluded the terms of the agreement did not require impartial party-appointed arbitrators, the court turned to the effect of the incorporated-by-reference AAA rules on arbitrator qualifications.[222] When the parties executed their agreement, AAA rules did not require arbitrators to be impartial, but by the time the parties invoked arbitration, the AAA rules by default required arbitrators to be impartial and called for disqualification for partiality or lack of independence.[223] Because the AAA disqualified Americo's first-choice arbitrator as partial, the arbitration panel was formed contrary to the express terms of the arbitration agreement. The Court concluded that because the arbitrator panel in *Americo* was selected contrary to the AAA rules, which the parties integrated into the arbitration agreement, the arbitrators exceeded their authority when they attempted to resolve the parties' dispute.[224]

In April 2013, in *Timegate Studios, Inc. v. Southpeak Interactive, L.L.C.*, the Fifth Circuit considered the issue whether arbitrator's creation of the perpetual license in a dispute concerning a publishing agreement caused the arbitrator to exceed his powers.[225] The court applied the test of "whether the arbitrator's decision draws its essence from the arbitration agreement" and found that the perpetual license did further the general aims of the agreement.[226]

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[201] *SSP Holdings Ltd. P'ship v. Lopez*, 432 S.W.3d 487, 501 (Tex. App.—San Antonio 2014, pet. denied).
[202] *Id.* at 493-494.
[203] *Id.* at 494.
[204] *Id.* at 496.
[205] *Id.*
[206] *Id.*
[207] *Id.*
[208] *Id.*
[209] *Stolt-Nielsen S.A. v. AnimalFeeds Int'l Corp.*, 559 U.S. 662 (2010).
[210] *Id.* at 662.
[211] *Id.* at 664.
[212] *Id.* 674-75.
[213] *Oxford Health Plans LLC v. Sutter*, 133 S. Ct. 2064, 2069 (2013) (abrogating *Reed v. Fla. Metro. Univ., Inc.*, 681 F.3d 630 (5th Cir. 2012)).
[214] *Id.* at 2067.
[215] *Id.* at 2068.
[216] *Id.*
[217] *Americo Life, Inc. v. Myer*, 440 S.W.3d 18, 25 (Tex. 2014).
[218] *Id.* at 21.
[219] *Id.* at 22.
[220] *Id.*
[221] *Id.*
[222] *Id.* at 23.
[223] *Id.* at 21.
[224] *Id.* at 25.
[225] *Timegate Studios, Inc., v. Southpeak Interactive, L.L.C.*, 713 F.3d 797 (5th Cir. 2013).
[226] *Id.* at 802.

The district court vacated the award, holding that the arbitrator exceeded his powers because the perpetual license was inconsistent with the essence of the underlying contract.[227] The Fifth Circuit reversed and remanded with instructions to confirm the award.[228] The court first considered whether the arbitrators' award "draws its essence from the agreement and found that the agreement "can accurately be summed up as the creation of a mutually beneficial business relationship between two parties with distinct expertise: a video game developer and a video game publisher. The parties were to work jointly to create, market, and popularize a video game whose success would yield financial benefits to be distributed between the two parties in accordance with their respective contributions to the joint effort as required by the contract."[229] The court then explained that a perpetual license furthered these general claims of the agreement in light of Timegate's frequent breaches of the contract which made it impossible for the parties to further cooperate.[230] The court held that "[a]n adequate remedy in the form of a monetary award was available for Timegate's breaches to date; however, whether sequels . . . could be developed successfully and marketed profitably . . . was so speculative that the arbitrator rationally could have concluded that a monetary award was not an appropriate remedy for those breaches.[231] Thus, the arbitrator could have found that each party could achieve objectives of the agreement only by severing their mutual obligations.[232]

Similarly in 2014 *Why Nada Cruz*, the Fifth Circuit found that the arbitrator did not exceed his powers when the arbitrator dismissed the arbitration due to the party's failure to timely request arbitration.[233]

Also, in *Rain CII Carbon, LLC v. ConocoPhilips Co.*, when the party attempting to vacate an award alleged that the arbitrator did not provide a "reasoned" award, as required by the arbitration agreement, the Fifth Circuit held that almost anything beyond a standard award will be considered a reasoned award because if the parties wished to ensure a more detailed award, they would have agreed upon that when entering into the arbitration agreement. [234]

Furthermore, in *Stage Stores, Inc. v. Gunnerson* the Houston [1st District] Court of Appeals held that an arbitrator failed to give a "reasoned" award when the award failed to "identify and provide any amount of reasoning for ruling against" one of the appellant's three key defenses.[235] The court rejected the appellant's assertion that the award must be vacated for failing to address the defense and instead remanded the award back to the arbitrator.[236] The court noted that an ambiguous award, or an "award that fails to completely adjudicate the matters raised," cannot "be enforced but must be remanded back to the arbitrator for clarification."[237]

The Texas Supreme Court in *Nafta Traders v. Quinn*, held that the TAA contains no policy against parties' agreeing to limit the authority of an arbitrator to that of a judge, but rather, an express provision requiring vacatur when "arbitrators [have] exceeded their powers".[238] "Nafta and Quinn agreed that an arbitrator appointed to resolve disputes between them 'does not have authority (i) to render a decision which contains a reversible error of state or federal law, or (ii) to apply a cause of action or remedy not expressly provided for under existing state or federal law.' Unless there is some reason to exclude such limitations from the general rule that the parties' agreement determines arbitral authority, Nafta's contention that the arbitrator exceeded his authority raises a ground to vacate the award, and the court of appeals erred in holding to the contrary."[239]

Texas Courts of Appeals rejected vacatur based on the claim that arbitrators exceeded their power when:

- The party claimed never to have received a notice of arbitration proceedings, when the agreement provided that the arbitrators were authorized to proceed *ex parte* if the party was evasive.[240]
- The party claimed that the awarded attorney's fees were excessive despite the arbitration provisions which authorized the arbitrator to award attorney's fees and assess the cost of arbitration.[241]
- The party alleged that the arbitrators decided the matters outside the scope of the arbitration agreement between Cambridge Legacy Group and Jain and ignored well-settled controlling law by treating three companies (two of which were subsidiaries to Cambridge) as if they were in the same group under the same claim.[242] The Court found that arbitrators had authority under the agreement which allowed them to decide "the present matter in controversy, as set forth in the attached statement of claim, answers, and all related cross claims, counterclaims, and/or third-party claims which may be asserted."[243]
- The arbitrator awarded equitable extension of the noncompetition period because the arbitration agreement authorized the arbitrator to apply Delaware law which allows for an equitable extension of noncompetition period.[244]

4. The Doctrine of Manifest Disregard

The Fifth Circuit rejected the manifest disregard doctrine and held in several cases that manifest disregard doctrine does not constitute an independent, non-statutory reason for vacating awards under the FAA.[245] Thus, Texas courts deciding the vacatur of

[227] *Id.* at 798.
[228] *Id.* at 807.
[229] *Id.* at 803.
[230] *Id.*
[231] *Id.* at 804.
[232] *Id.*
[233] *Why Nada Cruz, L.L.C. v. Ace Am. Ins. Co.*, 569 F. App'x 339, 343 (5th Cir. 2014).
[234] *Rain CII Carbon, LLC v. ConocoPhillips Co.*, 647 F.3d 469, 474 (5th Cir. 2012).
[235] *Stage Stores, Inc. v. Gunnerson*, 477 S.W.3d 848, 863 (Tex. App.—Houston [1st Dist.] 2015, no pet.).
[236] *Id.*
[237] *Id.*
[238] *Nafta Traders, Inc. v. Quinn*, 339 S.W.3d 83, 96 (Tex. 2011).
[239] *Id.* at 91.
[240] *Venture Cotton Co-op v. Neudorf*, No. 14–13–00808–CV, 2014 WL 4557765, at *2 (Tex. App.—Houston [14 st Dist.] Sept. 16, 2014, no pet.) (mem. op.).
[241] *Beech Street Corp. v. Baylor Healthcare Sys.*, No. 05–12–01671–CV, 2014 WL 3743864, at *3 (Tex. App.—Dallas July 29, 2014, pet. filed) (mem. op).
[242] *Cambridge Legacy Grp. v. Jain*, 407 S.W.3d 433, 449 (Tex. App.—Dallas, 2013, pet. denied).
[243] *Id.* at 450.
[244] *Nationbuilders Ins. Servs., Inc. v. Hous. Intern. Ins. Grp., Ltd.*, No. 05–12–01103–CV, 2013 WL 3423755, at *7 (Tex. App.—Dallas July 3, 2013, pet. denied) (mem. op.).
[245] *Bain v. Bank*, 539 F. App'x 485, 486 (5th Cir. 2013); *Woods v. P.A.M. Transp. Inc.-L.U.*, 440 F. App'x 265, 269 (5th Cir. 2011); *Householder Grp. v. Caughran*, 354 F. App'x 848 (5th Cir. 2009); *United Forming, Inc. v. FaulknerUSA, LP*, 350 F. App'x 948, 950 (5th Cir. 2009); *Citigroup Global Markets, Inc. Bacon*, 562 F.3d 349, 353-356 (5th Cir. 2009).

arbitration awards follow the Supreme Court's *Hall Street* and the 5th Circuit's interpretation of the FAA.[246]

However, the Texas Supreme Court's decision in *Nafta Traders* from March 2011 implies that the FAA and the Supreme Court's decision in *Hall Street*, "does not preempt all state-law impediments to arbitration.[247]

The Dallas Court of Appeals similarly concluded that *Hall Street* indicated that Texas common-law grounds for vacating the award would not be preempted by the FAA.[248] Therefore, manifest disregard remains a very narrow and "extremely limited" standard of review.[249] "It is more than error or misunderstanding of the law."[250] The disregard of law has to be obvious and "capable of being readily and instantly perceived by the average person qualified to serve as an arbitrator"[251] and the arbitrator had to appreciate the existence of a legal principle, and consciously ignore it.[252] "In other words, the issue is not whether the arbitrator correctly interpreted the law, but whether the arbitrator, knowing the law and recognizing that the law required a particular result, simply disregarded the law."[253] In *Humitech* the court rejected the appellant's assertion that the arbitrator misinterpreted the evidence and misapplied the law because the record showed that the arbitrator, after hearing all the evidence, determined the credibility of the witnesses and analyzed conflicting evidence, thus the appellant did not show that anything the arbitrator did was capricious.[254]

It is an interesting time of continued change and development of the law related to vacatur claims. You serve your client well by understanding that vacatur is fact specific, especially as it relates to disclosures and the underlying agreements between the parties as to the scope of the arbitration.

CONCLUSION

As the number and type of arbitration proceedings continues to expand, the proceedings are evolving to better fit the needs of practitioners and their clients. Having a clear understanding about the nature of the proceeding that is going to be held is essential to making the correct strategy decisions for your client at the outset.

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[246] *Hoskins v. Hoskins*, No. 04-13-00859-CV, 2014 WL 5176384, at *3 (Tex. App.—San Antonio Oct. 15, 2014, no pet.) (mem. op); *Beech Street Corp. v. Baylor Healthcare Sys.*, No. 05–12–01671–CV, 2014 WL 3743864, at *3 (Tex. App.—Dallas July 29, 2014, pet. filed) (mem. op); *Forest Oil Corp. v. El Rucio Land & Cattle Co, Inc.*, 446 S.W.3d 58, 81-82 (Tex. App.—Houston [1st Dist.] 2014, pet denied); *IQ Holdings, Inc. v. Villa D'Este Condominium Owner's Ass'n, Inc.*, No. 01-11-00914-CV, 2014 WL 982844, at *7 (Mar. 13, 2014); *W. Dow Hamm III Corp. v. Millennium Income Fund, L.L.C.*, No. 01-12-00313-CV, 2013 WL 978263, at *6 (Tex. App.—Houston [1st Dist.] March 1, 2013, pet. denied). *See also* Jeffrey Price, *Challanging Arbitration Awards in Texas After Hall Street and Nafta Traders*, 65 ADVOC. 44, 48-49 (2013).

[247] *Nafta Traders, Inc. v. Quinn*, 339 S.W.3d 84, 100 (Tex. 2011).

[248] *Humitech Dev. Corp. v. Perlman*, 424 S.W.3d 782, 795 (Tex. App.—Dallas 2014, pet. denied).

[249] *Id.*

[250] *Id.*

[251] *Id.*

[252] *Id.*

[253] *Id.* (quoting *Xtria L.L.C. v. Int'l Ins. Alliance Inc.*, 286 S.W.3d 583, 594 (Tex. App.—Texarkana 2009, pet. denied)).

[254] *Id.* at 796.