WHAT SHOULD I DO IN ARBITRATION AND WHAT DO I DO IF I DON'T LIKE THE RESULT?

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Texas Super Lawyer, Texas Monthly Magazine, 2003-2014

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Dallas Bar Association Board of Directors - 2012-
Dallas Bar Association-Judiciary Committee (Co-Chair - 2014)
Dallas Bar Association-Trial Skills Section (Vice-Chair - 2014)
Dallas Bar Association-CLE Committee (Co-Vice Chair - 2014)
Dallas Bar Association-Transition to Law Committee (Chair - 2013)
Dallas Bar Association-Bench Bar Committee (Co-Chair - 2012)
Dallas Bar Association -Tort and Insurance Practice Section Board of Directors – 2005-2012 (Chair - 2011)
Dallas Bar Association– Business Litigation Section Council – 2008-2012 (Chair – 2010)
Dallas Trial Lawyers Association (Board of Directors, Five Years).
Texas Bar Foundation-Sustaining Life Fellow
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Dawn Estes is a 25-year lawyer and one of the founding partners of the women-owned Dallas law firm Estes Okon Thorne & Carr. Dawn's thriving trial practice includes managing and resolving sophisticated disputes for a variety of large and mid-sized corporate clients in state and federal courts and arbitrations.

Dawn's successful litigation track record has earned her an AV Preeminent® lawyer rating through Martindale-Hubbell, along with recognition as a Texas Super Lawyer for the last 10 years, one of the Top 50 Women Lawyers in Texas, and a Best Lawyer in Business Litigation by *D Magazine*. Her diverse background includes experience in commercial litigation, electronic discovery and document retention, internet and computer technology, personal injury defense, and arbitration.

Before practicing for 18 years at a large Dallas law firm, Dawn graduated cum laude from Southern Methodist University, and earned her J.D. from St. Mary's University School of Law, where she served as Associate Editor of the Law Journal.

Dawn has served on the National Panel of Commercial and Employment Arbitrators for past 13 years and has held numerous leadership positions within the Dallas Bar Association. When not advocating for her clients, Dawn can be found singing Americana tunes at a variety of local venues with her band, Black Dirt Tango.

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A proven leader in the Texas legal community, Roland Johnson served as president of the State Bar of Texas for 2009-2010. He holds extensive memberships in professional legal associations, often serving in committee and board positions.

Roland is licensed to practice before the U.S. District Court for the Northern, Eastern, Western and Southern Districts of Texas; the U.S. Court of Appeals for the 5th Circuit; and the U.S. Supreme Court. His extensive experience benefits his clients in their quest for justice in commercial litigation, arbitrations and legal malpractice matters.

Roland has been repeatedly honored for his professionalism and legal knowledge. Roland is often asked to speak on ethics, professionalism, arbitration, and leadership issues.

Additional Highlights

- President, State Bar of Texas (2009–2010)
- Member, American Law Institute
- Member, American Board of Trial Advocates
- Member of American Arbitration Association's Commercial and Large/Complex Case Panels
- Board Certified - Civil Trial Law
- Chair (2013), Charter Fellow, Sustaining Life Fellow of the Tarrant County Bar Foundation
- Member, The Board of Disciplinary Appeals (2013-2016)
- Board Member, Executive Committee Member, Sustaining Life Fellow of the Texas Bar Foundation
- Board Member, Texas Access to Justice Foundation
    - Member, Texas Access to Justice Legislative Committee
- Member, Judicial Committee on Information Technology
- Member, Dean's Advisory Council, Texas A&M University School of Law

- Member, College of the State Bar of Texas
- Member, Texas Association of Defense Counsel
- Commissioner, Fort Worth Civil Service Commission (1990–1999); Chair (1994–1999)
- President, Tarrant County Bar Association (2001–2002); Professionalism Award (2004)
- Board Member, Texas Legal Protection Plan (2006–2008)
- Board Member, Texas Center for Legal Ethics and Professionalism (2007–2008)
- Chair, Professionalism Committee, State Bar of Texas (2007–2008)
- President, Eldon B. Mahon Inn of Court (2007-2008)
  Honorary Serjeant's Inn of Dallas – Fort Worth Inns of Court
- President, Baylor Alumni Association (2011-2012)
- State Bar of Texas: Michael J. Crowley Award 2011
- Board Member, Baylor Alumni Association (2007–2014)
- Board Member of the State Bar of Texas from 2003 to 2006
    - In 2006, named Outstanding Third Year Director of the State Bar of Texas
- The Best Lawyers in America® - (2009-2015) for work in practice areas of Bet-the-Company Litigation and Commercial Litigation
- Texas Super Lawyers, by Thompson Reuter's *Texas Monthly* (2003-present)
- Power Lawyer in 2008, *Fort Worth Business Press*
- Texas Wesleyan University School of Law's Distinguished Adjunct Faculty Award (2005)
- Graduate, Baylor University School of Law (JD, cum laude, 1979)
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- Swine Barn Superintendent. Southwestern Exposition & Livestock Show (1998–present)

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WHAT SHOULD I DO IN ARBITRATION AND WHAT DO I DO IF I DON'T LIKE THE RESULT?

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), describe several of the arbitration forums that are available, 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 fall 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 (the "TAA") and the Federal Arbitration Act (the "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

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 §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 that 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

[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.

> another forum, whether judicial or administrative.[9]

In *AT&T Mobility LLC v. Concepcion*, the Supreme Court held that the FAA pre-empted California's "Discover Bank rule," which provided that 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]

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]

3. <u>The Texas Supreme Court Also Typically Enforces Arbitration Provisions, Unless it is Used to Gain an Unfair Advantage</u>

In Re U.S. Home Corporation, was the first of two Texas Supreme Court decisions involving arbitration of contracts involving home builders.[18] In this case, two couples brought claims on behalf of themselves and others similarly situated alleging that their homes were built without shower pans.[19] 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.[20]

The Supreme Court first addressed the trial court's finding that the arbitration clauses were contracts of adhesion and thus procedurally unconscionable.[21] The purchasers were able to prove only that U.S. Home refused to contract with them unless they agreed to arbitration, and the 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 Supreme Court held that like any other contract clause, a party cannot avoid the impact of arbitration clause by merely failing to read it.[22]

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

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[9] *Id*. at 988.
[10] *AT&T Mobility LLC v. Concepcion*, 131 S. Ct. 1740; 179 L. Ed. 2d 742 (2011). The Discover Bank rules 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*.
[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] *In Re U.S. Home Corporation*, 236 S.W. 3d 761 (Tex. 2007)
[19] *Id*. at 763.
[20] *Id*.
[21] *Id*. at 764.
[22] *Id*.

Fourth, the trial court found arbitration would be unduly burdensome and costly. The 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 American Arbitration Association's usual fees, and the Supreme Court found that this was insufficient to carry the plaintiffs' burden.[23]

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 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 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 since they had not requested mediation themselves.[24]

The plaintiffs also argued that they did not have to arbitrate with the individual defendants since 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, since 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.[25]

As a result of all of the foregoing, the 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.[26] 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 American Arbitration Association 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.

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 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 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 Supreme Court's review was not foreclosed.

The Culls next argued that an order compelling arbitration can only be reviewed before arbitration occurs. The 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 Court also cited §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 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

[23] *Id*.
[24] *Id*.
[25] *Id*. at 765.
[26] *Perry Homes v. Cull*, 258 S.W. 3d. 580 (Tex. 2008).

was 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*[27] 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 is that a showing of prejudice was 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 was 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 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.

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 Company*, the 5th Circuit affirmed the trial court's ruling that granted in part and denied in part a motion to compel arbitration by Halliburton.[28] 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.[29] Subsequently, Ms. Jones signed a

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

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

[29] *Id.* at 231.

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."[30]

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.[31]

Ms. Jones subsequently filed an arbitration proceeding and then a lawsuit. In the trial court, Ms. Jones asserted several defenses to 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' 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.[32] The court went on to reject Ms. Jones' 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' 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, 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 5th Circuit.[33]

5. 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. 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.

[30] *Id.*
[31] *Id.*
[32] *See In re Halliburton Company*, 80 S.W. 3d 566, 572 (Tex. 2002).
[33] *Id.* at 241.

At the end of this paper, you will find a chart that summarizes some of the rules and procedures of three common arbitration forums. These three forums are described in sections 1. through 3. below.

1. The American Arbitration Association ("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.[34]

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.[35]

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, and some of the nuanced differences in the rules of the three forums are shown in the chart at the end of this paper.

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);
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

[34] 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).

[35] Attached to this paper is a table containing a comparison of select rules for AAA, JAMS and the International Institute for Conflict Prevention and Resolution. Credit for the creation of this chart in 2012 goes to Gilda R. Turitz, a partner with Sideman & Bancroft LLP in San Francisco; credit for updating the chart for the 2015 Advanced Trial Strategies Course goes to Anthony H. Lowenberg of Estes Okon Thorne & Carr, PLLC.

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.

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 requests for references related to arbitrators.

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 affect 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.

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 Federal Arbitration Act's grounds for vacatur and modification "are exclusive" and cannot be "supplemented by contract."[36] In 2011, the Texas Supreme Court chose not to adopt such a restrictive reading of cases decided under the Texas Arbitration Act ("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.[37]

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.*"[38]

The handbook did not state whether federal or state law would apply.[39] Nafta moved to compel arbitration under the FAA and an agreed order compelling arbitration was signed by the district court.[40] 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.[41] 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.[42]

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.[43] 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."[44]

On appeal, the Texas Supreme Court held that the TAA permits parties to contractually agree to expanded judicial review of arbitration awards.[45] 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."[46]

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:

[36] *Hall Street Associates, LLC v. Mattel, Inc.*, 552 U.S. 576, 578, 128 S.Ct. 1396 (2008).
[37] *Nafta Traders, Inc. v. Quinn*, 339 S.W.3d 84 (Tex. 2011).
[38] *Nafta Traders, Inc. v. Quinn*, 339 S.W. 3d at 87 (emph. added).
[39] *Id*. at 87-8.
[40] *Id.* at 88.
[41] *Id.*
[42] *Id.*
[43] *Id.*
[44] *Id.*
[45] *Id*. at 96-97.
[46] *Id.* at 101.

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

6. Compelling Appearance of Witnesses

Almost all arbitration forums have procedures for the issuance of allowing 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.

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 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) Texas Arbitration Act

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.[47]

Because Texas law favors arbitration, judicial review of an arbitration decision is extremely narrow, unless the parties agree to a broader scope of review.[48]

b) Federal Arbitration Act

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.[49]

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.[50] 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.[51]

While 2nd, 4th, 6th, 9th Circuits may apply the common law doctrine of "manifest disregard for law" in addition to the FAA grounds for vacating an

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

[48] *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.

[49] 9 U.S.C. § 10(a) (2002).

[50] *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.); Com*edy Club, Inc. v. Improv W. Assocs.*, 553 F.3d 1277, 1290 (9th Cir.).

[51] *See* Patrick Sweeney, *Exceeding Their Powers: A Critique of Stolt-Nielsen and Manifest Disregard, and a Proposal for Substantive Arbitral Review*, 71 WASH. & LEE L. REV. 1571, 1575 (2014).

arbitration award, in the 1st, 5th, 7th, 8th, and 11th Circuit, the courts disregard the doctrine.[52]

However, as noted above, a 2008 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.[53]

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.[54]

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.[55] 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.[56]

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.[57] Similar obligation can be found under the American Arbitration Association Commercial Arbitration Rules,[58] JAMS Comprehensive Arbitration Rules,[59] FINRA,[60] CPR[61] and ICC rules.[62]

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.[63] 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.[64] 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.[65]

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

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[52] 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).

[53] *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").

[54] 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).

[55] *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)).

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

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

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

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

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

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

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

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

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

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

appellant.[66] Furthermore, the arbitrator and the attorney acted as if they did not know each other.[67]

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 unrelated party in litigation involving the arbitrator's law firm.[68]

Similarly in September 2014, the Dallas Court of Appeals in *Maritage 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.[69] The dispute involved a claim against a construction company which homes allegedly had less square footage than represented to the buyers.[70] The party seeking vacatur (Martigate) alleged that the arbitrator failed to disclose mediation and three arbitrations with the other parties' lawyers during the pendency of the case.[71] 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.[72] In response, Martigate'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.[73] Only after the hearing Martigate requested a more detailed disclosure.[74] 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.[75] 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.[76]

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.[77]

In February 2014, in *Morgan Keegan & Company, 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.[78] 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."[79]

c) Arbitrators Exceeded Their Powers

The Texas Supreme Court has stated that arbitrator's authority is derived from the arbitration agreement.[80] 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."[81]

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.[82]
- The arbitrator departed from the interpretation and enforcement of the surface agreement when he rendered the declaratory relief and rewrote the

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[66] *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).

[67] *Id.* at 92.

[68] *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.).

[69] *Meritage Homes of Tex., L.L.C., v. Ruan*, No. 05-13-00831-CV, 2014 WL 4558772, at *4 (Sept. 16, 2014 petition for review filed) (mem. op.).

[70] *Id.* at *1.

[71] *Id.* at *2.

[72] *Id.* at *1.

[73] *Id.*

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

[75] *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)).

[76] *Id.* at * 4.

[77] *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).

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

[79] *Id.* at 15.

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

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

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

agreement.[83] The Court has found that the arbitrator does 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."[84]

- The arbitrator exceeded her power because the award had an effect restraining free speech in violation of the party's constitutional right.[85] 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.[86]
- The arbitrator exceeded his powers because he did not enforce a rule requiring the parties to exchange documents before the hearing.[87] The Court disagreed and found that the JAMS' rules, under which the hearing was conducted, did not restrict arbitrator's authority.[88]

d) Refusal to Hear Evidence Material to the Controversy

In October 2014, the San Antonio Court of Appeals issued a memorandum opinion in *Hoskins v. Hoskins*, in which the court declined to vacate an arbitration award when appellant asserted the arbitrators failed to hear evidence material to controversy.[89] The appellant claimed that arbitrators refused to conduct a hearing on claims raised in the supplemental complaint.[90] The court held 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.[91] 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.[92]

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.[93] The burden of proof is on the party seeking to avoid rendition of an order based on the arbitration award.[94]

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.[95]

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.[96] 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.[97] 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."[98] 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.[99] Thus, because Astra Oil had not made the payment, it was

[83] *Forest Oil*, 446 S.W.3d at 81.
[84] *Id.* at 82.
[85] *IQ Holdings, Inc. v. Villa D'Este Condo. Owner's Ass'n, Inc.*, No. 01-11-00914-CV, 2014 WL 982844, at *5 (Mar. 13, 2014).
[86] *Id.* at *5.
[87] *Humitech Development Corp. v. Perlman*, 424 S.W.3d 782, 792-93 (2014).
[88] *Id.* at 793.
[89] *Hoskins v. Hoskins*, No. 04-13-00859-CV, 2014 WL 5176384, at *5 (Tex. App.—San Antonio Oct. 15, 2014, no pet.) (mem. op).
[90] *Id.* at *1.
[91] *Id.* at *5.
[92] *Id.*
[93] TEX. FAM. CODE ANN. § 153.0071(b) (2007).
[94] *Id.*
[95] *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).
[96] *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.).
[97] *Id.* at *10.
[98] *Id.*
[99] *Id.*

not entitled to indemnity.[100] 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.[101]

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."[102] 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.[103]

b) Evident Partiality of Arbitrators

The Supreme Court found in *Commonwealth Coatings*, that the arbitrators must tell the parties about any "substantial interest [they have] in a firm."[104] The Supreme 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.[105]

Commonwealth Coatings was a plurality opinion and the federal courts differ in their interpretation of the FAA provisions in light of this case.[106] 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.[107] 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.[108]

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.[109] 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.[110]

The Texas Courts of Appeals have found that following, undisclosed, circumstances justified vacating the arbitral award:[111] (1) arbitrator held a position of lead counsel for one of the parties, six years prior to the arbitration,[112] (2) arbitrator's law firm was listed a party to the arbitration as a representative client on Martindale-Hubbell,[113] (3) Arbitrator's law firm represented a client who was in dispute with one of the parties to the arbitration,[114] (4) arbitrator's law firm represented an affiliate of one of the parties to the arbitration.[115]

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;[116] (2) arbitrator once represented a vendor who supplied materials to one of the parties;[117] (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.[118]

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[100] *Id.*
[101] *Id.*
[102] *Id.* at *18.
[103] *Id.* at *19.
[104] *Commonwealth Coatings v. Continental Casualty Co.*, 393 U.S. 145 (1968) (plurality opinion).
[105] *Id.* at 150.
[106] *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).
[107] *Id.* at 54.
[108] *Id.* at 55.
[109] *See Tenaska Energy, Inc. v. Ponderosa Pine Energy*, LLC, 437 S.W.3d 518, 520, 524 (Tex. 2014).
[110] *Id.*
[111] *See Kratovil & Johnson*, *Evident Partiality* 65 ADVOC. 52, 57 (2013).
[112] *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.).
[113] J.D. Edwards World Solutions Co. v. Estes, Inc., 91 S.W.3d 836 (Tex. App.—Fort Worth 2002, pet. denied).
[114] *Judd v. Texakoma Oil & Gas Corp.*, No. 05-99-00039-CV, 2000 WL 19534, *at *2, (Tex. App.—Dallas Jan. 13, 2000).*
[115] *Amoco D.T. Co. v. Occidental Petroleum Corp.*, 343 S.W.3d 837 (Tex. App.—Houston [14th Dist.] 2011, pet. denied).
[116] *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.).
[117] *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.).
[118] *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.] March 1, 2013, pet denied).

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.[119] 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.[120] 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.[121]

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.[122] 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.[123] 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.[124]

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.[125] 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.[126]

e) Other Misconduct

In April 2014, the San Antonio Court of Appeals decided in *SSP Holdings Ltd Partnership v. Lopez* did not find that the arbitrators engaged in improper conduct that would justify a vacatur.[127] 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.[128] The court held that "an 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."[129] Because the arbitration agreement did not define "opinion," nor used any modifiers such as "reasoned", the award issued by the arbitrators sufficiently explained their decision and, in fact, constituted a brief, written opinion."[130] Second 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.[131] 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."[132] 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.[133] The court then stated that the trial court did not order a submission of the "entirety of the dispute"

[119] *InfoBilling, Inc. v. Transaction Clearing, LLC*, No. SA-12-CV-01116-DAE, 2013 WL 1501570, at *3-4 (W.D. Tex., Apr. 10, 2013).
[120] *Id.* at *3-4.
[121] *Id.* at *4.
[122] *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).
[123] *Id.* at *6.
[124] *Id.*
[125] *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.").
[126] *Id.*
[127] *SSP Holdings Ltd. Partnership v. Lopez*, 432 S.W.3d 487, 501 (Tex. App.—San Antonio, 2014, pet denied).
[128] *Id.* at 493-494.
[129] *Id.* at 494.
[130] *Id.* at 496.
[131] *Id.*
[132] *Id.*
[133] *Id.*

and nothing in the order deprived the party of any of its available defenses.[134]

f) Arbitrators Exceeded Their Powers

In a 2010 *Stolt-Nielsen S.A. v. AnimalFeeds International Corp.* case, the Supreme Court vacated the arbitration award because the arbitrators exceeded their power by allowing class arbitration.[135] Both parties of this maritime contract case stipulated that that the contract was silent on the matter of admissibility of class arbitration.[136] 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.[137] 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."[138]

In *Oxford Health v. Sutter*, a 2013 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.[139] The issue was whether an arbitrator erred in treating Sutter's claim as class arbitration.[140] The Supreme 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."[141] Unlike in Stolt-Nielsen, the parties never agreed on the meaning of the contract.[142] 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.[143] 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.[144] The Court examined the agreement to determine parties' intent concerning the selection of arbitrators.[145] 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."[146] 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.[147] 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.[148] 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.[149] 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 arbitrators 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.[150]

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.[151] 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.[152]

The district court vacated the award, holding that the arbitrator exceeded his powers because the

[134] *Id.*
[135] *Stolt-Nielsen S.A. v. AnimalFeeds Int'l Corp.*, 559 U.S. 662 (2010).
[136] *Id.* at 662.
[137] *Id.* at 664.
[138] *Id.* 674-75.
[139] *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)).
[140] *Id.* at 2067.
[141] *Id.* at 2068.
[142] *Id.*
[143] *Americo Life, Inc. v. Myer*, 440 S.W.3d 18, 25 (Tex. 2014).
[144] *Id.* at 21.
[145] *Id.* at 22.
[146] *Id.*
[147] *Id.*
[148] *Id.* at 23.
[149] *Id.* at 21.
[150] *Id.* at 25.
[151] *Timegate Studios, Inc., v. Southpeak Interactive, L.L.C.*, 713 F.3d 797 (5th Cir. 2013).
[152] *Id.* at 802.

perpetual license was inconsistent with the essence of the underlying contract.[153] The Fifth Circuit reversed and remanded with instructions to confirm the award.[154] 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."[155] 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.[156] 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.[157] Thus, the arbitrator could have found that each party could achieve objectives of the agreement only by severing their mutual obligations.[158]

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.[159]

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. [160]

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".[161] "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."[162]

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.[163]
- 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.[164]
- 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.[165] 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."[166]
- The arbitrator awarded equitable extension of the noncompetition period because the arbitration agreement authorized the arbitrator to apply

[153] *Id.* at 798.
[154] *Id.* at 807.
[155] *Id.* at 803.
[156] *Id.*
[157] *Id.* at 804.
[158] *Id.*
[159] *Why Nada Cruz, L.L.C. v. Ace Am. Ins. Co.*, 569 F. App'x 339, 343 (5th Cir. 2014).
[160] *Rain CII Carbon, LLC v. ConocoPhillips Co.*, 647 F.3d 469, 474 (5th Cir. 2012).
[161] *Nafta Traders, Inc. v. Quinn*, 339 S.W.3d 83, 96 (Tex. 2011).
[162] *Id.* at 91.
[163] *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.).
[164] *Beech Street Corp. v. Baylor Healthcare Sys.*, No. 05–12–01671–CV, 2014 WL 3743864, at *3 (Tex. App.—Dallas July 29, 2014, petition for review filed) (mem. op).
[165] Cambridge Legacy Grp. v. Jain, 407 S.W.3d 433, 449 (Tex. App.—Dallas, 2013, pet denied).
[166] *Id.* at 450.

Delaware law which allows for an equitable extension of noncompetition period.[167]

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.[168] Thus, Texas courts deciding the vacatur of arbitration awards follow the Supreme Court's *Hall Street* and the 5th Circuit's interpretation of the FAA.[169]

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.[170]

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.[171] Therefore, manifest disregard remains a very narrow and "extremely limited" standard of review.[172] "It is more than error or misunderstanding of the law."[173] 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"[174] and the arbitrator had to appreciate the existence of a legal principle, and consciously ignore it.[175] "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."[176] 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.[177]

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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[167] *Nationbuilders Ins. Servs., Inc. v. Houston Intern. Ins. Grp., Ltd.*, No. 05–12–01103–CV, 2013 WL 3423755, at *7 (Tex. App.—Dallas July 3, 2013, pet. denied) (mem. op.).

[168] *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).

[169] *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, petition for review 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).

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

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

[172] *Id.*

[173] *Id.*

[174] *Id.*

[175] *Id.*

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

[177] *Id.* at 796.

APPENDIX – COMPARISON OF SELECTED PROVIDER RULES (CHART)

Advanced Trial Strategies 2015 | "What Do I Do in Arbitration and What Do I Do If I Don't Like the Result?" | Comparison of Selected Provider Rules*

SUBJECT	AMERICAN ARBITRATION ASSOCIATION COMMERCIAL ARBITRATION RULES	JAMS COMPREHENSIVE ARBITRATION RULES & PROCEDURES	CPR: INTERNATIONAL INSTITUTE FOR CONFLICT PREVENTION AND RESOLUTION NON-ADMINISTERED ARBITRATION RULES
Rules Effective Date	Rules amended and effective October 1, 2013; Fees amended and effective November 1, 2014	Comprehensive & Streamlined Arbitration Rules & Procedures both effective July 1, 2014	Rules effective July 1, 2013 , CPR also promulgated Rules for Administered Arbitration
Website	www.adr.org	www.jamsadr.com	www.cpradr.org
General (from materials of provider institution)	The AAA Rules provide for administered arbitration of domestic commercial disputes.	The JAMS Rules govern binding arbitrations of disputes or claims that are administered by JAMS.	The CPR rules are intended, in particular, for complex cases. Until 2013, CPR provided for non-administered (ad hoc) arbitration only. CPR now has two sets of rules for administered and non-administered arbitration. This chart summarizes the administered arbitration rules, which are a bit more complex than the non-administered rules.
Application	Where the parties have provided for arbitration by the AAA under its Commercial Arbitration Rules or for arbitration by the AAA of a domestic commercial dispute without specifying particular rules, the Rules are deemed a part of their arbitration agreement. Parties may agree to written modifications after arbitrator's appointment and only with arbitrator's consent. (R-1(a))	Where the parties have provided for arbitration by JAMS under its Comprehensive Rules or for arbitration by JAMS without specifying any particular JAMS rules and the disputes or claims exceed $250,000, not including interest or attorneys' fees, the rules are deemed a part of their arbitration agreement. (Rule 1(a), Rule 1(b)) Parties may agree on any procedures not specified in the rules that are consistent with applicable law and JAMS policies by promptly notifying JAMS of any such party-agreed procedures and confirming such procedures in writing. (Rule 2)	Where the parties have agreed in writing to apply these rules, the rules are deemed a part of their arbitration agreement. Parties may agree to modify the rules in writing or on the record during the course of the arbitral proceeding. (Rule 1.1) "These Administered Rules shall govern the arbitration except that where any of these Administered Rules is in conflict with a mandatory provision of applicable arbitration law, that provision of law shall prevail." (Rule 1.2)
AAA Rules for Large, Complex Cases	"The procedures for Large, Complex Commercial Disputes shall apply…in which the disclosed claim or counterclaim of any party is at least $500,000…" (R.1(c))		
Expedited Rules or Procedures	"Unless the parties or the AAA determines otherwise, the Expedited Procedures shall apply in any case in which no disclosed claim or counterclaim exceeds $75,000…" (R-1(b))	JAMS' Streamlined Rules govern arbitrations when the parties agree, or if the claim or counterclaim does not exceed $250,000. (Streamlined Rule 1) JAMS' Expedited Procedures (Rule 16.1 and 16.2 of the Comprehensive Rules) apply if referenced in the parties agreement to arbitrate, or are later agreed to by all parties. (Rule 16.1)	

Advanced Trial Strategies 2015 | "What Do I Do in Arbitration and What Do I Do If I Don't Like the Result?" | Comparison of Selected Provider Rules

SUBJECT	AMERICAN ARBITRATION ASSOCIATION COMMERCIAL ARBITRATION RULES	JAMS COMPREHENSIVE ARBITRATION RULES & PROCEDURES	CPR: INTERNATIONAL INSTITUTE FOR CONFLICT PREVENTION AND RESOLUTION NON-ADMINISTERED ARBITRATION RULES
Version of Rules Applicable to the Arbitration	Rules in effect at the time the administrative requirements are met for a demand for arbitration or submission agreement received by the AAA. (R-1(a))	Rules in effect at time of commencement. (Rule 3)	Rules in effect at time of commencement. "If the parties have provided for CPR arbitration without specifying either the Non-Administered or Administered Rules, the CPR Administered Rules shall apply to any arbitration agreement dated July 1, 2013 or later. (Rule 1.1)
JURISDICTION OF ARBITRATOR			
Objections to Jurisdiction or Existence/Validity of Arbitration Clause	"The 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 or to the arbitrability of any claim or counterclaim." (R-7(a))	Arbitrator has power to resolve challenges to its jurisdiction, including disputes over the existence, validity, interpretation or scope of the arbitration agreement. (Rule 8(b))	Tribunal has power to hear and determine challenges to its jurisdiction, including objections with respect to existence, scope or validity of the arbitration agreement. (Rule 8.1)
Arbitration Clause Deemed a Separate Agreement	Yes. (R-7(b))	No provision.	Yes. (Rule 8.2)
COMMENCEMENT OF ARBITRATION			
How Commenced	Commenced by written demand to respondent when initiated under an arbitration provision in a contract, and the filing at AAA of demand or submission to arbitrate. (R-4)	Commenced when JAMS confirms in a Commencement Letter either the submission to JAMS of a post-dispute arbitration agreement fully executed by all parties; the submission to JAMS of a pre-dispute written contractual provision; written confirmation of an oral agreement of all parties; or a court order compelling arbitration at JAMS. (Rule 5)	Commenced when the claimant simultaneously delivers a notice of arbitration to the respondent and to CPR. (Rule 3.1) The commencement date is the date CPR receives both the notice of arbitration and the filing fee. (Rule 3.4)
Defense Statement Due	Required within 14 calendar days after notice of the filing of the arbitration demand is sent by the AAA. (R-5(b))	Required within 14 calendar days of the service of the notice of claim. (Rule 9)	Required within 20 days of the commencement date. (Rule 3.5)
Expedited Procedures	Except under extraordinary circumstance, only one 7 day extension of time to respond to a demand for arbitration or counterclaims will be granted. (E-1)	Required within 7 calendar days of the service of the notice of claim. [Streamlined Rule 7]	
CONFIDENTIALITY OF PROCEEDINGS			
Confidentiality of Proceedings	The arbitrator and AAA shall maintain the privacy of the hearings unless the law provides otherwise. (R-25)	Yes, except in connection with a judicial challenge to or enforcement of an award, unless otherwise required by law or judicial decision. (Rule 26(a))	Yes, except in connection with judicial proceedings ancillary to the arbitration or the parties agree otherwise. (Rule 20)

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ARBITRATORS/TRIBUNAL MATTERS			
Number of Arbitrators	Absent the parties' agreement, one arbitrator unless the AAA determines three to be appropriate. (R-15)	One neutral arbitrator unless all parties agree otherwise. (Rule 7(a))	Three arbitrators, unless parties have agreed in writing to a single arbitrator. Unless otherwise agreed, any arbitrator not appointed by a party shall be a member of the CPR Panels of Distinguished Neutrals. (Rule 5.1)
Expedited Procedures	One. (E-4(a))	One. (Streamlined Rule 12(a))	
AAA Rules for Large, Complex Cases	Either one or three as agreed upon by the parties. Absent agreement, three arbitrators if claim/counterclaim involves at least $1,000,000; if a lesser amount, then one arbitrator. (L-2(a))		
Arbitrator Compensation	Neutral arbitrators compensated at a rate consistent with the arbitrator's stated rate of compensation; made through the AAA, not directly between the parties and arbitrator. (R- 55)	Arbitrators set their own hourly, partial and full day rates, available by contacting JAMS.	Arbitrators compensated "on a reasonable basis determined at the time of appointment." Full disclosure of compensation to all parties required. (Rule 17.1)
Expedited Procedures	Arbitrators will receive compensation at a rate to be suggested by the AAA regional office. (E-10)		
Selection Process	Agreement of parties of arbitrator; if no agreement, AAA shall send an identical list to each party and the parties are encouraged to agree on an arbitrator. (R-12(a)). If the parties fail to agree on any persons named, AAA shall have the power to appoint from among other members of the National Roster. (R-12(b))	In absence of parties' agreement on arbitrator selection, JAMS may attempt to facilitate agreement and shall submit candidate list of at least 5 candidates in the case of a sole Arbitrator, and 10 candidates in the case of a tripartite panel, to parties for ranking. If this process does not yield an arbitrator or a complete panel, JAMS shall designate sole arbitrator or as many as are necessary to complete the panel. (Rule 15(a) - (d))	If single arbitrator or three neutral arbitrators, selection is by parties' agreement or, if none, by CPR. (Rule 5.3, 6.1, 6.2) If there are to be two party-appointed arbitrators, they appoint the third, who shall be the chair. CPR resolves an impasse between party arbitrators if necessary as in the case of a single arbitrator. (Rule 5.2) If the procedures do not result in the selection of the required number of arbitrators, CPR shall submit candidate list to the parties for ranking prior to making the appointment. (Rule 6.2) With more than one claimant or respondent (Rule 5.5), CPR shall appoint all of the arbitrators. (Rule 6.2, 6.3)

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AAA Rules for Large, Complex Cases	AAA will appoint, as agreed by the parties. If no agreement on a method of appointment, AAA will appoint from the Large, Complex Commercial Case Panel, in the manner provided by the regular rules. (L-2(c))		
Expedited Procedures	AAA submits a list of five proposed arbitrators from its National Roster; if parties cannot agree, each party has seven days to strike two names. If the arbitrator cannot be appointed from the list, the AAA can make an appointment without submitting additional lists. (E-4)	Similar to the above rule, but the candidate list is 3. (Streamlined Rule 12(c))	
Venue	Determined by AAA if parties have not agreed. AAA decision is final and binding. (R-11)	Determined by arbitrator after consulting with the parties. (Rule 19(a))	Determined by tribunal if parties have not agreed. The award is deemed made at such place. (Rule 9.5)
Substantive Law	No express provision.	Determined by arbitrator if not designated by the parties. (Rule 24(c))	Determined by tribunal if not designated by the parties. (Rule 10.1)
INTERIM MEASURES OF PROTECTION			
Arbitrator Authority to Take Interim Measures	Arbitrator may take interim measures he or she deems necessary, including injunctive relief and measures for the protection or conservation of property and disposition of perishable goods. (R 37(a)) Measures may include an interim award. Arbitrator may require security for the costs of such measures. (R-37(b))	Arbitrator permitted to take such measures as deemed necessary, including injunctive relief and measures for the protection or conservation of property and disposition of disposable goods. Measures may include an interim award. Arbitrator may require security for the costs of such measures (Rule 24(e))	"…the Tribunal may take such interim measures as it deems necessary, including measures for the preservation of assets, the conservation of goods or the sale of perishable goods. The Tribunal may require appropriate security as a condition of ordering such measures." (Rule 13.1)
Express Recognition of Court Proceedings as Alternative Route to Interim Measures of Protection	Yes. (R-37(c))	Yes. (Rule 24(e))	Yes. (Rule 13.2)
Available Procedure Before Arbitrator Appointment	A party may notify the AAA and request relief on an emergency basis. The AAA shall then appoint a single emergency arbitrator on an expedited basis. (R-38)	No provision.	Interim measures via application to CPR and appointment of a special, pre-tribunal arbitrator. (Rule 14)

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PRE-HEARING CONFERENCE			
Requirement/Timing	Optional at the request of any party or upon the AAA's own initiative; may be conducted in person or by telephone. (R-10 - Administrative Conference; R-21 - P reliminary Hearing)	Optional at any party's request or arbitrator's direction; may be conducted in person or by telephone. (Rule 16)	Required, generally to be held promptly after Tribunal is constituted. (Rule 9.3)
AAA Rules for Large, Complex Cases	"Prior to the dissemination of the list of potential arbitrators, AAA shall, unless the parties agree otherwise, conduct an administrative conference…by conference call. The conference will take place within 14 days after the commencement of the arbitration." (L-1) After the selection of the arbitrator(s), a mandatory preliminary hearing will be held "promptly" by telephone conference call. The activities and procedures that will govern the arbitration will be memorialized in a Scheduling and Procedure Order (L-3)		
DISCOVERY			
Production of Documents	Production of documents and other information may be directed by arbitrator at any party's request or on the arbitrator's own initiative. (R-22)	The parties shall cooperate in good faith and shall complete an initial exchange of all relevant, non-privileged documents within 21 calendar days after all pleadings or notice of claims have been received; arbitrator may modify obligations at Preliminary Conference. (Rule 17(a))	"The Tribunal may require and facilitate such discovery as it shall determine is appropriate in the circumstances, taking into account the needs of the parties and the desirability of making discovery expeditious and cost-effective." (Rule 11)
AAA Rules for Large, Complex Cases	Parties may conduct discovery as agreed to by all the parties but the arbitrator(s) may place limits. If parties cannot agree on the production of documents and other information, the arbitrator(s) may establish the extent of discovery, and may order depositions or interrogatories. (L-3(d) & (e))		

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Expedited Procedures	Rules for Expedited Procedures are contained at E-1 through E-10. Where no party's claim exceeds $25,000, the case shall be resolved on submission, although the arbitrator has the discretion to order an in-person hearing. (E-6(b)) "In cases in which a hearing is to be held, the arbitrator shall set the date, time, and place of the hearing, to be scheduled to take place within 30 calendar days of confirmation of the arbitrator's appointment." (E-7)	Arbitrator will require parties to comply with Rule 17(a) prior to the first Preliminary Conference. (Rule 16.2(a)) Document requests are limited to documents directly relevant to the dispute, restricted in time frame, subject matter and persons/entities to which they pertain, not include broad phraseology. Arbitrator may edit or limit the number of requests. (Rule 16.2(b)) E-Discovery is limited - see Rule 16.2(c), 16.2(f), 16.2(g) for specifics.	
		"The Parties and the Arbitrator will make every effort to conclude the document and information exchange process within 14 calendar days after all pleadings or notices of claims have been received…" (Streamlined Rule 13(a))	
Confidentiality or Protective Orders	"The arbitrator shall have the authority to issue any orders necessary "conditioning any exchange or production of confidential documents and information, and the admission of confidential evidence at the hearing… to preserve such confidentiality." (R-23(a))	"The Arbitrator may issue orders to protect the confidentiality of proprietary information, trade secrets or other sensitive information." (Rule 26(b))	Tribunal authorized to issue orders to protect proprietary information, trade secrets, or other sensitive information. (Rule 11)
Witness Disclosure	Arbitrator may direct the identification of any witnesses, the subject matter of their anticipated testimonies, exchange written witness statements, and determine whether written witness statements will replace direct testimony at the hearing. (P-2(a)(xii)(a))	Parties are required to make an initial exchange of names of individuals whom they may call as witnesses within 21 calendar days after all pleadings or notice of claims have been received. (Rule 17(a))	Unless otherwise determined by the tribunal or agreed by the parties, the pre-hearing memorandum shall include the name, capacity and subject of testimony of any witnesses to be called. (Rule 12.1(e))
Expedited Procedures		Same as above, except within 14 days (Streamlined Rule 13(a))	
AAA Rules for Large, Complex Cases	The identification and availability of witnesses, including experts, is a matter to be considered at the preliminary hearing. (L-3)		

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CONDUCT OF HEARINGS			
General Discretion/Obligation in Conducting the Proceedings	"The arbitrator, exercising his or her discretion, shall conduct the proceedings with a view to expediting the resolution of the dispute and may direct the order of proof, bifurcate proceedings and direct the parties to focus their presentation on issues the decision of which could dispose all or part of the case." (R-32(b)) "Any arbitrator shall be impartial and independent and shall perform his or her duties with diligence and in good faith..." (R-18(a)) "Before proceeding with the first hearing, each arbitrator may take an oath of office and, if required by law, shall do so." (R-27)	"The Arbitrator will ordinarily conduct the Arbitration Hearing in the manner set forth in these Rules. The Arbitrator may vary these procedures if it is determined reasonable and appropriate to do so." (Rule 22(a))	"Subject to these Rules, the Tribunal may conduct the arbitration in such manner as it shall deem appropriate." (Rule 9.1) "Tribunal should bear in mind its obligation to manage the proceeding firmly in order to complete proceedings as economically and expeditiously as possible." (Rule 9.2) "The Tribunal shall determine the manner in which the parties shall present their cases." (Rule 12.1)
Pre-Hearing Memoranda	No provision.	Yes, at least 14 calendar days before the hearing (may be modified in Preliminary Conference). (Rule 20(a)) Arbitrator has discretion to permit or require rebuttal statements or other pre-hearing written submissions. (Rule 20(b))	Yes, unless the parties agree or the Tribunal determines otherwise. The memorandum shall include a statement of facts, a statement of each claim being asserted, a statement of the applicable law and authorities upon which the party relies, a statement of the relief requested, and a statement of the nature and manner of presentation of the evidence, including witness information. (Rule 12.1)
Expedited Procedures	At least two business days prior to the hearing, parties shall exchange copies of all exhibits the intend to submit at the hearing. (E-5)	Same as above, except within 7 calendar days. (Streamlined Rule 15(a))	

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AAA Rules for Large, Complex Cases	(a) The arbitrator shall take such steps as deemed necessary or desirable to avoid delay and to achieve a fair, speedy and cost-effective resolution of a Large, Complex Commercial Dispute. (b) As promptly as practicable after the selection of the arbitrator(s), a preliminary hearing shall be scheduled in accordance with sections P-1 and P-2 of these rules. (c) The parties shall exchange copies of all exhibits they intend to submit at the hearing at least 10 calendar days prior to the hearing unless the arbitrator(s) determines otherwise. (d) The parties and the arbitrator(s) shall address issues pertaining to the pre-hearing exchange and production of information in accordance with rule R-22 of the AAA Commercial Rules, and the arbitrator's determinations on such issues shall be included within the Scheduling and Procedure Order. (e) The arbitrator, or any single member of the arbitration tribunal, shall be authorized to resolve any disputes concerning the pre-hearing exchange and production of documents and information by any reasonable means within his discretion, including, without limitation, the issuance of orders set forth in rules R-22 and R-23 of the AAA Commercial Rules. (f) In exceptional cases, at the discretion of the arbitrator, upon good cause shown and consistent with the expedited nature of arbitration, the arbitrator may order depositions to obtain the testimony of a person who may possess information determined by the arbitrator to be relevant and material to the outcome of the case. The arbitrator may allocate the cost of taking such a deposition. (g) Generally, hearings will be scheduled on consecutive days or in blocks of consecutive days in order to maximize efficiency and minimize costs. (L-3)		

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Dispositive Motions	Allowed if the arbitrator determines that the moving party has shown that the motion is likely to succeed and dispose of or narrow the issues in the case. (R-33)	"The Arbitrator may permit any Party to file a Motion for Summary Disposition of a particular claim or issue, either by agreement of all interested Parties or at the request of one Party, provided other interested Parties have reasonable notice to respond to the request." (Rule 18)	
Hearings	The parties may agree to waive oral hearings in any case. (R-32(d))	"The Arbitrator, after consulting with the Parties that have appeared, shall determine the date, time and location of the Hearing." (Rule 19). The arbitrator may proceed with the hearing in the absence of a party that fails to attend. (Rule 22(j)). The parties may agree to waive oral hearing and submit the dispute to the arbitrator for an award. (Rule 23)	If either party requests, otherwise at the tribunal's discretion. (Rule 12.2)
Expedited Procedures	If the claim doesn't exceed $25,000 and in other cases where the parties agree, the dispute will be resolved by submission of documents unless any party requests an oral hearing, or the arbitrator deems it necessary. (E-6)		
Location/Time of Hearings	The arbitrator determines the date, time and place of each hearing. (R-24)	After consulting with the parties, the arbitrator determines date, time and location of the hearing. (Rule 19(a))	Meetings and hearings may be held anywhere the tribunal deems appropriate. (Rule 9.5)
Formal Rules of Evidence	Not required to be applied, provided however, that the arbitrator take into account principles of legal privilege. (R-34(a) & (c))	Strict conformity not required, "except that the Arbitrator shall apply applicable law relating to privileges and work product." (Rule 22(d)) Settlement offers and mediator recommendations ordinarily not admissible. (Rule 22(f))	Not required to be applied, provided, however, that the tribunal shall apply the lawyer-client privilege and the work product immunity. (Rule 12.2)
Tribunal Requests for Evidence	Permitted. (R-34)	No provision.	Permitted. (Rule 12.3)
Expedited Procedures	Arbitrator may require further submission of documents within two days after the hearing. (E-7)		
Tribunal Appointment of Neutral Experts	No provision.	No provision.	Permitted. (Rule 12.3)
Tribunal Inspection of Goods or Property	An arbitrator may make an inspection or investigation in connection with the arbitration. (R-36)	No provision.	No provision.

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Written Statements of Witnesses	Permitted. (P-2, R-35(a))	At discretion of the arbitrator. (Rule 22(e))	At discretion of the tribunal. (Rule 12.2)
Usages of Trade Considered	No provision.	No provision.	Tribunal shall consider usages of trade applicable to the subject contract. (Rule 10.2)
Confidential Nature of Hearings/Attendance of Persons	The arbitrator shall have the authority to issue any orders necessary…including, without limitation… conditioning any exchange or production of confidential documents and information, and the admission of confidential evidence at the hearing, on appropriate orders to preserve such confidentiality." (R-23(a))	JAMS and the arbitrator shall maintain the hearing's confidential nature. Any person having a direct interest in the arbitration may attend the hearing, subject to the arbitrator's discretion or the parties' agreement. Arbitrator may exclude any non-party from any part of a hearing. (Rule 26)	Tribunal may exclude witnesses during testimony of other witnesses. (Rule 12.4) Except as otherwise required by law or judicial proceeding, the tribunal shall treat proceedings as confidential. (Rule 20)
Closure of Hearings	"The arbitrator shall specifically inquire of all parties whether they have any further proofs to offer or witnesses to be heard. Upon receiving negative replies or if satisfied that the record is complete, the arbitrator shall declare the hearing closed." (R-39)	Hearings may be declared closed when the arbitrator determines that all relevant material evidence and arguments have been presented. (Rule 22(h)) The arbitrator may reopen the hearings at any time before the award is made. (Rule 22(i))	No express provision.
Expedited Procedures	"Generally the hearing shall not exceed one day." (E-8(a))		
AWARD			
Types of Award	"In addition to a final award, the arbitrator may make other decisions, including interim, interlocutory, or partial rulings, orders, and awards. In any interim, interlocutory, or partial award, the arbitrator may assess and apportion the fees, expenses, and compensation related to such award as the arbitrator determines is appropriate." (R-47) On the request of settling parties, the arbitrator may set forth the terms of the settlement in a "consent award." (R 48)	Final Award or Partial Final Award, and the arbitrator may make other decisions, including interim or partial rulings, orders and awards. (Rule 24(d))	Final, interim, interlocutory and partial. To facilitate enforcement of non-final awards, tribunal may state that it views the award as final for purposes of any related judicial proceedings. (Rule 15.1) If requested by all parties and accepted by the tribunal, the tribunal may record a settlement in the form of an award made by consent of the parties. (Rule 21.4))
Form of Award	"The arbitrator need not render a reasoned award unless the parties request such an award in writing prior to appointment of the arbitrator or unless the arbitrator determines that a reasoned award is appropriate." (R-46(b))	Reasoned award unless the parties agree otherwise. (Rule 24(h))	Reasoned award unless the parties agree otherwise. (Rule 15.2)
Time Limit for Issuance	"Promptly" and no later than 30 days from date of closing of hearing. (R- 45)	Within 30 calendar days after the date of the close of the hearing. (Rule 24(a))	Generally, one month after submission of the dispute to the tribunal for decision. (Rule 15.8)

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Expedited Procedures	"Unless otherwise agreed by the parties, the award shall be rendered not later than 14 calendar days from the date of the closing of the hearing or, if oral hearings have been waived, from the due date established for the receipt of the parties' final statements and proofs." (E-9)		
Formalities of Award	Award must be in writing and signed by a majority of the arbitrators. It must be executed in the manner required by law. (R-46(a))	Award must be in writing and signed by the arbitrator or a majority of arbitrators where there is a panel. (Rule 24(h), 24(b)) Arbitrator shall provide the Final Award or Partial Final Award to JAMS for issuance. (Rule 24(a))	Award must be dated and signed by the arbitrator or a majority of arbitrators when there are three arbitrators. (Rule 15.2)
Pre-Award and Post-Award Interest	The arbitrator may award interest at such rate and from such date as the arbitrator deems appropriate. (R-47(d)(i))	The arbitrator may award "interest (at such rate and from such date as the Arbitrator may deem appropriate) if provided by the Parties' agreement or allowed by applicable law." (Rule 24(g))	In the discretion of the tribunal, taking into consideration the contract and applicable law. (Rule 10.4)
Types of Remedies Expressly Permitted	"The arbitrator may grant any remedy or relief that the arbitrator deems just and equitable and within the scope of the agreement of the parties, including, but not limited to, specific performance of a contract." (R-47(a))	"The Arbitrator may grant any remedy or relief that is just and equitable and within the scope of the Parties' agreement, including, but not limited to, specific performance of a contract or any other equitable or legal remedy." (R 24(c))	Any remedy or relief, including specific performance, within the scope of the parties' agreement and permissible under the applicable substantive law. (Rule 10.3)
Post-Award Requests	Within 20 days of receipt of award, a party may request a clerical, typographical or computational correction of the award. "The arbitrator is not empowered to redetermine the merits of any claim already decided." (R-50)	Within 7 calendar days after issuance of the award, a party may request that the arbitrator correct any computational, typographical, or other similar error in an award. The Arbitrator may make any necessary and appropriate correction to the Award within 21 calendar days of receiving a request or 14 calendar days after the Arbitrator's proposal to do so. (Rule 24 (j))	Within 15 days after receipt of the award, a party may request clarification, correction or additional award as to claims not determined. (Rule 15.6)
Expedited Procedures		Same as above, except the Arbitrator has 14 days to make corrections after receiving a request or 7 days after the Arbitrator's proposal to do so. (Streamlined Rule 19(i))	

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Costs	Fixed and allocated by tribunal at time of award. (R-47)	Each Party shall pay its pro rata share of JAMS fees and expenses as set forth in the JAMS fee schedule in effect at the time of the commencement of the Arbitration, unless the Parties agree on a different allocation. (Rule 31(a)). The parties are jointly and severally liable for the payment of fees. (Rule 31(c))	Fixed by tribunal at time of award. (Rule 19.1) Allocation by tribunal subject to party agreement. (Rule 19.2)
Items Included in Costs	Administrative fees, witness expenses, and compensation for neutral arbitrator. Arbitrator may apportion such costs as the arbitrator deems appropriate. (R-47(c))	JAMS arbitration fees and arbitrator compensation and expenses. (R 31(c))	Tribunal fees; expenses; costs of tribunal and party experts; costs of legal representation and assistance and experts incurred by a party to the extent the tribunal deems appropriate; administrative costs. (Rule 19.1)
Award of Attorneys' Fees	Allowed if the parties have so requested, or attorneys' fee award is authorized by law or their arbitration agreement. (R 47(d)(ii))	At the arbitrator's discretion if provided by the parties' agreement or allowed by applicable law. (Rule 24(g))	At the tribunal's discretion, they may be included in costs. (Rule 19.1(d)), subject to contrary party agreement. (Rule 19.2)
OTHER PROCEDURES			
Mediation During Arbitration	"…where a claim or counterclaim exceeds $75,000, upon the AAA's administration of the arbitration or at any time while the arbitration is pending, the parties shall mediate their dispute… Absent an agreement of the parties to the contrary, the mediation shall take place concurrently with the arbitration and shall not serve to delay the arbitration proceedings. However, any party to an arbitration may unilaterally opt out of this rule upon notification to the AAA and the other parties to the arbitration... Unless agreed to by all parties and the mediator, the mediator shall not be appointed as an arbitrator to the case. " (R-9)	Permitted; the parties may agree to submit the case to JAMS for mediation. (Rule 28(a)). The JAMS mediator may not be the arbitrator unless the parties so agree in writing to submit the matter to the arbitrator for settlement assistance. (Rule 28(b))	Either party may propose settlement negotiations to the other party at any time. Tribunal may suggest that the parties explore settlement at times the tribunal deems appropriate and with parties' consent may arrange for mediation. Tribunal members are barred from mediating and will not be informed of any settlement offers or other statements made during settlement negotiations or a mediation between the parties, unless both parties consent. On the parties' request, Tribunal may record a settlement in the form of an award made by consent of the parties. (Rule 21)
Optional Arbitration Appeal	Not applicable.	"The Parties may agree at any time to the JAMS Optional Arbitration Appeal Procedure. All Parties must agree in writing for such procedure to be effective. Once a Party has agreed to the Optional Arbitration Appeal Procedure, it cannot unilaterally withdraw from it, unless it withdraws, pursuant to Rule 13, from the Arbitration." (Rule 34)	CPR Arbitration Appeal Procedure. (See http://www.cpradr.org/RulesCaseServices/CPRRules/AppellateArbitrationProcedure.aspx.)

* Credit for the creation of this chart in 2012 goes to Gilda R. Turitz, a partner with Sideman & Bancroft LLP in San Francisco. Thank you to Anthony H. Lowenberg of Estes Okon Thorne & Carr, PLLC, who updated it for the 2015 Advanced Trial Strategies Course.