

# **ARBITRATION-RELATED LITIGATION IN TEXAS**

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## ARBITRATION-RELATED LITIGATION IN TEXAS

### I. INTRODUCTION

Congress intended for arbitration to be a faster, less expensive *alternative* to litigation. Businesses frequently include arbitration clauses in their contracts in an attempt to avoid the time and costs associated with the traditional court system. But judging from the steady stream of arbitration-related decisions emanating from state and federal courts, even the most “air-tight” arbitration clause cannot guarantee that disputes will be resolved without judicial intervention.

Courts typically deal with arbitration-related disputes in two circumstances. First, when a party invokes an arbitration clause and its opponent resists arbitrating the dispute, the parties often litigate the enforceability and scope of the arbitration clause before any arbitration proceeding begins (referred to herein as “pre-arbitration litigation”).<sup>1</sup> Second, after an arbitration panel renders its decision and issues an award, parties frequently turn to the courts in an effort to confirm, modify, or vacate the arbitral award (referred to herein as “post-arbitration litigation”).

This paper provides a comprehensive overview of arbitration-related litigation in Texas and offers guidance for handling an arbitration-related dispute in the court system. It is focused on arbitration-related litigation arising under the Texas Arbitration Act or the Federal Arbitration Act. Arbitration-related cases arising from foreign, international, or labor arbitration proceedings are beyond the scope of the paper.

### II. THE EFFECT OF THE GOVERNING LAW ON ARBITRATION-RELATED LITIGATION

The law that governs an arbitration agreement has a significant impact, both substantively and procedurally, on arbitration-related litigation.

#### A. The Governing Law

##### 1. General Arbitration Statutes

In Texas, the two most common statutory sources of the governing law for arbitration agreements are the Texas Arbitration Act, TEX. CIV. PRAC. & REM. CODE, Ch. 171 (“TAA”) and the Federal Arbitration Act, 9 U.S.C. § 1 *et. seq.* (“FAA”).

##### a. Scope of the TAA

The TAA is intended to apply broadly, with only limited “carve outs” in the statutory text. For example, the TAA does not apply to collective bargaining agreements, workers’ compensation benefit claims, or any agreements made before January 1, 1966.<sup>2</sup> Nor does it apply to (1) a claim based on a transaction with an individual where the consideration is less than \$50,000 or (2) a claim for personal injury, unless the arbitration agreements are in writing and signed by each party *and* his or her attorney.<sup>3</sup>

##### b. Scope of the FAA

The FAA also applies broadly to all suits pending in state and federal court when the dispute concerns a “contract evidencing a transaction involving commerce,”<sup>4</sup> with the exception of “contracts of employment of seamen, railroad employees, or any other class of workers engaged in foreign or interstate commerce.”<sup>5</sup> Both state and federal courts have construed the “involving commerce” phrase very liberally in favor of application of the FAA. The United States Supreme Court has held that the FAA extends to any contract “affecting commerce,” as far as the Commerce Clause will reach.<sup>6</sup> Similarly, the Texas Supreme Court has held that “‘interstate commerce’ is not limited to the interstate shipment of goods, but includes all contracts ‘relating to’ interstate commerce.”<sup>7</sup>

##### c. FAA Preemption of the TAA

The FAA and TAA are not mutually exclusive.<sup>8</sup> Rather, “the FAA only preempts *contrary* state law, not consonant state law.”<sup>9</sup> The purpose of the FAA is to create substantive rules, applicable in state and federal

<sup>1</sup> We call this litigation “pre-arbitration litigation” because these disputes typically play out before arbitration takes place. Occasionally, however, arguments regarding the enforceability and scope of an arbitration clause are raised in post-arbitration proceedings after an arbitration award has issued. *See, e.g., Morrison v. Amway Corp.*, 517 F.3d 248 (5th Cir. 2008); *Perry Homes v. Cull*, 258 S.W.3d 580 (Tex. 2008).

<sup>2</sup> TEX. CIV. PRAC. & REM. CODE § 171.002(a).

<sup>3</sup> *Id.* § 171.002(b), (c); *Bison Bldg. Materials, Ltd. v. Aldridge*, 422 S.W.3d 582, 585 (Tex. 2012).

<sup>4</sup> 9 U.S.C. §§ 1, 2.

<sup>5</sup> 9 U.S.C. § 1. The Supreme Court has held that even in the face of a delegation clause (*see infra* Part III.A.1.a), a court

and not an arbitrator should determine whether any of these statutory exceptions to the FAA apply. *See New Prime, Inc. v. Oliveira*, 139 S. Ct. 532, 538 (2019).

<sup>6</sup> *Citizens Bank v. Alafabco, Inc.*, 539 U.S. 52, 56 (2003); *see also In re Nexion Health at Humble, Inc.*, 173 S.W.3d 67, 69 (Tex. 2005).

<sup>7</sup> *In re FirstMerit Bank, N.A.*, 52 S.W.3d 749, 754 (Tex. 2001).

<sup>8</sup> *See In re D. Wilson Constr. Co.*, 196 S.W.3d 774, 779 (Tex. 2006).

<sup>9</sup> *Id.*

courts, to prevent states from limiting the enforceability of arbitration agreements.<sup>10</sup>

The Texas Supreme Court has promulgated a four-part test for determining whether the TAA would thwart the goals and policies of the FAA in a particular case. The FAA preempts the TAA only if: “(1) the agreement is in writing, (2) it involves interstate commerce, (3) it can withstand scrutiny under traditional contract defenses [under state law], and (4) state law affects the enforceability of the agreement.”<sup>11</sup> The fourth factor is satisfied only where state law would “refuse to enforce an arbitration agreement that the FAA would enforce,” either because (1) the TAA has expressly exempted the agreement from coverage (*see* TEX. CIV. PRAC. & REM. CODE § 171.002(a)), or (2) the TAA has imposed an enforceability requirement not found in the FAA.<sup>12</sup>

FAA preemption has two practical effects. First, as indicated above, the FAA will nullify a state statute purporting to limit the ability of parties to arbitrate their claims in a manner inconsistent with the FAA.<sup>13</sup> For example, if a state arbitration statute requires the signature of an attorney, then the FAA, if it applies, will preempt such requirement and render a non-conforming arbitration agreement enforceable.<sup>14</sup> However, the FAA will not validate an agreement that is otherwise unenforceable under general contract principles. Even if the FAA applies, an agreement to arbitrate still must be valid under general principles of state contract law.<sup>15</sup>

Second, whether the FAA applies to an arbitration agreement and preempts the TAA may impact the

availability and manner of appellate review of a trial court’s order compelling or denying arbitration in state court. Appellate review under both the TAA and FAA is discussed in greater detail in Part III.D.

#### d. FAA Preemption of Other Statutes

The FAA takes precedence over state attempts to undercut the enforceability of arbitration agreements.<sup>16</sup> Thus, the FAA generally preempts state statutes that disfavor arbitration.<sup>17</sup>

The FAA also applies to federal statutory claims, unless it is overridden by a contrary congressional command.<sup>18</sup> A party attempting to avoid arbitration under the FAA must show that Congress intended to preclude a waiver of judicial remedies for the statutory rights at issue.<sup>19</sup> Such intent may be shown from the statute’s text, legislative history, or from an inherent conflict between arbitration and the statute’s underlying purposes,<sup>20</sup> and must be “clear and manifest.”<sup>21</sup> For instance, the Supreme Court found that the National Labor Relations Act (NLRA) did not preempt the FAA because the NLRA did not explicitly mention “arbitration.”<sup>22</sup>

#### e. Application of the FAA in State Court

The FAA does not confer federal subject matter jurisdiction.<sup>23</sup> Parties seeking a federal forum for disputes arising out of FAA-governed arbitration agreements must be able to invoke diversity or federal question jurisdiction.<sup>24</sup> Therefore, many disputes

<sup>10</sup> *Southland Corp. v. Keating*, 465 U.S. 1, 14-16 (1984).

<sup>11</sup> *In re D. Wilson Constr. Co.*, 196 S.W.3d at 780 (citing *In re Nexion Health at Humble, Inc.*, 173 S.W.3d 67, 69 (Tex. 2005)).

<sup>12</sup> *Id.*

<sup>13</sup> *In re Nexion Health at Humble, Inc.*, 173 S.W.3d at 69; *In re Jim Walter Homes, Inc.*, 207 S.W.3d 888, 896 (Tex. App.—Houston [14th Dist.] 2006, orig. proceeding).

<sup>14</sup> *Jones v. Halliburton Co.*, 583 F.3d 228, 234 (5th Cir. 2009); *In re Nexion Health*, 173 S.W.3d at 69 (“The TAA interferes with the enforceability of the arbitration agreement by adding an additional requirement—the signature of a party’s counsel—to arbitration agreements in personal injury cases.”); *see also Forged Components, Inc. v. Guzman*, 409 S.W.3d 91, 98 (Tex. App.—Houston [1st Dist.] 2013, no pet.).

<sup>15</sup> *In re AdvancePCS Health L.P.*, 172 S.W.3d 603, 606 (Tex. 2005) (per curiam); *In re Halliburton Co.*, 80 S.W.3d 566, 568 (Tex. 2002).

<sup>16</sup> *In re David’s Supermarkets*, 43 S.W.3d 94, 98 (Tex. App.—Waco 2001, orig. proceeding); *Perry v. Thomas*, 482 U.S. 483, 492 n.9 (1987).

<sup>17</sup> *Marmet Health Care Ctr., Inc. v. Brown*, 565 U.S. 530, 532 (2012); *In re Poly-America*, 262 S.W.3d 337, 349 (Tex. 2008); *Jack B. Anglin Co., Inc. v. Tipps*, 842 S.W.2d 266, 271 (Tex. 1992); *In re David’s Supermarkets*, 43 S.W.3d at 98.

Note, however, that an arbitration agreement may still be unenforceable on the basis of unconscionability if it involves a waiver of substantive statutory rights and remedies. *See In re Poly-America, L.P.*, 262 S.W.3d at 348-53. In other words, a party cannot contractually absolve itself of statutory rights and remedies by including them in an arbitration provision. *See id.* at 352.

<sup>18</sup> *Shearson/American Express, Inc. v. McMahon*, 482 U.S. 220, 226 (1987); *In re Am. Homestar of Lancaster, Inc.*, 50 S.W.3d 480, 484 (Tex. 2001).

<sup>19</sup> *McMahon*, 482 U.S. at 227; *In re Am. Homestar of Lancaster, Inc.*, 50 S.W.3d at 484.

<sup>20</sup> *McMahon*, 482 U.S. at 227; *In re Am. Homestar of Lancaster, Inc.*, 50 S.W.3d at 484.

<sup>21</sup> *Epic Systems v. Lewis*, 138 S.Ct. 1612, 1624 (2018).

<sup>22</sup> *Id.* at 1626.

<sup>23</sup> *Vaden v. Discover Bank*, 556 U.S. 49, 58 (2009); *Volvo Trucks N. Am., Inc. v. Crescent Ford Truck Sales, Inc.*, 666 F.3d 932, 936 (5th Cir. 2012); *Palisades Acquisition XVI, LLC v. Chatman*, 288 S.W.3d 552, 555 (Tex. App.—Houston [14th Dist.] 2009, no pet.).

<sup>24</sup> *Moses H. Cone Hosp. v. Mercury Constr. Corp.*, 460 U.S. 1, 25 n.32 (1983).

involving arbitration agreements governed by the FAA are heard in state court.<sup>25</sup> While state courts apply federal substantive law in these cases, Texas law, as set forth in the TAA, provides the procedural framework.<sup>26</sup>

## 2. Special Arbitration Statutes

Other statutory sources for arbitration include the Texas Family Code<sup>27</sup> and the Texas Labor Code for collective bargaining agreements<sup>28</sup> and worker's compensation disputes.<sup>29</sup>

## 3. Common Law

Even if a dispute is not subject to arbitration under statute, an agreement may be enforceable under common law.<sup>30</sup> Statutory and common law arbitration exist side-by-side, and the TAA does not supplant common law arbitration.<sup>31</sup> However, given the broad reach of the FAA and TAA, common law arbitration only comes into play in the rare cases where the contract falls outside the scope of these statutes or where the parties specifically invoke the common law (and opt out of the TAA and/or FAA) in their arbitration agreement.

## B. Impact of Parties' Choice of Law

Parties generally are free to choose which law shall apply in any arbitration proceeding.

### 1. Parties Seeking Application of the FAA

Most Texas courts of appeals have held that if the parties agree to arbitrate under the FAA, then the FAA

applies, and it is not necessary to make a further showing that the transaction affects or involves interstate commerce.<sup>32</sup> Although the Texas Supreme Court has not directly addressed the issue, in one case, it examined whether a transaction involved interstate commerce, even though the parties included a clause in an arbitration agreement stating that the underlying transaction “involves interstate commerce . . . and shall be governed by the Federal Arbitration Act.”<sup>33</sup>

To be on the safe side, contracting parties who wish to be governed by the FAA should include a recitation in their agreement of the underlying facts necessary to establish applicability of the FAA in addition to a statement indicating that the FAA applies.

### 2. Parties Seeking Application of the TAA

Parties may contract to be bound by the TAA rather than the FAA—even where the FAA would otherwise apply—as long as they “specifically exclude the application of federal law.”<sup>34</sup> It is not enough to simply state that an agreement will be governed by Texas law. Courts repeatedly have held that where a choice of law provision states that an agreement will be interpreted under the laws of Texas, the FAA applies concurrently with the TAA, under the theory that the FAA is part of the law of Texas.<sup>35</sup>

On the other hand, the TAA alone applies where the choice of law provision states that any dispute between the parties will be resolved pursuant to the TAA.<sup>36</sup> The specific reference to the TAA, rather than

<sup>25</sup> *Vaden*, 556 U.S. at 58-60; *Chatman*, 288 S.W.3d at 556.

<sup>26</sup> *Anglin*, 842 S.W.2d at 268-69; *In re MHI P'ship, Ltd.*, 7 S.W.3d 918, 921 (Tex. App.—Houston [1st Dist.] 1999, orig. proceeding).

<sup>27</sup> *See, e.g.*, TEX. FAM. CODE § 6.601, § 153.0071.

<sup>28</sup> TEX. LAB. CODE §§ 102.001-102.075.

<sup>29</sup> TEX. LAB. CODE §§ 410.101-410.121.

<sup>30</sup> *L.H. Lacy Co. v. City of Lubbock*, 559 S.W.2d 348, 350 (Tex. 1977); *Blue Cross Blue Shield of Tex. v. Juneau*, 114 S.W.3d 126, 134 n.5 (Tex. App.—Austin 2003, no pet.).

<sup>31</sup> *Juneau*, 114 S.W.3d at 134 n.5 (Tex. App.—Austin 2003, no pet.); *Lee v. El Paso County*, 965 S.W.2d 668, 672 (Tex. App.—El Paso 1998, pet. denied).

<sup>32</sup> *See, e.g., Palisades Acquisition, XVI, LLC v. Chatman*, 288 S.W.3d 552, 554-55 (Tex. App.—Houston [14th Dist.] 2009, no pet.); *GeoSurveys, Inc. v. State Nat'l Bank*, 143 S.W.3d 220, 224 (Tex. App.—Eastland 2004, no pet.); *In re Kellogg Brown & Root*, 80 S.W.3d 611, 617 (Tex. App.—Houston [1st Dist.] 2002, orig. proceeding). *But see In re Godt*, 28 S.W.3d 732, 736 (Tex. App.—Corpus Christi 2000, orig. proceeding).

<sup>33</sup> *In re FirstMerit Bank, N.A.*, 52 S.W.3d 749, 754 (Tex. 2001).

<sup>34</sup> *In re L & L Kempwood Assoc, L.P.*, 9 S.W.3d 125, 127-28 (Tex. 1999).

<sup>35</sup> *In re Olshan Found. Repair Co., LLC*, 328 S.W.3d 883, 890 (Tex. 2010) (holding that provision stating that disputes arising out of the contract shall be resolved by arbitration administered “pursuant to the arbitration laws in your state” did not preclude application of the FAA); *L & L Kempwood*, 9 S.W.3d at 127-28 (holding that provision stating the contract would be governed by “the law of the place where the Project is located” did not preclude application of the FAA); *see also Roehrs v. FSI Holdings, Inc.*, 246 S.W.3d 796, 803 (Tex. App.—Dallas 2008, pet. denied) (holding that both the FAA and TAA applied where a choice of law provision stated, “This Agreement shall be governed by and construed in accordance with the laws of the State of Texas, without giving effect to its ruled [sic] governing conflict of laws.”); *Dewey v. Wegner*, 138 S.W.3d 591, 596 n.5 (Tex. App.—Houston [14th Dist.] 2004, no pet.); *see also Action Indus., Inc. v. U.S. Fidelity & Guar. Co.*, 358 F.3d 337, 340-42 (5th Cir. 2004) (holding the FAA applied where the agreement stated that Tennessee law governed).

<sup>36</sup> *In re Olshan Found. Repair*, 328 S.W.3d at 891 (holding the FAA did not apply where the agreement stated that disputes would be resolved “pursuant to the Texas General Arbitration Act”); *Ford v. NYLCare Health Plans of Gulf Coast, Inc.*, 141 F.3d 243, 249-50 (5th Cir. 1998) (holding the TAA applied where the agreement stated arbitration would be settled “in accordance with the Texas General Arbitration Act”).

Texas law generally, is required to preclude application of the FAA.<sup>37</sup>

### III. PRE-ARBITRATION LITIGATION

Most arbitration-related litigation occurs when a dispute arises between parties to a contract with an arbitration clause and one of the parties resists arbitrating the dispute. Whether the arbitration clause is governed by the TAA or the FAA, this litigation typically focuses on two questions: (1) is the arbitration clause enforceable (*i.e.*, was there a valid agreement to arbitrate) and (2) does the parties' dispute fall within the scope of the clause?<sup>38</sup> If the answer to both of these questions is “yes,” then the court must order the parties to arbitration.<sup>39</sup>

This section will examine these substantive questions and the procedural issues involved in litigating these questions in trial and appellate courts.

#### A. Enforceability of Arbitration Clauses

##### 1. Who Decides the Enforceability Questions – the Court or the Arbitrator?

In pre-arbitration litigation, disputes often arise as to whether issues relating to the existence or enforceability of an arbitration agreement should be adjudicated by a court or an arbitrator. The answer depends on the type of challenge asserted. The United States Supreme Court has identified three distinct types: (1) challenges to the validity of the agreement to arbitrate; (2) challenges to the validity of the “contract as a whole, either on a ground that directly affects the entire agreement (e.g., that the agreement was fraudulently induced), or on the ground that the illegality of one of the contract’s provisions renders the whole contract invalid”; and (3) challenges that call into question the existence of an agreement, such as “whether the alleged obligor ever signed the contract, whether the signor lacked authority to commit the

alleged principal, or whether the signor lacked the mental capacity to assent.”<sup>40</sup> The first two “validity” challenges “[have] to do with whether a contract that meets contract formation requirements is enforceable.”<sup>41</sup> The third challenge – an “existence” challenge—“depends on whether the requirements for contract formation are met.”<sup>42</sup>

##### a. *Challenges to the Validity of the Agreement to Arbitrate*

Under the “separability doctrine” first articulated by the United States Supreme Court in *Prima Paint*, arbitration clauses are “separable” from the contracts in which they are embedded.<sup>43</sup> Citing this doctrine, both federal and state courts have held that challenges to the validity of an arbitration clause must be heard by courts.<sup>44</sup>

Parties can deviate from this default rule by providing “clear and unmistakable” evidence of their intention to submit “questions of arbitrability” to the arbitrator.<sup>45</sup> One way to do this is to include a separate “delegation clause” in the arbitration agreement providing that an arbitrator, rather than a court, will resolve threshold arbitrability questions as well as underlying merits disputes.<sup>46</sup>

For example, in *Rent-a-Center, West, Inc. v. Jackson*, a delegation clause provided that “[t]he Arbitrator, and not any federal, state or local court or agency, shall have the exclusive authority to resolve any dispute relating to the interpretation, applicability, enforceability, or formation of this Agreement, including but not limited to any claim that all or any part of this Agreement is void or voidable.”<sup>47</sup> In a 5-4 decision, the United States Supreme Court found this delegation clause to be presumptively valid, and held that when a delegation clause is included in an arbitration agreement, the arbitrator is to decide any challenges to the validity of the arbitration agreement

<sup>37</sup> *In re Olshan Found. Repair*, 328 S.W.3d at 891; *Ford*, 141 F.3d at 249-50.

<sup>38</sup> *In re FirstMerit Bank, N.A.*, 52 S.W.3d at 753-54.

<sup>39</sup> *G.T. Leach Builders, LLC v. Sapphire, V.P., L.P.*, 458 S.W.3d 502, 520 (Tex. 2015).

<sup>40</sup> *Buckeye Check Cashing, Inc. v. Cardegna*, 546 U.S. 440, 444 & n.1 (2006); *see also RSL Funding, LLC v. Newsome*, 569 S.W.3d 116, 124 (Tex. 2018); *In re Morgan Stanley & Co.*, 293 S.W.3d, 182, 186 (Tex. 2009).

<sup>41</sup> *Symetra Life Ins. Co. v. Rapid Settlements Ltd.*, No. H-05-3167, 2007 WL 114497, at \*16 (S.D. Tex. Jan. 10, 2007).

<sup>42</sup> *Id.*

<sup>43</sup> *Prima Paint Corp. v. Flood & Conklin Mfg. Co.*, 388 U.S. 395, 402-04 (1967).

<sup>44</sup> *Buckeye*, 546 U.S. at 445-46; *In re FirstMerit Bank, N.A.*, 52 S.W.3d at 756; *Am. Med. Tech., Inc. v. Miller*, 149 S.W.3d 265, 272 (Tex. App.—Houston [14th Dist.] 2004, no pet.).

<sup>45</sup> *First Options of Chicago, Inc. v. Kaplan*, 514 U.S. 938, 944 (1995); *In re Weekley Homes, L.P.*, 180 S.W.3d 127, 130 (Tex. 2005) (“[A]bsent unmistakable evidence that the parties intended the contrary, it is the courts rather than the arbitrators that must decide ‘gateway matters’ such as whether a valid arbitration agreement exists.”); *see also ConocoPhillips, Inc. v. Local 13-0555 United Steelworkers Int’l Union*, 714 F.3d 627, 631-33 (5th Cir. 2014) (union failed to meet its burden of showing that ConocoPhillips clearly and unmistakably consented to arbitrator deciding gateway arbitrability questions).

<sup>46</sup> *Henry Schein, Inc. v. Archer and White Sales, Inc.*, 139 S. Ct. 524, 527 (2019).

<sup>47</sup> 561 U.S. 63, 65 (2010).



unless the challenge is directed specifically to the delegation clause itself (e.g., that the delegation clause was fraudulently induced or is unconscionable).<sup>48</sup>

Consistent with *Rent-a-Center*, the Texas Supreme Court has held that parties may agree to delegation clauses that send gateway issues such as arbitrability to the arbitrator.<sup>49</sup> When faced with such agreements, courts have no discretion but to compel arbitration unless the clause’s validity is challenged on legal or public policy grounds.<sup>50</sup>

Practitioners should be aware that the Fifth Circuit and many other courts have held that the incorporation of AAA rules (which empower an arbitrator to decide arbitrability) into an arbitration clause constitutes clear and unmistakable evidence of the parties’ intent to submit arbitrability questions to the arbitrator.<sup>51</sup> Many Texas courts have held the same where the dispute is between signatories to the agreement.<sup>52</sup> But the Texas Supreme Court recently held that the incorporation of the AAA rules does not show clear intent to arbitrate arbitrability when a dispute arises between a signatory to the arbitration agreement and a non-signatory, and thus a court should resolve such disputes.<sup>53</sup> Moreover, the Houston Court of Appeals has declined to find such “clear and unmistakable” intent when the arbitration clause at issue was very narrow in scope.<sup>54</sup>

b. *Challenges to the Validity of the Contract as a Whole*

A challenge to the validity of the entire contract must be decided in arbitration, regardless of whether the challenge would render the contract void or voidable if successful.<sup>55</sup>

c. *Challenges to the Existence of the Contract*

The United States Supreme Court has not passed judgment on the question of whether a court or an arbitrator should decide challenges to the existence of an agreement.<sup>56</sup> However, both the Fifth Circuit and the Texas Supreme Court have concluded that these types of challenges should be resolved by courts.<sup>57</sup> This category includes disputes about whether non-signatories can compel or be bound by an arbitration clause.<sup>58</sup>

With this overview in mind, this paper will discuss how specific challenges play out in Part III.A.3 below.

2. Existence of a Valid Arbitration Agreement

A court’s first task in any pre-arbitration litigation matter is determining whether there is a valid arbitration agreement that binds the parties to the dispute. Absent such an agreement, “a party cannot be forced to forfeit the constitutional protections of the judicial system and submit its dispute to arbitration.”<sup>59</sup> The FAA’s or TAA’s presumption in favor of arbitrability is not

<sup>48</sup> *Id.* at 2779; see also *Aviles v. Russell Stover Candies, Inc.*, 559 Fed. App’x 413, 415 (5th Cir. 2014). After the *Rent-a-Center* decision, the Fifth Circuit held that courts may decide the arbitrability question themselves, despite the existence of a delegation clause, if the argument that the arbitration agreement applies is “wholly groundless.” *Archer & White Sales, Inc. v. Henry Schein, Inc.*, 878 F.3d 488, 495 (5th Cir. 2017), vacated by 139 S. Ct. 524 (2019). But the United States Supreme Court reversed, rejecting the “wholly groundless” exception. *Henry Schein, Inc.*, 139 S. Ct. at 528.

<sup>49</sup> *RSL Funding, LLC v. Newsome*, 569 S.W.3d 116, 121 (Tex. 2018).

<sup>50</sup> *Id.*

<sup>51</sup> See, e.g., *Petrofac, Inc. v. DynMcDermott Petroleum Op.*, 687 F.3d 671, 675 (5th Cir. 2012); *Qualcomm Inc. v. Nokia Corp.*, 466 F.3d 1366, 1372-73 (Fed. Cir. 2006); *Terminix Int’l Co., LP v. Palmer Ranch Ltd. P’ship*, 432 F.3d 1327, 1332-33 (11th Cir. 2005); *Contec Corp. v. Remote Solution, Co.*, 398 F.3d 205, 208 (2d Cir. 2005). But see *Riley Mfg. Co. v. Anchor Glass Container Corp.*, 157 F.3d 775, 780 (10th Cir. 1998).

<sup>52</sup> See, e.g., *Signature Pharm., L.L.C. v. Ranbaxy, Inc.*, No. 05-17-00412-CV, 2018 WL 1250006, at \*6 (Tex. App.—Dallas Mar. 12, 2018, pet. denied) (mem. op.); *Schlumberger Tech. Corp. v. Baker Hughes Inc.*, 355 S.W.3d 791, 801 (Tex. App.—Houston [1st Dist.] 2011, no pet.).

<sup>53</sup> *Jody James Farms, JV v. Altman Group, Inc.*, 547 S.W.3d 624, 632 (Tex. 2018).

<sup>54</sup> See *Burlington Resources Oil & Gas Co. v. San Juan Basin Royalty Trust*, 249 S.W.3d 34, 40-42 (Tex. App.—Houston [1st Dist.] 2007, pet. denied).

<sup>55</sup> *Buckeye*, 546 U.S. at 446-48; *Nitro-Lift Technologies v. Howard*, 568 U.S. 17, 20 (2012); *RSL Funding, LLC v. Newsome*, 569 S.W.3d 116, 124 (Tex. 2018).

<sup>56</sup> *Buckeye*, 546 U.S. at 444 n.1.

<sup>57</sup> See, e.g., *Will-Drill Res., Inc. v. Samson Res. Co.*, 352 F.3d 211, 218-19 (5th Cir. 2003) (agreeing that whether a party’s signature is forged or the agent lacked authority to bind the principle should be resolved by courts); *Lefoldt v. Horne, L.L.P.*, 853 F.3d 804, 822 (5th Cir. 2017) (holding that application of Mississippi’s “minutes rule” for public entities raised issue of contract formation for two alleged arbitration agreements and thus should be decided by district court); *In re Morgan Stanley & Co.*, 293 S.W.3d at 189-90.

<sup>58</sup> See *Halliburton Energy Servs., Inc. v. Ironshore Specialty Ins. Co.*, 921 F.3d 522, 530 (5th Cir. 2019); *In re Rubiola*, 334 S.W.3d 220, 224 (Tex. 2011).

<sup>59</sup> *Glazer’s Wholesale Distribs., Inc. v. Heineken USA, Inc.*, 95 S.W.3d 286, 296 (Tex. App.—Dallas 2001, pet. granted, judgment vacate by agr.); *accord Freis v. Canales*, 877 S.W.2d 283, 284 (Tex. 1994) (per curiam).

implicated in this inquiry and arises only after it is determined that a valid arbitration agreement exists.<sup>60</sup>

*a. Application of State Contract Law*

The existence of an agreement to arbitrate is determined under state law general contract principles, even when the FAA applies.<sup>61</sup> By way of example, courts have applied general contract principles in holding as follows:

- While the TAA and FAA both require a written agreement, an oral agreement to arbitrate can be enforceable under common law.<sup>62</sup>
- An arbitration agreement contained in a separate agreement can be incorporated into the parties' contract by reference.<sup>63</sup> For example, one court held that an unsigned arbitration clause contained in a general-conditions document, which was incorporated by reference into the signed contract, was an enforceable agreement to arbitrate.<sup>64</sup>
- A contract to arbitrate may be comprised of a series of writings, which taken as a whole, show that the parties intended to arbitrate.<sup>65</sup>
- A signature was necessary to establish a binding contract under Texas law when the arbitration agreement contained (1) a statement that “[b]y signing this agreement the parties are giving up any right they may have to sue each other” and (2) a signature block for the employer.<sup>66</sup>

Importantly, states must put arbitration agreements on equal plane with other contracts and cannot impose additional barriers to the enforcement of arbitration agreements.<sup>67</sup> Any such additional barriers are subject to being preempted by the FAA. For example, in *Kindred Nursing Centers, L.P. v. Clark*, the Kentucky

Supreme Court had declined to compel arbitration between a nursing home and the estates of its former patients, concluding that the power of attorneys that had been executed by the patients had not specifically authorized the patients' representatives to agree to mandatory arbitration. The United States Supreme Court reversed, holding that the Kentucky court's rule had “fail[ed] to put arbitration agreements on equal plane with other contracts,” and arose from the same “hostility to arbitration” that “led Congress to enact the FAA.”<sup>68</sup>

As with any contract, a determination as to whether an arbitration agreement is ambiguous is for the court to decide, and a court can raise the issue *sua sponte*.<sup>69</sup> For example, in *J.M. Davidson, Inc. v. Webster*, the Texas Supreme Court was unable to determine whether a clause included in a dispute resolution policy, allowing the company to “unilaterally abolish or modify any personnel policy without prior notice,” permitted the company to terminate the arbitration agreement without notice.<sup>70</sup> The clause was included in a separate paragraph which addressed employment issues, but did not relate to alternative dispute resolution.<sup>71</sup> Finding proper interpretation of the language was critical to conclude whether the agreement was illusory, the court remanded to the trial court for a determination of what the parties meant by the clause.<sup>72</sup> The court explained: “While we generally favor arbitration agreements, we should not reflexively endorse an agreement so lacking in precision that a court must first edit the document for comprehension, and then rewrite it to ensure its enforceability.”<sup>73</sup>

*b. Arbitration with Non-Signatories*

Both federal and state courts have recognized that “under certain circumstances, principles of contract law

<sup>60</sup> *Sharpe v. AmeriPlan Corp.*, 769 F.3d 909 (5th Cir. 2014); *J.M. Davidson, Inc. v. Webster*, 128 S.W.3d 223, 227 (Tex. 2003).

<sup>61</sup> *In re Palm Harbor Homes, Inc.*, 195 S.W.3d 672, 676 (Tex. 2006).

<sup>62</sup> *Id.* at 676; *see also L. H. Lacy Co. v. City of Lubbock*, 559 S.W.2d 348 (Tex. 1977).

<sup>63</sup> *In re D. Wilson Constr. Co.*, 196 S.W.3d 774, 781 (Tex. 2006). *But see Sharpe*, 769 F.3d at 916 (holding that the parties' incorporation of a policy manual by reference and the later amendment of that manual to include an arbitration clause did not require arbitration where the original agreement contained a detailed dispute resolution provision requiring litigation in a particular venue, and could not be changed absent a written amendment).

<sup>64</sup> *Teal Constr. Co./Hillside Villas Ltd. v. Darren Casey Interests, Inc.*, 46 S.W.3d 417, 420 (Tex. App.—Austin 2001, pet. denied).

<sup>65</sup> *Massey v. Galvan*, 822 S.W.2d 309, 315-16 (Tex. App.—Houston [14th Dist.] 1992, writ denied).

<sup>66</sup> *Huckaba v. Ref-Chem, L.P.*, 892 F.3d 686, 689-90 (5th Cir. 2018).

<sup>67</sup> *See Kindred Nursing Centers, L.P. v. Clark*, 137 S. Ct. 1421, 1423-24 (2017).

<sup>68</sup> *Id.* at 1428; *compare Lefoldt v. Horne, L.L.P.*, 853 F.3d 804, 822 (5th Cir. 2017) (holding that Mississippi's “minutes rule”—which required that a contract with a public entity be approved a majority of a quorum of a board and reflected in the board's minutes—had been applied to a wide variety of contracts with public entities and thus could be used to invalidate the alleged arbitration agreements).

<sup>69</sup> *See, e.g., J.M. Davidson, Inc. v. Webster*, 128 S.W.3d 223, 229, 231 (Tex. 2003).

<sup>70</sup> *Id.* at 234-35.

<sup>71</sup> *Id.* at 229.

<sup>72</sup> *Id.* at 230.

<sup>73</sup> *Id.* at 231.

and agency may bind a non-signatory to an arbitration agreement.”<sup>74</sup> Federal courts have recognized six theories that may bind non-signatories to arbitration agreements: (1) incorporation by reference; (2) assumption; (3) agency; (4) alter ego; (5) equitable estoppel; and (6) third-party beneficiary.<sup>75</sup> The Texas Supreme Court appears to have added two additional categories: (7) parties whose claims are derivative of the rights of a signatory, and (8) nonsignatories designated as parties in the arbitration agreement.<sup>76</sup> In the past, the Fifth Circuit had analyzed application of these theories under federal common law.<sup>77</sup> But after the United States Supreme Court held in *Arthur Andersen LLP v. Carlisle* that state law is to apply to this inquiry,<sup>78</sup> the Fifth Circuit explained that its “prior decisions applying federal common law, rather than state contract law, to decide such questions, have been modified to conform with *Arthur Andersen*.”<sup>79</sup> “The Texas Supreme Court always has chosen to rely on state law, but has noted that its decisions are “informed by persuasive and well-reasoned federal precedent.”<sup>80</sup>

#### (1) Incorporation by Reference

An arbitration clause can be incorporated by reference into another contract to bind a non-signatory.<sup>81</sup> For example, in *In re Bank One*, the Texas Supreme Court found a valid arbitration agreement was incorporated by reference when the plaintiff’s representative signed an account signature card.<sup>82</sup> Likewise, a non-signatory can compel arbitration against a party to an arbitration agreement when that party has entered into a separate contract with the non-signatory that incorporates the existing arbitration clause.<sup>83</sup>

<sup>74</sup> *In re Kellogg Brown & Root, Inc.*, 166 S.W.3d 732, 738 (Tex. 2005) (citing cases); see also *McMillan v. Computer Translation Sys. & Support*, 66 S.W.3d 477, 481 (Tex. App.—Dallas 2001, no pet.).

<sup>75</sup> See *In re Kellogg*, 166 S.W.3d at 739 (relying on state law but noting a desire to maintain consistency between state and federal law).

<sup>76</sup> *In re Labatt Food Serv., L.P.*, 279 S.W.3d 640, 642 (Tex. 2009); *In re Rubiola*, 334 S.W.3d 220 (Tex. 2011).

<sup>77</sup> *Wash. Mut. Fin. Group, LLC v. Bailey*, 364 F.3d 260, 267 (5th Cir. 2004).

<sup>78</sup> 556 U.S. 624, 630 (2009).

<sup>79</sup> *Crawford Prof'l Drugs, Inc. v. CVS Caremark Corp.*, 748 F.3d 249, 255, 261-62 (5th Cir. 2014).

<sup>80</sup> *In re Kellogg*, 166 S.W.3d at 739.

<sup>81</sup> *In re Houston Progressive Radiology Assocs., PLLC*, 474 S.W.3d 435, 446 n.7 (Tex. App.—Houston [1st Dist.] 2015, no pet.) (citing cases).

<sup>82</sup> 216 S.W.3d 825, 826 (Tex. 2007) (per curiam).

<sup>83</sup> *Am. Express Travel Related Servs. Co. v. Am. Fine Art*, No. 3:03-CV-2348L, 2004 WL 1144103, at \*3 (N.D. Tex. May

On the other hand, in *Cappadonna Electrical Management v. Cameron County*, the Corpus Christi Court of Appeals declined to apply incorporation by reference to compel arbitration when subcontractors did not attempt to incorporate the terms of the Prime Contract into their subcontract, and the Prime Contract was the only contract containing an arbitration clause.<sup>84</sup> The court found that incorporation by reference applies when a party binds itself by incorporating a document by reference into its own contract, but a non-signatory non-party could not use the doctrine to enforce a provision of a document it did not sign or incorporate.<sup>85</sup>

#### (2) Assumption

A non-signatory may be bound by an arbitration clause if the signatory assigned the contract to the non-signatory and the non-signatory expressly or impliedly assumed the obligations.”<sup>86</sup> Express assumption requires “actual promissory words, or words of assumption.”<sup>87</sup> Implied assumption can arise “when the benefit received by the assignee is so entwined with the burden imposed by the assignor’s contract that the assignee is estopped from denying assumption and the assignee would otherwise be unjustly enriched.”<sup>88</sup> One federal district court has declined to bind a non-signatory under an assumption theory when there was no proof that the non-signatory “took actions evidencing an intent to arbitrate any dispute.”<sup>89</sup>

#### (3) Agency

A non-signatory can be bound to an arbitration agreement if the signor of the agreement was acting as

20, 2004) (quoting *Thomson-CSF S.A. v. Am. Arbitration Ass’n*, 64 F.3d 773, 777 (2d Cir. 1995)).

<sup>84</sup> 180 S.W.3d 364, 373 (Tex. App.—Corpus Christi 2005, no pet.).

<sup>85</sup> *Id.*

<sup>86</sup> *Toll Austin, TX, LLC v. Dusing*, No. 03-16-00621-CV, 2016 WL 7187482, at \*4 (Tex. App.—Austin Dec. 7, 2016, no pet.); *Creative Artists Agency, LLC v. Las Palmas Race Park, LLC*, No. 13-14-00015-CV, 2015 WL 6652655, at \*3 (Tex. App.—Corpus Christi Oct. 29, 2015, no pet.) (mem. op.); see also *Ace Am. Ins. Co. v. Huntsman Corp.*, 255 F.R.D. 179, 193 (S.D. Tex. 2008) (the non-signatory is bound when “its subsequent conduct indicates that it is assuming the obligation to arbitrate”) (quoting *Thomson-CSF*, 64 F.3d at 777).

<sup>87</sup> *NextEra Retail of Tex., L.P. v. Inv’rs Warranty of Am. Inc.*, 418 S.W.3d 222, 226 (Tex. App.—Houston [1st Dist.] 2013, pet. denied).

<sup>88</sup> *Id.* at 228; see also *Creative Artists*, 2015 WL 6652655, at \*3.

<sup>89</sup> *Ace Am. Ins. Co.*, 255 F.R.D. at 194.

its agent.<sup>90</sup> Because the signor is entitled to a “presumption of independent status,” the party seeking to compel the non-signatory to arbitrate must prove that the signor was acting in an agency capacity.<sup>91</sup> But where an agent signs an agreement on behalf of a disclosed principal (for example, an executive officer signing on behalf of her company), the agent cannot be required to arbitrate if sued in his or her personal capacity, unless the parties specifically agree that the agent is bound in that capacity.<sup>92</sup> If a contracting party tries to avoid an unfavorable clause by suing the counter-party’s agent, the non-signatory agent may be able to invoke the arbitration clause against the suing party.<sup>93</sup>

#### (4) Alter ego

A non-signatory can be required to arbitrate when the non-signatory and a signatory are alter egos of each other.<sup>94</sup> The Fifth Circuit has explained that “[t]he corporate veil may be pierced to hold an alter ego liable for the commitments of its instrumentality only if (1) the owner exercised complete control over the corporation with respect to the transaction at issue and (2) such control was used to commit a fraud or wrong that injured the party seeking to pierce the veil.”<sup>95</sup>

#### (5) Equitable Estoppel

Of these six bases listed above, estoppel has been the focus of the most judicial attention. There are several different species of estoppel: including direct benefits, intertwined claims, and concerted misconduct. These theories are discussed below.

Direct Benefits Estoppel. Direct benefits estoppel may be applied to bind a non-signatory to arbitrate where a signatory seeks to compel arbitration.<sup>96</sup> Under this theory, “a non-signatory plaintiff seeking the benefits of a contract is estopped from simultaneously

attempting to avoid the contract’s burdens, such as the obligation to arbitrate disputes.”<sup>97</sup> The underlying principle behind this doctrine is that a “nonparty [to a contract] cannot both have his contract and defeat it too.”<sup>98</sup>

The Texas Supreme Court has examined direct benefits estoppel in several cases and has determined that parties may be bound to arbitrate under this theory: (1) when the non-signatory pursues a claim “on the contract” or (2) when the non-signatory seeks and obtains substantial benefits from the contract.<sup>99</sup> Under this doctrine, non-signatories generally must arbitrate claims arising from the contract, but not if the claim arises from general legal obligations.<sup>100</sup> A non-signatory will not be bound simply because a claim is *related* to a contract with an arbitration provision.<sup>101</sup> Rather, the court has explained that “a non-signatory should be compelled to arbitrate a claim only if it seeks, through the claim, to derive a direct benefit from the contract containing the arbitration provision.”<sup>102</sup>

Thus, a non-signatory subcontractor in *In re Kellogg Brown & Root, Inc.* was not forced to arbitrate its quantum meruit claim when its right to payment stemmed from a second-tier subcontract containing no arbitration clause, even though the first-tier subcontract contained an arbitration agreement.<sup>103</sup> Similarly, in *Jody James Farms*, the non-signatory was not forced to arbitrate its claims for breach of fiduciary duty and violation of Deceptive Trade Practices Act claims because they arose out of common law and statutory duties, rather than contract obligations.<sup>104</sup> In contrast, in *In re Weekley Homes*, a non-signatory whose father purchased a home for her benefit could be compelled to arbitrate when she had exercised contract rights in the past and was equitably entitled to other contractual

<sup>90</sup> *Bridas S.A.P.I.C. v. Gov’t of Turkmenistan*, 345 F.3d 347, 356-58 (5th Cir. 2003); *see also Rice Company (Suisse), S.A. v. Precious Flowers Ltd.*, 523 F.3d 528, 538 (5th Cir. 2008) (“Directly put, where an agent signs a contract requiring arbitration, the principal is bound by the arbitration requirement.”).

<sup>91</sup> *Bridas*, 345 F.3d at 356-58 (quoting *Hester Int’l Corp. v. Federal Republic of Nigeria*, 879 F.2d 170, 176 (5th Cir. 1989)).

<sup>92</sup> *DK Joint Venture 1 v. Weyand*, 649 F.3d 310, 314-15 (5th Cir. 2011); *Covington v. Aban Offshore Ltd.*, 650 F.3d 556, 559 (5th Cir. 2011); *Roe v. Ladymon*, 318 S.W.3d 502, 515 (Tex. App.—Dallas 2010, no pet.); *Elgohary v. Herrera*, 405 S.W.3d 785, 791 (Tex. App.—Houston [1st Dist.] 2013, no pet.).

<sup>93</sup> *Jody James Farms, JV v. Altman Group, Inc.*, 547 S.W.3d 624, 635 (Tex. 2018) (citing *In re Kaplan Higher Educ. Corp.*, 235 S.W.3d 206, 209 (Tex. 2007)).

<sup>94</sup> *Bridas*, 345 F.3d at 358-59.

<sup>95</sup> *Id.* at 359.

<sup>96</sup> *In re Kellogg*, 166 S.W.3d at 739.

<sup>97</sup> *Id.*

<sup>98</sup> *In re Weekley Homes, L.P.*, 180 S.W.3d 127, 135 (Tex. 2005).

<sup>99</sup> *Id.* at 131-33.

<sup>100</sup> *In re Vesta Ins. Group, Inc.*, 192 S.W.3d 759, 761-62 (Tex. 2006) (per curiam) (holding that non-signatories may be bound to arbitrate a tortious interference claim, even though such a claim arises from both the contract and general law, because a tortious interference claim falls more “on the arbitration side of the scale.”).

<sup>101</sup> *In re Kellogg*, 166 S.W.3d at 741.

<sup>102</sup> *Id.*

<sup>103</sup> *Id.*

<sup>104</sup> *Jody James Farms, JV v. Altman Group, Inc.*, 547 S.W.3d 624, 637-38 (Tex. 2018).



benefits.<sup>105</sup> Likewise, in *Rachal v. Reitz*, a trust beneficiary was bound to arbitrate his suit against the trustee for misappropriation where the inter vivos trust contained an arbitration clause and the beneficiary manifested the assent required to form an enforceable agreement to arbitrate by accepting the benefits of the trust and suing to enforce its terms.<sup>106</sup>

Texas state and federal courts also have invoked the doctrine of “equitable estoppel” to require a signatory plaintiff to arbitrate against a non-signatory defendant who seeks to compel arbitration,<sup>107</sup> but they did not use the label of “direct benefits estoppel” for this application of the doctrine until recently.<sup>108</sup> The Fifth Circuit first held in *Grigson v. Creative Artists Agency* that a signatory plaintiff cannot “have it both ways” by seeking to hold a non-signatory liable under duties imposed by an agreement containing an arbitration clause, while on the other hand, seeking to avoid arbitration because the defendant is a non-signatory.<sup>109</sup> Thus, following *Grigson*, Texas courts have applied equitable estoppel when a signatory to a written agreement containing an arbitration clause must rely on the terms of the agreement in asserting its claims against a non-signatory.<sup>110</sup>

The Texas Supreme Court blurred these labels in *G.T. Leach Builders, LLC v. Sapphire, V.P., L.P.*, where it discussed the “direct benefits” estoppel doctrine (and the foregoing precedents) in a case where a signatory brought the claims against the non-signatory and the non-signatory sought to compel the signatory to

arbitration.<sup>111</sup> The court declined to apply the doctrine—not because it was being invoked by the non-signatory—but rather because the plaintiff signatory’s claims against the non-signatory defendants arose from other contracts, not the agreement containing the arbitration clause.<sup>112</sup>

After *G.T. Leach*, both Texas state courts and the Fifth Circuit have invoked the “direct benefits estoppel” doctrine in determining whether a signatory plaintiff was bound to arbitrate against a non-signatory defendant that seeks to compel arbitration.<sup>113</sup>

Texas courts have held that equitable estoppel is subject to traditional equitable defenses.<sup>114</sup> Thus, courts have declined to apply equitable estoppel where the party invoking it had “unclean hands”<sup>115</sup> or unreasonably delayed asserting its motion to compel arbitration under laches.<sup>116</sup> However, in *Rachal v. Reitz*, the Texas Supreme Court declined to decide whether the doctrine of unclean hands barred application of the direct benefits estoppel doctrine because the party seeking to avoid arbitration had failed to assert the argument.<sup>117</sup>

Concerted Misconduct Estoppel. The Fifth Circuit in *Grigson* recognized the existence of another theory of equitable estoppel called the “concerted misconduct” theory. It applies “when [a] signatory to [a] contract containing an arbitration clause raises allegations of substantially interdependent and concerted misconduct

<sup>105</sup> 180 S.W.3d at 133-35. *But see Fleetwood Enters., Inc. v. Gaskamp*, 280 F.3d 1069, 1076-77 (5th Cir. 2002) (finding that, without more, children of signatory parents could not be bound to arbitrate merely on the basis of the parent-child relationship).

<sup>106</sup> 403 S.W.3d 840 (Tex. 2013).

<sup>107</sup> *See, e.g., Meyer v. WMCO-GP, LLC*, 211 S.W.3d 302, 305-06 (Tex. 2006); *Elkjer v. Scheef & Stone, LLP*, 8 F. Supp. 3d 845, 858-59 (N.D. Tex. 2014); *see also Bidas*, 345 F.3d at 361-62 (maintaining above distinction between equitable estoppel and “direct benefits” version of estoppel).

<sup>108</sup> *See, e.g., In re Weekley Homes*, 180 S.W.3d at 134-35; *Hellenic Inv. Fund, Inc. v. Det Norske Veritas*, 464 F.3d 514, 517-20 (5th Cir. 2006); *see also Crawford Prof'l Drugs, Inc. v. CVS Caremark Corp.*, 748 F.3d 249, 259 n.5 (5th Cir. 2014) (noting that direct benefits estoppel had been limited to signatories compelling nonsignatories to arbitration, but making *Erie* guess that Arizona courts would permit arbitration by estoppel under inverse situation under facts of the case).

<sup>109</sup> 210 F.3d 524, 528 (5th Cir. 2000).

<sup>110</sup> *See, e.g., Meyer*, 211 S.W.3d at 305-07 (holding that a signatory relies on the terms of the written agreement “[w]hen a party’s right to recover and its damages depend on the agreement containing the arbitration provision.”).

<sup>111</sup> 458 S.W.3d 502, 527-29 (Tex. 2015).

<sup>112</sup> Even before *G.T. Leach*, some federal district courts had held that the direct benefits estoppel doctrine could be employed outside the context of a signatory defendant seeking to compel arbitration of a claim by a non-signatory plaintiff. *See, e.g., Wood v. PennTex Res., L.P.*, 458 F. Supp. 2d 355, 370-73 (S.D. Tex. 2006); *Ace Am. Ins. Co. v. Huntsman Corp.*, 255 F.R.D. 179, 201-08 (S.D. Tex. 2008); *Compana LLC v. Mondial Assistance SAS*, No. 3:07-CV-1293-D, 2008 WL 190522, at \*\*6-7 (N.D. Tex. Jan. 23, 2008).

<sup>113</sup> *See, e.g., Hays v. HCA Holdings*, 838 F.3d 605, 609 (5th Cir. 2016); *Jody James Farms*, 547 S.W.3d at 637-38; *VSR Fin. Servs., Inc. v. McLendon*, 409 S.W.3d 817, 830-32 (Tex. App.—Dallas 2013, no pet.); *see also Rachal*, 403 S.W.3d at 846 n.5 (noting that “[d]irect benefits estoppel . . . is a type of equitable estoppel.”)

<sup>114</sup> *See, e.g., In re EGL Eagle Global Logistics, L.P.*, 89 S.W.3d 761, 766 (Tex. App.—Houston [1st Dist.] 2002, orig. proceeding).

<sup>115</sup> *ANCO Ins. Servs. of Houston v. Romero*, 27 S.W.3d 1, 6 (Tex. App.—San Antonio 2000, pet. denied).

<sup>116</sup> *Texas Enter., Inc. v. Arnold Oil Co.*, 59 S.W.3d 244, 249-50 (Tex. App.—San Antonio 2001, orig. proceeding).

<sup>117</sup> 403 S.W.3d at 848 n.7.

by both the non-signatory and one or more of the signatories to the contract.”<sup>118</sup>

However, in *In re Merrill Lynch Trust Company*, the Texas Supreme Court declined to adopt this “concerted misconduct” theory.<sup>119</sup> In so doing, the court emphasized that its decision about concerted misconduct would remain tentative until the United States Supreme Court clarifies whether concerted misconduct estoppel correctly reflects federal law.<sup>120</sup> In light of the Supreme Court’s post-*Grigson* decision that application of equitable estoppel is controlled by state law, *see infra* notes 78 & 79, federal courts applying Texas law follow *In re Merrill Lynch*, not *Grigson*.<sup>121</sup>

**Intertwined Claims Estoppel.** Another theory of estoppel is “intertwined claims estoppel,” which involves “compel[ing] arbitration when a nonsignatory defendant has a ‘close relationship’ with one of the signatories and the claims are ‘intimately founded in and intertwined with the underlying contract obligations.’”<sup>122</sup> The Texas Supreme Court referenced this theory in *In re Merrill Lynch* for the purpose of comparing it with the “concerted misconduct” theory but did not expressly adopt it.<sup>123</sup> Since then, Texas intermediate courts have split on whether this theory is viable under Texas law.<sup>124</sup> The Fifth Circuit, making an *Erie* guess, held in *Hays v. HCA Holdings* that the Texas Supreme Court would adopt intertwined claims estoppel as a valid theory of estoppel if presented with the question.<sup>125</sup> But in *Jody James Farms*, the Texas Supreme Court declined to adopt this theory, instead holding that it would not have applied anyway because the relationship between the signatory and non-

signatory in that case was not sufficiently close, and would have had to be “closer than merely independent participants in a business transaction” for the theory to potentially apply.<sup>126</sup>

#### (6) Third-party Beneficiary

A non-signatory also may be required to arbitrate as a third party beneficiary of an arbitration agreement.<sup>127</sup> Under this theory, a court must look to the intentions of the contracting parties at the time the contract was executed, and there must be evidence of a clear intention to benefit the non-signatory.<sup>128</sup>

For example, in *JP Morgan Chase & Co. v. Conegie ex. rel Lee*, the Fifth Circuit held that a nursing home patient was bound to arbitrate under a third party beneficiary theory, where the nursing home admission agreement containing the arbitration clause was signed by the patient’s mother on the patient’s behalf and the agreement expressly named the patient as the recipient of care and services from the nursing home.<sup>129</sup>

A third-party beneficiary may also compel arbitration, even though it is not a signatory to the contract.<sup>130</sup>

#### (7) Derivative Claims

In *In re Labatt Food Service*, the Texas Supreme Court held that non-signatories could be bound to arbitrate whether their claims are derivative of the rights of a signatory.<sup>131</sup> In this case, the court found that an arbitration agreement between a decedent and his employer required the decedent’s beneficiaries to arbitrate their wrongful death claims against the decedent’s employer, even though they did not sign the arbitration agreement, because “they still stand in [the

<sup>118</sup> *Grigson*, 210 F.3d at 527.

<sup>119</sup> 235 S.W.3d 185, 191-95 (Tex. 2007); *see also G.T. Leach Builders, LLC*, 458 S.W.3d at 529 n.23 (declining to reconsider this issue).

<sup>120</sup> *In re Merrill Lynch Trust Co.*, 235 S.W.3d at 195.

<sup>121</sup> *See, e.g., Growtech Partners v. Accenture LLP*, 118 F. Supp. 3d 920, 931 n.4 (S.D. Tex. 2015).

<sup>122</sup> *In re Merrill Lynch Trust Co.*, 235 S.W.3d at 193-94 (quoting *Thomson-CSF, S.A. v. Am. Arbitration Ass’n*, 64 F.3d 773, 779 (2d Cir. 1995)).

<sup>123</sup> *Id.* at 193-95.

<sup>124</sup> *Compare Cotton Commercial USA, Inc. v. Clear Creek Indep. Sch. Dist.*, 387 S.W.3d 99, 105-06 (Tex. App.—Houston [14th Dist.] 2012, no pet.) (opining that *In re Merrill Lynch* recognized the doctrine) and *FD Frontier Drilling (Cyprus), Ltd. v. Didmon*, 438 S.W.3d 688, 695 (Tex. App.—Houston [1st Dist.] 2014, pet. denied) (same) and *Zars v. Brownlow*, No. 07-07-00303-CV, 2013 WL 3355660, at \*4 (Tex. App.—Amarillo June 28, 2013, no pet.) (mem. op.) (same), with *Glassell Producing Co. v. Jared Res., Ltd.*, 422 S.W.3d 68, 82 (Tex. App.—Texarkana 2014, no pet.) (describing direct benefits estoppel as “the only form of equitable estoppel recognized in Texas”).

<sup>125</sup> 838 F.3d 605, 612 (5th Cir. 2016).

<sup>126</sup> *Jody James Farms, JV v. Altman Group, Inc.*, 547 S.W.3d 624, 640 (Tex. 2018).

<sup>127</sup> *See Nationwide of Bryan, Inc., v. Dyer*, 969 S.W.2d 518, 520 (Tex. App.—Austin 1998, no pet.); *In re Rangel*, 45 S.W.3d 783, 787 (Tex. App.—Waco 2001, orig. proceeding).

<sup>128</sup> *Bridas S.A.P.I.C. v. Gov’t of Turkmenistan*, 345 F.3d 347, 362 (5th Cir. 2003); *see also Jody James Farms*, 547 S.W.3d at 635.

<sup>129</sup> 492 F.3d 596, 600 (5th Cir. 2007).

<sup>130</sup> *In re NEXT Fin. Group, Inc.*, 271 S.W.3d 263, 267 (Tex. 2008); *Jody James Farms*, 547 S.W.3d at 635; *see also Superior Energy Services, LLC v. Cabinda Gulf Oil Company Ltd.*, 635 Fed. App’x 375 (9th Cir. 2016); *Atlas Health, LLC v. Trevithick*, No. 05-16-00219-CV, 2017 WL 655926, \*3 (Tex. App.—Dallas Feb. 17, 2017, no pet.).

<sup>131</sup> *In re Labatt Food Serv., L.P.*, 279 S.W.3d 640, 642 (Tex. 2009).

decendent signatory’s] legal shoes and are bound by his agreement.”<sup>132</sup> Analogously, the Fifth Circuit held that a non-signatory subrogee could invoke the arbitration rights held by its signatory subrogor.<sup>133</sup>

#### (8) Nonsignatories Designated as Parties

In *In re Rubiola*, the Texas Supreme Court held that “[s]ignatories to an arbitration agreement may identify other parties in their agreement who may enforce arbitration as though they signed the agreement themselves.”<sup>134</sup> In that case, the Salmons bought a house from Greg and Catherine Rubiola using a standard form real estate sales contract, which did not contain an arbitration clause. The Salmons applied for mortgage financing from Rubiola Mortgage Company, with Greg’s brother, J.C. acting as the mortgage broker and loan officer. As part of the loan process, the Salmons executed an arbitration agreement calling for arbitration of any and all disputes arising between the “parties,” with parties defined to include “Rubiola Mortgage Company, and each and all persons and entities that sign this agreement or any other agreements between or among any of the parties as to this transaction,” as well as “individual partners, affiliates, officers, directors, employees, agents, and/or representatives of any party to such documents.”<sup>135</sup> The court found that this broad definition of “parties” allowed nonsignatories Greg Rubiola and J.C. Rubiola (who had signed only in his representative capacity) to compel arbitration of the Salmons’ fraud claims arising out of the purchase of the home.<sup>136</sup>

### 3. Defenses to Enforcement

Parties resisting arbitration can challenge the enforceability of an arbitration agreement by asserting

state law contract defenses, such as fraud, unconscionability, and waiver.<sup>137</sup> Federal courts apply the relevant state law, not federal common law to evaluate these defenses.<sup>138</sup> This section covers several of those defenses and discusses whether a court or the arbitrator should determine whether the defenses apply.<sup>139</sup>

#### a. *Fraud*

Depending upon the circumstances, a fraud defense is sometimes heard by the arbitrator and sometimes by the court. If the alleged fraud would invalidate the entire contract, then the issue is to be determined by the arbitrator.<sup>140</sup> If, however, a party claims that the arbitration clause itself has been induced by fraud, the issue should be adjudicated by the court.<sup>141</sup>

The Texas Supreme Court has held that a waiver-of-reliance provision (a provision that expresses the parties’ intent to waive fraudulent inducement claims or that disclaims reliance on representations about specific matters in dispute) defeated a fraudulent inducement defense as a matter of law under the facts of the case, even where the alleged fraud specifically related to the arbitration clause.<sup>142</sup>

#### b. *Unconscionability and Duress*

If a defense of unconscionability or duress pertains to the entire contract, those issues are to be arbitrated.<sup>143</sup> If, however, the unconscionability or duress relates to the arbitration clause itself, rather than the contract as a whole, then the issue is for the court.<sup>144</sup> Where a party claims that the unconscionability or duress relates to both the arbitration provision and the contract as a whole, the issue must be arbitrated unless the arbitration

<sup>132</sup> *Id.*; see also *In re Jindal Saw Ltd.*, 289 S.W.3d 827 (Tex. 2009). Interestingly, on nearly identical facts, the Fifth Circuit declined to adopt *Labatt*’s derivative theory, instead choosing to compel arbitration under the direct benefits estoppel doctrine. *Graves v. BP America, Inc.*, 568 F.3d 221, 223-24 (5th Cir. 2009).

<sup>133</sup> See *Halliburton Energy Servs., Inc. v. Ironshore Specialty Ins. Co.*, 921 F.3d 522, 532 (5th Cir. 2019).

<sup>134</sup> 334 S.W.3d 220, 226 (Tex. 2011).

<sup>135</sup> *Id.* at 222-23.

<sup>136</sup> *Id.* at 224-25; but see *Albertson’s Holdings, LLC v. Kay*, 514 S.W.3d 878, 885 (Tex. App.—Tyler Feb. 8, 2017, no pet.) (rejecting employer’s motion to compel arbitration against employee’s husband, despite contract provision identifying spouse as a party subject to the arbitration clause, because husband’s loss of consortium claim was “separate and independent” and not entirely derivative of the employee’s claim.).

<sup>137</sup> See TEX. CIV. PRAC. & REM. CODE § 171.001 (“A party may revoke the agreement only on a ground that exists at law or in equity for the revocation of a contract.”).

<sup>138</sup> *Arthur Andersen LLP v. Carlisle*, 556 U.S. 624, 630 (2009); *Crawford Prof’l Drugs, Inc. v. CVS Caremark Corp.*, 748 F.3d 249, 255 (5th Cir. 2014).

<sup>139</sup> This list is not exclusive. For example, judicial estoppel is a defense to enforcement where the party seeking arbitration had argued that the dispute was not arbitrable in parallel litigation in another jurisdiction. See *New Hampshire Ins. Co. v. Magellan Reinsurance Co., Ltd.*, 508 S.W.3d 320, 330 (Tex. App.—Fort Worth 2013, no pet.).

<sup>140</sup> *Prima Paint Corp. v. Flood & Conklin Mfg. Co.*, 388 U.S. 395, 403-04 (1967); *Teal Constr. Co./Hillside Villas, Ltd. v. Darren Casey Interests, Inc.*, 46 S.W.3d 417, 420-21 (Tex. App.—Austin 2001, pet. denied).

<sup>141</sup> *Prima Paint Corp.*, 388 U.S. at 403-04; *Forest Oil Corp. v. McAllen*, 268 S.W.3d 51, 56 (Tex. 2008).

<sup>142</sup> *McAllen*, 268 S.W.3d at 57-61.

<sup>143</sup> *In re FirstMerit Bank, N.A.*, 52 S.W.3d 749, 756 (Tex. 2001).

<sup>144</sup> *In re Halliburton Co.*, 80 S.W.3d 566, 571 (Tex. 2002); *In re FirstMerit Bank, N.A.*, 52 S.W.3d at 756.

provision alone was singled out from the other provisions.<sup>145</sup>

“Arbitration agreements may be either substantively or procedurally unconscionable, or both.”<sup>146</sup> Procedural unconscionability refers to circumstances surrounding the adoption or execution of the arbitration provision.<sup>147</sup> “The only cases under Texas law in which an agreement was found procedurally unconscionable involve situations in which one of the parties appears to have been incapable of understanding the agreement.”<sup>148</sup>

Substantive unconscionability refers to the fairness of the arbitration provision itself.<sup>149</sup> The test for substantive unconscionability is whether, “given the parties’ general commercial background and the commercial needs of the particular trade or case, the clause involved is so one-sided that it is unconscionable under the circumstances existing when the parties made the contract.”<sup>150</sup>

Unconscionability defenses are generally challenging because there is nothing inherently unconscionable about an arbitration agreement.<sup>151</sup> The Texas Supreme Court has emphasized that it was “wary of setting the bar for holding arbitration clauses unconscionable too low.”<sup>152</sup> A party is bound by an agreement to arbitrate, regardless of whether he read it or thought it had different terms.<sup>153</sup> Therefore, ignorance of an arbitration provision or its significance will not defeat arbitration.<sup>154</sup>

Furthermore, unconscionability will not negate a bargain simply because one party is in a less advantageous bargaining position.<sup>155</sup> To defeat an agreement to arbitrate due to unequal bargaining power, a party must demonstrate that the clause was the result of the type of fraud or overwhelming economic power that would be grounds for revocation of any contract.<sup>156</sup>

While unconscionability is difficult to prove, a court may find an arbitration agreement substantively unconscionable due to excessive costs.<sup>157</sup> A party opposing arbitration on this basis must prove with specific information the likelihood of incurring excessive costs, through invoices, expert testimony, reliable cost estimates, or other comparable evidence.<sup>158</sup> In *In re Olshan Foundation Repair Co.*, the Texas Supreme Court emphasized that “a comparison of the total costs of the two forums [arbitration vs. litigation] is the most important factor in determining whether the arbitral forum is an adequate and accessible substitute to litigation.”<sup>159</sup> “Other factors include the actual cost of arbitration compared to the total amount of damages the claimant is seeking and the claimant’s overall ability to pay the arbitration fees and costs. These factors may also show arbitration to be an inadequate and inaccessible forum for the particular claimants to vindicate their rights. However, these considerations are

<sup>145</sup> *In re RLS Legal Solutions, LLC*, 221 S.W.3d 629, 631-32 (Tex. 2007).

<sup>146</sup> *Royston, Rayzor, Vickery & Williams, LLP v. Lopez*, 467 S.W.3d 494, 499 (Tex. 2015); see also *In re Halliburton*, 80 S.W.3d at 571; TEX. CIV. PRAC. & REM. CODE § 171.022 (stating that “a court may not enforce an agreement to arbitrate if the court finds the agreement was unconscionable at the time the agreement was made”).

<sup>147</sup> *In re Halliburton*, 80 S.W.3d at 571.

<sup>148</sup> *Fleetwood Enters., Inc. v. Gaskamp*, 280 F.3d 1069, 1073 (5th Cir. 2002) (citing *In re Turner Bros. Trucking Co.*, 8 S.W.3d 370 (Tex. App.—Texarkana 1999, orig. proceeding) (holding that arbitration agreement was unconscionable where one party was functionally illiterate and no one explained the agreement to him) and *Prevot v. Phillips Petroleum Co.*, 133 F. Supp. 2d 937 (S.D. Tex. 2001) (holding that arbitration agreement was unconscionable where plaintiffs did not speak English and the agreement was not translated or explained to them)); see also *Delfingen US-Texas L.P. v. Valenzuela*, 407 S.W.3d 791, 801-02 (Tex. App.—El Paso 2013, no pet.) (affirming trial court’s finding of procedural unconscionability where an employee did not speak English and testified that employer made affirmative misrepresentations about the nature of the agreement). *But see ReadyOne Indus., Inc. v. Lopez*, 551 S.W.3d 305, 315 (Tex. App.—El Paso 2018, no pet.) (holding that illiteracy or a language barrier alone do not establish procedural unconscionability).

<sup>149</sup> *In re Halliburton*, 80 S.W.3d at 571.

<sup>150</sup> *In re Palm Harbor Homes, Inc.*, 195 S.W.3d 672, 678 (Tex. 2006) (quoting *In re FirstMerit Bank*, 52 S.W.3d 749, 757 (Tex. 2001)); see also *In re Poly-America, L.P.*, 262 S.W.3d 337, 348 (Tex. 2008) (agreement is substantively unconscionable where it is “grossly one-sided.”).

<sup>151</sup> *In re Poly-America, L.P.*, 262 S.W.3d 337, 348 (Tex. 2008).

<sup>152</sup> *In re Olshan Found. Repair Co., LLC*, 328 S.W.3d 883, 892 (Tex. 2010).

<sup>153</sup> *In re McKinney*, 167 S.W.3d 833, 835 (Tex. 2005) (per curiam); *EZ Pawn Corp. v. Mancias*, 934 S.W.2d 87, 90 (Tex. 1996).

<sup>154</sup> *In re McKinney*, 167 S.W.3d at 835; *EZ Pawn*, 934 S.W.2d at 90.

<sup>155</sup> *In re Palm Harbor Homes*, 195 S.W.3d at 679 (finding no unconscionability when parties claimed they would not have signed the arbitration agreement had the concept of arbitration been explained to them).

<sup>156</sup> *In re AdvancePCS Health L.P.*, 172 S.W.3d 603, 608 (Tex. 2005).

<sup>157</sup> See *In re FirstMerit Bank, N.A.*, 52 S.W.3d 749, 756 (Tex. 2001).

<sup>158</sup> *Id.*; *In re Olshan Foundation Repair*, 328 S.W.3d at 895.

<sup>159</sup> 328 S.W.3d at 894-95.

less relevant if litigation costs more than arbitration.”<sup>160</sup> Applying this standard, the court found that the plaintiffs had not met their burden of proving arbitration costs would be excessive.<sup>161</sup>

The Texas Supreme Court found an arbitration agreement substantively unconscionable where the agreement purported to limit key remedies available under the Texas Workers’ Compensation Act.<sup>162</sup> The court held that the limitation of remedies in the arbitration agreement undermined the deterrent regime that the Legislature had designed to protect Texas workers.<sup>163</sup> Notably, the court found that, in light of the arbitration agreement’s severance provision, the arbitration could proceed with the unenforceable provisions stricken.<sup>164</sup>

Similarly, the Texas Supreme Court held in *Venture Cotton Cooperative v. Freeman* that an arbitration agreement that purported to waive certain remedies available under the DTPA could not be enforced when it did not comply with the DTPA’s detailed instructions on how to accomplish such a waiver.<sup>165</sup> However, the court determined that the offending portion of the agreement was severable because it was peripheral to the contract’s central purpose.<sup>166</sup>

In the same case, the court held that a contract that provides for one party to recover attorneys’ fees but not the other is not per se unconscionable.<sup>167</sup> Rather, the unconscionability inquiry required a broader analysis that the court of appeals had failed to perform—specifically, “a highly fact-specific inquiry into the circumstances of the bargain, such as the commercial atmosphere in which the agreement was made, the alternatives available to the parties at the time and their ability to bargain, any illegality or public-policy concerns, and the agreement’s oppressive or shocking nature.”<sup>168</sup>

The Texas Supreme Court revisited the substantive unconscionability defense in *Royston, Rayzor*, where it

held that a law firm’s client agreement was not unconscionable just because it required arbitration of the client’s claims against the firm but did not require arbitration of the firm’s fee claims against the client.<sup>169</sup>

The Southern District of Texas found an arbitration agreement substantively unconscionable where the agreement purported to limit injunctive relief available under the Lanham Act.<sup>170</sup> The court held that the limitation of remedies in the arbitration agreement undermined the Act’s purpose.<sup>171</sup> Notably, the court that, even though the agreement did not contain a severability clause, the restriction on injunctive relief could be severed while preserving the parties’ choice to arbitrate.<sup>172</sup>

### c. Failure to Comply with a Condition Precedent in the Contract

Arbitration clauses sometimes include conditions precedent to arbitration, such as participating in mediation before arbitration, giving notice, demanding arbitration, or filing the arbitration demand within a certain period of time.<sup>173</sup>

For many years, there had been a split among Texas courts of appeals regarding whether a court or arbitrator should resolve the issue of whether a condition precedent to arbitration has been satisfied.<sup>174</sup> The United States Supreme Court held in *Howsam v. Dean Witter Reynolds, Inc.* that this issue was for the arbitrator to decide.<sup>175</sup>

Following *Howsam*, the Texas Supreme Court held in *G.T. Leach Builders, LLC v. Sapphire, V.P., L.P.* that it was for an arbitrator, not a court, to decide whether a deadline embedded in the parties’ contract barred arbitration.<sup>176</sup> The court drew a distinction between (1) questions of substantive arbitrability addressing the existence, enforceability, and scope of an agreement and (2) questions of procedural arbitrability, addressing the construction and application of limitations contained in the agreement itself.<sup>177</sup> The latter questions are for

<sup>160</sup> *Id.* at 895.

<sup>161</sup> *Id.* at 896-97; *see also TMI, Inc. v. Brooks*, 225 S.W.3d 783, 796 (Tex. App.—Houston [14th Dist.] 2007, pet. denied) (holding parties failed to prove unconscionability, even where they showed projected arbitration costs as high as \$120,000, because less expensive means of arbitration were available).

<sup>162</sup> *In re Poly-America, L.P.*, 262 S.W.3d at 349-53.

<sup>163</sup> *Id.* at 351-53.

<sup>164</sup> *Id.* at 359-60.

<sup>165</sup> 435 S.W.3d 222, 230 (Tex. 2014).

<sup>166</sup> *Id.* at 230-31.

<sup>167</sup> *Id.* at 233.

<sup>168</sup> *Id.* at 228.

<sup>169</sup> *Royston, Rayzor*, 467 S.W.3d at 501-02.

<sup>170</sup> *Shipman Agency, Inc. v. TheBlaze Inc.*, 315 F. Supp. 3d 967, 973-74 (S.D. Tex.2018).

<sup>171</sup> *Id.* at \*4.

<sup>172</sup> *Id.*

<sup>173</sup> *See, e.g., In re R & R Pers. Specialists of Tyler, Inc.*, 146 S.W.3d 699, 704-05 (Tex. App.—Tyler 2004, orig. proceeding) (arbitration agreement required written notice of intent to arbitrate, compliance with deadlines regarding notice of claim, and participation in mediation before arbitration).

<sup>174</sup> *See Valero Energy Corp. v. Teco Pipeline Co.*, 2 S.W.3d 576, 583 (Tex. App.—Houston [14th Dist.] 1999, no pet.) (citing cases).

<sup>175</sup> 537 U.S. 79, 84 (2002).

<sup>176</sup> 458 S.W.3d 502, 520 (Tex. 2015).

<sup>177</sup> *Id.* at 520-22.



arbitrators to decide (unless a party claims that these limitations render the agreement unconscionable, which would raise an issue of substantive arbitrability).<sup>178</sup>

*d. Waiver*

Whether a party waives its right to seek arbitration by its litigation conduct is an issue for the court.<sup>179</sup> A party waives arbitration by substantially invoking the judicial process to the other party's detriment.<sup>180</sup> To determine whether a party has waived its right to arbitrate, courts look to the totality of the circumstances, including the following factors: (1) whether the party asserting the right to arbitrate was plaintiff or defendant in the lawsuit, (2) how long the party waited before seeking arbitration, (3) the reasons for any delay in seeking to arbitrate, (4) how much discovery and other pretrial activity the party seeking to arbitrate conducted before seeking arbitration, (5) whether the party seeking to arbitrate requested the court to dispose of claims on the merits, (6) whether the party seeking to arbitrate asserted affirmative claims for relief in court, (7) the amount of time and expense the parties have expended in litigation, and (8) whether the discovery conducted would be unavailable or useful in arbitration.<sup>181</sup> No one factor is dispositive.

There is a strong presumption against waiver.<sup>182</sup> Mere participation in litigation is not enough to establish waiver.<sup>183</sup> For instance, in *In re Fleetwood Homes of Texas*, the Texas Supreme Court held that there was no waiver, despite the fact that the parties had engaged in limited discovery and that the relator did not pursue its arbitration demand until eight months after litigation commenced.<sup>184</sup> Because the relator had not filed any dispositive motions and did not wait until the eve of trial to move to compel arbitration, the court found that the presumption against waiver had not been overcome.

Similarly, in *In re Citigroup Global Markets*, the court held that the relator did not waive its arbitration rights when it engaged in a seven-month jurisdictional

battle before moving to compel arbitration.<sup>185</sup> The court pointed out that the parties had focused on jurisdictional disputes, not the merits, and that the relator had not sent or responded to written discovery or conducted depositions before seeking arbitration.

Likewise, in *G.T. Leach Builders*, the defendant did not waive arbitration by (1) filing pretrial motions, including motions for continuance, to designate responsible third parties, or quash depositions, (2) seeking to transfer venue, (3) agreeing to a new trial date, or (4) designating experts and engaging in pre-trial discovery, because the defendant's actions were primarily defensive in nature and the defendant did not seek adjudication of plaintiff's claims on the merits.<sup>186</sup>

Nor does a party waive arbitration against an opponent with whom it had an arbitration agreement by litigating a related but distinct claim against a third party with whom it did not have an arbitration agreement.<sup>187</sup> That principle came into play in the recent *RSL Funding* case in the Texas Supreme Court. Metlife had sold annuity contracts without arbitration clauses to certain individuals, who in turn sold the policies to RSL in contracts containing arbitration clauses. Litigation arose between all three groups in multiple forums, but RSL's actions in litigation against Metlife were not relevant to the issue of whether it waived its arbitration rights against the individuals.<sup>188</sup> Rather, the court examined RSL's conduct with respect to the individuals after the dispute arose between those parties and found it insufficient to establish waiver.<sup>189</sup>

One of the rare occasions in which the Texas Supreme Court found waiver was in *Perry Homes v. Cull*, where the party seeking to compel arbitration had vigorously opposed arbitration earlier in the proceeding, had participated in substantial merits discovery, and then sought arbitration shortly before trial was set to

<sup>178</sup> *Id.* at 522.

<sup>179</sup> *Perry Homes v. Cull*, 258 S.W.3d 580, 587 (Tex. 2008); see also *Vine v. PLS Fin. Servs., Inc.*, 689 Fed. App'x 800, 803-04 (5th Cir. 2017); *Tellez v. Madrigal*, 292 F. Supp. 3d 749, 755 (W.D. Tex. 2017).

<sup>180</sup> *In re Bank One, N.A.*, 216 S.W.3d 825, 827 (Tex. 2007) (per curiam) (applying the FAA); *Menna v. Romero*, 48 S.W.3d 247, 251 (Tex. App.—San Antonio 2001, pet. dism'd w.o.j.) (applying the TAA); see also *Cargill Ferrous Int'l v. Sea Phoenix MV*, 325 F.3d 695, 700 (5th Cir. 2003).

<sup>181</sup> *RSL Funding LLC v. Pippins*, 499 S.W.3d 423, 430 (Tex. 2016); *Perry Homes*, 258 S.W.3d at 591-92.

<sup>182</sup> *Perry Homes*, 258 S.W.3d at 590.

<sup>183</sup> *In re Vesta Ins. Group, Inc.*, 192 S.W.3d 759, 763 (Tex. 2006) (per curiam); see also *In re D. Wilson Constr. Co.*, 196 S.W.3d 774, 783 (Tex. 2006); *In re Bank One, N.A.*, 216 S.W.3d at 827.

<sup>184</sup> *In re Fleetwood Homes of Texas, L.P.*, 257 S.W.3d 692, 694 (Tex. 2008).

<sup>185</sup> *In re Citigroup Global Markets, Inc.*, 258 S.W.3d 623, 625-26 (Tex. 2008).

<sup>186</sup> 458 S.W.3d at 511-14; see also *Richmont Holdings, Inc. v. Superior Recharge System, L.L.C.*, 455 S.W.3d 573, 576 (Tex. 2014) (defendant did not waive arbitration by filing a separate, related suit in another county, moving to transfer venue, and delaying in filing a motion to compel arbitration).

<sup>187</sup> See *Kennedy Hodges, L.L.P., v. Gobellan*, 433 S.W.3d 542, 545 (Tex. 2014) (per curiam); *In re Service Corp. Int'l*, 85 S.W.3d 171, 175 (Tex. 2002).

<sup>188</sup> *RSL Funding*, 499 S.W.3d at 431-34.

<sup>189</sup> *Id.*

begin.<sup>190</sup> The Fifth Circuit has found that a waiver of arbitration occurred under similarly egregious facts.<sup>191</sup>

The Fifth Circuit and the Texas Supreme Court recently reached opposite conclusions about litigation-conduct waiver in a pair of class action lawsuits brought against payday loan companies. In *Vine v. PLS Financial Services*, the Fifth Circuit held in a 2-1 decision that payday lenders had waived the right to invoke the arbitration clauses in their customer agreements by initiation of criminal charges against their customers (by systematically submitting worthless check affidavits to local district attorneys' offices in an effort to achieve repayment).<sup>192</sup> The Texas Supreme Court, in contrast, declined to find arbitration waiver in *Henry v. Cash Biz*, holding that the payday lenders did not "substantially invoke the judicial process" by informing the district attorney that their customers' checks had been returned for insufficient funds.<sup>193</sup> The *Henry* Court noted that while it recognized the importance for consistency between federal and state law where there is concurrent jurisdiction (e.g., FAA), it nevertheless agreed with the dissenting judge in *Vine*.<sup>194</sup>

A party attempting to establish waiver must also show that it has been prejudiced.<sup>195</sup> Prejudice in this context is "the inherent unfairness in terms of delay, expense, or damage to a party's legal position that occurs when the party's opponent forces it to litigate an issue and later seeks to arbitrate that same issue."<sup>196</sup> For example, the court found prejudice in *Perry Homes*

where one party's delayed arbitration request resulted in extensive discovery and delayed disposition, while at the same time limiting its opponents' right to appellate review.<sup>197</sup> In *Forby v. One Technologies, L.P.*, the Fifth Circuit found prejudice to the plaintiff where the defendant moved to compel arbitration only after its motion to dismiss had been denied and the plaintiff would likely have to re-litigate defendant's dismissal arguments in the arbitration forum.<sup>198</sup> A party asserting waiver should offer proof of how it would be prejudiced, rather than relying on general allegations of delay and expense.<sup>199</sup>

e. *Lack of Consideration/Illusory*

Arbitration agreements must be supported by consideration.<sup>200</sup> Consideration may be in the form of bilateral promises to arbitrate or may be a part of a larger, underlying contract to which the arbitration clause belongs.<sup>201</sup> However, an arbitration agreement is illusory if one party unilaterally can "avoid its promise to arbitrate by amending the provisions or terminating it altogether."<sup>202</sup>

Consideration and mutuality are common issues in arbitrations arising from employment agreements.<sup>203</sup> To enforce an arbitration agreement against an at-will employee, the employer must show that the employee received notice of the arbitration policy and accepted it.<sup>204</sup> An employee accepts the terms of the arbitration policy as a matter of law if he continues working after receiving notice of the policy.<sup>205</sup> In *In re Dallas*

<sup>190</sup> *Perry Homes*, 258 S.W.3d at 596-97; cf. *Holmes v. Graves*, No. 01-12-01032-CV, 2013 WL 6506306, at \*6 (Tex. App.—Houston [1st Dist.] Dec. 10, 2013, no pet.) (mem. op.) (finding waiver where plaintiffs delayed invoking their arbitration rights until after they lost their merits-based request for injunctive relief in the trial court).

<sup>191</sup> *Raju v. Murphy*, 709 Fed. App'x 318 (5th Cir. 2018) (plaintiff waived arbitration when he filed a lawsuit in state court and only sought to compel arbitration when lawsuit was removed to federal court); *In re Mirant Corp.*, 613 F.3d 584 (5th Cir. 2010) (defendant waived arbitration where it answered, requested trial by jury, sought a protective order, and filed multiple motions to dismiss with prejudice, and only sought to compel arbitration when the motions to dismiss were partially denied); *Nicholas v. KBR, Inc.*, 565 F.3d 904 (5th Cir. 2009) (plaintiff waived arbitration where she filed a lawsuit in state court, filed a motion to remand after it had been removed, responded to discovery, sat for deposition, and moved to compel arbitration only after her motion for remand had been denied).

<sup>192</sup> *Vine v. PLS Fin. Servs., Inc.*, 689 Fed. App'x 800, 805-06 (5th Cir. 2017).

<sup>193</sup> *Henry v. Cash Biz, LP*, 551 S.W.3d 111, 118 (Tex. 2018).

<sup>194</sup> *Id.*

<sup>195</sup> *RSL Funding*, 499 S.W.3d at 430.

<sup>196</sup> *Perry Homes*, 258 S.W.3d at 597.

<sup>197</sup> *Id.*; see also *Raju*, 709 Fed. App'x at 319 (affirming finding of prejudice where defendant was "required to answer the complaint, to file a counterclaim, to consult with two law firms, and to gear her legal strategy to court proceedings instead of arbitration.").

<sup>198</sup> 909 F.3d 780, 785-86 (5th Cir. 2018).

<sup>199</sup> See *IBS Asset Liquidations LLC v. Servicios Multiples Del Norte SA de CV*, 419 S.W.3d 573, 575-76 (Tex. App.—San Antonio 2013, pet. denied).

<sup>200</sup> *In re Palm Harbor Homes*, 195 S.W.3d at 676.

<sup>201</sup> *Id.*

<sup>202</sup> *In re 24R, Inc.*, 324 S.W.3d 564 (Tex. 2010); accord *Carey v. 24 Hour Fitness, USA, Inc.*, 669 F.3d 202, 205 (5th Cir. 2012).

<sup>203</sup> See, e.g., *J.M. Davidson, Inc. v. Webster*, 128 S.W.3d 223 (Tex. 2003); *In re Kellogg, Brown & Root*, 80 S.W.3d 611 (Tex. App.—Houston [1st Dist.] 2002, orig. proceeding); *In re Jebbia*, 26 S.W.3d 753, 758 (Tex. App.—Houston [14th Dist.] 2000, orig. proceeding) (rejecting the argument that an arbitration provision lacked consideration because the employment relationship was at-will).

<sup>204</sup> *In re Dallas Peterbilt, Ltd.*, 196 S.W.3d 161, 162 (Tex. 2006) (per curiam).

<sup>205</sup> *Id.* at 163.

*Peterbilt, Ltd.*, for instance, an employee claimed that he did not receive notice of the policy. However, the employee had signed an acknowledgment form stating that he had received a summary of the policy.<sup>206</sup> The court found this summary to be sufficient notice.<sup>207</sup>

Even if an arbitration agreement is formed during an at-will employment relationship, it is not illusory if the promises to arbitrate are not dependent upon continued employment.<sup>208</sup> For example, in *In re Halliburton Company*, an employer sent notice to employees of a new dispute resolution program requiring arbitration and explained that continued employment would constitute acceptance of the plan.<sup>209</sup> The Texas Supreme Court held that the arbitration provision was not dependent upon continued employment and thus not illusory, because the plaintiff accepted the program by continuing to work.<sup>210</sup> The court further held that the agreement was not illusory even though the employer retained the right to modify or discontinue the program.<sup>211</sup> The court reasoned that the employer could not avoid its promise to arbitrate because amendments *would not apply to existing disputes*, and the program could only be terminated upon ten days' notice.<sup>212</sup>

The Fifth Circuit distinguished *In re Halliburton* in finding an arbitration agreement illusory and unenforceable in *Morrison v. Amway Corporation*<sup>213</sup> and in *Carey v. 24 Hour Fitness, USA, Inc.*<sup>214</sup> In *Morrison*, the sellers of household products and their distributors agreed to abide by dispute resolution procedures set forth in rules of conduct proffered by the seller, which contained an agreement to arbitrate. However, the seller reserved the right to unilaterally amend the rules of conduct simply by publishing a notice of amendment, by which the seller conceivably could have restricted the applicability of the arbitration rights or eliminated them altogether. Significantly, any amendment to the arbitration agreement could have applied to disputes that arose before the amendment, a fact that distinguished the case from *In re Halliburton*, where any amendment would have applied only

prospectively. The *Morrison* Court found that where one party retains the unilateral, unrestricted right to amend or terminate an arbitration agreement even to disputes arising before the amendment or termination, the agreement is illusory and unenforceable.<sup>215</sup> The Fifth Circuit reaffirmed this holding in *Carey*, emphasizing that notice and acceptance of an amendment with possible retroactive application is “not sufficient to render an arbitration provision non-illusory.”<sup>216</sup>

In *Lizalde v. Vista Quality Markets*, the Fifth Circuit announced a three-part test for determining whether a *Halliburton*-type savings clause sufficiently restrains an employer's unilateral right to terminate its obligation to arbitrate.<sup>217</sup> “[R]etaining termination power does not make an agreement illusory so long as that power (1) extends only to prospective claims, (2) applies equally to both the employer's and employee's claims, and (3) so long as advance notice to the employee is required before termination is effective.” Applying the *Lizalde* test, the Fifth Circuit later struck down as illusory an employment agreement that violated the third “advance notice” prong because any changes made by the employer to the arbitration plan (including termination) would have been “immediately effective upon notice to” employees.<sup>218</sup>

While the Texas Supreme Court has yet to comment on the *Lizalde* test, decisions from Texas intermediate courts have been consistent with the Fifth Circuit's formulation.<sup>219</sup>

#### f. Lack of Mental Capacity

The Texas Supreme Court and Fifth Circuit have reached opposite conclusions as to how to treat a defense that a signatory lacked the mental capacity to enter the contract. The Fifth Circuit held that an arbitrator should decide a defense of mental incapacity because it is a defense that goes to the entire agreement, rather than the arbitration clause itself.<sup>220</sup> The Texas Supreme Court declined to follow the Fifth Circuit, instead finding that the issue of mental incapacity is for

<sup>206</sup> *Id.*

<sup>207</sup> *Id.*

<sup>208</sup> *In re Dillard Dep't Stores, Inc.*, 198 S.W.3d 778, 782 (Tex. 2006) (per curiam).

<sup>209</sup> *In re Halliburton Co.*, 80 S.W.3d 566, 567 (Tex. 2002).

<sup>210</sup> *Id.* at 569.

<sup>211</sup> *Id.* at 569-70.

<sup>212</sup> *Id.* at 569-70.

<sup>213</sup> 517 F.3d 248 (5th Cir. 2008).

<sup>214</sup> 669 F.3d 202, 205 (5th Cir. 2012).

<sup>215</sup> 517 F.3d at 256-57. The Texas Supreme Court has held that an arbitration agreement was not illusory—even where a separate employee manual purportedly gave the employer the

right to unilaterally change personnel policies—because the policy manual was not a contract and had not been incorporated by reference into the stand-alone arbitration agreement. *In re 24R, Inc.*, 324 S.W.3d 564 (Tex. 2010).

<sup>216</sup> 669 F.3d at 208.

<sup>217</sup> 746 F.3d 222, 225-26 (5th Cir. 2014).

<sup>218</sup> *Nelson v. Watch House Int'l*, 815 F.3d 190, 195 (5th Cir. 2016).

<sup>219</sup> See, e.g., *Temporary Alternatives, Inc. v. Jamrowski*, 511 S.W.3d 64, 68-70 (Tex. App.—El Paso 2014, no pet.) (citing cases).

<sup>220</sup> *Primerica Life Ins. Co. v. Brown*, 304 F.3d 469, 472 (5th Cir. 2002).



the court to decide rather than the arbitrator, because it is a formation defense calling into question the very existence of a contract.<sup>221</sup>

g. *Illegality*

A party may challenge a contract as illegal and void *ab initio*, but such a challenge must be considered by the arbitrator, not in court.<sup>222</sup>

## B. Scope of Arbitration Clauses

A determination of whether a given dispute falls within the scope of an arbitration clause is a matter of contract interpretation that must be performed by the trial court and is subject to *de novo* review in the appellate courts.<sup>223</sup>

### 1. Broad or Narrow?

A court's characterization of an arbitration clause as either "broad" or "narrow" typically is the first step in the analysis.<sup>224</sup> While the use of the terms is suggestive of a dichotomy, it is more useful and accurate to consider arbitration clauses on a spectrum:

- The clauses with the broadest scope are those that encompass "any and all disputes between the parties."<sup>225</sup>
- Only slightly narrower are those clauses that provide for arbitration of "any and all disputes arising under or relating to" the contract at issue.

<sup>221</sup> *In re Morgan Stanley & Co.*, 293 S.W.3d 182, 189-90 (Tex. 2009) (orig. proceeding).

<sup>222</sup> *Buckeye Checking Cashing, Inc. v. Cardegna*, 546 U.S. 440, 446 (2006); *RSL Funding, LLC v. Newsome*, 569 S.W.3d 116, 125 (Tex. 2018).

<sup>223</sup> See, e.g., *Pennzoil Exp. and Prod. Co. v. Ramco Energy Ltd.*, 139 F.3d 1061, 1066 & n.7 (5th Cir. 1998); *In re Choice Homes, Inc.*, 174 S.W.3d 408, 413 (Tex. App.—Houston [14th Dist.] 2005, orig. proceeding).

<sup>224</sup> See, e.g., *I.D.E.A. Corp. v. WC & R Interests, Inc.*, 545 F. Supp. 2d 600, 605 (W.D. Tex. 2008).

<sup>225</sup> See, e.g., *Kirby Highland Lakes Surgery Ctr., L.L.P. v. Kirby*, 183 S.W.3d 891, 898 (Tex. App.—Austin 2006, orig. proceeding) (citing *Neal v. Hardee's Food Sys.*, 918 F.2d 34, 36-37 (5th Cir. 1990)); see also *Telecom Italia, SPA v. Wholesale Telecom Corp.*, 248 F.3d 1109, 1114 (11th Cir. 2001).

<sup>226</sup> See *Kirby*, 183 S.W.3d at 898 (citing *Pennzoil Exploration*, 139 F.3d at 1067-68, and *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth*, 473 U.S. 614, 625-26 (1985)); see also *In re Houston Progressive Radiology Assocs., PLLC*, 474 S.W.3d 435, 447 (Tex. App.—Houston [1st Dist.] 2015, no pet.); *AdvoCare GP, LLC v. Heath*, No. 05-16-00409-CV, 2017 WL 56402, at \*5 (Tex. App.—Dallas Jan. 5, 2017, no pet.) (mem. op.).

<sup>227</sup> *Tittle v. Enron Corp.*, 463 F.3d 410, 422 (5th Cir. 2006); *Autonation USA Corp. v. Leroy*, 105 S.W.3d 190, 197 (Tex. App.—Houston [14th Dist.] 2003, orig. proceeding); *In re*

Courts have labeled these clauses as "extremely broad" and "capable of expansive reach."<sup>226</sup> Courts provide that a "dispute arises out of or relates to a contract if the legal claim underlying the dispute could not be maintained without reference to the contract."<sup>227</sup> Unlike the broader clause referenced above, however, this clause requires that the dispute be tied to the performance of duties specified in the contract.<sup>228</sup>

- On the narrower side of the spectrum are those clauses that provide for arbitration of "all disputes arising out of the contract" but omit phrases like "or related to" or "in connection with" the contract.<sup>229</sup>
- Finally, there are many other ways in which parties can carefully limit the scope of an arbitration clause, such as limiting arbitration only to certain categories of disputes or to disputes arising out of one contract in a multi-contract relationship.<sup>230</sup> For example, the Fifth Circuit held that a clause requiring arbitration "[i]f a dispute arises with respect to either Party's *performance*" did not encompass disputes related to the *interpretation* of the agreement.<sup>231</sup>

The strong presumption favoring arbitration generally requires that courts resolve doubts as to the scope of the agreements in favor of coverage, whether they arise under the FAA or TAA.<sup>232</sup> However, under the FAA,

*Conseco Fin. Serv. Corp.*, 19 S.W.3d 562, 570 (Tex. App.—Waco 2000, orig. proceeding).

<sup>228</sup> *Telecom Corp.*, 248 F.3d 1109, 1116 (11th Cir. 2001).

<sup>229</sup> See *Kirby*, 183 S.W.3d at 898; see also *Baudoin v. Mid-Louisiana Anesthesia Consultants, Inc.*, 306 Fed. App'x 188, 192 (5th Cir. 2009) (characterizing clause providing for arbitration "arising out of" the agreement as a narrow clause); *Ikon Office Solutions v. Eifert*, 2 S.W.3d 688, 694 (Tex. App.—Houston [14th Dist.] 1999, pet. denied) (narrowly construing clause that applied to any "dispute arising out of the [agreement]."); *In re Houston Progressive Radiology Assocs.*, 474 S.W.3d at 445-46 (same).

<sup>230</sup> See, e.g., *Hebbronville Lone Star Rentals, L.L.C. v. Sunbelt Rentals Indus. Servs., L.L.C.*, 898 F.3d 629, 636 (5th Cir. 2018) (holding that arbitrator exceeded his powers in reforming the contract based on mutual mistake when arbitration clause empowered him only to resolve "dispute[s] over Seller's proposed adjustments" to a revenue calculation in an earnout provision, not disputes "regarding" or "arising out of" the revenue calculation.).

<sup>231</sup> *Papalote Creek II v. Lower Colorado River Auth.*, 918 F.3d 450, 456 (5th Cir. 2019).

<sup>232</sup> *In re D. Wilson Constr. Co.*, 196 S.W.3d 774, 782 (Tex. 2006); *In re Kellogg, Brown & Root, Inc.*, 166 S.W.3d 732, 737 (Tex. 2005); *In re FirstMerit Bank*, 52 S.W.3d 749, 753 (Tex. 2001).

“the presumption arises only after the party seeking to compel arbitration proves that a valid arbitration agreement exists, because the purpose of the FAA was to make arbitration agreements as enforceable as other contracts, not more so.”<sup>233</sup>

To determine whether a claim falls within the scope of an arbitration agreement, courts look at the terms of the agreement and the factual allegations in the petition, rather than the legal causes of action asserted.<sup>234</sup> A broad arbitration clause, purporting to cover all claims, disputes, and other matters relating to the contract or its breach, creates a presumption of arbitrability.<sup>235</sup> A court should not deny a motion to compel arbitration “unless it can be said with positive assurance that an arbitration clause is not susceptible to an interpretation which would cover the dispute at issue.”<sup>236</sup> The burden is on the party opposing arbitration to show that the claims fall outside the scope of the arbitration agreement as interpreted by the court.<sup>237</sup>

## 2. Related Claims

Related claims are generally subject to arbitration if the facts alleged in a petition “touch matters,” have a “significant relationship” to, are “inextricably enmeshed” with, or are “factually intertwined” with the issue that is subject to the arbitration agreement.<sup>238</sup> If, however, the facts alleged in support of a claim stand alone, or are completely independent of the contract and could be maintained without reference to the contract, then the claim is not subject to arbitration.<sup>239</sup> When a dispute raises both arbitrable and nonarbitrable claims, the FAA requires courts to compel arbitration of the arbitrable claims, “even where the result would be the possibly inefficient maintenance of separate proceedings in different forums.”<sup>240</sup>

<sup>233</sup> *In re Kellogg*, 166 S.W.3d at 737-38 (internal citations omitted).

<sup>234</sup> *Prudential Sec., Inc. v. Marshall*, 909 S.W.2d 896, 900 (Tex. 1995).

<sup>235</sup> *In re Houston Progressive Radiology Assocs.*, 474 S.W.3d at 443; *Am. Realty Trust, Inc. v. JDN Real Estate-McKinney, L.P.*, 74 S.W.3d 527, 531 (Tex. App.—Dallas 2002, pet. denied); *Lost Creek Mun. Util. Dist. v. Travis Indus. Painters, Inc.*, 827 S.W.2d 103, 105 (Tex. App.—Austin 1992, writ denied).

<sup>236</sup> *Marshall*, 909 S.W.2d at 899; see also *In re D. Wilson Constr.*, 196 S.W.3d at 783.

<sup>237</sup> *Marshall*, 909 S.W.2d at 900.

<sup>238</sup> *In re Medallion, Ltd.*, 70 S.W.3d 284, 288 (Tex. App.—San Antonio 2002, orig. proceeding); *Pennzoil Co. v. Arnold Oil Co., Inc.*, 30 S.W.3d 494, 498 (Tex. App.—San Antonio 2000, orig. proceeding); *AdvoCare GP, LLC v. Heath*, No. 05-16-00409-CV, 2017 WL 56402, at \*4 (Tex. App.—Dallas Jan. 5, 2017, no pet.) (mem. op.) (holding that broad arbitration clause encompassed tort claims that are dependent upon and relate to the contract).

Some courts have taken a more restrictive approach when arbitration is sought under a contractual provision and tort claims are asserted.<sup>241</sup> These courts have held that a tort claim falls within the scope of an agreement to arbitrate if it is so interwoven with the contract that it cannot stand alone, and a tort falls outside the scope of an agreement to arbitrate if it could be maintained without reference to the contract.<sup>242</sup>

## C. Pre-Arbitration Litigation in the Trial Court

In considering how litigation regarding the enforceability of arbitration clauses plays out in Texas, it is important to keep in mind that agreements governed by the FAA are regularly heard in Texas courts. Texas law, as set forth in the TAA, still controls the procedural issues in these cases.<sup>243</sup>

### 1. Actions to Compel Arbitration in Texas State Courts

If a party to an arbitration agreement that falls within the scope of the TAA refuses to arbitrate a dispute, the other party can file an application to compel arbitration in a trial court. This application can be brought as an independent suit if no litigation is pending, or in the form of a motion to compel if civil litigation already has commenced.

The TAA requires a court to order arbitration upon a showing of an agreement to arbitrate, and the opposing party’s refusal to arbitrate.<sup>244</sup> If the party opposing the application denies the existence of an agreement to arbitrate, “the court shall summarily determine that issue.”<sup>245</sup>

In adjudicating an application to compel arbitration, the court should not address the merits of the dispute.<sup>246</sup> For example, the San Antonio Court of

<sup>239</sup> *In re Medallion*, 70 S.W.3d at 288.

<sup>240</sup> *KPMG LLP v. Cocchi*, 565 U.S. 18, 22 (2011) (per curiam) (quoting *Dean Witter Reynolds Inc. v. Byrd*, 470 U.S. 213, 217 (1985)).

<sup>241</sup> *In re Great Western Drilling, Ltd.*, 211 S.W.3d 828, 837 (Tex. App.—Eastland 2006), *mand. granted*, *In re Gulf Exploration, LLC*, 289 S.W.3d 836 (Tex. 2009).

<sup>242</sup> *Loy v. Harter*, 128 S.W.3d 397, 403 (Tex. App.—Texarkana 2004, pet. denied); *Associated Glass, Ltd. v. Eye Ten Oaks Investments, Ltd.*, 147 S.W.3d 507, 513 (Tex. App.—San Antonio 2004, orig. proceeding); *Valero Energy Corp. v. Teco Pipeline Co.*, 2 S.W.3d 576, 590 (Tex. App.—Houston [14th Dist.] 1999, orig. proceeding).

<sup>243</sup> *Jack B. Anglin Co., Inc. v. Tipps*, 842 S.W.2d 266, 268-69 (Tex. 1992); *In re MHI P’ship, Ltd.*, 7 S.W.3d 918, 921 (Tex. App.—Houston [1st Dist.] 1999, orig. proceeding).

<sup>244</sup> TEX. CIV. PRAC. & REM. CODE § 171.021.

<sup>245</sup> *Id.* § 171.021.

<sup>246</sup> TEX. CIV. PRAC. & REM. CODE § 171.026; *Kelly v. Hinson*, 387 S.W.3d 906, 912-13 (Tex. App.—Fort Worth 2012, pet.

Appeals ruled that a trial court abused its discretion in entering findings of fact relating to the merits of the dispute while simultaneously compelling arbitration.<sup>247</sup> The court of appeals concluded that the party seeking arbitration would be irreparably harmed if the trial court's fact findings were presented to and adopted by the arbitrator and would have no appellate rights in that circumstance.<sup>248</sup>

*a. Venue*

If an issue referable to arbitration is already pending in litigation before a court of competent jurisdiction, any application relating to arbitration between those parties must be filed in that court.<sup>249</sup>

If litigation has not yet commenced, the party seeking arbitration must file its application to compel arbitration in accordance with the TAA's independent venue provision, which provides that the application should be filed:

- (a) . . . (1) in the county in which an adverse party resides or has a place of business; or (2) if an adverse party does not have a residence or place of business in this state, in any county.
- (b) If the agreement to arbitrate provides that the hearing before the arbitrators is to be held in a county in this state, a party must file the initial application with the clerk of the court of that county.
- (c) If a hearing before the arbitrators has been held, a party must file the initial application with the clerk of the court of the county in which the hearing was held....<sup>250</sup>

*b. Summary Judgment-Type Procedure*

A motion to compel arbitration is evaluated under a burden-shifting scheme akin to a motion for summary judgment, and it is subject to the same evidentiary standards.<sup>251</sup> The process can be divided into three steps.

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denied) (holding trial court erred in refusing to hear motion to compel and in granting summary judgment).

<sup>247</sup> *In re H2O Plumbing, Inc.*, 115 S.W.3d 79, 81 (Tex. App.—San Antonio 2003, orig. proceeding).

<sup>248</sup> *Id.*

<sup>249</sup> TEX. CIV. PRAC. & REM. CODE § 171.024(a).

<sup>250</sup> *Id.* § 171.024(b) (incorporating by reference TEX. CIV. PRAC. & REM. CODE § 171.096).

<sup>251</sup> *In re Jebbia*, 26 S.W.3d 753, 756-57 (Tex. App.—Houston [14th Dist.] 2000, orig. proceeding).

<sup>252</sup> *In re Oakwood Mobile Homes, Inc.*, 987 S.W.2d 571, 573 (Tex. 1999); *Wachovia Sec., L.L.C. v. Emery*, 186 S.W.3d 107, 113 (Tex. App.—Houston [1st Dist.] 2005, orig. proceeding).

- Step one: The party seeking to compel arbitration must establish the existence of an arbitration agreement and that the claims fall within the agreement.

The party seeking to compel arbitration has the burden to establish that an arbitration agreement exists.<sup>252</sup> As discussed *supra* Part III.A.2, this requires a showing that the agreement containing the arbitration clause “meets the requirements of general contract law,” such as offer and acceptance, but it does not require the movant to disprove the nonmovant's potential affirmative defenses.<sup>253</sup> Submission of an authenticated copy of the agreement containing the arbitration clause generally will satisfy this initial burden.<sup>254</sup> The Fourteenth Court of Appeals, in a 5-4 en banc decision, affirmed the trial court's denial of a motion to compel where the movant had failed to authenticate the agreement containing the arbitration clause (over the dissenters' objections that the authentication defect was waived).<sup>255</sup>

Additional proof—beyond authentication of the arbitration agreement—also may be necessary if a party's right to enforce the agreement is not obvious from the face of the agreement.<sup>256</sup> For example, a non-signatory to an arbitration agreement should produce evidence that it is entitled to enforce the agreement.<sup>257</sup> In *Mohamed v. Auto Nation USA Corp.*, the non-signatory likely would have succeeded in enforcing an arbitration clause had it come forward with proof establishing that it was an assignee of the contract containing the arbitration agreement.<sup>258</sup>

As discussed *supra* Part III.B, the party seeking arbitration must also show that the claims in dispute fall within the scope of the arbitration clause.<sup>259</sup>

- Step two: The party opposing arbitration must raise defenses to arbitration.

Once the party seeking to compel arbitration has satisfied its initial burden, the burden shifts to the

<sup>253</sup> See *In re Advanced PCS Health L.P.*, 172 S.W.3d 603, 606 (Tex. 2005); *USB Fin. Serv., Inc. v. Branton*, 241 S.W.3d 179, 184 (Tex. App.—Fort Worth 2007, no pet.).

<sup>254</sup> *In re H.E. Butt Grocery Co.*, 17 S.W.3d 360, 367 (Tex. App.—Houston [14th Dist.] 2000, orig. proceeding).

<sup>255</sup> *In re Estate of Guerrero*, 465 S.W.3d 693, 705 (Tex. App.—Houston [14th Dist.] 2015, pet. denied).

<sup>256</sup> See *Mohamed v. Auto Nation US Corp.*, 89 S.W.3d 830, 836 (Tex. App.—Houston [1st Dist.] 2002, orig. proceeding).

<sup>257</sup> *Id.* at 836-38.

<sup>258</sup> *Id.*

<sup>259</sup> *In re Oakwood Mobile Homes*, 987 S.W.2d at 573; *In re Autotainment Partners*, 183 S.W.3d 532, 534 (Tex. App.—Houston [14th Dist.] 2006, orig. proceeding).

opposing party to raise defenses to arbitration.<sup>260</sup> The party opposing arbitration may attack his opponent's "case-in-chief" by raising a fact issue on the existence of the arbitration agreement or arguing that the claims do not fall within the scope of the arbitration agreement.<sup>261</sup> Alternatively, the party opposing arbitration may present evidence supporting an affirmative defense to enforcement of the arbitration clause, such as those discussed *supra* Part III.A.3.<sup>262</sup> To defeat arbitration, these defenses must specifically relate to the arbitration clause.<sup>263</sup> Under the "separability doctrine," if the defenses relate to the entire agreement, then they must be adjudicated in arbitration, rather than by the trial court.<sup>264</sup>

If the opposing party does not meet its burden of presenting evidence that would prevent enforcement of the arbitration clause, the trial court must compel arbitration and stay its own proceedings.<sup>265</sup>

- Step three: A hearing is necessary if material fact issues remain.

An evidentiary hearing is not required in every case, and a trial court may summarily decide whether to compel arbitration based on affidavits, pleadings, discovery, and stipulations.<sup>266</sup> But if issues of material fact remain as to whether there is an enforceable arbitration agreement, the trial court must promptly allow an evidentiary hearing on the matter.<sup>267</sup> Such an evidentiary hearing must be held "summarily."<sup>268</sup> The term "summarily" describes not only the procedure, but the speed with which a court should rule.<sup>269</sup> The trial court's resolution of the factual dispute is reviewed on appeal for legal sufficiency.<sup>270</sup>

Where a trial court cannot fairly decide on the motion to compel because it lacks sufficient information regarding the scope of an arbitration provision or other issues of arbitrability, the trial court may order pre-arbitration discovery.<sup>271</sup> However, the discovery order may not reach beyond the issues raised in the motion to compel and may not pertain to the merits of the underlying controversy.<sup>272</sup> Any reasonable discovery should be resolved without delay.<sup>273</sup>

### c. *Effect of an Application on Pending Litigation*

A trial court must stay an action involving an issue subject to arbitration if a motion to compel arbitration has been filed or an order compelling arbitration has been issued.<sup>274</sup> During arbitration, a court order may be needed to replace an arbitrator, compel attendance of witnesses, or direct arbitrators to proceed promptly.<sup>275</sup> However, if the arbitrable issues are severable, the stay applies only to those issues.<sup>276</sup> A court only can stay the lawsuit when it compels arbitration; it cannot dismiss the suit in its entirety.<sup>277</sup>

When an issue is pending in both arbitration and litigation, arbitration should be given priority to the extent it is likely to resolve issues material to the litigation.<sup>278</sup> For example, in *Merrill Lynch Trust*, where the plaintiffs' claims against Merrill Lynch were held to be arbitrable but the claims against two Merrill Lynch affiliates were not, the Texas Supreme Court concluded that the litigation against the affiliates should be stayed until the arbitration with Merrill Lynch was complete, so as not to undermine the arbitration.<sup>279</sup> Similarly, in *In re Merrill Lynch & Co.*, when one corporate affiliate's claims against Merrill Lynch were arbitrable and another affiliate's factually-identical claims were not, the Texas Supreme Court held that the trial court abused

<sup>260</sup> *Emery*, 186 S.W.3d at 113.

<sup>261</sup> *Nabors Drilling USA, LP v. Carpenter*, 198 S.W.3d 240, 246 (Tex. App.—San Antonio 2006, orig. proceeding).

<sup>262</sup> *In re Oakwood Mobile Homes*, 987 S.W.2d at 573; *Royston, Rayzor, Vickery & Williams, LLP v. Lopez*, 467 S.W.3d 494, 500 (Tex. 2015).

<sup>263</sup> *In re FirstMerit Bank, N.A.*, 52 S.W.3d 749, 756 (Tex. 2001); *Royston, Rayzor*, 467 S.W.3d at 501.

<sup>264</sup> See *supra* Part III.A.1; see also *Am. Med. Tech., Inc. v. Miller*, 149 S.W.3d 265, 272 (Tex. App.—Houston [14th Dist.] 2004, no pet.).

<sup>265</sup> *In re H.E. Butt Grocery*, 17 S.W.3d at 367.

<sup>266</sup> *In re Jim Walter Homes, Inc.*, 207 S.W.3d 888, 896 (Tex. App.—Houston [14th Dist.] 2006, orig. proceeding).

<sup>267</sup> *In re Jebbia*, 26 S.W.3d at 757.

<sup>268</sup> *Trico Marine Servs., Inc. v. Stewart and Stevenson Technical Servs., Inc.*, 73 S.W.3d 545, 548 (Tex. App.—Houston [1st Dist.] 2002, orig. proceeding).

<sup>269</sup> *In re MHI P'ship Ltd.*, 7 S.W.3d 918, 922 (Tex. App.—Houston [1st Dist.] 1999, orig. proceeding).

<sup>270</sup> *Sidley Austin Brown & Wood, L.L.P. v. J.A. Green Dev. Corp.*, 327 S.W.3d 859, 863 (Tex. App.—Dallas 2010, no pet.).

<sup>271</sup> TEX. CIV. PRAC. & REM. CODE § 171.086(a)(4), (6); *In re Houston Pipe Line Co.*, 311 S.W.3d 449, 451-52 (Tex. 2009).

<sup>272</sup> *In re Houston Pipeline Co.*, 311 S.W.3d at 451-52.

<sup>273</sup> *Id.* at 451.

<sup>274</sup> TEX. CIV. PRAC. & REM. CODE § 171.025(a).

<sup>275</sup> *In re Gulf Exploration LLC*, 289 S.W.3d 836, 841 (Tex. 2009).

<sup>276</sup> TEX. CIV. PRAC. & REM. CODE § 171.025(b).

<sup>277</sup> *Brooks v. Pep Boys Auto. Supercenters*, 104 S.W.3d 656, 659-60 (Tex. App.—Houston [1st Dist.] 2003, no pet.).

<sup>278</sup> *In re Merrill Lynch & Co., Inc. and Merrill Lynch, Pierce, Fenner & Smith Inc.*, 315 S.W.3d 888, 891 (Tex. 2010).

<sup>279</sup> *In re Merrill Lynch Trust Co.*, 235 S.W.3d 185, 195 (Tex. 2007).



its discretion in refusing to stay the litigation until the arbitration had concluded, because “the parallel litigation threatened to undermine or moot the arbitration and bargained-for arbitration rights.”<sup>280</sup>

However, the Fifth Circuit has observed that the fact that a plaintiff’s claims against multiple defendants would be split into different proceedings (in this case, two arbitrations and one state court lawsuit) was “an inevitable and permissible consequence where one of multiple defendants asserts a right to arbitrate,” a result the defendants could have avoided by foregoing arbitration.<sup>281</sup>

## 2. Actions to Stay Arbitration in Texas State Courts

A party attempting to resist an actual or threatened arbitration may apply to a court for an order staying the arbitration proceeding.<sup>282</sup> The same venue rules that govern applications to compel arbitration also govern applications to stay arbitration. *See supra* Part III.C.1.a. If there is a “substantial bona fide dispute as to whether an agreement to arbitrate exists, the court shall try the issue promptly and summarily.”<sup>283</sup> If the court rejects the application, it should order the parties to arbitrate.<sup>284</sup>

## 3. Actions to Compel Arbitration and Stay Litigation in Federal Court

If the FAA governs the arbitration clause and diversity of citizenship or a federal question exists, the parties can litigate the arbitrability of their dispute in a federal forum.<sup>285</sup>

In federal court, the FAA provides for two different devices that can be used to enforce an arbitration

agreement.<sup>286</sup> The first is an affirmative order to engage in arbitration.<sup>287</sup> The second is a stay of litigation in a case involving arbitrable disputes.<sup>288</sup> These two remedies are independent, meaning that an order compelling the parties to arbitrate does not stay litigation, and a stay of litigation does not compel a party to arbitrate. In fact, one of these remedies may be granted while the other is denied.<sup>289</sup>

### a. *Compelling Arbitration*

A petition to compel arbitration is a request that the court grant specific performance of an agreement to arbitrate.<sup>290</sup> To determine whether a federal court has jurisdiction over a petition to compel, a court may “look through” the petition to examine whether it is predicated on an action that “arises under” federal law.<sup>291</sup> Under the FAA, a party may file a petition to compel arbitration in the federal district court where the arbitration is to take place.<sup>292</sup>

The substantive issues involved in deciding a motion to compel parallel those considered by state courts.<sup>293</sup> The FAA requires the court to summarily order the parties to arbitrate if it finds that there is a written arbitration agreement and that the opposing party failed to proceed under the agreement. If the opposing party disputes either the existence of the written arbitration agreement or its failure to comply, the court must summarily try the issue.<sup>294</sup> Whether there is an agreement to arbitrate is a “threshold question,” for the district court<sup>295</sup> and should be decided before class certification<sup>296</sup> or merits issues. However, a district court does have the power to enter a preliminary

<sup>280</sup> *In re Merrill Lynch & Co.*, 315 S.W.3d at 891; *accord In re Houston Progressive Radiology Assocs.*, 474 S.W.3d at 450 (holding that, under the FAA, claims of a non-signatory must be stayed if “(1) the arbitrated and litigated disputes involved the same operative facts, (2) the claims asserted in the arbitration and litigation are ‘inherently inseparable,’ and (3) the litigation has a ‘critical impact’ on the arbitration.”) (quoting *In re Devon Energy Corp.*, 332 S.W.3d 543, 548 (Tex. App.—Houston [1st Dist.] 2009, no pet.)).

<sup>281</sup> *Al Rushaid v. Nat’l Oilwell Varco, Inc.*, 814 F.3d 300, 306 (5th Cir. 2016).

<sup>282</sup> TEX. CIV. PRAC. & REM. CODE § 171.023.

<sup>283</sup> *Id.*

<sup>284</sup> *Id.*

<sup>285</sup> *Bank One, N.A. v. Shumake*, 281 F.3d 507, 513 (5th Cir. 2002); *Specialty Healthcare Mgmt., Inc. v. St. Mary Parish Hosp.*, 220 F.3d 650, 653 n.5 (5th Cir. 2000).

<sup>286</sup> *Brown v. Pac. Life Ins. Co.*, 462 F.3d 384, 389 n.1 (5th Cir. 2006).

<sup>287</sup> 9 U.S.C. § 4.

<sup>288</sup> 9 U.S.C. § 3.

<sup>289</sup> *See Midwest Mech. Contractors, Inc. v. Commonwealth Constr. Co.*, 801 F.2d 748, 750-51 (5th Cir. 1986).

<sup>290</sup> *Id.* at 750.

<sup>291</sup> *Vaden v. Discover Bank*, 556 U.S. 49, 60 (2009).

<sup>292</sup> 9 U.S.C. § 4; *see also Econo-Car Int’l, Inc. v. Antilles Car Rentals, Inc.*, 499 F.2d 1391 (3d Cir. 1974).

<sup>293</sup> *See Tittle v. Enron Corp.*, 463 F.3d 410, 418 (5th Cir. 2006) (federal courts consider whether there is a valid arbitration agreement between the parties, whether the dispute in question falls within the scope of the arbitration agreement, and whether other legal constraints external to the parties’ agreement foreclose arbitration).

<sup>294</sup> 9 U.S.C. § 4; *see also Trammell v. AccentCare, Inc.*, No. 18-50872, 2019 WL 2417408, at \*2 (5th Cir. June 7, 2019).

<sup>295</sup> *Auto Parts Mfg. Miss., Inc. v. King Constr. of Hous., L.L.C.*, 782 F.3d 186, 196 (5th Cir. 2015).

<sup>296</sup> *Reyna v. Int’l Bank of Commerce*, 839 F.3d 373, 377 (5th Cir. 2016) (defendant’s motion to compel arbitration must be decided before FLSA class certification where the defendant moved promptly to compel and there was no dispute as to the existence of an arbitration agreement with sole plaintiff).

injunction to maintain the status quo before resolving a pending motion to compel arbitration.<sup>297</sup>

*b. Staying Litigation*

A motion to stay litigation is a request for the district court to refrain from further action in a suit pending arbitration.<sup>298</sup> Under Section 3 of the FAA, a party may move to stay litigation in the federal district court where the litigation is pending “upon any issue referable to arbitration under an agreement in writing for such arbitration.”<sup>299</sup>

The court must grant the stay if there is a written agreement to arbitrate between the parties and the issues raised are within the reach of the agreement.<sup>300</sup> If only some claims in the pending suit are arbitrable, but others are not, the court may stay the proceedings only as to the arbitrable claims.<sup>301</sup> If the court decides that all issues in a case must be submitted to arbitration, it may dismiss the case rather than stay it.<sup>302</sup>

4. Actions to Stay Arbitration in Federal Court

Unlike the TAA, the FAA provides no statutory mechanism for preventing arbitration of a dispute that is not subject to arbitration. Parties seeking a stay of arbitration in federal court typically do so by requesting declaratory and/or injunctive relief.<sup>303</sup>

5. Actions Relating to the Arbitrator Selection Process

Both the TAA and FAA contain provisions allowing a court to appoint arbitrators in certain circumstances. The TAA provides that a “court, on application of a party stating the nature of the issues to be arbitrated and the qualifications of the proposed arbitrators, shall appoint one or more qualified arbitrators if: (1) the agreement to arbitrate does not specify a method of appointment; (2) the agreed method fails or cannot be followed; or (3) an appointed

arbitrator fails or is unable to act and a successor has not been appointed.”<sup>304</sup>

Similarly, Section 5 of the FAA provides:

If in the agreement provision be made for a method of naming or appointing an arbitrator or arbitrators or an umpire, such method shall be followed; but if no method be provided therein, or if a method be provided and any party thereto shall fail to avail himself of such method, or if for any other reason there shall be a lapse in the naming of an arbitrator or arbitrators or umpire, or in filling a vacancy, then upon the application of either party to the controversy the court shall designate and appoint an arbitrator or arbitrators or umpire, as the case may require, who shall act under the said agreement with the same force and effect as if he or they had been specifically named therein....<sup>305</sup>

The Texas Supreme Court, applying the FAA, has emphasized that “fail to avail” and “lapse” language can be invoked only when there is “some ‘mechanical breakdown in the arbitrator selection process’ or ‘one of the parties refuses to comply, thereby delaying arbitration indefinitely.’”<sup>306</sup> The court held that any alleged lapse must be measured from the time the parties reach an impasse under the selection process outlined in the arbitration agreement, and not before, and that a one-month delay following the impasse is insufficient as a matter of law to constitute a “lapse” under Section 5.<sup>307</sup>

The Fifth Circuit adopted a similar definition of lapse in *BP Exploration Libya Ltd v. ExxonMobil Libya Ltd*, holding that it means “a lapse in time in the naming of the arbitrator or in the filling of a vacancy on a panel of arbitrators, or some other mechanical breakdown in the arbitrator process.”<sup>308</sup> While such a lapse occurred

<sup>297</sup> *Janvey v. Alguire*, 647 F.3d 585, 592-95 (5th Cir. 2011) (“The language of the FAA does not touch on the ancillary power of the federal court to act before it decides whether the dispute is arbitrable”).

<sup>298</sup> *Midwest Mech. Contractors*, 801 F.2d at 750.

<sup>299</sup> 9 U.S.C. § 3.

<sup>300</sup> *Midwest Mech. Contractors*, 801 F.2d at 750-51; *In re Complaint of Hornbeck Offshore (1984) Corp.*, 981 F.2d 752, 754 (5th Cir. 1993). Non-signatories to an arbitration agreement may also seek a stay under Section 3 if they seek arbitration under traditional theories of state law—assumption, piercing the corporate veil, alter ego, incorporation by reference, third-party beneficiary, waiver, and estoppel. *Arthur Andersen LLP v. Carlisle*, 556 U.S. 624, 630 (2009).

<sup>301</sup> *Wick v. Atl. Marine*, 605 F.2d 166, 168 (5th Cir. 1979).

<sup>302</sup> *Alford v. Dean Witter Reynold, Inc.*, 975 F.2d 1161, 1164 (5th Cir. 1992).

<sup>303</sup> See, e.g., *F.C. Schaffer & Assocs., Inc. v. Demech Contractors, Ltd.*, 101 F.3d 40, 41 (5th Cir. 1996) (per curiam) (declaratory and injunctive relief); *Wood v. PennTex Res., L.P.*, 458 F. Supp. 2d 355, 360 (S.D. Tex. 2006) (declaratory relief); *Higman Marine Servs., Inc. v. BP Amoco Chem. Co.*, 114 F. Supp. 2d 593, 595 (S.D. Tex. 2000) (declaratory and injunctive relief).

<sup>304</sup> TEX. CIV. PRAC. & REM. CODE § 171.041(b).

<sup>305</sup> 9 U.S.C. § 5.

<sup>306</sup> *In re Service Corp. Int'l*, 355 S.W.3d 655, 659 (Tex. 2011) (quoting *In re La Pc. Corp.*, 972 S.W.2d 63, 64-65 (Tex. 1998)).

<sup>307</sup> *Id.* at 660.

<sup>308</sup> 689 F.3d 481, 492 (5th Cir. 2012) (internal citations omitted).

in *BP Exploration*, the district court abused its discretion in ordering the parties to proceed with five arbitrators when their agreement specified only three.<sup>309</sup>

In state court, as noted *infra* in Part III.D.1.a, trial court decisions relating to the selection of arbitrators are not subject to interlocutory appeal, but may be reviewable by mandamus.<sup>310</sup> The Fifth Circuit, however, held in *BP Exploration* that where the sole relief sought in the district court is a resolution of the impasse over the arbitrator selection process (and not the merits of the dispute), the district court’s resolution of that impasse is a final order under 9 U.S.C. § 16(a)(3) and is therefore subject to traditional appellate review.<sup>311</sup>

#### D. Appellate Review

The route to, and availability of, appellate review of trial court decisions regarding the arbitrability of disputes depends on whether (1) the arbitration agreement at issue arises under the TAA or the FAA, (2) the case is in federal or state court, and (3) the challenged order is favorable to arbitration (e.g., an order compelling arbitration or denying a motion to stay arbitration) or hostile to arbitration (e.g., an order denying a motion to compel arbitration or granting a motion to stay arbitration).

##### 1. Proceedings in State Court

###### a. Cases Arising Under the TAA

The TAA allows for an interlocutory appeal of orders that are hostile to arbitration, specifically orders (1) denying an application to compel arbitration, or (2) granting an application to stay arbitration.<sup>312</sup>

But the TAA does not allow for interlocutory review of orders favorable to arbitration – i.e., orders compelling arbitration or denying a motion to stay arbitration. Orders compelling arbitration under the TAA generally are interlocutory because the TAA requires that they be accompanied by a stay of the

underlying litigation and because the TAA contemplates that court action “may be needed to replace an arbitrator, compel attendance of witnesses or direct arbitrators to proceed promptly.”<sup>313</sup> However, orders compelling arbitration can be reviewed as part of the appeal from a final judgment in the case once arbitration is complete, even where the party challenging the order unsuccessfully pursued mandamus relief.<sup>314</sup>

The Texas Supreme Court has not specifically addressed the availability of mandamus relief when the trial court erroneously compels arbitration under the TAA. However, the breadth of its rationale in precluding mandamus review of orders compelling arbitration under the FAA (see the *In re Gulf Exploration* discussion in the next section) calls into question the availability of mandamus review under the TAA as well. Thus, pre-*Gulf Exploration* authority regarding the availability of mandamus review under the TAA should be viewed skeptically.<sup>315</sup>

###### b. Cases Arising Under the FAA

Orders hostile to arbitration. Until 2009, a state court’s order regarding an arbitration agreement governed by the FAA was not reviewable by interlocutory appeal in Texas courts.<sup>316</sup> This was true even for orders hostile to arbitration, including orders denying motions to compel arbitration, even though such orders were appealable in federal court. Instead, orders denying motions to compel under the FAA had been reviewable only by mandamus.<sup>317</sup> Thus, given the frequent uncertainty as to whether the TAA or FAA applies, parties seeking review of an order denying a motion to compel or an order staying arbitration often had to file both an interlocutory appeal (in the event the TAA governed) and a petition for writ for mandamus (in the event the FAA governed).<sup>318</sup>

In 2009, the Texas Legislature amended the Texas Civil Practice and Remedies Code to allow an interlocutory appeal of a court order *denying* arbitration

interlocutory order granting arbitration. See 842 S.W.2d 266, 271-72 (Tex. 1992) (stating “both the Texas and federal acts permit a party to appeal from an interlocutory order granting or denying a request to compel arbitration”).

<sup>315</sup> See *Mohamed v. Auto Nation USA Corp.*, 89 S.W.3d 830, 834 (Tex. App.—Houston [1st Dist.] 2002, orig. proceeding) (holding mandamus relief was available to challenge an order compelling arbitration under either the TAA or the FAA); see also *In re Wolff*, 231 S.W.3d 466, 467 (Tex. App.—Dallas 2007, orig. proceeding); *In re Kepka*, 178 S.W.3d 279, 286 (Tex. App.—Houston [1st Dist.] 2005, orig. proceeding).

<sup>316</sup> *Anglin*, 842 S.W.2d at 272.

<sup>317</sup> See, e.g., *In re Bank One*, 216 S.W.3d 825, 826 (Tex. 2007) (per curiam).

<sup>318</sup> *Anglin*, 842 S.W.2d at 272.

<sup>309</sup> *Id.* at 495-96. But see *Adam Technologies Int’l S.A. de C.V. v. Sutherland Global Servs., Inc.*, 729 F.3d 443, 451 (5th Cir. 2013) (no lapse where party’s own noncompliance with the ICDR’s procedural requirements led to dispute over panel composition, and panel ultimately had been empaneled by ICDR).

<sup>310</sup> See *infra* notes 322 and 323 and accompanying text.

<sup>311</sup> *BP Exploration*, 689 F.3d at 489-90; see also *Bordelon Marine, L.L.C. v. Bibby Subsea ROV, L.L.C.*, 685 Fed. App’x 330, 334 (5th Cir. 2017).

<sup>312</sup> TEX. CIV. PRAC. & REM. CODE § 171.098.

<sup>313</sup> *In re Gulf Exploration, LLC*, 289 S.W.3d 836, 840-41 (Tex. 2009).

<sup>314</sup> See *Chambers v. O’Quinn*, 242 S.W.3d 30, 32 (Tex. 2007) (per curiam). The Texas Supreme Court’s decision in *Anglin v. Tipps* caused some confusion on this issue by erroneously stating that the TAA allows a party to appeal from an

for actions filed on or after September 1, 2009.<sup>319</sup> The amendment provided that a party may appeal a judgment or interlocutory order “under the same circumstances that an appeal from a federal district’s order or decision would be permitted by 9 U.S.C. Section 16.”<sup>320</sup> As a result of this amendment, dual appellate and mandamus proceedings are no longer necessary.<sup>321</sup> Because the amendment expressly incorporates federal law, orders that are not subject to an interlocutory appeal in federal courts—like orders appointing a specific arbitrator—are not subject to an interlocutory appeal in Texas state courts either.<sup>322</sup> In such circumstances, a mandamus petition is the only available means of obtaining appellate review.<sup>323</sup>

Orders favorable to arbitration. Although interlocutory appeal remains unavailable to review orders *favorable* to arbitration, mandamus might be appropriate in rare circumstances.<sup>324</sup> In *In Re Gulf Exploration*, the Texas Supreme Court held that mandamus is generally unavailable to review the granting of a motion to compel arbitration because there is usually an adequate remedy by appeal.<sup>325</sup> The court noted that “there is no definitive list of when an appeal will be ‘adequate,’ as it depends on a careful balance of the case-specific benefits and detriments of delaying or interrupting a particular proceeding.”<sup>326</sup> However, the fact that the parties may waste time and money in arbitration is not sufficient to demonstrate the inadequacy of an appeal, particularly where a party can recover any fees and expenses incurred in the arbitration.<sup>327</sup> The court also explained that the fact that federal and state arbitration acts exclude from interlocutory review orders compelling arbitration “tilt strongly against [allowing] mandamus review” in most circumstances.<sup>328</sup>

*In re Gulf Exploration* also clarified the court’s earlier decision in *In re Palacios*, in which the court had suggested that review might be available “if a party can meet a ‘particularly heavy’ mandamus burden to show ‘clearly and indisputably that the district court did not

have the discretion to stay the proceedings pending arbitration.”<sup>329</sup> *In re Gulf Exploration* effectively eliminated the *Palacios* exception by holding that it does not apply to the question of whether compelling arbitration was correct, but rather applies only to the question of whether the case should have been dismissed or stayed.<sup>330</sup>

Even in closing the door on the *Palacios* exception, the supreme court still held that mandamus review may be available under very limited circumstances: “In those rare cases when legislative mandates conflict, mandamus ‘may be essential to preserve important substantive and procedural rights from impairment or loss, [and] allow the appellate courts to give needed and helpful direction to the law that would otherwise prove elusive in appeals from final judgments.’”<sup>331</sup> This rationale explained the court’s prior authorization of mandamus review in *In re Poly-America, L.P.*, where it reviewed an order compelling arbitration because a waiver of statutory remedies in the challenged arbitration agreement threatened to undermine the legislative worker’s compensation system as a whole.<sup>332</sup>

### c. *Cases Arising Under the Common Law*

For arbitrations arising under the common law, a trial court’s rulings on a motion to compel arbitration may be challenged by mandamus.<sup>333</sup>

## 2. Proceedings in Federal Court

### a. *Review of Decisions Hostile to Arbitration Under the FAA in Federal Court*

In federal court, where federal procedural law controls, the FAA permits an interlocutory appeal from an order refusing to stay litigation pending arbitration, 9 U.S.C. § 16(a)(1)(A), or an order denying a motion to compel arbitration, 9 U.S.C. § 16(a)(1)(B).<sup>334</sup>

In the Fifth Circuit, an appeal from the denial of a motion to compel arbitration does not automatically stay

<sup>319</sup> TEX. CIV. PRAC. & REM. CODE § 51.016. The changes in § 51.016 apply to actions filed on or after September 1, 2009, and do not apply to appeals initiated before September 1, 2009.

<sup>320</sup> *Id.*

<sup>321</sup> Dylan O. Drummond, *Bridging the Gulf Between the Texas and Federal Arbitration Acts: S.B. 1650 End Simultaneous Mandamus and Interlocutory Appellate Proceedings in Texas*, THE HOUSTON LAWYER, Sept./Oct. 2009, at 47.

<sup>322</sup> See *CMH Homes v. Perez*, 340 S.W.3d 444 (Tex. 2011).

<sup>323</sup> *In re Service Corp. Int’l*, 355 S.W.3d 655, 658 (Tex. 2011) (granting mandamus relief to vacate trial court order appointing arbitrator in a manner inconsistent with the parties’ agreement).

<sup>324</sup> See *In re Gulf Exploration, LLC*, 289 S.W.3d 836 (Tex. 2009).

<sup>325</sup> *Id.* at 842.

<sup>326</sup> *Id.*

<sup>327</sup> *Id.* at 842-43.

<sup>328</sup> *Id.* at 842.

<sup>329</sup> 221 S.W.3d 564, 565-66 (Tex. 2006) (per curiam).

<sup>330</sup> *In re Gulf Exploration, LLC*, 289 S.W.3d at 841.

<sup>331</sup> *Id.* at 843.

<sup>332</sup> *Id.* (citing *In re Poly-America*, 262 S.W.3d 337, 352 (Tex. 2008)).

<sup>333</sup> *Royston, Rayzor, Vickery & Williams, LLP v. Lopez*, 467 S.W.3d 494, 499 (Tex. 2015).

<sup>334</sup> *Arthur Andersen, LLP v. Carlisle*, 556 U.S. 624, 627 (2009).



litigation.<sup>335</sup> The district court may, however, grant a discretionary stay.<sup>336</sup> To determine whether the stay should be granted, courts apply a four-part test, which asks, (1) whether the stay applicant has made a strong showing that he is likely to succeed on the merits; (2) whether the applicant will be irreparably injured absent a stay; (3) whether issuance of the stay will substantially injure other parties interested in the proceedings; and (4) whether the public interest favors a stay.<sup>337</sup>

*b. Review of Decisions Favorable to Arbitration Under the FAA in Federal Court*

The FAA also provides appellate review of any final order with respect to an arbitration, regardless of whether it is favorable or hostile to arbitration, 9 U.S.C. § 16(a)(3), but most orders favorable to arbitration (compelling arbitration or staying litigation) are interlocutory and do not result in a final order. Under 9 U.S.C. § 16(b), a party may not appeal from such an interlocutory order unless it obtains permission to take an interlocutory appeal under 28 U.S.C. § 1292(b).

In reconciling Section 16(a)(3) and Section 16(b), the United States Supreme Court held that when a district court compels arbitration and dismisses the remainder of the action, the order is a final judgment and immediately appealable.<sup>338</sup> However, where the district court stays the litigation pending completion of arbitration, rather than dismissing the case, the order is interlocutory and appellate review is unavailable.<sup>339</sup> This is true even where the district court administratively closes the case.<sup>340</sup> In such circumstances, a complaining party can raise the arbitrability issue only after the arbitration takes place and a final judgment is entered.<sup>341</sup>

<sup>335</sup> *Weingarten Realty Investors v. Miller*, 661 F.3d 904, 907-10 (5th Cir. 2011). There is a circuit split on this issue. *Id.* at 908 (explaining that the Third, Fourth, Seventh, Tenth, and Eleventh Circuits hold that a notice of appeal automatically stays proceedings in the district court).

<sup>336</sup> *Id.* at 910.

<sup>337</sup> *Id.*; *Hilton v. Braunskill*, 481 U.S. 770, 776 (1987).

<sup>338</sup> *Green Tree Fin. Corp. Alabama v. Randolph*, 531 U.S. 79, 89 (2000).

<sup>339</sup> *Mire v. Full Spectrum Lending, Inc.*, 389 F.3d 163, 167 (5th Cir. 2004); *see also In re Great Western Drilling, Ltd.*, 289 S.W.3d 836, 839 (Tex. 2009).

<sup>340</sup> *Mire*, 389 F.3d at 167; *see also SW Elec. Power Co. v. Certain Underwriters at Lloyds of London*, 772 F.3d 384 (5th Cir. 2014).

<sup>341</sup> *See, e.g., Morrison v. Amway Corp.*, 517 F.3d 248, 253 (5th Cir. 2008); *see also Perry Homes v. Cull*, 258 S.W.3d 580, 586-87 (Tex. 2008) (citing cases).

<sup>342</sup> *Banc One Acceptance Corp. v. Hill*, 367 F.3d 426, 428 (5th Cir. 2004).

3. Standard of Review

Federal courts review a grant or denial of a petition to compel arbitration on a *de novo* basis.<sup>342</sup>

The Texas Supreme Court has instructed that both the trial court's determination of an arbitration agreement's validity and its determination of the arbitrability of a dispute between a signatory and non-signatory are legal questions subject to *de novo* review.<sup>343</sup> Numerous courts of appeals have applied a no-evidence standard to the trial court's factual determinations.<sup>344</sup> Various courts have indicated that the hybrid "de novo/no-evidence" standard is the equivalent of an "abuse of discretion" standard of review.<sup>345</sup>

To the extent that a court considers a decision to grant a motion to compel arbitration via mandamus, it should do so under an abuse of discretion standard.<sup>346</sup>

**E. Class Arbitration**

Since 2010, the United States Supreme Court has rendered four major decisions on class arbitration that both answer old questions and raise new ones regarding the practice.<sup>347</sup> First, in *Stolt-Nielsen S.A. v. Animalfeeds International, Inc.*, the Court held in a 5-3 decision that class arbitration is unavailable where the parties' agreement is "silent" on the availability of such arbitration.<sup>348</sup> Second, in *AT&T Mobility LLC v. Concepcion*, the Court concluded in a 5-4 decision that the FAA preempts a California rule that held class action waivers in consumer arbitration agreements to be unconscionable and therefore unenforceable.<sup>349</sup> Third, in *American Express Co. v. Italian Colors Restaurant*, the Court held in a 5-3 decision that arbitration agreements containing class action waivers are enforceable even if the result is that it becomes

<sup>343</sup> *J.M. Davidson, Inc. v. Webster*, 128 S.W.3d 223, 227 (Tex. 2003); *Jody James Farms*, 547 S.W.3d at 630-31; *see also In re Labatt Food Serv., L.P.*, 279 S.W.3d 640, 643 (Tex. 2009).

<sup>344</sup> *See, e.g., Trammell v. Galaxy Ranch Sch., L.P.*, 246 S.W.3d 815, 820 (Tex. App.—Dallas 2008, no pet.); *Garcia v. Huerta*, 2011 Tex. App. LEXIS 2255, at \*8 (Tex. App.—San Antonio Mar. 30, 2011, pet. denied).

<sup>345</sup> *See, e.g., Sidley Austin Brown & Wood, LLP v. J.A. Green Dev. Corp.*, 327 S.W.3d 859, 863 (Tex. App.—Dallas 2010, no pet.); *Huerta*, 2011 Tex. App. LEXIS 2255, at \*8; *SEB, Inc. v. Campbell*, 2011 Tex. App. LEXIS 1588, at \*\*4-6 (Tex. App.—Austin Mar. 2, 2011, no pet.); *In re Houston Progressive Radiology Assocs., PLLC*, 474 S.W.3d 435, 442 (Tex. App.—Houston [1st Dist.] 2015, no pet.).

<sup>346</sup> *In re 24R Inc.*, 324 S.W.3d 564, 566 (Tex. 2010).

<sup>347</sup> *See generally* Alan S. Kaplinksy, *Arbitration Developments: Has the Supreme Court Finally Stepped In?*, 66 BUS. LAW. 529 (2011) (discussing confusion throughout the federal judiciary regarding class arbitration).

<sup>348</sup> 559 U.S. 662 (2010).

<sup>349</sup> 563 U.S. 333 (2011).

economically unfeasible for a plaintiff to assert a claim.<sup>350</sup> Fourth, in *Lamps Plus, Inc. v. Varela*, the Court held 5-4 that class arbitration cannot proceed where the contract at issue is ambiguous on the question, and that such arbitration is permissible only when the parties expressly consent to it.<sup>351</sup>

After these cases, parties seeking to pursue or avoid class arbitration must address three basic questions: (1) is there an agreement on class arbitration; (2) are there any generally applicable contractual defenses to the class arbitration provision; and (3) who will decide the enforceability of the provision?

### 1. Agreement on Class Treatment

A threshold question is whether the arbitration agreement permits or forbids class arbitration. A provision that expressly agrees to or waives class arbitration is generally dispositive,<sup>352</sup> although a party may mount a challenge to the provision under general principles of contract law.<sup>353</sup> In *Stolt-Nielsen*, the Supreme Court answered the question of whether class arbitration is available when an agreement is silent on the issue, concluding that “a party may not be compelled under the FAA to submit to class arbitration unless there is a contractual basis for concluding that the party *agreed* to do so.”<sup>354</sup> At the time, the Court did not close the door on the notion of implied consent to class arbitration. The parties in *Stolt-Nielsen* had stipulated that no agreement existed regarding class arbitration, and the Court thus had no occasion to address what contractual basis would support a finding of consent.<sup>355</sup> But the Court obliquely indicated that an implied agreement is possible.<sup>356</sup> Any such opening was definitively closed by the Court’s 2019 decision in *Lamps Plus, Inc.* There, the Court held that class arbitration was not permitted where the parties’ contract was ambiguous as to its availability, and instead emphasized that the bilateral nature of arbitration should not be disturbed absent clear evidence that the

contracting parties consented to multilateral arbitration.<sup>357</sup>

### 2. Defenses Against Class Arbitration Clauses and Preemption

As with the arbitration agreement itself, parties may attack a class arbitration provision using defenses that are generally applicable to *any* contract (such as fraud, duress, or unconscionability).<sup>358</sup> However, as the Court made clear in *Concepcion*, state law doctrines that specifically target arbitration are preempted by the FAA.<sup>359</sup> For example, outright bans on arbitration or the application of a general doctrine “in a fashion that disfavors arbitration” would be preempted under the FAA.<sup>360</sup>

The reach of this second category is unclear. While the Court clearly stated why it was preempting the California law at issue in *Concepcion*, the majority gave little guidance as to where the preemption line should be drawn. The Court indicated that judges may not rely on “the uniqueness of an agreement to arbitrate” as grounds for voiding an arbitration provision,<sup>361</sup> citing several examples of laws that might be preempted.<sup>362</sup> But the Court’s analysis was focused on the rule before it—specifically, California case law holding that consumer arbitration agreements are unconscionable if (1) the agreement is in an adhesion contract, (2) disputes between the parties are likely to involve small amounts of damages, and (3) the party with inferior bargaining power alleges a deliberate scheme to defraud.<sup>363</sup> The Court spent the bulk of the opinion discussing how the California rule violated the fundamental attributes of arbitration and the FAA, assailing it for forcing “manufactured” class arbitration on a non-consenting party.<sup>364</sup>

The strong language of the opinion suggests that at the time the decision issued, there was a majority of justices on the Supreme Court who believed that class procedures may be fundamentally incompatible with

<sup>350</sup> 570 U.S. 228 (2013).

<sup>351</sup> 139 S. Ct. 1407, 1419 (2019).

<sup>352</sup> Cf. *Stolt-Nielsen S.A.*, 559 U.S. at 681 (“[I]nterpretation of an arbitration agreement is generally a matter of state law.”).

<sup>353</sup> See *infra* notes 358–361 and accompanying text.

<sup>354</sup> 559 U.S. at 684.

<sup>355</sup> *Id.* at 687 & n.10.

<sup>356</sup> See *id.* at 685 (“An implicit agreement to authorize class-action arbitration, however, is not a term that the arbitrator may infer *solely* from the fact of the parties’ agreement to arbitrate.”) (emphasis added); see also Erin Miller, *No Class Arbitration Without Agreement*, SCOTUSBLOG, Apr. 29, 2010, <http://www.scotusblog.com/?p=19459> (making a similar observation) (last visited Aug. 19, 2019).

<sup>357</sup> 139 S. Ct. 1407, 1415 (2019).

<sup>358</sup> 9 U.S.C. § 2; *Doctor’s Ass’n, Inc. v. Casarotto*, 517 U.S. 681, 687 (1996).

<sup>359</sup> *AT&T Mobility LLC v. Concepcion*, 563 U.S. 333, 341 (2011).

<sup>360</sup> *Id.*

<sup>361</sup> *Id.*

<sup>362</sup> *Id.* at 342 (“Other examples are easy to imagine. The same argument might apply to a rule classifying as unconscionable arbitration agreements that fail to abide by the Federal Rules of Evidence, or that disallow an ultimate disposition by a jury (perhaps termed ‘a panel of twelve lay arbitrators’ to help avoid preemption).”).

<sup>363</sup> *Id.* at 340 (citing *Discover Bank v. Superior Court*, 113 P.3d 1100, 1110 (Cal. 2005)).

<sup>364</sup> *Id.* at 343-52.

arbitration because they (1) make the dispute-resolution process slower, more complex and more costly; (2) threaten the due process rights of absent class members; and (3) increase risks to defendants to an unacceptable level.<sup>365</sup> The opinion immediately drew the ire of several U.S. senators,<sup>366</sup> who have since introduced legislation to limit compelled arbitration in employment, consumer, and civil rights cases.<sup>367</sup>

### 3. Who Decides the Enforceability of a Class Arbitration Clause?

Finally, there remains the question of who decides the enforceability of a class arbitration provision—a court or the arbitrator. In *Green Tree Financial Corp. v. Bazzle*, a four-justice plurality of the United States Supreme Court had suggested that the arbitrator should decide the issue.<sup>368</sup> However, the Supreme Court observed in *Stolt-Nielsen* that its *Green Tree* plurality opinion lacks precedential value.<sup>369</sup> The Supreme Court has never resolved the issue.<sup>370</sup>

The Texas Supreme Court has relied on *Green Tree* to conclude that disputes over the enforceability of a class arbitration provision under the FAA must go to the arbitrator.<sup>371</sup>

In contrast, the Fifth Circuit has held that class arbitrability is a gateway issue to be decided by courts, not arbitrators, absent clear and unmistakable language to the contrary.<sup>372</sup> Several other circuit courts have reached the same conclusion.<sup>373</sup>

The issue is complicated when an agreement contains a clause delegating gateway issues to the arbitrator. See *supra*, Part III.A.1.a. Where agreements contain a proper delegation clause but do not expressly

forbid class arbitration, the Fifth Circuit has held that the issue of class arbitrability should be decided by the arbitrator.<sup>374</sup>

The result is different where the agreement expressly prohibits class arbitration. In *20/20 Communications, Inc. v. Crawford*, the Fifth Circuit held that class arbitrability was an issue for the court where the arbitration agreement prohibited arbitration “as a class or collective action ... to the maximum extent permitted by law.”<sup>375</sup> The court acknowledged that there were arguably delegation clauses in the agreement that, standing alone, empowered the arbitrator to decide questions of class arbitrability.<sup>376</sup> But the court held that when read alongside the class arbitration bar, these clauses no longer clearly and unmistakably stated that arbitrators shall decide questions of class arbitrability.<sup>377</sup>

## IV. POST-ARBITRATION LITIGATION

Post-arbitration litigation often is necessary when the losing party fails to fully comply with the arbitrator’s decision. The prevailing party may seek judicial confirmation of an award to take advantage of the additional enforcement mechanisms available for a court judgment.

The losing party often will ask a court to modify or vacate the award, either in response to the winning party’s application for confirmation or on its own motion. These challenges are frequently made in spite of the extremely narrow scope of judicial review of arbitration awards. Before initiating post-arbitration litigation, a party should consider a number of factors set forth below.

<sup>365</sup> *Id.* at 348-50.

<sup>366</sup> See Press Release, Rep. Hank Johnson, Sens. Franken and Blumenthal Announce Legislation Giving Consumers More Power in the Courts v. Corporations (Apr. 27, 2011), available at <https://hankjohnson.house.gov/media-center/press-releases/rep-hank-johnson-sens-franken-and-blumenthal-announce-legislation-giving> (announcing the reintroduction of the Arbitration Fairness Act) (last visited Aug. 19, 2019).

<sup>367</sup> Arbitration Fairness Act of 2011, S. 987, 112th Cong. § 3 (2011).

<sup>368</sup> *Compare Green Tree Fin. Corp. v. Bazzle*, 539 U.S. 444, 452-53 (2003) (plurality opinion) (remanding the case so that the arbitrator could decide the class arbitration clause controversy), with *id.* at 454-55 (Stevens, J., concurring in judgment) (noting that he believes the arbitrator should have heard controversy but that the petitioner failed to raise this argument on review).

<sup>369</sup> See *Stolt-Nielsen S.A. v. Animalfeeds Int’l, Inc.*, 559 U.S. 662, 679(2010) (“[T]he parties appear to have believed that the judgment in *Bazzle* requires an arbitrator . . . to decide whether a contract permits class arbitration . . . . In fact, however, only the plurality decided that question.”).

<sup>370</sup> *Lamps Plus, Inc. v. Varela*, 139 S. Ct. 1407, 1417 n.4 (2019).

<sup>371</sup> *In re Wood*, 140 S.W.3d 367, 369 (Tex. 2004).

<sup>372</sup> *20/20 Communications, Inc. v. Crawford*, 930 F.3d 715, 718-19 (5th Cir. 2019).

<sup>373</sup> See *Del Webb Cmty., Inc. v. Carlson*, 817 F.3d 867, 877 (4th Cir. 2016); *Reed Elsevier, Inc. ex rel. LexisNexis Div. v. Crockett*, 734 F.3d 594, 599 (6th Cir. 2013); *Herrington v. Waterstone Mortg. Corp.*, 907 F.3d 502, 506-07 (7th Cir. 2018); *Catamaran Corp. v. Towncrest Pharmacy*, 864 F.3d 966, 972 (8th Cir. 2017); *Eshagh v. Terminix Int’l Co., L.P.*, 588 F. App’x 703, 704 (9th Cir. 2014) (unpublished); *JPay, Inc. v. Kobel*, 904 F.3d 923, 935-36 (11th Cir. 2018).

<sup>374</sup> *J&K Admin. Mgmt. Servs., Inc.*, 817 F.3d 193, 197-98 (5th Cir. 2016); *Pedcor Mgmt. Co., Inc. Welfare Benefit Plan v. Nations Pers. of Tex., Inc.*, 343 F.3d 355, 363 (5th Cir. 2003).

<sup>375</sup> 930 F.3d 715, 719-20.

<sup>376</sup> *Id.* at 721.

<sup>377</sup> *Id.*

## A. Substantive Considerations

The first question your client is likely to ask is whether you have any chance of prevailing on your challenge to the arbitration award. To answer this question, you will need to review the available grounds for vacatur or modification, the scope of the arbitration clause, the record of the arbitration proceedings, the arbitrator's decision, and the applicable standard of review, among other things. You will also need to determine whether the underlying arbitration agreement is governed by the Texas Arbitration Act, the Federal Arbitration Act or federal or state common law, as the governing law may impact the availability grounds for vacatur, the standards for reviewing those grounds, and the enforceability of a clause expanding the scope of judicial review.

### 1. Grounds for Vacatur

#### a. *Statutory Grounds under TAA and FAA*

The grounds for vacating an award under the TAA are limited and are focused on “the integrity of the process rather than the propriety of the result.”<sup>378</sup> An arbitration award is not subject to vacatur even if the relief granted by the arbitrators could not or would not be granted by a court of law or equity.<sup>379</sup>

The TAA provides that an award may be vacated in the following circumstances:

- If the award was obtained by corruption, fraud, or other undue means;
- If the rights of a party were prejudiced by evident partiality by a neutral arbitrator, corruption in an arbitrator, or misconduct or willful behavior of an arbitrator;
- If the arbitrators exceed their powers, refused to postpone the hearing after a showing of sufficient cause, refused to hear evidence material to the controversy, or conducted a hearing contrary to the TAA or in a manner that substantially prejudiced the rights of a party; or
- If there was no agreement to arbitrate, the parties were not compelled by the court to arbitrate, and the party opposing the arbitration did not participate in the hearing without raising the objection.<sup>380</sup>

An arbitration award may be vacated under the FAA on grounds that are similar to those found in the TAA:

- Where the award was procured by corruption, fraud, or undue means;
- Where there was evident partiality or corruption in the arbitrators;
- Where 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
- 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.<sup>381</sup>

The sections below discuss these vacatur grounds in greater detail. As noted below, the grounds that appear to have been most often successfully invoked are the “evident partiality” and “exceeding their powers” grounds.

#### (1) Evident Partiality (CPRC § 171.088(a)(2)(A) & 9 USC § 10(a)(2)).

The “evident partiality” vacatur ground does not require a showing of actual bias or corruption, but rather is focused on whether an arbitrator's nondisclosure might lead to a reasonable perception of bias. The best discussion of this ground for Texas practitioners can be found in a 2013 article by Anne Johnson and Christopher Kratovil (link provided below).<sup>382</sup> The following paragraphs summarize some of the key points made in that article.

The test for “evident partiality” under the FAA in the Fifth Circuit is whether an arbitrator's nondisclosure involves a “significant compromising relationship”—a standard adopted by the en banc court in *Positive Software Solutions, Inc. v. New Century Mortgage Corp.*<sup>383</sup> The court held that that the “draconian remedy” of vacatur cannot be based on the nondisclosure of a trivial or insubstantial prior relationship between the arbitrator and the parties to the proceeding.<sup>384</sup> Accordingly, the court concluded that vacatur was not appropriate merely because an arbitrator did not disclose that, more than seven years before the arbitration, he had

<sup>378</sup> *TUCO, Inc. v. Burlington N. R.R. Co.*, 912 S.W.2d 311, 315 (Tex. App.—Amarillo 1995), *modified on other grounds*, 960 S.W.2d 629 (Tex. 1997).

<sup>379</sup> TEX. CIV. PRAC. & REM. CODE § 171.090.

<sup>380</sup> TEX. CIV. PRAC. & REM. CODE § 171.088(a)(1)-(4).

<sup>381</sup> 9 U.S.C. § 10(a).

<sup>382</sup> Christopher D. Kratovil & Anne M. Johnson, *Evident Partiality*, 65 THE ADVOCATE 52 (Winter 2013) (*available*

*at* [http://www.dykema.com/assets/htmldocuments/Advocate\\_Winter\\_Vol65.pdf](http://www.dykema.com/assets/htmldocuments/Advocate_Winter_Vol65.pdf)) (last visited Aug. 19, 2019).

<sup>383</sup> 476 F.3d 278, 286 (5th Cir.) (en banc), *cert. denied*, 127 S. Ct. 2943 (June 11, 2007) (No. 06-1352).

<sup>384</sup> *Id.* at 283.



served as co-counsel with one of the lawyers for a party to the arbitration in unrelated litigation. The contacts made during that representation were “tangential, limited, and stale.”<sup>385</sup>

Since the *Positive Software* decision came down, there are only two reported cases in this Circuit in which a federal district court found a nondisclosure that satisfied the “significant compromising relationship” standard:

- In *Infobilling, Inc. v. Transaction Clearing, LLC*, the party seeking vacatur alleged that the opposing counsel—an officer of a PAC that raised money for the county Republican party—had significant political ties to one of the arbitrators, a former state judge, and that the arbitrator and lawyer may have seen each other regularly at fundraisers and other campaign activities.<sup>386</sup> The district court found that these allegations “stated a claim for vacatur” and warranted limited discovery into whether the arbitrator had “significant political ties” with the lawyer.<sup>387</sup>
- In *Dealer Computer Services, Inc. v. Michael Motor Co.*, the district court found that there was a “reasonable impression of bias” caused by the arbitrator’s failure to disclose the fact that she served as an arbitrator in a case involving the same defendant, similar contractual language, and the same damages expert.<sup>388</sup> However, the Fifth Circuit reversed the vacatur based on its determination that the petitioner had waived its complaint by failing to object to the arbitrator’s participation on the panel despite being on inquiry notice of her involvement in the related case.<sup>389</sup>

The test for “evident partiality” is slightly more lenient in Texas state courts. In the leading case of *Burlington Northern Railroad Co. v. TUCO, Inc.*, the Texas Supreme Court found evident partiality where an arbitrator failed to disclose that he had accepted a substantial referral from the law firm of a non-neutral co-arbitrator during the course of the arbitration.<sup>390</sup> The court held:

[A] prospective neutral arbitrator selected by the parties or their representatives exhibits

evident partiality if he or she does not disclose facts which might, to an objective observer, create a reasonable impression of the arbitrator’s partiality. We emphasize that this evident partiality is established from the non-disclosure *itself*, regardless of whether the nondisclosed information necessarily establishes partiality or bias.<sup>391</sup>

The Texas Supreme Court revisited the evident partiality standard five years later in *Mariner Financial Group, Inc. v. Bossley*.<sup>392</sup> In that case, the court found that a fact issue existed as to whether the chair of the arbitration panel was “evidently partial” based on the arbitrator’s failure to disclose a prior adverse relationship with one of the parties’ expert witnesses. The court emphasized that under *TUCO*’s objective test, the “consequences for nondisclosure are directly tied to the materiality of the unrevealed information.”<sup>393</sup> Whereas in *TUCO*, the undisclosed relationship was obviously known to the arbitrator, the record in *Mariner* was silent as to whether the arbitrator remembered or knew the expert witness, and thus the Court required additional fact-finding before it could determine whether the undisclosed relationship was material to the issue of evident partiality.<sup>394</sup>

The Texas Supreme Court again had occasion to apply its *TUCO* standard in *Tenaska Energy, Inc. v. Ponderosa Pine Energy, LLC*, where it reversed the Dallas Court of Appeals and reinstated the trial court’s vacatur of a \$125 million arbitration award on evident partiality grounds.<sup>395</sup> The arbitrator had disclosed that one of the law firms involved, Nixon Peabody, had previously recommended him as an arbitrator, and that he was the director of a litigation services company called Lexsite.<sup>396</sup> However, he failed to disclose that (1) all of his contacts at the 700-lawyer firm were with the two lawyers that represented the party to the arbitration at issue, (2) he owned stock in Lexsite, served as president of its US subsidiary, and had conducted significant marketing for the company; (3) he had meetings or contacts with the two lawyers in question to solicit business from the firm; and (4) he had allowed one of the two lawyers to edit his disclosures to minimize the contact.<sup>397</sup> Under these circumstances, the Court held that “[t]aken together, this undisclosed information might cause a reasonable person” to view

<sup>385</sup> *Id.* at 284-85.

<sup>386</sup> No. SA-12-CV-01116-DAE, 2013 WL 1501570, at \*4 (W.D. Tex. Apr. 10, 2013).

<sup>387</sup> *Id.*

<sup>388</sup> 761 F. Supp. 2d 459 (S.D. Tex. 2010), *rev’d*, 485 Fed. App’x 724 (5th Cir. 2012).

<sup>389</sup> 485 Fed. App’x 724, 727-28 (5th Cir. 2012)

<sup>390</sup> 960 S.W.2d 629 (Tex. 1997).

<sup>391</sup> *Id.* at 636.

<sup>392</sup> 79 S.W.3d 30, 32-35 (Tex. 2002).

<sup>393</sup> *Id.* at 32.

<sup>394</sup> *Id.* at 33.

<sup>395</sup> 437 S.W.3d 518 (Tex. 2014).

<sup>396</sup> *Id.* at 521.

<sup>397</sup> *Id.* at 521-22, 525-26.

the arbitrator as being partial towards the Nixon Peabody lawyers” and rejected the “inquiry notice” standard adopted by the intermediate court.<sup>398</sup>

Several Texas courts of appeals have vacated arbitration decisions under the *TUCO* standard. For example:

- In *Karlseng v. Cooke*, the arbitrator stated in his disclosure statement that he did not have a significant personal relationship with the parties or their counsel. As it turned out, the arbitrator, a former judge, had a decades-long social relationship with one of the attorneys, received valuable gifts and meals from the attorney, and yet the two presented themselves as “complete strangers” at the arbitration hearing. The Dallas Court of Appeals vacated a \$22 million arbitration award based on its finding of evident partiality.<sup>399</sup>
- In *Alim v. KBR (Kellogg, Brown & Root) – Halliburton*, the Dallas Court of Appeals held that vacatur was proper where an arbitrator failed to disclose that a party representative had appeared before him in a prior arbitration.<sup>400</sup>
- In *Amoco D.T. Co. v. Occidental Petroleum Corp.*, the Houston Court of Appeals held that vacatur was proper where an arbitrator failed to disclose that another attorney in his law firm represented a parent company of one of the parties.<sup>401</sup>
- In *J.D. Edwards World Solutions Co. v. Estes, Inc.*, the Fort Worth Court of Appeals held that the neutral arbitrator’s failure to disclose a business relationship with one of the parties, including the provision of legal advice, established evident partiality.<sup>402</sup>
- In *Houston Village Builders v. Falbaum*, the Houston Court of Appeals found evident partiality where an arbitrator failed to disclose that he had an attorney-client relationship with a trade association to which one of the parties belonged.<sup>403</sup>
- In *Texas Commerce Bank v. Universal Technical Institute of Texas, Inc.*, the Houston Court of Appeals affirmed a vacatur on evident partiality grounds where the arbitrator failed to disclose that

he had served as lead counsel for one of the parties in a lawsuit six years earlier.<sup>404</sup>

Of course, there are many more examples of cases in which no evident partiality is found. Recent prominent examples include the following cases:

- In *Port Arthur Steam Energy LP v. Oxbow Calcining LLC*, the Houston Court of Appeals found no evident partiality where the arbitrator’s prior law firm was involved in unrelated litigation against the law firm (but not the specific lawyer) representing one of the parties, and the arbitrator had no financial interest in, and was unaware of, the connection to the other litigation.<sup>405</sup>
- In *Forest Oil Corp. v. El Rucio Land and Cattle Co.*, the Houston Court of Appeals held that Forest Oil failed to establish evident partiality where the challenged panelist had not disclosed that he had been considered as a mediator in related litigation, but there was a conflict in the evidence as to whether the panelist was even aware that he had been under consideration.<sup>406</sup> The Texas Supreme Court affirmed.<sup>407</sup>
- In *Sebastian v. Wilkerson*, the Beaumont Court of Appeals reversed a district court vacatur, finding no evident partiality where the arbitrator was “Facebook friends” with the attorney for one of the parties and had, a few years earlier, made a \$1000 contribution to her unsuccessful judicial campaign. The court concluded that “[a] reasonable member of the public understands that trial judges commonly rely on members of the bar for campaign assistance and would not conclude that” such assistance would translate into bias in favor of that attorney.” The court added that “a Facebook friendship does not show the degree or intensity of a judge’s relationship with a person, and thus, standing alone, provides no insight into the nature of a relationship.”<sup>408</sup>

Notably, even when construing arbitration agreements under the FAA rather than the TAA, Texas courts follow the Texas Supreme Court’s standard for evident

<sup>398</sup> *Id.* at 526-28.

<sup>399</sup> 346 S.W.3d 85, 87-94, 96-100 (Tex. App.—Dallas 2011, no pet.).

<sup>400</sup> 331 S.W.3d 178, 182 (Tex. App.—Dallas 2011, no pet.).

<sup>401</sup> 343 S.W.3d 837, 848, 850 (Tex. App.—Houston [14th Dist.] 2011, pet. denied).

<sup>402</sup> 91 S.W.3d 836, 844 (Tex. App.—Fort Worth 2002, pet. denied).

<sup>403</sup> 105 S.W.3d 28, 35 (Tex. App.—Houston [14th Dist.] 2003, pet. denied).

<sup>404</sup> 985 S.W.2d 678 (Tex. App.—Houston [1st Dist.] 1999, pet. dismissed w.o.j.).

<sup>405</sup> 416 S.W.3d 708, 713 (Tex. App.—Houston [1st Dist.] 2013, pet. denied).

<sup>406</sup> 446 S.W.3d 58, 77-81 (Tex. App.—Houston [1st Dist.] 2014), *aff’d* 518 S.W.3d 422 (Tex. 2017).

<sup>407</sup> *Forest Oil Corp. v. El Rucio Land and Cattle Co.*, 518 S.W.3d 422 (Tex. 2017).

<sup>408</sup> No. 09-18-00223-CV, 2019 WL 470087, at \*4 (Tex. App.—Beaumont Feb. 7, 2019, no pet.) (mem. op.).

partiality established in *TUCO* rather than the Fifth Circuit’s *Positive Software* standard.<sup>409</sup>

- (2) Exceeding the scope of the arbitrator’s authority (CPRC § 171.088(a)(3)(A) & 9 USC § 10(a)(4)).

**Texas Cases.** The most common vacatur ground invoked by those challenging arbitration awards is the “exceed powers” ground. Arbitrators “exceed their powers” when they decide matters that are not properly before them or their award is not rationally inferable from the parties agreement.<sup>410</sup> To evaluate this vacatur ground, courts must review the arbitration agreement from which the arbitrator’s authority is derived—which may limit the arbitrator’s authority to deciding the matters submitted either expressly or by necessary implication—as well as the factual allegations pertinent to the claim.<sup>411</sup> Courts also look to the parties’ submission agreement and pleadings in arbitration to determine what issues the parties agreed to arbitrate.<sup>412</sup>

Arbitration clauses can range from very broad to very narrow. For example, the clauses with the broadest scope are those that encompass “any and all disputes between the parties,”<sup>413</sup> and only slightly narrower are those that provide for arbitration of “any and all disputes arising under or relating to” the contract at issue. Courts have labeled these clauses as “extremely broad” and “capable of expansive reach.”<sup>414</sup> On the other hand, there are many ways in which parties can limit the scope of an arbitration clause, such as (1) limiting arbitration only to certain categories of disputes, (2) limiting arbitration to disputes arising out of one contract in a

multi-contract relationship, or (3) restricting the arbitrator’s authority to award certain remedies, such as punitive damages.

Broad arbitration clauses have been held to support awards rendered on a variety of grounds,<sup>415</sup> including those not specifically argued to the arbitrators.<sup>416</sup> Broad clauses make “exceeding their powers” challenges particularly difficult because any doubts concerning the scope of arbitrability must be resolved in favor of arbitration.<sup>417</sup>

Unless an arbitration agreement under the TAA expressly provides otherwise (*see infra* Part IV.A.1.c), an arbitrator does not exceed his authority by misinterpreting the contract or misapplying the law.<sup>418</sup> Rather, a court’s task is limited to determining whether the arbitrator was authorized by the parties’ agreement to decide the dispute, not whether he decided the dispute correctly.<sup>419</sup>

Arbitration awards also can be challenged if the arbitration procedures set forth in the parties’ contract are not followed. The Texas Supreme Court has ordered the vacatur of an arbitration award where the arbitration panel was chosen in a manner that was inconsistent with the parties’ agreement. The parties’ adoption of a tripartite selection process and the imposition of a requirement that arbitrators be “independent” trumped the more general reference to the incorporation of the AAA rules, which, after the execution of the agreement, adopted the requirement that arbitrators be

<sup>409</sup> *See Amoco D.T. Co.*, 343 S.W.3d at 843.

<sup>410</sup> *Forged Components, Inc. v. Guzman*, 409 S.W.3d 91, 104 (Tex. App.—Houston [1st Dist.] 2013, no pet.); *Ancor Holdings, LLC v. Peterson, Goldman & Villani, Inc.*, 294 S.W.3d 818, 829-30 (Tex. App.—Dallas 2009, no pet.); *Barsness v. Scott*, 126 S.W.3d 232, 241 (Tex. App.—San Antonio 2003, pet. denied).

<sup>411</sup> *Centex/Vestal v. Friendship W. Baptist Church*, 314 S.W.3d 677, 684 (Tex. App.—Dallas 2010, pet. denied); *Graham-Rutledge & Co. v. Nadia Corp.*, 281 S.W.3d 683, 690 (Tex. App.—Dallas 2009, no pet.); *see also Glover v. IBP, Inc.*, 334 F.3d 471, 474 (5th Cir. 2003) (“To determine whether an arbitrator exceeded his powers, we must examine the language in the arbitration agreement.”).

<sup>412</sup> *See Centex/Vestal*, 314 S.W.3d at 685-86; *see also City of Baytown v. C.L. Winter, Inc.*, 886 S.W.2d 515, 518-19 (Tex. App.—Houston [1st Dist.] 1994, writ denied).

<sup>413</sup> *See, e.g., Kirby Highland Lakes Surgery Ctr., L.L.P. v. Kirby*, 183 S.W.3d 891, 898-99 (Tex. App.—Austin 2006, orig. proceeding) (citing *Neal v. Hardee’s Food Sys. Inc.*, 918 F.2d 34, 36-37 (5th Cir. 1990)); *see also Telecom Italia, SPA v. Wholesale Telecom Corp.*, 248 F.3d 1109, 1114 (11th Cir. 2001).

<sup>414</sup> *See Kirby*, 183 S.W.3d at 898 (citing *Pennzoil Exploration*, 139 F.3d at 1067-68, and *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth*, 473 U.S. 614, 625-26 (1985)).

<sup>415</sup> *See Centex/Vestal*, 314 S.W.3d at 685 (noting that “[a]ny claim arising out of or related to the Contract” was subject to arbitration was broad and encompassed a wide range of disputes); *Skidmore Energy, Inc. v. Maxus (U.S.) Exp. Co.*, 345 S.W.3d 672 (Tex. App.—Dallas 2011, pet. denied).

<sup>416</sup> *See City of Baytown v. C.L. Winter, Inc.*, 886 S.W.2d 515, 518 (Tex. App.—Houston [1st Dist.] 1994, writ denied); *J.J. Gregory Gourmet Servs., Inc. v. Antone’s Import Co.*, 927 S.W.2d 31, 34-35 (Tex. App.—Houston [1st Dist.] 1995, no writ).

<sup>417</sup> *Townes Telecomms. Inc. v. Travis, Wolff & Co.*, 291 S.W.3d 490, 493 (Tex. App.—Dallas 2009, pet. denied).

<sup>418</sup> *Ancor Holdings*, 294 S.W.3d at 830 (relevant inquiry is whether the arbitrator “had the authority, based on the arbitration clause and the parties’ submissions, to reach a certain issue, not whether the arbitrator correctly decided the issue”); *see also Executone Info. Sys., Inc. v. Davis*, 26 F.3d 1314, 1323 (5th Cir. 1994).

<sup>419</sup> *Major League Baseball Players Ass’n v. Garvey*, 532 U.S. 504, 509 (2001); *Forest Oil Corp. v. El Rucio Land and Cattle Co.*, 518 S.W.3d 422, 431-32 (Tex. 2017).

“impartial.”<sup>420</sup> Because the “panel was formed contrary to the express terms of the arbitration agreement,” it “exceeded its authority when it resolved the parties’ dispute.”<sup>421</sup> The Amarillo Court of Appeals, without explicitly relying on CPRC § 171.088(a)(3), also vacated an arbitration award where the award was issued two-and-a-half years after the parties’ agreed-upon deadline.<sup>422</sup>

Finally, arbitration awards can be vacated under this ground if the arbitrator resolves an arbitrability dispute between a signatory and a non-signatory that should have been adjudicated by the trial court instead.<sup>423</sup>

Texas intermediate appellate courts have vacated all or part of an award based on the “exceeding powers” ground in the following exemplar cases:

- In *Jones v. Brelsford*, the Houston Court of Appeals held that arbitrator exceeded its authority in ordering a trust beneficiary to convey her interest in a ranch to a co-beneficiary under a settlement agreement, when the divested beneficiary was not a signatory to the agreement containing the arbitration clause.<sup>424</sup>
- In *Townes Telecommunications, Inc. v. Travis, Wolff & Co., L.L.P.*, the Dallas Court of Appeals held that the arbitrators exceeded their authority by ordering the parties to allocate costs and attorneys’ fees among the parties in direct contravention of the arbitration agreement, which required that costs and fees “shall be borne entirely by the non-prevailing party (to be designated by the arbitration panel in the award) and may not be allocated between the parties by the arbitration panel.”<sup>425</sup> The court therefore vacated the portion of the arbitration decision pertaining to costs and fees.
- In *Lee v. Daniels & Daniels*, the San Antonio Court of Appeals held that an arbitrator exceeded his powers in assessing all of his fees against the client

in an attorney-client dispute, when the engagement agreement expressly provided that the cost of arbitration would be split 50%-50%.<sup>426</sup>

- In *Pettus v. Pettus*, the trial court vacated an award upon finding that the arbitrators had deviated from procedures they had established concerning the inclusion of other parties in the arbitration.<sup>427</sup> The Fort Worth Court of Appeals affirmed the vacatur, concluding that the arbitrators had exceeded the scope of their authority by failing to follow these procedures.<sup>428</sup>
- In *In Burlington Resources Oil & Gas Co. v. San Juan Basin Royalty Trust*, the parties agreed to arbitrate only those issues included in an exhibit to their arbitration agreement.<sup>429</sup> The Houston Court of Appeals held that the arbitrator exceeded his authority when he decided a question which was not included in the exhibit, and therefore vacated that part of the arbitration award.<sup>430</sup>
- In *Robinson v. West*, the Eastland Court of Appeals concluded that the arbitrator exceeded his authority by entering an award that did not dissolve the firm when the parties’ agreement to submit the dispute to an arbitrator stated that the firm would be dissolved.<sup>431</sup>
- In *Peacock v. Wave Tec Pools, Inc.*, the Waco Court of Appeals concluded that an arbitrator exceeded his authority by ordering a remedy outside the specific remedies contemplated in the arbitration agreement. The court held that the scope of the permissible award was defined by the arbitration agreement, and not the underlying construction agreement.<sup>432</sup>
- In *Barsness v. Scott*, the San Antonio Court of Appeals vacated an arbitration panel’s modified award because the panel exceeded its authority in modifying the award to the extent that the

<sup>420</sup> *Americo Life, Inc. v. Myer*, 440 S.W.3d 18, 22-25 (Tex. 2014).

<sup>421</sup> *Id.* at 25.

<sup>422</sup> *Sims v. Building Tomorrow’s Talent, LLC*, No. 07-12-00170-CV, 2014 WL 1800839 (Tex. App.—Amarillo Apr. 30, 2014, pet. denied) (mem. op.) (also referencing CPRC § 171.053, which, while not an explicit vacatur ground, requires arbitrators to make awards “within the time established by the agreement to arbitrate.”).

<sup>423</sup> *Jody James Farms, JV v. Altman Group, Inc.*, 547 S.W.3d 624, 633 (Tex. 2018). While the Texas Supreme Court does not reference the vacatur ground, the court of appeals’ opinion makes clear that the motion to vacate was brought under the “exceed their powers” ground set forth in 9 U.S.C. § 10(a)(4). 506 S.W.3d 595, 597 (Tex. App.—Amarillo 2016).

<sup>424</sup> 390 S.W.3d 486, 494 (Tex. App.—Houston [1st Dist.] 2012, no pet.).

<sup>425</sup> 291 S.W.3d 490, 492-93 (Tex. App.—Dallas 2009, pet. denied).

<sup>426</sup> 264 S.W.3d 273, 279-81 (Tex. App.—San Antonio 2008, pet. denied)

<sup>427</sup> 237 S.W.3d 405, 418 (Tex. App.—Fort Worth 2007, pet. denied).

<sup>428</sup> *Id.* at 420.

<sup>429</sup> 249 S.W.3d 34, 37 (Tex. App.—Houston [1st Dist.] 2007, pet. denied).

<sup>430</sup> *Id.* at 45-46.

<sup>431</sup> No. 11-03-00028-CV, 2004 WL 178586 (Tex. App.—Eastland 2004), *rev’d on other grounds*, 180 S.W.3d 575 (Tex. 2005).

<sup>432</sup> 107 S.W.3d 631 (Tex. App.—Waco 2003, no pet.).



modification rendered the award inconsistent with the merits of the original arbitral decision.<sup>433</sup>

As discussed in greater detail in Part IV.A.1.c, the Texas Supreme Court’s decision in *Nafta Traders, Inc. v. Quinn* also may encourage further reliance on this vacatur ground. Under *Nafta Traders*, parties have the option, under the TAA, to draft arbitration provisions that prohibit arbitrators from misapplying the law. Arbitration awards rendered under such provisions may be vacated under the “exceed their powers” ground if the award is legally erroneous.<sup>434</sup>

**Federal Cases.** Federal case law under 9 U.S.C. § 10(a)(4) is generally consistent with the state law cases. An arbitrator exceeds his powers when he acts “contrary to express contractual provisions.”<sup>435</sup> If a contract “creates a plain limitation on the authority of an arbitrator, [courts] will vacate an award that ignores the limitation.”<sup>436</sup> However, “limitations on an arbitrator’s authority must be plain and unambiguous” and a reviewing court will “resolve all doubts in favor of arbitration.”<sup>437</sup>

The Fifth Circuit will sustain an arbitration award as long “as the arbitrator’s decision ‘draws its essence’ from the contract — even if [it] disagree[s] with the arbitrator’s interpretation of the contract.”<sup>438</sup> The court is not limited to the panel’s explanation of the award; rather, the court looks only to the result reached.<sup>439</sup> “The single question is whether the award, however arrived at, is rationally inferable from the contract.”<sup>440</sup> The Fifth Circuit has described several factors that indicate whether an arbitrator was arguably interpreting the underlying contract: “(1) whether the arbitrator identifies her task as interpreting the contract; (2) whether she cites and analyzes the text of the contract; and (3) whether her conclusions are framed in terms of the contract’s meaning.”<sup>441</sup>

Vacatur under section 10(a)(4) in the Fifth Circuit are few and far between. The most oft-cited example is

*Totem Marine Tug & Barge, Inc. v. North American Towing, Inc.*<sup>442</sup> There, the court held that an arbitration panel exceeded its powers when it awarded damages that the prevailing party in the arbitration never requested. The dispute arose out of a charter agreement in which Totem was to use one of North American’s vessels. In its claim against Totem, North American sought expenses for the return of the vessel. Instead, the arbitration panel found that North American should have asked for damages for charter hire, which included “the balance of charter hire due under the charter less the earnings of the vessel during that period.”<sup>443</sup> In vacating the award, the Fifth Circuit emphasized the importance of notice, stating that “[a]ll parties in an arbitration proceeding are entitled to notice and an opportunity to be heard.”<sup>444</sup> The court reasoned that because North American did not submit the issue of charter hire damages, Totem prepared and argued a case about return expenses, not charter hire. The Court concluded that “[b]y awarding charter hire, the arbitrators ignored the arbitral dispute submitted by the parties and dispensed their ‘own brand of industrial justice.’”<sup>445</sup>

In a more recent case, the Fifth Circuit vacated an arbitration award under section 10(a)(4) because the arbitrator was not appointed in the manner specified in the parties’ contract and because the arbitrator applied AAA rules, even though the contracts called for arbitration in accordance with ICC rules.<sup>446</sup>

The Fifth Circuit also recently affirmed vacatur of an arbitration award in *Hebbronville Lone Star Rentals, L.L.C. v. Sunbelt Rentals Indus. Services, L.L.C.*<sup>447</sup> In that case, an arbitration agreement limited the arbitrator’s authority to resolving disputes about revenue calculation.<sup>448</sup> The arbitrator made the permissible revenue calculation, but also went a step further by reforming the parties’ agreement in light of evidence of mutual mistake.<sup>449</sup> The district court found that the arbitrator exceeded its limited authority by

<sup>433</sup> 126 S.W.3d 232 (Tex. App.—San Antonio 2003, pet. denied).

<sup>434</sup> 339 S.W.3d 84 (Tex. 2011).

<sup>435</sup> *Apache Bohai Corp. LDC v. Texaco China BV*, 480 F.3d 397, 401 (5th Cir. 2007).

<sup>436</sup> *Id.*

<sup>437</sup> *Id.* at 404; see also *United Steel v. Delek Refining, Ltd.*, 575 Fed. App’x 330 (5th Cir. 2014) (reversing vacatur of arbitration decision based on finding that collective bargaining agreement did not expressly prohibit arbitrator from choosing to sanction, rather than discharging, employee).

<sup>438</sup> *Timegate Studios, Inc. v. Southpeak Interactive, L.L.C.*, 713 F.3d 797, 802 (5th Cir. 2013) (quoting *Executone*, 26 F.3d at 1320).

<sup>439</sup> *Executone*, 26 F.3d at 1325.

<sup>440</sup> *Id.*

<sup>441</sup> *BNSF R. Co. v. Alstom Transp., Inc.*, 777 F.3d 785, 788 (5th Cir. 2015).

<sup>442</sup> 607 F.2d 649 (5th Cir. 1979).

<sup>443</sup> *Id.* at 650.

<sup>444</sup> *Id.* at 651.

<sup>445</sup> *Id.* at 652.

<sup>446</sup> See *PoolRe Ins. Corp. v. Organizational Strategies, Inc.*, 783 F.3d 256, 265 (5th Cir. 2015).

<sup>447</sup> 898 F.3d 629 (5th Cir. 2018).

<sup>448</sup> *Id.* at 633.

<sup>449</sup> *Id.* at 631-32.

reforming the agreement, and the Fifth Circuit affirmed.<sup>450</sup>

In 2010, the Supreme Court rendered a seemingly anomalous section 10(a)(4) decision in *Stolt-Nielsen S.A. v. Animalfeeds International Corp.*<sup>451</sup> There, the Court vacated an arbitral decision allowing for class arbitration of claims under section § 10(a)(4), finding that the arbitrators “exceeded their powers” in imposing class arbitration on parties whose arbitration clauses were silent on the issue of class treatment. This opinion is noteworthy because, as discussed above, courts typically have looked to the arbitration clause and the submission agreement to determine the scope of the arbitrator’s powers and to determine whether those powers have been exceeded.<sup>452</sup> However, in *Stolt-Nielsen*, the parties mutually agreed to empower the arbitrators to decide whether class arbitration was available under the parties’ agreement.<sup>453</sup> The Court vacated the arbitrators’ decision that class arbitration was available—not based on their lack of authority to render the decision, but rather on their failure to base their analysis on applicable FAA, maritime or New York law.<sup>454</sup>

In 2013, the Supreme Court revisited section 10(a)(4) in *Oxford Health Plans LLC v. Sutter*.<sup>455</sup> A unanimous Court held that an arbitrator’s decision to allow class arbitration could not be overturned because the decision was based on the arbitrator’s interpretation of the parties’ contract, even though the interpretation likely was incorrect. The Court found that the limited scope of review available under section 10(a)(4) did not permit a substantive review of the arbitrator’s decision on the merits. The Court distinguished *Stolt-Nielsen* on the ground that the arbitration panel in that case imposed its own “policy choice” in ordering class arbitration despite the absence of any contractual basis for the order.

Citing *Oxford Health*, the Fifth Circuit reiterated that section 10(a)(4) cannot be invoked to contest an

arbitration’s erroneous construction of a contract.<sup>456</sup> The sole question under section 10(a)(4) “is whether the arbitrators even arguably interpreted the [a]greement in reaching their award; it is not whether their interpretations of the [a]greement or the governing law were correct.<sup>457</sup> The court’s strongly-worded opinion should serve as a warning to those litigants “who seek refuge in § 10(a)(4)” when “an arbitration goes an opponent’s way on the basis of a questionable contract interpretation.”<sup>458</sup>

- (3) Award procured by “corruption, fraud or undue means” (CPRC § 171.088(a)(2)(B)-(C) & 9 USC § 10(a)(1)).

To show that an award was obtained by corruption, fraud or undue means under the TAA or FAA, the movant must demonstrate (1) that the fraud, corruption or undue means occurred by clear and convincing evidence, (2) that the misconduct was not discoverable by due diligence before or during the arbitration hearing, and (3) that the fraud, corruption or undue means materially related to an issue in the arbitration.<sup>459</sup> The third prong requires “a nexus between the alleged fraud and the basis for the panel’s decision,”<sup>460</sup> but it is not necessary to prove that the result of the arbitration would have been different in the absence of the fraud.<sup>461</sup>

The terms “fraud,” “undue means” and “corruption” are not defined either in the TAA or FAA. Courts typically have employed the traditional definition of fraud.<sup>462</sup> The phrase “undue means” has been associated with “immoral, illegal, or bad faith conduct.”<sup>463</sup> Courts also have relied on the dictionary definition of corruption.<sup>464</sup> All of these standards require a showing of bad faith, such as perjury, bribery, undisclosed bias of an arbitrator, or willfully destroying or withholding of evidence.<sup>465</sup> A mistake of law is insufficient to vacate an arbitration award based on “undue means.”

<sup>450</sup> *Id.* at 632,636.

<sup>451</sup> 559 U.S. 662, 671-75(2010).

<sup>452</sup> *DiRussa v. Dean Witter Reynolds Inc.*, 121 F.3d 818, 824 (2d Cir. 1997).

<sup>453</sup> *Stolt-Nielsen*, 559 U.S. at 667.

<sup>454</sup> *Id.* at 672-76.

<sup>455</sup> 569 U.S. 564 (2013).

<sup>456</sup> *BNSF Railway Co. v. Alstom Transp., Inc.*, 777 F.3d 785, 789 (5th Cir. 2015).

<sup>457</sup> *Id.*

<sup>458</sup> *Id.* at 788.

<sup>459</sup> *Morgan Keegan & Co. v. Garrett*, 495 Fed. App’x 443, 447, 447 (5th Cir. 2012); *Las Palmas Med. Ctr. v. Moore*, 349 S.W.3d 57, 67 (Tex. App. El Paso—2010, pet. denied); *Henry v. Halliburton Energy Services, Inc.*, 100 S.W.3d 505, 510 (Tex. App.—Dallas 2003, pet. denied).

<sup>460</sup> *Forsythe Int’l, S.A. v. Gibbs Oil Co. of Tex.*, 915 F.2d 1017, 1022 (5th Cir. 1990).

<sup>461</sup> *Karaha Bodas Co. v. Perusahaan Pertambangan Minyak Dan Gas Bumi Negara*, 364 F.3d 274, 306-07 (5th Cir. 2004).

<sup>462</sup> *Las Palmas Med. Ctr. v. Moore*, 349 S.W.3d 57, 66 (Tex. App.—El Paso 2010, pet. denied).

<sup>463</sup> *Id.* (citing *LeFoumba v. Legend Classic Homes, Ltd.*, No. 14-08-00243-CV, 2009 WL 3109875, at \*2 (Tex. App.—Houston [14th Dist.] 2009, no pet.) and *In re Arbitration Between Trans Chem. Ltd. and China Nat’l Machinery Import & Export Corp.*, 978 F. Supp. 266, 304 (S.D. Tex. 1997)).

<sup>464</sup> *Id.*

<sup>465</sup> *Good Times Stores, Inc. v. Macias*, 355 S.W.3d 240, 244 (Tex. App.—El Paso 2011, pet. denied); *In re Arbitration Between Trans Chem. Ltd.*, 978 F. Supp. at 304; see also *Morgan Keegan & Co.*, 495 Fed. App’x at 447.

(4) Misconduct leading to an unfair hearing (CPRC § 171.088(a)(3)(B)-(D) & 9 USC § 10(a)(3)).

Both the TAA and FAA also allow for vacatur for other arbitrator misconduct that leads to an unfair arbitration hearing, including (1) a refusal to postpone the hearing “upon sufficient cause shown,” (2) a refusal to hear evidence pertinent and material to the controversy, or (3) other misbehavior that substantially prejudices the “rights of any party.”

In considering what constitutes “sufficient cause” for postponement of a hearing under the TAA, some Texas courts look to the grounds that a trial court would find sufficient to grant a motion for continuance under Rule 251 of the Texas Rules of Civil Procedure.<sup>466</sup> The Fifth Circuit, on the other hand, has held that to establish that a panel was guilty of misconduct under section 10(a)(3) of the FAA for denying postponement of an arbitration hearing, the movant must show that (1) there was no reasonable basis for the panel’s refusal to postpone the hearing, and (2) it suffered prejudice as a result of the refusal to postpone, i.e., that a continuance might have altered the outcome of the arbitration.<sup>467</sup> A rare example of a successful vacatur on this ground occurred where the panel refused to continue the hearing to allow for the testimony of an official whose testimony was central to the fraudulent inducement claims at issue and was not cumulative of any other evidence in the record.<sup>468</sup>

To vacate an arbitration award based on the refusal to hear and material evidence, the evidentiary error “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 he was deprived of a fair hearing.”<sup>469</sup> Arbitrators are not bound by the rules of evidence.<sup>470</sup> Nor are they required to hear all the evidence tendered by the parties as long as each party is given an adequate opportunity to present evidence and arguments.<sup>471</sup> The First Court of Appeals

has affirmed a vacatur on this ground where the panel refused to consider a post-submission brief that disproved an assertion that plaintiffs had interjected on the last day of the hearing and that the panel had relied on in its decision.<sup>472</sup>

Finally, both the FAA and TAA include a catchall clause allowing vacatur for any other misbehavior resulting in substantial prejudice to the rights of any party. This clause has been successfully invoked, for example, when the arbitrators received and relied on evidence on an *ex parte* basis outside the presence of the opposing party.<sup>473</sup>

(5) No agreement to arbitrate, no order compelling arbitration, and no waiver (CPRC § 171.088(a)(4)).

Typically, disputes about the scope, validity, or existence of an arbitration agreement are resolved before arbitration through a motion to compel or stay arbitration. However, if a party proceeds directly to arbitration without being compelled to by a court, and objects to the arbitration on the ground that there is no enforceable arbitration agreement, it may seek to vacate any adverse arbitration award issued on that basis under the TAA (but not the FAA). Specifically, section 171.088(a)(4) of the TAA provides that an award may be vacated “[i]f there was no agreement to arbitrate, the parties were not compelled by the court to arbitrate, and the party opposing the arbitration did not participate in the hearing without raising the objection.”<sup>474</sup> On at least three occasions in the last decade, Texas appellate courts have determined that vacatur was appropriate under section 171.088(a)(4) because of the absence of a valid arbitration agreement.<sup>475</sup>

<sup>466</sup> *Hoggett v. Zimmerman, Axelrad, Meyer, Stern & Wise, P.C.*, 63 S.W.3d 807, 811 (Tex. App.—Houston [14th Dist.] 2001, no pet.); *In re Guardianship of Cantu de Villarreal*, 330 S.W.3d 11, 26 (Tex. App.—Corpus Christi 2010, no pet.).

<sup>467</sup> *Laws v. Morgan Stanley Dean Witter*, 452 F.3d 398, 400-01 (5th Cir. 2006); *SunGard Energy Sys., Inc. v. Gas Transmission Nw. Corp.*, 551 F. Supp. 2d 608, 613 (S.D. Tex. 2008); see also *In re Chestnut Energy Partners*, 300 S.W.3d 386, 400 (Tex. App.—Dallas 2009, pet. denied) (interpreting FAA).

<sup>468</sup> *Tempo Shain Corp. v. Bertek, Inc.*, 120 F.3d 16, 20 (2d Cir. 1997).

<sup>469</sup> *Forsythe Int’l, S.A. v. Gibbs Oil Company of Texas*, 915 F.2d 1017, 1023 (5th Cir. 1990); *Las Palmas Med. Ctr. v. Moore*, 349 S.W.3d 57, 73 (Tex. App.—El Paso 2010, pet. denied).

<sup>470</sup> *Bernhardt v. Polygraphic Co.*, 350 U.S. 198, 203-04 n.4 (1956).

<sup>471</sup> *Josty v. South Shore Harbour Cmty. Ass’n*, 226 S.W.3d 459, 464 (Tex. App.—Houston [1st Dist.] 2006, pet. denied); *Babcock & Wilcox Co. v. PMAC, Ltd.*, 863 S.W.2d 225, 234 (Tex. App.—Houston [14th Dist.] 1993, writ denied).

<sup>472</sup> See *Valentine v. Interactive Brokers LLC*, No. 01-15-00943-CV, 2017 WL 3597735 (Tex. App.—Houston [1st Dist.] Aug. 22, 2017, pet. denied) (mem. op.).

<sup>473</sup> *Totem Marine Tug & Barge, Inc. v. N. Am. Towing, Inc.*, 607 F.2d 649, 653 (5th Cir. 1979).

<sup>474</sup> TEX. CIV. PRAC. & REM. CODE § 171.088(a)(4); see also *Ewing v. Act Catastrophe-Tex. L.C.*, 375 S.W.3d 545, 549-50 (Tex. App.—Houston [14th Dist.] 2012, pet. denied) (noting that this ground for vacatur is not available under the FAA).

<sup>475</sup> See, e.g., *Jones v. Brelsford*, 390 S.W.3d 486, 494 (Tex. App.—Houston [1st Dist.] 2012, no pet.); *Roe v. Ladymon*, 318 S.W.3d 502, 521 (Tex. App.—Dallas 2010, no pet.); *Holcim (Tex.) Ltd. P’ship v. Humboldt Wedag*, 211 S.W.3d 796, 802, 807 (Tex. App.—Waco 2006, no pet.).

*b. Non-Statutory Grounds for Vacatur*

(1) Common Law Grounds

In *Hoskins v. Hoskins*, the Texas Supreme Court held that the TAA sets out the exclusive grounds for vacating arbitration awards arising from agreements governed by that statute, and that common law vacatur grounds are no longer viable.<sup>476</sup> (Common law grounds remain viable for agreements that are not governed by the TAA, such as collective bargaining agreements.<sup>477</sup>)

The court had avoided answering that question on several prior occasions.<sup>478</sup> In the absence of supreme court guidance, some Texas courts had been willing to consider vacatur challenges under Texas common law where: (1) the arbitration decision was tainted with fraud, misconduct, or gross mistake as would imply bad faith and failure to exercise honest judgment;<sup>479</sup> (2) the award violated public policy;<sup>480</sup> or (3) the arbitrators acted in manifest disregard of the law (meaning they clearly recognized the applicable law but chose to ignore it).<sup>481</sup> None of these grounds survived *Hoskins*.

Before the United States Supreme Court’s decision in *Hall Street Associates, L.L.C. v. Mattel, Inc.*, the Fifth

Circuit similarly had recognized two common law grounds for vacatur, allowing vacatur where an award violates public policy or where arbitrators have acted in “manifest disregard of the law.”<sup>482</sup> But the Fifth Circuit has since held that these federal common law vacatur grounds did not survive *Hall Street’s* determination that the FAA statutory vacatur grounds are exclusive.<sup>483</sup> While several other circuits agree with the Fifth Circuit that federal common law grounds for vacatur have been extinguished,<sup>484</sup> the Second, Fourth, Sixth, Ninth, and Tenth Circuits have concluded that the “manifest disregard of the law” doctrine survives, at least as a judicial gloss on the federal statutory grounds.<sup>485</sup> The United States Supreme Court has acknowledged this circuit split but has declined to resolve it.<sup>486</sup>

Like the Fifth Circuit, Texas appellate courts reviewing arbitration awards under the FAA have unanimously concluded that the FAA grounds are exclusive and that common law vacatur grounds are unavailable.<sup>487</sup>

<sup>476</sup> 497 S.W.3d 490, 494-96 (Tex. 2016). The court found support for its conclusion in Section 171.087 of the TAA, which says that the trial court “shall confirm” an award “[u]nless grounds are offered for vacating” it under Section 171.088. *Id.* at 494.

<sup>477</sup> *Jefferson County v. Jefferson County Constables Ass’n*, 546 S.W.3d 661, 665 (Tex. 2018).

<sup>478</sup> See *E. Tex. Salt Water Disposal Co. v. Werline*, 307 S.W.3d 267, 270 n.7 (Tex. 2010) (“We express no opinion on this issue [of whether an arbitration under the TAA can be set aside on common law grounds.]”); *CVN Group, Inc. v. Delgado*, 95 S.W.3d 234, 237-38 (Tex. 2002) (assuming, without deciding, that the common law grounds are still viable, but holding that sufficient showing was not made); *Callahan & Assoc. v. Orangefield Indep. Sch. Dist.*, 92 S.W.3d 841, 844 (Tex. 2002) (same).

<sup>479</sup> *Baker Hughes Oilfield Operations, Inc. v. Hennig Prod. Co.*, 164 S.W.3d 438, 446 (Tex. App.—Houston [14th Dist.] 2005, no pet.); *IPCO-G&C Joint Venture v. A.B. Chance Co.*, 65 S.W.3d 252, 256 (Tex. App.—Houston [1st Dist.] 2001, pet. denied); *Teleometrics Int’l, Inc. v. Hall*, 922 S.W.2d 189, 193 (Tex. App.—Houston [1st Dist.] 1995, writ denied).

<sup>480</sup> *CVN Group, Inc. v. Delgado*, 95 S.W.3d 234 (Tex. 2002) (noting that arbitration award could have been vacated under public policy ground had it allowed mechanic’s lien to eviscerate the protections given to the homestead under the Texas Constitution and Property Code); *Lee v. El Paso County*, 965 S.W.2d 668, 672 (Tex. App.—El Paso 1998, pet. denied) (arbitrator’s award of payment for unused sick leave accrued before amendment to collective bargaining agreement violated Article III, Section 53 of the Texas Constitution); *Campbell Harrison & Dagley, L.L.P. v. Hill*, 782 F.3d 240, 245 (5th Cir. 2015) (arbitrators’ determination that provision of attorney fee agreement providing that law firms would recover contingency fee of 15% of client’s

recovery, in addition to hourly fee, did not violate public policy).

<sup>481</sup> *Home Owners Mgmt Enters., Inc. v. Dean*, 230 S.W.3d 766, 768 (Tex. App.—Dallas 2007, no pet.).

<sup>482</sup> *Sarofim v. Trust Co. of the West*, 440 F.3d 213, 216 (5th Cir. 2006). The “manifest disregard of the law” ground was an extremely limited one, available only upon a showing that (1) the arbitrators knew of a governing legal principle yet refused to apply it or ignored it altogether, (2) the law ignored by the arbitrators was well-defined, explicit, and clearly applicable to the case; and (3) the award results in significant injustice to the losing party. See *Brabham v. A.G. Edwards & Sons, Inc.*, 376 F.3d 377, 392 (5th Cir. 2004).

<sup>483</sup> See *Citigroup Global Markets, Inc. v. Bacon*, 562 F.3d 349 (5th Cir. 2009).

<sup>484</sup> See, e.g., *Medicine Shoppe Int’l, Inc. v. Turner Invs., Inc.*, 614 F.3d 485, 489 (8th Cir. 2010); *Frazier v. CitiFinancial Corp., LLC*, 604 F.3d 1313, 1324 (11th Cir. 2010).

<sup>485</sup> See, e.g., *Stolt-Nielsen SA v. Animalfeeds Int’l Corp.*, 548 F.3d 85, 93-95 (2d Cir. 2008), *overruled on other grounds*, 559 U.S. 662 (2010); *Wachovia Sec., LLC v. Brand*, 671 F.3d 472, 482 (4th Cir. 2012); *Coffee Beanery, Ltd. v. WW, L.L.C.*, 300 Fed. App’x 415, 418-19, 2008 WL 4899478, at \*4 (6th Cir. Nov. 14, 2008); *Comedy Club Inc. v. Improv West Assocs.*, 553 F.3d 1277, 1290 (9th Cir. 2009); *Adviser Dealer Servs., Inc. v. Icon Advisers, Inc.*, 557 Fed. App’x 714, 717 (10th Cir. 2014).

<sup>486</sup> See *Stolt-Nielsen SA*, 559 U.S. at 672 n.3.

<sup>487</sup> See, e.g., *Parallel Networks, LLC v. Jenner & Block, LLP*, No. 05-13-00748-CV, 2015 WL 5904685, \*6 (Tex. App.—Dallas Oct. 9, 2015, pet. denied) (mem. op.); *Thomas Petroleum, Inc. v. Morris*, 355 S.W.3d 94, 98 (Tex. App.—Houston [1st Dist.] 2011, pet. denied); *Vorwerk ex rel. Vorwerk v. Williamson County Grain, Inc.*, No. 03-10-00549-

- (2) Re-urging arguments made in opposition to a motion to compel after an arbitration award has issued.

In Texas state court, if a party is compelled to arbitration over its objections (e.g., that the arbitration agreement does not exist, is unenforceable, or the dispute is outside the scope of the agreement), the case is typically stayed while the arbitration proceeds.<sup>488</sup> If the party resisting arbitration then suffers an adverse result during arbitration, it can then raise its challenge to the arbitrability of the dispute in court after final judgment is entered, under a more favorable standard of review than a typical vacatur motion.<sup>489</sup> This is true even where that party unsuccessfully challenged the order compelling arbitration in a pre-arbitration mandamus proceeding.<sup>490</sup>

In federal court, the availability of post-arbitration review of a motion compelling arbitration depends on whether the case was stayed or dismissed upon the grant of the motion. If a district court compels arbitration and dismisses the remainder of the action, the order is a final judgment and immediately appealable, meaning that a party cannot wait until after the arbitration concludes to challenge the district court's arbitrability determination.<sup>491</sup> However, in most cases in which arbitration is compelled, the district court also stays the litigation, meaning that the order compelling arbitration is interlocutory. Under 9 U.S.C. § 16(b), a party may not appeal from such an interlocutory order unless it obtains permission to take an interlocutory appeal under 28 U.S.C. § 1292(b).<sup>492</sup> This is true even where the district court administratively closes the case.<sup>493</sup> In such circumstances, as in state court, a complaining party can raise the arbitrability issue on appeal after the arbitration takes place and a final judgment is entered.<sup>494</sup>

If the parties *never* litigated arbitrability before arbitration, it appears that the losing party in arbitration may do so afterward through a motion to vacate (at least in the collective bargaining context). In *ConocoPhillips, Inc. v. Local 13-0555 United Steelworkers Int'l Union*,

CV, 2012 WL 593481, at \*3 n.15 (Tex. App.—Austin Feb. 23, 2012, pet. denied) (mem. op.); *Good Times Stores, Inc. v. Macias*, 355 S.W.3d 240, 247 (Tex. App.—El Paso 2011, pet. denied); *Petroleum Analyzer Co. LP v. Olstowski*, No. 01-09-00076-CV, 2010 WL 2789016, at \*12 (Tex. App.—Houston [1st Dist.] July 15, 2010, no pet.) (mem. op.); *Allstyle Coil Co., L.P. v. Carreon*, 295 S.W.3d 42, 44 (Tex. App.—Houston [1st Dist.] 2009, no pet.).

<sup>488</sup> *In re Gulf Exp., LLC*, 289 S.W.3d 836, 840 (Tex. 2009).

<sup>489</sup> *Perry Homes v. Cull*, 258 S.W.3d 580, 586-87 (Tex. 2008).

<sup>490</sup> *Id.* at 586.

<sup>491</sup> *Green Tree Fin. Corp. Alabama v. Randolph*, 531 U.S. 79, 89 (2000).

<sup>492</sup> *Mire v. Full Spectrum Lending, Inc.*, 389 F.3d 163, 167 (5th Cir. 2004); see also *In re Great W. Drilling, Ltd.*, 289 S.W.3d 836, 839 (Tex. 2009).

the Fifth Circuit affirmed the district court's vacatur of an arbitration award arising out of the dismissal of an employee who failed a drug test, where the applicable collective bargaining agreement specifically carved out an exception to the arbitration clause for such dismissals.<sup>495</sup>

- c. *Challenges based on an arbitration clause that expands the available vacatur grounds*

In certain circumstances, a lucky appellate lawyer will find that parties to the arbitration clause included a provision expanding the availability of judicial review. For example, an arbitration clause might provide that the arbitrator “shall not have the power to commit errors of law or legal reasoning, and the award may be vacated or corrected on appeal to a court of competent jurisdiction for any such error.”

Such a provision will not help if the arbitration agreement is governed by the FAA. In *Hall Street Associates, L.L.C. v. Mattel, Inc.*, the United States Supreme Court held that Sections 10 and 11 of the FAA provide the exclusive grounds for vacating, modifying or correcting an arbitration award.<sup>496</sup> These limited FAA grounds for vacatur cannot be supplemented or expanded by contract.<sup>497</sup>

The *Hall Street* Court left the door open for parties to expand or modify the scope of review for arbitration agreements governed by state arbitration statutes or the common law.<sup>498</sup> The Texas Supreme Court decided not to apply *Hall Street's* reasoning to agreements governed by the TAA.<sup>499</sup> Instead, the court held in *Nafta Traders, Inc. v. Quinn* that “the TAA presents no impediment to an agreement that limits the authority of an arbitrator in deciding a matter and thus allows for judicial review of an arbitration award for reversible error.”<sup>500</sup> In other words, although expanded judicial review is not available for agreements governed by the FAA, it is available for arbitration agreements governed by the TAA. The Texas Supreme Court went a step further and held that where an agreement is governed both by the

<sup>493</sup> *Mire*, 389 F.3d at 167.

<sup>494</sup> See, e.g., *Morrison v. Amway Corp.*, 517 F.3d 248, 253 (5th Cir. 2008); *Perry Homes*, 258 S.W.3d at 586-87 (citing cases).

<sup>495</sup> 714 F.3d 627, 630 (5th Cir. 2014).

<sup>496</sup> 552 U.S. 576, 586 (2008) (citing 9 U.S.C. §§ 10-11).

<sup>497</sup> *Id.* at 578.

<sup>498</sup> *Id.* at 590.

<sup>499</sup> *Nafta Traders, Inc. v. Quinn*, 339 S.W.3d 84, 97 (Tex. 2011).

<sup>500</sup> *Id.*



TAA and the FAA, the FAA does not preempt enforcement of an agreement for expanded judicial review of an arbitration award enforceable under the TAA.<sup>501</sup>

However, the contractual language expanding review should be clear, and should both limit the arbitrator's authority and expand judicial review. Language that only limits the arbitrator's authority does not suffice to expand judicial review.<sup>502</sup>

The Texas Supreme Court has rejected an argument by a losing party that “by authorizing arbitrators ‘to award punitive damages where allowed by substantive law,’ the parties [had] clearly agreed to judicial review of any award.”<sup>503</sup>

## 2. Grounds for Modification or Correction of an Arbitration Award

An arbitration award may be modified or corrected by a court under extremely limited circumstances. The TAA allows a court to modify an award if: (1) the award contains an “evident miscalculation of numbers”; (2) the award contains “an evident mistake in the description of a person, thing, or property referred to in the award”; (3) the award addresses a matter not submitted to the arbitrator, and it may be corrected without affecting the merits of the decision on issues that were actually submitted; or (4) the form of the award is imperfect in a manner that does not affect the merits of the controversy.<sup>504</sup> For example, a court may add a missing date to an arbitration award to enable the calculation of pre-judgment interest.<sup>505</sup> But an “evident miscalculation” cannot be found if the award is “rationally inferable from the facts before the arbitrator”; rather the miscalculation must be “clear, concise, and conclusive from the record.”<sup>506</sup>

Before resorting to litigation, a party can give the arbitrator an opportunity to modify, correct, or clarify its decision on the grounds set forth above, by filing an application for modification or correction with the

arbitrator within 20 days after the award is delivered to the applicant.<sup>507</sup> The party seeking modification must provide notice to the opposing party, which triggers a ten-day deadline for filing any objections to the modification request. Any modification cannot affect the merits of, and must be consistent with, the original arbitral decision.<sup>508</sup>

The grounds for modifying an award under the FAA are nearly identical to those under the TAA.<sup>509</sup> A court may modify or correct the award “to effect the intent thereof and promote justice between the parties.”<sup>510</sup> Application for modification must be made in “the United States court in and for the district wherein the award was made.”<sup>511</sup> Unlike the TAA, the FAA does not have a procedure whereby a party can seek modification from the arbitrator first.

## 3. Grounds for Confirmation of an Arbitration Award.

Under the TAA, a court must confirm an arbitration award on application of a party, unless grounds are offered for vacating, modifying, or correcting the award.<sup>512</sup> The FAA contains a nearly identical provision.<sup>513</sup>

If no proceeding is before the court, a party may initiate one by filing a complaint or petition. Arbitration awards may be confirmed through summary judgment, if the moving party can establish that no issues of material fact prohibit confirmation of the award.<sup>514</sup>

Although an arbitration award has the same effect as a court judgment, confirming an award through the court allows the successful party to take advantage of all means of enforcement that are available for other judgments.<sup>515</sup>

## 4. Standard of Review

Any party seeking to vacate an arbitration award must take into account the very onerous standard of review. In both federal and state courts, judicial review

<sup>501</sup> *Id.* at 101.

<sup>502</sup> *Methodist Healthcare Sys., Ltd., LLP v. Friesenhahn*, No. 04-16-00824-CV, 2017 WL 4518284, at \*3 (Tex. App.—San Antonio Oct. 11, 2017, pet. denied) (mem. op.).

<sup>503</sup> *Forest Oil Corp. v. El Rucio Land and Cattle Co.*, 518 S.W.3d 422, 432 (Tex. 2017).

<sup>504</sup> TEX. CIV. PRAC. & REM. CODE § 171.091(a).

<sup>505</sup> See *Baker Hughes Oilfield Operations, Inc. v. Hennig Prod. Co., Inc.*, 164 S.W.3d 438, 447 (Tex. App.—Houston [14th Dist.] 2005, no pet.).

<sup>506</sup> *Mega Builders, Inc. v. Paramount Stores, Inc.*, No. 14-14-00744-CV, 2015 WL 3429060 (Tex. App.—Houston [14th Dist.] May 28, 2015, no pet.) (mem. op.).

<sup>507</sup> TEX. CIV. PRAC. & REM. CODE § 171.054.

<sup>508</sup> *Barsness v. Scott*, 126 S.W.3d 232, 241 (Tex. App.—San Antonio 2003, pet. denied).

<sup>509</sup> 9 U.S.C. § 11.

<sup>510</sup> *Id.*

<sup>511</sup> *Id.*

<sup>512</sup> TEX. CIV. PRAC. & REM. CODE § 171.087.

<sup>513</sup> 9 U.S.C. § 9.

<sup>514</sup> See *Baker Hughes Oilfield Operations, Inc. v. Hennig Prod. Co.*, 164 S.W.3d 438, 442-43 (Tex. App.—Houston [14th Dist.] 2005, no pet.).

<sup>515</sup> *Southland Corp. v. Keating*, 465 U.S. 1, 12 (1984); *City of Baytown v. C.L. Winter, Inc.*, 886 S.W.2d 515, 518 (Tex. App.—Houston [1st Dist.] 1994, writ denied); TEX. CIV. PRAC. & REM. CODE § 171.092; 9 U.S.C. § 13.

of an arbitration decision is “extraordinarily narrow” because both Texas law and federal policy strongly favor arbitration.<sup>516</sup> A reviewing court may not substitute its judgment for that of the arbitrator’s merely because it would have reached a different result, or for a mere mistake of fact or law.<sup>517</sup> Every reasonable presumption must be indulged to uphold the arbitrator’s decision, and none is indulged against it.<sup>518</sup> The court may not review the arbitrator’s decision on the merits even if it is alleged that the decision is based on factual error or it misinterprets the parties’ agreement.<sup>519</sup>

Both state and federal appellate courts apply a *de novo* standard of review of a district court’s order confirming an arbitration award.<sup>520</sup> In reviewing an order granting a vacatur, Texas courts apply a *de novo* standard and review the trial court’s resolution of disputed facts for legal and factual sufficiency,<sup>521</sup> while the Fifth Circuit accepts findings of fact that are not clearly erroneous and applies a *de novo* standard to questions of law and the application of law to facts.<sup>522</sup> Both the Fifth Circuit and Texas courts emphasize that appellate review is “intended to reinforce the strong deference due an arbitral tribunal.”<sup>523</sup>

## B. Procedural Considerations Before Initiating Post-Arbitration Litigation

### 1. Is the Arbitration Award Final?

An arbitral award must be final and definite before it can be reviewed by a court.<sup>524</sup> “To be considered *final*, an arbitration award must be intended by the arbitrator

to be a complete determination of every issue submitted. It must resolve all the issues submitted to arbitration definitively enough so that the rights and obligations of the parties, with respect to the issues submitted to the arbitrator, need no further adjudication.”<sup>525</sup> For example, an arbitration award was not final when the parties had contracted for a two-phased arbitration process that included a *de novo* appeal from the first arbitration award, and the appeal from the award had not yet occurred.<sup>526</sup> Another award was deemed not final where the chair of a panel, speaking for the majority, “reserve[d] the right to withdraw his assent”—without any time limitation—if two of the assumptions underlying the decision proved to be incorrect.<sup>527</sup>

Some federal courts have recognized exceptions to the finality requirement for the purposes of confirmation and vacatur, including (1) when the issues of liability and damages are bifurcated in the arbitration proceeding, (2) when the arbitration panel orders interim security or temporary equitable relief that was necessary to prevent the final award from becoming meaningless), or (3) when the interim award finally disposes of a separate and independent claim.<sup>528</sup> The El Paso Court of Appeals invoked the last of these exceptions in confirming a partial interim award in *In re Chevron*.<sup>529</sup>

The Dallas Court of Appeals addressed a tricky finality issue in *Yaseen Educational Society v. Islamic Association of Arabi, Ltd.*<sup>530</sup> The parties in that case agreed (1) to submit their dispute about the ownership

<sup>516</sup> *East Texas Salt Water Disposal Co. v. Werline*, 307 S.W.3d 267, 271 (Tex. 2010); *Rain CII Carbon, LLC v. ConocoPhillips Co.*, 674 F.3d 469, 471 (5th Cir. 2012); see also *Univ. Computer Sys., Inc. v. Dealer Solutions*, 183 S.W.3d 741, 752 (Tex. App.—Houston [1st Dist.] 2005, pet. denied) (citations omitted).

<sup>517</sup> *Dealer Solutions*, 183 S.W.3d at 752; *ConocoPhillips Co.*, 674 F.3d at 472.

<sup>518</sup> *Dealer Solutions*, 183 S.W.3d at 752 (citing *CVN Group, Inc. v. Delgado*, 95 S.W.3d 234, 238 (Tex. 2002)).

<sup>519</sup> *Major League Baseball Players Ass’n v. Garvey*, 532 U.S. 504, 509 (2001); *Jefferson County v. Jefferson County Constables Ass’n*, 546 S.W.3d 661, 674 (Tex. 2018).

<sup>520</sup> *Action Indus., Inc. v. U.S. Fidelity & Guar. Co.*, 358 F.3d 337, 339-40 (5th Cir.2004); *DK Joint Venture 1 v. Weyand*, 649 F.3d 310, 313 (5th Cir. 2011); *Peacock v. Wave Tec Pools, Inc.*, 107 S.W.3d 631 (Tex. App.—Waco 2003, no pet.).

<sup>521</sup> *Port Arthur Steam Energy, L.P. v. Oxbow Calcinin LLC*, 416 S.W.3d 708, 713 (Tex. App.—Houston [1st Dist.] 2013, pet. denied); see also *In re Chestnut Energy Partners, Inc.*, 300 S.W.3d 386, 397 (Tex. App.—Dallas 2009, pet. denied).

<sup>522</sup> *Hughes Training, Inc. v. Cook*, 254 F.3d 588, 592 (5th Cir. 2001).

<sup>523</sup> *McIlroy v. PaineWebber, Inc.*, 989 F.2d 817 (5th Cir. 2003); accord *Int’l Bank of Commerce—Brownsville v. Int’l*

*Energy Dev. Corp.*, 981 S.W.2d 38 (Tex. App.—Corpus Christi 1998, pet. denied).

<sup>524</sup> *SM Architects, PLLC v. AMX Veteran Specialty Serv., LLC*, 564 S.W.3d 902, 905-06 (Tex. App.—Dallas 2018, pet. filed).

<sup>525</sup> Thomas H. Oehmke, *Appealing Adverse Arbitration Awards*, 94 AM. JUR. TRIALS 211, at § 40 (2014); accord *In re Drobny*, No. 01-15-00435-CV, 2016 WL 4537076, at \* 8 (Tex. App.—Houston [1st Dist.] Aug. 30, 2016, orig. proceeding) (mem. op.) (“Normally, an arbitral award is deemed final when it evidences the arbitrators’ intention to resolve all claims submitted for arbitration.”).

<sup>526</sup> *Lincoln v. C & N Group, Inc.*, No. 05-97-00114-CV, 1997 WL 672626 (Tex. App.—Dallas Oct. 30, 1997, no pet.) (not designated for publication).

<sup>527</sup> *Norfolk S. Ry. Co. v. Sprint Commc’ns Co.*, 883 F.3d 417, 423 (4th Cir. 2018).

<sup>528</sup> *In re Chevron U.S.A., Inc.*, 419 S.W.3d 329, 337-38 (Tex. App.—El Paso 2010, orig. proceeding) (citing cases); *In re Drobny*, 2016 WL 4537076, at \*8.

<sup>529</sup> *In re Chevron*, 419 S.W.3d at 338-39.

<sup>530</sup> 406 S.W.3d 385 (Tex. App.—Dallas 2013, no pet.).

of a mosque to a panel of American-based Islamic scholars, and (2) that the panel’s decision would then be sent to Islamic scholars in India for a separate review and decision. The prevailing party in the initial arbitral decision issued by the American-based scholars sought confirmation of the award, claiming that the Indian-based scholars orally approved the American panel’s decision. The court of appeals disagreed, finding that the absence of an unambiguous decision by the Indian-based scholars caused the decision of the American panel to be incomplete and non-final.<sup>531</sup>

Citing *Yaseen*, the Dallas Court held that an arbitration panel’s “partial final award” ruling that it had jurisdiction to adjudicate the merits of the parties’ dispute was not final, and thus not reviewable by vacatur, because the award did finally resolve any of the ultimate disputes among the parties and left significant factual and legal issues open for further determination.<sup>532</sup>

## 2. In What Forum Should You Bring the Litigation?

A party seeking to confirm, modify, or vacate an award should also consider whether a federal forum is available and desirable. A choice of forum may implicate a variety of economic and legal factors, including the governing law, the applicable procedure, and the chances of success.

State courts are available for the adjudication of post-arbitration litigation, regardless of whether the arbitration agreement is governed by the TAA or FAA. Indeed, the FAA requires federal courts to recognize the enforceability of any arbitral award entered under the Act, including those confirmed in state court.<sup>533</sup>

The FAA provides that the “United States court in and for the district wherein the award was made” has the authority to (1) vacate an arbitration award, or (2) confirm an arbitration award if no court is specified in the agreement of the parties.<sup>534</sup> The provision is not a mandatory venue provision. Thus, a party may face circumstances in which a motion to confirm is filed in one district and a motion to vacate is filed in another district.<sup>535</sup> However, this provision does not confer

federal subject-matter jurisdiction; there must be an independent basis for federal jurisdiction before a district court may entertain an application to confirm or petition to vacate an arbitration award.<sup>536</sup>

Therefore, a party seeking a federal tribunal must be able to invoke diversity jurisdiction or federal question jurisdiction to get in the courthouse door, though domestic arbitration cases will rarely present a federal question. Parties cannot contract for a federal forum because they cannot bestow subject matter jurisdiction by contract.<sup>537</sup>

If filing a motion to vacate in state court, the appropriate venue is the county in which the arbitration was held, even if the parties had specified a different county in their agreement.<sup>538</sup>

## 3. What are the Deadlines for Action?

### a. State Court

The TAA imposes deadlines for parties seeking to modify or vacate arbitration awards, which apply to all cases in Texas courts, regardless of whether the FAA applies to the substantive dispute.<sup>539</sup> Under the TAA, an application to vacate must be made within 90 days after the date of delivery of a copy of the award, or within 90 days after the date the party knew or should have known of corruption, fraud, or other undue means as a grounds for vacating the award (subject to the possible acceleration of this deadline described below).<sup>540</sup> Similarly, an application to modify or correct an award must be made no later than the 90th day after the date of delivery of a copy of the award to the applicant (again, subject to the possible acceleration of this deadline described below).<sup>541</sup> In contrast, there is no statutory limitations period for the filing of an application to confirm an award.<sup>542</sup>

A party seeking to confirm an award might delay filing an application for confirmation for at least 90 days, hoping that its adversary will fail to move for vacatur within the statutory period, at which point its application for confirmation could proceed unimpeded.<sup>543</sup> Alternatively, it can move quickly to file an application for confirmation and set it for a prompt

<sup>531</sup> *Id.* at 392.

<sup>532</sup> *Armstrong v. SCA Promotions, Inc.*, No. 05-14-00300-CV, 2014 WL 1678988 (Tex. App.—Dallas Apr. 24, 2014, no pet.) (mem. op.).

<sup>533</sup> *Southland Corp. v. Keating*, 465 U.S. 1, 12 (1984).

<sup>534</sup> 9 U.S.C. §§ 9, 10(a).

<sup>535</sup> *See Cortez Byrd Chips, Inc. v. Bill Harbert Constr. Co.*, 529 U.S. 193 (2000).

<sup>536</sup> *See, e.g., Smith v. Rush Retail Ctrs., Inc.*, 360 F.3d 504 (5th Cir. 2004).

<sup>537</sup> *See Chicago Typographical Union No. 16 v. Chicago Sun-Times, Inc.*, 935 F.2d 1501, 1505 (7th Cir. 1991).

<sup>538</sup> *In re David Lopez*, 372 S.W.3d 174, 176 (Tex. 2012) (discussing TEX. CIV. PRAC. & REM. CODE § 171.096(c)).

<sup>539</sup> *Hamm v. Millennium Income Fund, L.L.C.*, 178 S.W.3d 256, 260 n.3 (Tex. App.—Houston [1st Dist.] 2005, pet. denied).

<sup>540</sup> TEX. CIV. PRAC. & REM. CODE § 171.088(b).

<sup>541</sup> *Id.* § 171.091(b).

<sup>542</sup> *Id.* § 171.087.

<sup>543</sup> *See Smith v. J-Hite, Inc.*, 127 S.W.3d 837 (Tex. App.—Eastland 2003, no pet.) (when successful party at arbitration filed an application to confirm the award after 90 days had run, the losing party could not assert a counterclaim to set

hearing, which has the effect of accelerating its adversary's 90-day deadline to file a motion to vacate or modify the award. This option arises from the holding in *Hamm v. Millennium Income Fund, L.L.C.*, where the court concluded that a motion to vacate or modify an award had to be pending or already ruled upon at the time a court considered an application for confirmation.<sup>544</sup> The court reasoned that judgments confirming arbitration awards were entitled to the same finality as judgments in general, and the policy of expediting arbitration matters would not be promoted by allowing a party to try to vacate an award that had already been confirmed.<sup>545</sup>

It is worth noting that at least one court has concluded that the 90-day deadline for filing a motion for vacatur applies only to the statutory grounds set forth in TEX. CIV. PRAC. & REM. CODE § 171.088, not the common law grounds discussed *supra* at Part IV.A.1.b(1).<sup>546</sup>

Finally, a request for modification or correction presented to an arbitrator pursuant to TEX. CIV. PRAC. & REM. CODE § 171.054, before the initiation of litigation, does not toll the 90-day statutory periods referenced above.<sup>547</sup> However, if the award is ultimately modified by the arbitrator, at least one court has counted the 90-day period from the date of the amended decision.<sup>548</sup>

#### b. Federal Court

For FAA cases brought in federal court, a party seeking confirmation must file its application “at any time within one year after the award is made.”<sup>549</sup> On the other hand, a party challenging an award must serve its notice of a motion to vacate, modify or correct the award

aside the award, notwithstanding the counterclaim savings statute).

<sup>544</sup> 178 S.W.3d 256, 262-68 (Tex. App.—Houston [1st Dist.] 2005, pet. denied).

<sup>545</sup> *Id.*; see also *City of Baytown v. C.L. Winter, Inc.*, 886 S.W.2d 515, 520-21 (Tex. App.—Houston [1st Dist.] 1994, writ denied) (rejecting argument that district court was barred from confirming the award during the 90-day statutory period allotted to file application to vacate, modify or correct the award).

<sup>546</sup> See *East Texas Salt Water Disposal Co. v. Hughes*, No. 12-04-00333-CV, 2006 WL 300410, at \*8 (Tex. App.—Tyler Feb. 8, 2006, pet. denied) (mem. op.).

<sup>547</sup> See *Bob Bennett & Assocs. v. Land*, No. 01-12-00795-CV, 2013 WL 2445369 (Tex. App.—Houston [1st Dist.] June 4, 2013, pet. denied) (mem. op.); *Teleometrics Int'l, Inc. v. Hall*, 922 S.W.2d 189, 192 (Tex. App.—Houston [1st Dist.] 1995, writ denied).

<sup>548</sup> *Louisiana Natural Gas Pipeline, Inc. v. Bludworth Bond Shipyard, Inc.*, 875 S.W.2d 458, 462 (Tex. App.—Houston [1st Dist.] 1994, writ denied).

<sup>549</sup> 9 U.S.C. § 9.

“upon the adverse party or his attorney within three months after the award is filed or delivered.”<sup>550</sup> This limitations period applies whether a vacatur, modification or correction is sought in an original petition or in a counterclaim filed in response to an application for confirmation. As in state court, a party seeking confirmation should consider waiting for the expiration of the three-month statutory period for filing a vacatur before filing its application to confirm.

#### 4. Can a court award attorneys' fees or interest in a post-arbitration proceeding?

The TAA allows a court, in a proceeding to confirm, modify, or correct an award, to award “costs of the application and of the proceedings subsequent to the application.”<sup>551</sup> Several Texas courts have declined to award attorneys' fees under this provision, concluding that this language allows only the recovery of court costs.<sup>552</sup> This is true even if the underlying dispute (such as a breach of contract claim) would have allowed recovery of attorneys' fees.<sup>553</sup>

Likewise, “[t]he FAA does not provide for attorney's fees to a party who is successful in confirming an arbitration award in federal court.”<sup>554</sup> However, the Fifth Circuit has permitted an award for fees incurred in a confirmation action when the opponent's reasons for challenging the arbitration decision “‘were without merit’ or ‘without justification,’ or [were] legally frivolous, that is, brought in bad faith to harass rather than to win.”<sup>555</sup>

If parties contractually agree that attorneys' fees incurred in confirming an arbitration award are recoverable by the victorious party, an award of fees in the confirmation proceedings should be upheld.<sup>556</sup>

<sup>550</sup> *Id.* § 12.

<sup>551</sup> TEX. CIV. PRAC & REM. CODE § 171.092(b).

<sup>552</sup> See, e.g., *Monday v. Cox*, 881 S.W.2d 381 (Tex. App.—San Antonio 1994, writ denied).

<sup>553</sup> *Kline v. O'Quinn*, 874 S.W.2d 776, 780 (Tex. App.—Houston [14th Dist.] 1994, writ denied).

<sup>554</sup> *Trans Chem. Ltd. and China Nat'l Mach. Import & Export Corp.*, 978 F. Supp. 266, 311 (S.D. Tex. 1997) (citing *Menke v. Monchecourt*, 17 F.3d 1007, 1009 (7th Cir. 1994)); see also *Sarofim v. Trust Co. of the West*, 2005 WL 1155072, at \*1 (S.D. Tex. May 9, 2005).

<sup>555</sup> *Trans Chem. Ltd.*, 978 F. Supp. at 311 (citing *Executone Info Sys. v. Davis*, 26 F.3d 1314, 1331 (5th Cir. 1994)); *Sarofim*, 2005 WL 1155072, at \*1 (citing cases).

<sup>556</sup> See *Marcus & Millichap Real Estate Inv. Brokerage Co. v. Woodman Inv. Group*, 28 Cal Rptr. 3d 584 (Cal Ct. App. 2005) (arbitration provision authorized an award of fees in “any litigation, arbitration or other legal proceedings which may arise between any of the parties hereto”).



The First Court of Appeals has held that neither the FAA nor the Texas Finance Code authorize a court to award pre- or post-judgment interest when the arbitrator made no such award.<sup>557</sup>

## 5. Considerations Specific to a Motion for Vacatur

### a. Was error preserved?

Before initiating a challenge to an arbitration award, counsel should confirm that the error was properly preserved in the arbitration proceeding. “A party may not sit idly by during an arbitration procedure and then collaterally attack that procedure on grounds not raised before the arbitrator when the result turns out to be adverse.”<sup>558</sup> For example, a party can waive an otherwise valid objection to the partiality of the arbitrator by proceeding with arbitration despite knowledge of facts giving rise to such an objection, even when the arbitrator failed to disclose the grounds for bias.<sup>559</sup> The Fifth Circuit has held that even *constructive* knowledge of an arbitrator’s conflict of interest can result in waiver if an objection is not raised during the arbitration hearing.<sup>560</sup> Likewise, a party cannot submit, brief, and dispute the issue of contract formation in the arbitration and then later seek vacatur of the arbitration award on the ground that the arbitrator lacked the authority to adjudicate that issue.<sup>561</sup>

One prominent commentator advises that to preserve error, a party should make an objection “to the arbitrator and opposing parties orally, followed by a writing that is also sent to the arbitrator, opponents, and any tribunal administrator” so that there is a “paper trail detailed enough for a reviewing court to treat as a *de facto* record if there is no stenographic record.”<sup>562</sup> “When the evidentiary hearing commences (whether or not there is a record), the written objection should be

proffered as part of the record, and later, preserved in any hearing briefs.”<sup>563</sup>

### b. Was there a reasoned decision?

In general, under either the TAA or FAA, an arbitrator need not explain the rationale behind the award.<sup>564</sup> Even if the parties request findings of facts and conclusions of law, the arbitrator is not obligated to make such findings.<sup>565</sup> The absence of a reasoned decision can preclude effective judicial review under some of the available grounds for vacatur (e.g., manifest disregard of the law, exceeding powers).<sup>566</sup> But while the requirement of a reasoned decision “would help to uncover egregious failures to apply the law to an arbitrated dispute . . . , such a rule also would undermine the twin goals of settling disputes efficiently and avoiding long and expensive litigation.”<sup>567</sup>

The parties may, by agreement, require that the arbitrator provide a reasoned decision (including findings of fact and conclusions of law). This agreement can be made at the time of the original contract, before the appointment with the arbitrator, or by subsequent agreement with the arbitrator.<sup>568</sup> In *YPF S.A. v. Apache Overseas, Inc.*, the Fifth Circuit held that a reasoned award “requires the arbitrators to submit ‘something short of findings and conclusions but more than a simple result’” and found that the arbitrator’s explanation easily satisfied this requirement.<sup>569</sup> In contrast, Houston’s First Court of Appeals, in a 2-1 decision, determined that an arbitrator’s decision that did not adequately address one of the defendant’s main arguments did not qualify as a “reasoned award”—thus violating the parties’ agreement that such a reasoned award was required—

<sup>557</sup> *Forged Components, Inc. v. Guzman*, 409 S.W.3d 91, 106 (Tex. App.—Houston [1st Dist.] 2013, no pet.) (citing cases).

<sup>558</sup> *Bossley v. Mariner Fin. Group, Inc.*, 11 S.W.3d 349, 351-52 (Tex. App.—Houston [1st Dist.] 2000), *aff’d*, 79 S.W.3d 30 (Tex. 2002); *compare Americo Life Inc. v. Myer*, 356 S.W.3d 496, 498 (Tex. 2011) (party properly preserved error to the AAA’s striking of its proposed arbitrator by arguing to the AAA that the proposed arbitrator satisfied the qualifications set out in the arbitration agreement).

<sup>559</sup> *See Kendall Builders, Inc. v. Chesson*, 149 S.W.3d 796 (Tex. App.—Austin 2004, pet. denied); *see also TUCO*, 960 S.W.2d at 637 n.9 (“Of course, a party who learns of a conflict before the arbitrator issues his or her decision must promptly object to avoid waiving the complaint.”); *Skidmore Energy, Inc. v. Maxus (U.S.) Exp. Co.*, 345 S.W.3d 672 (Tex. App.—Dallas 2011, pet. denied).

<sup>560</sup> *Light-Age, Inc. v. Ashcroft-Smith*, 922 F.3d 320, 322-23 (5th Cir. 2019).

<sup>561</sup> *OMG, L.P. v. Heritage Auctions, Inc.*, 612 Fed. App’x 207, 208 (5th Cir. 2015) (per curiam).

<sup>562</sup> Oehmke, *supra* note 525, § 77.

<sup>563</sup> *Id.*

<sup>564</sup> *Gray v. Noteboom*, 159 S.W.3d 750, 754 (Tex. App.—Fort Worth 2005, pet. denied); *Thomas v. Prudential Sec., Inc.*, 921 S.W.2d 847 (Tex. App.—Austin 1996, no writ); *Valentine Sugars, Inc. v. Donau Corp.*, 981 F.2d 210, 214 (5th Cir. 1993); *Anderman/Smith Operating Co. v. Tenn. Gas Pipeline Co.*, 918 F.2d 1215, 1219 n.3 (5th Cir. 1990).

<sup>565</sup> *Noteboom*, 159 S.W.3d at 753-54; *see* TEX. CIV. PRAC. & REM. CODE § 171.053(a) (The TAA requires only that the arbitration award “be in writing and signed by each arbitrator joining in the award”).

<sup>566</sup> *See, e.g., Pfeifle v. Chemoil Corp.*, 73 Fed. App’x 720 (5th Cir. 2003) (“Stated simply, we cannot determine from the arbitrators’ decision what, if any, rationale produced their [damages] award.”).

<sup>567</sup> Oehmke, *supra* note 525 at § 43.

<sup>568</sup> *Id.*

<sup>569</sup> 924 F.3d 815, 820 (5th Cir. 2019) (quoting *Sarofim v. Trust Co. of the W.*, 440 F.3d 213, 215 n.1 (5th Cir. 2006)).



and therefore remanded the case back to the arbitrator for clarification of its decision.<sup>570</sup>

c. *What is the state of the “record”?*

A party contemplating filing a motion for vacatur should consider whether there is an adequate record to support the anticipated challenge, because it will bear the “burden to bring forth a complete record that establishes [its] basis for relief.”<sup>571</sup> When there is no transcript of the arbitration proceedings available, a reviewing court will presume that evidence supported the arbitration panel’s award.<sup>572</sup> For example, a court held it could not review a claim that an arbitrator exceeded the scope of her authority where the appellant failed to furnish a record of the arbitration proceedings.<sup>573</sup> Also, when a losing party asserted that its adversary was not entitled to an award of punitive damages, the court rejected the challenge because, in the absence of a transcription of the arbitration proceedings, it was “unable to determine what claims were submitted or what evidence was offered before the arbitrators.”<sup>574</sup>

d. *Is discovery available to supplement the record?*

In most cases, the “record” for a vacatur action will consist of (1) the arbitration award, (2) the underlying contract between the parties, (3) the transcript of the arbitration proceedings, and (4) any written briefing or documentary evidence submitted to the arbitrators.

Case law is sparse on the availability of discovery to bolster this record. Finding little instructive Texas authority, the Dallas Court of Appeals has reviewed out-of-state authority on the question of whether a party must produce some evidence supporting vacatur before being entitled to post-arbitration discovery regarding that issue.<sup>575</sup> But the court did not resolve the question. Rather, it assumed without deciding that the party seeking vacatur had the burden of making a prima facie showing before proceeding with discovery, and found that the party had met that burden in this case through statements made by opposing counsel.<sup>576</sup>

Commentators have suggested that parties should have at least a limited opportunity to obtain written and oral discovery in certain situations.<sup>577</sup> For example, where a court found that the petitioner’s allegations of evident partiality “stated a claim for vacatur,” limited discovery was warranted to explore whether the arbitrator had “significant political ties” with counsel for one of the parties.<sup>578</sup> Another court held that an arbitrator can be deposed regarding claims of bias or prejudice, as long as there is clear evidence of impropriety and the questioner avoids questioning the arbitrator on the thought processes underlying his decision.<sup>579</sup> Generally, other testimonial evidence will be limited to the rare cases in which it would be helpful in establishing the intent of the parties, the meaning of disputed terms in the underlying agreement, or the procedural history of the dispute.

e. *Is there a good faith basis for a vacatur action?*

To avoid sanctions, a party should proceed with a vacatur motion only if he or she has a good faith basis for challenging the arbitral award. Texas courts thus far have been reluctant to award sanctions in unsuccessful vacatur actions. In *Baker Hughes Oilfield Operations, Inc. v. Hennig Prod. Co.*, the prevailing party sought sanctions, alleging that the party seeking vacatur “presented an incomplete record on appeal, raised critical issues for the first time on appeal, and filed an inadequate brief misstating the record and making unsupported accusations.”<sup>580</sup> The court nevertheless refused to award sanctions because the record did not reveal “truly egregious” conduct.<sup>581</sup>

However, courts elsewhere have become more aggressive in awarding sanctions. In *B.L. Harbert, Int’l, LLC v. Hercules Steel Co.*, the Eleventh Circuit warned that “[i]f we permit parties who lose in arbitration to freely relitigate their cases in court, arbitration will do nothing to reduce congestion in the judicial system; dispute resolution will be slower instead of faster; and reaching a final decision will cost more instead of

<sup>570</sup> See *Stage Stores, Inc. v. Gunnerson*, 477 S.W.3d 848, 858-63 (Tex. App.—Houston [1st Dist.] 2015, no pet.).

<sup>571</sup> *Anzilotti v. Gene D. Liggin, Inc.*, 899 S.W.2d 264, 267 (Tex. App.—Houston [14th Dist.] 1995, no writ).

<sup>572</sup> *Nafta Traders, Inc. v. Quinn*, 339 S.W. 3d 84, 101 (Tex. 2011); *Thomas v. Prudential Sec., Inc.*, 921 S.W.2d 847 (Tex. App.—Austin 1996, no writ).

<sup>573</sup> *Grand Homes 96, L.P. v. Loudermilk*, 208 S.W.3d 696, 706 (Tex. App.—Fort Worth 2006, pet. denied).

<sup>574</sup> *Kline v. O’Quinn*, 874 S.W.2d 776, 783 (Tex. App.—Houston [14th Dist.] 1994, writ denied).

<sup>575</sup> *Rodas v. La Madeleine of Texas, Inc.*, No. 05-14-00054-CV, 2015 WL 1611780 (Tex. App.—Dallas Apr. 10, 2015, pet. denied) (mem. op.).

<sup>576</sup> *Id.*

<sup>577</sup> See George Chamberlain, *Cause of Action to Vacate Arbitration Award on Ground of Excess of Powers by Arbitrator*, 27 CAUSES OF ACTION 113, §§ 18-19, 26-27; see also *Matter of Andros Compania Maritima, S.A.*, 579 F.2d 691, 702 (2d Cir. 1978).

<sup>578</sup> *Infobilling, Inc. v. Transaction Clearing, LLC*, No. SA-12-CV-01116-DAE, 2013 WL 1501570, at \*4 (W.D. Tex. Apr. 10, 2013).

<sup>579</sup> *Legion Ins. Co. v. Ins. Gen. Agency, Inc.*, 822 F.2d 541, 543 (5th Cir. 1987); Oehmke, *supra* note 525, at § 105.

<sup>580</sup> 164 S.W.3d 438, 448 (Tex. App.—Houston [14th Dist.] 2005, no pet.).

<sup>581</sup> *Id.*

less.”<sup>582</sup> It thus concluded that “[a] realistic threat of sanctions may discourage baseless litigation over arbitration awards and help fulfill the purposes of the pro-arbitration policy contained in the FAA. . . . The warning this opinion provides is that in order to further the purposes of the FAA and to protect arbitration as a remedy we are ready, willing and able to consider imposing sanctions in appropriate cases.”<sup>583</sup> The Seventh Circuit has issued a similar warning.<sup>584</sup>

*f. What is the remedy if the award is vacated?*

(1) State Court

If an arbitration award is vacated on grounds other than TEX. CIV. PRAC. & REM. CODE § 171.088(a)(4), then the court may order a rehearing before new arbitrators are chosen (1) as provided in the arbitration agreement; or (2) by the court, if the agreement does not provide the manner of choosing the arbitrators.<sup>585</sup> If an arbitration award is vacated under Section 171.088(a)(3), then the court may order a rehearing before the arbitrators who made the original award or their appointed successors.<sup>586</sup>

Texas courts have disagreed about the scope of a trial court’s authority after it has vacated an arbitration award. The San Antonio Court of Appeals has held that after vacating an award, the trial court may only modify the award or order a rehearing.<sup>587</sup> The El Paso Court of Appeals, however, has held that the trial court’s authority is not limited to ordering a rehearing.<sup>588</sup>

(2) Federal Court

The FAA provides that “if an award is vacated and the time within which the agreement required the award to be made has not expired, the court may, in its discretion, direct a rehearing by the arbitrators.”<sup>589</sup> “Absent corruption, fraud, or other misconduct on the part of the arbitrator, or implicating the tribunal administrator or the rules under which it operated, the court vacating an arbitration award should order rehearing before the same panel, though that decision

remains within the court’s discretion.”<sup>590</sup> However, a district court does not have the authority to dictate procedures for a second arbitration.<sup>591</sup>

When a court vacates an award, but the time by which the arbitration agreement required the award to be made has expired, “then the award simply becomes null and void as if the merits were never arbitrated and the dispute can be litigated.”<sup>592</sup>

6. Appellate Court Review of Orders in Post-Arbitration Litigation

An appeal is generally available to review a trial court’s final judgment confirming, modifying, or vacating an arbitration award without directing a rehearing, because these are final orders or judgments.<sup>593</sup>

The TAA technically does not authorize an appeal from an order that vacates an arbitration award while granting a new arbitration hearing.<sup>594</sup> But typically, when a trial court vacates an arbitration award, it also simultaneously denies the prevailing party’s motion to confirm the award. Under these circumstances, the Texas Supreme Court has held that an appeal is proper under TEX. CIV. PRAC. & REM. CODE § 171.098(a)(3), which allows an appeal of an order denying confirmation, and the fact that a court also vacates an award and directs a rehearing will not preclude an appeal.<sup>595</sup> If, however, the trial court only *partially* confirms and vacates to address unresolved questions, an appeal is unavailable, because the award is incomplete and does not fall under any part of Section 171.098.<sup>596</sup>

Note that FAA cases brought in federal court are not subject to this jurisdictional limitation, as the FAA permits an appeal from an order “modifying, correcting, or vacating an award,” including orders vacating an award and remanding the case to arbitration for rehearing.<sup>597</sup> However, the Fifth Circuit has emphasized that such appellate jurisdiction does not extend to a district court order that merely remanded the case back

<sup>582</sup> 441 F.3d. 905, 906 (11th Cir. 2006).

<sup>583</sup> *Id.* at 913-14.

<sup>584</sup> See *CUNA Mut. Ins. v. Office and Prof’l Employees Int’l Union, Local No. 39*, 443 F.3d 556 (7th Cir. 2006) (“The filing of meritless suits and appeals in arbitration cases warrants Rule 11 sanctions.”).

<sup>585</sup> TEX. CIV. PRAC. & REM. CODE § 171.089(a).

<sup>586</sup> *Id.* § 171.089(b).

<sup>587</sup> *Stieren v. McBroom*, 103 S.W.3d 602, 607-08 (Tex. App.—San Antonio 2003, pet. denied); *Koch v. Koch*, 27 S.W.3d 93, 97 (Tex. App.—San Antonio 2000, no pet.).

<sup>588</sup> *Tri-Star Petroleum Co. v. Tipperary Corp.*, 107 S.W.3d 607, 614-15 (Tex. App.—El Paso 2003, pet. denied).

<sup>589</sup> 9 U.S.C. § 10(b).

<sup>590</sup> Oehmke, *supra* note 525, at § 246.

<sup>591</sup> *Positive Software Solutions, Inc. v. New Century Mortgage Corp.*, 436 F.3d 495, 505 (5th Cir. 2006), *reversed on other grounds*, 476 F.3d 278 (5th Cir. 2007) (en banc), *cert. denied*, 551 U.S. 1114 (2007).

<sup>592</sup> Oehmke, *supra* note 525, at § 245.

<sup>593</sup> TEX. CIV. PRAC. & REM. CODE § 171.098 (a).

<sup>594</sup> § 171.098(a)(5); *Stolhandske v. Stern*, 14 S.W.3d 810 (Tex. App.—Houston [1st Dist.] 2000, pet. denied).

<sup>595</sup> See *East Tex. Salt Water Disposal Co., v. Werline*, 307 S.W.3d 267, 270-71 (Tex. 2010).

<sup>596</sup> *Bison Building Materials, Ltd. v. Aldridge*, 422 S.W.3d 582, 586-87 (Tex. 2012).

<sup>597</sup> 9 U.S.C. § 16; see also *Atl. Aviation, Inc. v. EBM Group, Inc.*, 11 F.3d 1276, 1280 (5th Cir. 1994).

to the arbitration panel for clarification of its ruling, but neither vacated nor confirmed the award.<sup>598</sup>

7. Attempts to contractually limit or eliminate judicial review.

Courts are not inclined to permit parties to contractually limit or eliminate appellate review. For example, the San Antonio Court of Appeals considered a provision in an arbitration agreement that stated: “An award or determination of the arbitration tribunal shall be final and conclusive upon the parties . . . and no appeal thereof shall be made by the parties.”<sup>599</sup> It held that, notwithstanding this provision, it would consider a challenge that the award was tainted by fraud, misconduct, or gross mistake—a ground for vacatur then available under the common law.<sup>600</sup> It also held that the statutory grounds for vacating or modifying an award, set forth in Sections 171.088 and 171.091 of the Texas Civil Practice and Remedies Code, could not be waived.<sup>601</sup>

Federal circuit courts have also weighed in on this question in several pre-*Hall Street* decisions. In *Hoelt v. MVL Group, Inc.*, the Second Circuit held that the vacatur grounds set forth in 9 U.S.C. § 10 and in the common law “represent a floor for judicial review of arbitration awards below which parties cannot require courts to go, no matter how clear the parties’ intentions.”<sup>602</sup> In *MACTEC, Inc. v. Gorelick*, the Tenth Circuit held that a clear and unequivocal agreement foreclosing judicial review of an arbitration award beyond the district court level is enforceable.<sup>603</sup> The court held that private contractual restrictions on appellate review fulfill the FAA’s fundamental purpose of reducing “litigation costs by providing a more efficient forum.”<sup>604</sup> The court cautioned, however, that a clause precluding judicial review of the FAA vacatur grounds in the district court probably would be unenforceable.

### C. Non-Judicial Appellate Tribunals

Given the expense and time-consuming nature of post-award litigation, some courts and commentators have suggested that parties contract for a private appellate arbitration panel to review the arbitrator’s award as a substitute for judicial review.<sup>605</sup> One court has approved a provision allowing for a second arbitrator to review an arbitration award “according to the law and procedures applicable to appellate review of a civil judgment.”<sup>606</sup> A commentator describes the advantages of such an approach in terms of efficiency, flexibility and confidentiality. For example, parties that adopt this approach can exercise more control over the manner and standards by which such an “appeal” would be handled, in essence tailoring the traditional appellate rules to their liking. They could also set a schedule for more expedited review than would be available in the courts.<sup>607</sup>

The Judicial Arbitration and Mediation Services (JAMS) has crafted an optional appeal procedure that is available upon the agreement of both parties.<sup>608</sup> Under this procedure, an appellate panel of three neutral arbitrators will review the arbitration record, may conduct oral argument, and may reopen the record if appropriate. The panel will apply the same standard of review as a first-level appellate court, and may affirm, reverse, or modify an award.

## V. CONCLUSION

In today’s climate, the inclusion of an arbitration clause in a contract is hardly a guarantee that litigation can be avoided. On the contrary, as this article explains, there has been extensive litigation in recent years over the enforceability and scope of arbitration clauses and the validity of an arbitral award, once rendered. It is the authors’ hope that this article will help provide a useful overview of such arbitration-related litigation and practical guidance for navigating through it.

<sup>598</sup> *Murchison Capital Partners, L.P. v. Nuance Commc’ns, Inc.*, 760 F.3d 418, 421-23 (5th Cir. 2014).

<sup>599</sup> *Barsness v. Scott*, 126 S.W.3d 232, 238 (Tex. App.—San Antonio 2003, pet. denied).

<sup>600</sup> *Id.*

<sup>601</sup> *Id.*

<sup>602</sup> 343 F.3d 57, 64 (2d Cir. 2003).

<sup>603</sup> 427 F.3d 821 (10th Cir. 2005).

<sup>604</sup> *MACTEC, Inc. v. Gorelick*, 427 F.3d 821, 826 (10th Cir. 2005).

<sup>605</sup> See, e.g., *Chicago Typographical Union No. 16 v. Chicago Sun-Times, Inc.*, 935 F.2d 1501 (7th Cir. 1991); Mark Trachtenberg & Christina Crozier, “*Risky Business: Altering the Scope of Judicial Review of Arbitration Awards by*

*Contract*,” TEX. BAR J., Vol. 69, No. 9 (October 2006); Christopher D. Kratovil, *Judicial Review of Arbitration Awards*, at 13-14, University of Texas, 16th Annual Conference on State and Federal Appeals (June 1-2, 2006); Christian A. Garza and Christopher D. Kratovil, *Contracting for Private Appellate Review of Arbitration Awards*, THE APPELLATE ADVOCATE, 20 (Winter 2007).

<sup>606</sup> See *Redish v. Yellow Transp., Inc.*, No. 3-07-CV-0065-0, 2008 WL 2572658, at \*4 (N.D. Tex. June 24, 2008).

<sup>607</sup> Kratovil, *supra* note 605, at 14.

<sup>608</sup> See JAMS Optional Arbitration Appeal Procedure, available at: [https://www.jamsadr.com/files/Uploads/Documents/JAMS-Rules/JAMS\\_Optional\\_Appeal\\_Procedures-2003.pdf](https://www.jamsadr.com/files/Uploads/Documents/JAMS-Rules/JAMS_Optional_Appeal_Procedures-2003.pdf) (last visited Aug. 19, 2019).

