# Arbitration-Related Litigation in Texas

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## *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 in recent years, 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 to a contract with an arbitration clause resists arbitrating a dispute, the contracting parties often litigate the enforceability and scope of the arbitration clause before any arbitration proceeding begins (referred to herein as "pre-arbitration litigation").[1] 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. This paper does not address judicial review of foreign or international arbitration awards, which is beyond the scope of this 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. 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.[2] In addition, the TAA does not apply to (1) a claim

1. 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 v. Cull, 258 S.W.3d 580 (Tex. 2008).
2. TEX. CIV. PRAC. & REM. CODE § 171.002(a) (Vernon 2005).

based on a transaction with an individual where the consideration is less then $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.[3]

### *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,"[4] with the exception of "contracts of employment of seamen, railroad employees, or any other class of workers engaged in foreign or interstate commerce."[5] Both state and federal courts have construed the "involving commerce" phrase very liberally in favor of application of the FAA.[6] The United States Supreme Court has held that the FAA extends to any contract "affecting commerce," as far as the Commerce Clause will reach.[7] 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."[8]

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

The FAA and TAA are not mutually exclusive.[9] Rather, "the FAA only preempts *contrary* state law, not consonant state law."[10] The purpose of the FAA is to create substantive rules, applicable in state and federal courts, to prevent states from limiting the enforceability of arbitration agreements.[11]

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

3. *Id.* §§ 171.002(b), (c).
4. 9 U.S.C. §§ 1, 2 (2009).
5. § 1.
6. William M. Howard, Annotation*, When Does Contract Evidence Transaction Involving Commerce Within Meaning of Federal Arbitration Act (FAA)– Legal Issues and Principles*, 10 A.L.R. Fed. 2d 489 (2006).
7. *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).
8. *In re FirstMerit Bank*, 52 S.W.3d 749, 754 (Tex. 2001)
9. *See In re D. Wilson Constr. Co.*, 196 S.W.3d 774, 779 (Tex. 2006).
10. *Id.*
11. *Southland Corp. v. Keating*, 465 U.S. 1, 14-16 (1984).

affects the enforceability of the agreement."[12] 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.[13]

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.[14]

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.[15] 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.[16]

Second, whether the FAA applies to an arbitration agreement and preempts the TAA significantly impacts 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.

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12. *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)).
13. *Id.*
14. *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).
15. *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).
16. *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.").

### *d. FAA Preemption of Other Statutes*

The FAA takes precedence over state attempts to undercut the enforceability of arbitration agreements.[17] Thus, the FAA generally preempts state statutes that disfavor arbitration.[18]

The FAA also applies to federal statutory claims, unless it is overridden by a contrary congressional command.[19] 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.[20] 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.[21]

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

The FAA does not confer federal subject matter jurisdiction.[22] Parties seeking a federal forum for disputes arising out of FAA-governed arbitration agreements must be able to invoke diversity or federal question jurisdiction.[23] Therefore, many disputes involving arbitration agreements governed by the FAA are heard in state court.[24] While state courts apply federal sub-

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17. *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).
18. *In re Poly-America*, 262 S.W.3d 337, 349 (Tex. 2008); *Jack B. Anglin Company, 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.
19. *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).
20. *McMahon*, 482 U.S. at 227; *In re Am. Homestar of Lancaster, Inc.*, 50 S.W.3d at 484.
21. *Id.*
22. *Vaden v. Discover Bank*, 129 S. Ct. 1262, 1271 (2009); *Palisades Acquisition XVI, LLC v. Chatman*, 288 S.W.3d 552, 555 (Tex. App.—Houston [14th Dist.] 2009, no pet.).
23. *Moses H. Cone Hosp. v. Mercury Constr. Corp.*, 460 U.S. 1, 25 n.32 (1983).
24. *Vaden*, 129 S. Ct. at 1271-72; *Chatman*, 288 S.W.3d at 556.

stantive law in these cases, Texas law, as set forth in the TAA, provides the procedural framework.[25]

#### *2. Special Arbitration Statutes*

Other statutory sources for arbitration include the Texas Family Code[26] and the Texas Labor Code for collective bargaining agreements[27] and worker's compensation disputes.[28]

#### *3. Common Law*

Even if a dispute is not subject to arbitration under statute, an agreement may be enforceable under common law.[29] Statutory and common law arbitration exist side-by-side, and the TAA does not supplant common law arbitration.[30] 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. 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.[31] Although the Texas

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25. *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).
26. *See*, *e.g.*, TEX. FAM. CODE ANN. § 6.601 (Vernon 2006), § 153.0071 (Vernon Supp. 2009).
27. TEX. LAB. CODE ANN. §§102.001-102.075 (Vernon 2006).
28. TEX. LAB. CODE ANN. §§ 410.101-410.121 (Vernon 2006).
29. *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.).
30. *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).
31. *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.—Hous-

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."[32]

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."[33] Under this test, it is not enough to simply state that an agreement will be governed by Texas law. Courts have repeatedly 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.[34]

On the other hand, some courts have held that the TAA alone applies where the choice of law provision states that any dispute between the parties will be resolved pursuant to the TAA.[35] The specific reference to the TAA, rather than Texas

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ton [1st Dist.] 2002, orig. proceeding). *But see In re Godt*, 28 S.W.3d 732, 736 (Tex. App.—Corpus Christi 2000, orig. proceeding).

32. *In re FirstMerit Bank, N.A.*, 52 S.W.3d 749, 754 (Tex. 2001).
33. *In re L & L Kempwood Assoc.*, 9 S.W.3d 125, 127-28 (Tex. 1999).
34. *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 Industries, 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).
35. *In re Olshan Found. Repair Co., L.L.C.*, 277 S.W.3d 124, 131 (Tex. App.—Dallas 2009, orig. proceeding) (holding the FAA did not apply where the agreement stated that disputes would be resolved "pursuant

law generally, appears to be enough to preclude application of the FAA.[36]

## *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?[37]

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

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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").

36. *In re Olshan Found. Repair Co.,* 277 S.W.3d at 130; *Ford*, 141 F.3d at 249.

37. *In re FirstMerit Bank, N.A.*, 52 S.W.3d at 753-54.

signor lacked the mental capacity to assent."[38] The first two "validity" challenges "[have] to do with whether a contract that meets contract formation requirements is enforceable."[39] The third challenge – an "existence" challenge – "depends on whether the requirements for contract formation are met."[40]

### *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.[41] Citing this doctrine, both federal and state courts have found that challenges to the validity of an arbitration clause must be heard by courts.[42]

Parties can deviate from this default rule by providing "clear and unmistakable" evidence of their intention to submit "questions of arbitrability" to the arbitrator.[43] Practitioners should be aware of a line of cases holding 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.[44] However, the Houston Court of Appeals recently declined to find such "clear and unmistakable"

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38. *Buckeye Check Cashing, Inc. v. Cardegna*, 546 U.S. 440, 444 & n.1 (2006); *see also In re Morgan Stanley & Co.*, 293 S.W.3d, 182, 186 (Tex. 2009) (recognizing the three prongs set forth in *Buckeye*).
39. *Symetra Life Ins. Co. v. Rapid Settlements Ltd.*, No. H-05-3167, 2007 WL 114497, at *16 (S.D. Tex. Jan. 10, 2007).
40. *Id.*
41. *Prima Paint Corp. v. Flood & Conklin Mfg. Co.*, 388 U.S. 395, 402-04 (1967).
42. *Buckeye*, 546 U.S. at 445-46; *In re FirstMerit Bank, N.A.*, 52 S.W.3d at 756; *American Med. Tech., Inc. v. Miller*, 149 S.W.3d 265, 272 (Tex. App.—Houston [14th Dist.] 2004, no pet.).
43. *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.").
44. *See, e.g., 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); *Citifinancial, Inc. v. Newton*, 359 F. Supp. 2d 545, 549-52 (S.D. Miss. 2005).

intent when the arbitration clause at issue was very narrow in scope.[45]

#### *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.[46]

#### *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.[47] However, both the Fifth Circuit and the Texas Supreme Court have concluded that these types of challenges should be resolved by courts.[48]

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."[49]

#### *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

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45. *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).
46. *Buckeye*, 546 U.S. at 446-48.
47. *Id.* at 444 n.1.
48. *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); *In re Morgan Stanley & Co*., 293 S.W.3d at 189-90.
49. *Glazer's Wholesale Distribs., Inc. v. Heineken USA, Inc.,* 95 S.W.3d 286, 296 (Tex. App.—Dallas 2001, pet. dism'd by agr.); *accord Freis v. Canales,* 877 S.W.2d 283, 284 (Tex. 1994) (per curiam).

applies.[50] For 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.[51]
- An arbitration agreement contained in a separate agreement can be incorporated into the parties' contract by reference.[52] 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.[53]
- A contract to arbitrate may be comprised of a series of writings, which taken as a whole, show that the parties intended to arbitrate.[54]

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*.[55] 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.[56] The clause was included in a separate paragraph which addressed employment issues, but did not relate to alternative dispute resolution.[57] 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.[58] The court explained: "While we generally favor arbitration agreements, we should not reflexively endorse an agreement so lacking in precision

50. *In re Palm Harbor Homes, Inc.*, 195 S.W.3d 672, 676 (Tex. 2006).
51. *Id.; see also L. H. Lacy Co. v. City of Lubbock,* 559 S.W.2d 348 (Tex. 1977).
52. *In re D. Wilson Constr. Co*., 196 S.W.3d 774, 781 (Tex. 2006).
53. *Teal Constr. Co./Hillside Villas Ltd. v. Darren Casey Interests, Inc*., 46 S.W.3d 417, 420 (Tex. App.—Austin 2001, pet. denied).
54. *Massey v. Galvan*, 822 S.W.2d 309, 315-16 (Tex. App.—Houston [14th Dist.] 1992, writ denied).
55. *See*, *e.g*., *J.M. Davidson, Inc. v. Webster*, 128 S.W.3d 223, 229, 231 (Tex. 2003).
56. *Id.* at 234-35.
57. *Id.* at 229.
58. *Id*. at 230.

that a court must first edit the document for comprehension, and then rewrite it to ensure its enforceability."[59]

### *b. Arbitration with Non-Signatories*

Both federal and state courts have recognized that "under certain circumstances, principles of contract law and agency may bind a non-signatory to an arbitration agreement."[60] 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.[61] The Texas Supreme Court appears to have added a seventh category for parties whose claims are derivative of the rights of a signatory.[62] The Fifth Circuit analyzes application of these theories under federal law.[63] The Texas Supreme Court has chosen to rely on state law, but has noted that its reliance is "informed by persuasive and well-reasoned federal precedent."[64]

#### *(1) Incorporation by Reference*

An arbitration clause can be incorporated by reference into another contract to bind a non-signatory. 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.[65] 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.[66]

On the other hand, in *Cappadonna Electrical Management v. Cameron County*, the Corpus Christi Court of Appeals de-

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59. *Id*. at 231.
60. *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.).
61. *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).
62. *In re Labatt Food Serv., L.P.*, 279 S.W.3d 640, 642 (Tex. 2009).
63. *Wash. Mut. Fin. Group, LLC v. Bailey*, 364 F.3d 260, 267 (5th Cir. 2004).
64. *In re Kellogg*, 166 S.W.3d at 739.
65. 216 S.W.3d 825, 826 (Tex. 2007) (per curiam).
66. *Am. Express Travel Related Servs. Co. v. Am. Fine Art*, No. 3:03-CV-2348L, 2004 WL 1144103 at *3 (N.D. Tex. May 20, 2004) (quoting *Thomson-CSF S.A. v. Am. Arbitration Ass'n*, 64 F.3d 773, 777 (2d Cir. 1995)).

clined 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.[67] 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.[68]

#### *(2) Assumption*

A non-signatory may be bound by an arbitration clause if its subsequent conduct indicates that it is assuming the obligation to arbitrate."[69] A federal district court recently 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."[70]

#### *(3) Agency*

A non-signatory can be bound to an arbitration agreement if the signor of the agreement was acting as its agent.[71] 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.[72]

#### *(4) Alter Ego*

A non-signatory can be required to arbitrate when the non-signatory and a signatory are alter egos of each other.[73] The Fifth Circuit has explained that "[t]he corporate veil may be pierced to hold an alter ego liable for the commitments of its

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67. 180 S.W.3d 364, 373 (Tex. App.—Corpus Christi 2005, no pet.).
68. *Id*.
69. *Ace Am. Ins. Co. v. Huntsman Corp.*, 255 F.R.D. 179, 193 (S.D. Tex. 2008) (quoting *Thomson-CSF*, 64 F.3d at 777).
70. *Id* at 194.
71. *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.").
72. *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)).
73. *Id.* at 358-59.

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."[74]

### *(5) Estoppel*

Of these six bases listed above, estoppel has been the focus of the most judicial attention. The Texas Supreme Court has endorsed two distinct theories of estoppel. The first, direct benefits estoppel, may be applied to bind a non-signatory to arbitrate where a signatory seeks to compel arbitration.[75] The second, equitable estoppel, may be used to bind a signatory to arbitrate against a non-signatory who seeks to compel arbitration.[76]

*Direct Benefits Estoppel.* "Under 'direct benefits estoppel,' a non-signatory plaintiff seeking the benefits of a contract is estopped from simultaneously attempting to avoid the contract's burdens, such as the obligation to arbitrate disputes."[77] The underlying principle behind this doctrine is that a "nonparty [to a contract] cannot both have his contract and defeat it too."[78]

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.[79] Under this doctrine, non-signatories generally must arbitrate claims arising from the contract, but not if the claim

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74. *Id.* at 359.
75. *In re Kellogg*, 166 S.W.3d at 739.
76. *See Meyer v. WMCO-GP, LLC*, 211 S.W.3d 302, 305-06 (Tex. 2006). Equitable estoppel cannot be used by a signatory to compel a non-signatory to arbitrate, regardless of how closely the non-signatory is affiliated with the signing party. *Bridas*, 345 F.3d at 361; *In re Merrill Lynch, Pierce, Genner & Smith, Inc.*, 195 S.W.3d 807, 814-15 (Tex. App.—Dallas 2006, orig. proceeding).
77. *In re Kellogg*, 166 S.W.3d at 739.
78. *In re Weekley Homes, L.P.*, 180 S.W.3d 127, 135 (Tex. 2005).
79. *Id.* at 131-33. The Texas Supreme Court has taken note of another species of direct benefits estoppel applied by federal courts, which binds non-signatories "who, during the life of the contract, have embraced the contract despite their non-signatory status but then, during litigation, attempt to repudiate the arbitration clause in the agreement." However, the court did not reach the question of whether this form of direct benefits estoppel would be available under Texas law. *In re Kellogg*, 166 S.W.3d at 741 n.9 (citing cases).

arises from general legal obligations.[80] A non-signatory will not be bound simply because a claim is *related* to a contract with an arbitration provision.[81] 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."[82]

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.[83] 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 benefits.[84]

Thus far, Texas courts and the Fifth Circuit have used the direct benefits estoppel doctrine only to compel arbitration by non-signatories who have sued signatories.[85] However, some federal district courts in Texas have recently held that the doctrine may be employed outside this context.[86] It remains to be seen whether Texas state courts will do the same.

*Equitable Estoppel.* The Fifth Circuit held in *Grigson v. Creative Artists Agency* that a signatory plaintiff cannot "have it both ways."[87] It cannot, on one hand, seek to hold a non-signatory liable under duties imposed by an agreement containing an arbitration clause, while on the other hand, seek to avoid arbi-

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80. *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.").
81. *In re Kellogg*, 166 S.W.3d at 741.
82. *Id.*
83. *Id.*
84. 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).
85. *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).
86. *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).
87. 210 F.3d 524, 528 (5th Cir. 2000).

tration because the defendant is a non-signatory.[88] Thus, *Grigson* established two different circumstances in which a non-signatory may compel arbitration against a signatory.[89] First, equitable estoppel applies 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.[90] Second, equitable estoppel applies "when [a] signatory to [a] contract containing an arbitration clause raises allegations of substantially interdependent and concerted misconduct by both the non-signatory and one or more of the signatories to the contract."[91]

The Texas Supreme Court has declined to adopt *Grigson* in its entirety. The court has applied the first kind of equitable estoppel, involving reliance on an agreement with an arbitration clause,[92] but has declined to apply the second "concerted misconduct" test.[93] 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.[94]

Equitable estoppel is subject to traditional equitable defenses.[95] Thus, courts have declined to apply equitable estoppel where a non-signatory defendant had "unclean hands"[96] and where a non-signatory defendant unreasonably delayed asserting its motion to compel arbitration under laches.[97]

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88. *Id*.
89. *Id*. at 527.
90. *Id*. 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." *Meyer*, 211 S.W.3d at 307.
91. *Grigson*, 210 F.3d at 527.
92. *Meyer*, 211 S.W.3d at 305-07 (applying equitable estoppel where signatory plaintiffs asserted claims against non-signatories which would not have existed but for the agreement containing the arbitration provision, despite the plaintiffs' contention that their claims merely "touched upon" the agreement).
93. *In re Merrill Lynch Trust Co.*, 235 S.W.3d 185, 191-95 (Tex. 2007).
94. *Id*. at 195.
95. *In re EGL Eagle Global Logistics, L.P.*, 89 S.W.3d 761, 766 (Tex. App.—Houston [1st Dist.] 2002, orig. proceeding).
96. *ANCO Ins. Servs. of Houston v. Romero*, 27 S.W.3d 1, 6 (Tex. App.—San Antonio 2000, pet. denied).
97. *Texas Enter., Inc. v. Arnold Oil Co.*, 59 S.W.3d 244, 249-50 (Tex. App.—San Antonio 2001, orig. proceeding).

### *(6) Third-Party Beneficiary*

A non-signatory also may be required to arbitrate as a third party beneficiary of an arbitration agreement.[98] 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.[99]

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.[100]

A third-party beneficiary may also compel arbitration, even though it is not a signatory to the contract.[101]

### *(7) Derivative Claims*

In *In re Labatt Food Services*, the Texas Supreme Court held that non-signatories could be bound to arbitrate whether their claims are derivative of the rights of a signatory.[102] 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 decedent signatory's] legal shoes and are bound by his agreement."[103] 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.[104]

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98. *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).
99. *Bridas S.A.P.I.C. v. Gov't of Turkmenistan*, 345 F.3d 347, 362 (5th Cir. 2003).
100. 492 F.3d 596, 600 (5th Cir. 2007).
101. *In re NEXT Fin. Group, Inc.*, 271 S.W.3d 263, 267 (Tex. 2008).
102. *In re Labatt Food Serv., L.P.*, 279 S.W.3d 640, 642 (Tex. 2009).
103. *Id.*; *see also In re Jindal Saw Ltd.*, 289 S.W.3d 827 (Tex. 2009).
104. *Graves v. BP America, Inc*., 568 F.3d 221, 223-24 (5th Cir. 2009).

### *3. Defenses to Enforcement*

Parties resisting arbitration can challenge the enforceability of an arbitration agreement by asserting contract defenses, such as fraud, unconscionability, and waiver.[105] This section covers several of those defenses and notes who decides whether the defenses apply—the court or the arbitrator.

#### *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.[106] If, however, a party claims that the arbitration clause itself has been induced by fraud, the issue should be adjudicated by the court.[107]

The Texas Supreme Court recently 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.[108]

#### *b. Unconscionability and Duress*

If a defense of unconscionability or duress pertains to the entire contract, those issues are to be arbitrated.[109] 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.[110] Where a party claims that the unconscionability or duress relates to both the arbitration provision and the contract

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105. *See* TEX. CIV. PRAC. & REM. CODE § 171.001 (Vernon 2005) ("A party may revoke the agreement only on a ground that exists at law or in equity for the revocation of a contract.").
106. *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).
107. *Prima Paint Corp*., 388 U.S. at 403-04; *Forest Oil Corp. v. McAllen*, 268 S.W.3d 51, 56 (Tex. 2008).
108. *McAllen*, 268 S.W.3d at 57-61.
109. *In re FirstMerit Bank, N.A.*, 52 S.W.3d 749, 756 (Tex. 2001).
110. *In re Halliburton Co.*, 80 S.W.3d 566, 571 (Tex. 2002); *In re FirstMerit Bank, N.A.*, 52 S.W.3d at 756 .

as a whole, the issue must be arbitrated unless the arbitration provision alone was singled out from the other provisions.[111]

In evaluating the validity of an arbitration clause, courts may consider both procedural and substantive unconscionability.[112] Procedural unconscionability refers to circumstances surrounding the adoption or execution of the arbitration provision.[113] "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."[114]

Substantive unconscionability refers to the fairness of the arbitration provision itself.[115] 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."[116]

Unconscionability defenses are generally challenging, because there is nothing inherently unconscionable about an arbitration agreement.[117] A party is bound by an agreement to arbitrate, regardless of whether he read it or thought it had different terms.[118] Therefore, ignorance of an arbitration provision or its significance will not defeat arbitration.[119]

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111. *In re RLS Legal Solutions, LLC*, 221 S.W.3d 629, 631-32 (Tex. 2007).
112. *In re Halliburton*, 80 S.W.3d at 571; *see also* Tex. Civ. Prac. & Rem. Code § 171.022 (Vernon 2005) (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").
113. *In re Halliburton*, 80 S.W.3d at 571.
114. *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)).
115. *In re Halliburton*, 80 S.W.3d at 571.
116. *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.").
117. *In re Poly-America, L.P.*, 262 S.W.3d 337, 348 (Tex. 2008).
118. *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).
119. *In re McKinney*, 167 S.W.3d at 835; *EZ Pawn*, 934 S.W.2d at 90.

Furthermore, unconscionability will not negate a bargain simply because one party is in a less advantageous bargaining position.[120] 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.[121]

While unconscionability is difficult to prove, a court may find an arbitration agreement unconscionable due to excessive costs.[122] A party opposing arbitration on this basis must prove with specific information the likelihood of incurring excessive costs.[123] In *Olshan Foundation Repair Co. v. Ayala*, the court found arbitration unconscionable when it would have cost plaintiffs $33,000 to arbitrate their $22,650 claim.[124] The plaintiffs supported their motion in the trial court with specific information regarding the fees and asserted that the costs would effectively deprive them of the opportunity to bring their claims.[125]

The Texas Supreme Court also recently found an arbitration agreement substantively unconscionable where the agreement purported to limit key remedies available under the Texas Workers' Compensation Act.[126] The court found that the limitation of remedies in the arbitration agreement undermined the deterrent regime that the Legislature had designed to protect Texas workers.[127] Notably, the court found that, in light of the arbitration agreement's severance provision, the arbitration could proceed with the unenforceable provisions stricken.[128]

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120. *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).
121. *In re AdvancePCS Health L.P.*, 172 S.W.3d 603, 608 (Tex. 2005).
122. *See FirstMerit Bank, N.A.*, 52 S.W.3d 749, 756 (Tex. 2001).
123. *Id.*
124. 180 S.W.3d 212, 214-16 (Tex. App.—San Antonio 2005, pet. denied).
125. *Id*. at 215-16. *But see TMI, Inc. v. Brooks*, 225 S.W.3d 783, 796 (Tex. App.—Houston [14th Dist.] 2007, pet. denied) (distinguishing *Olshan* and 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).
126. *In re Poly-America, L.P.*, 262 S.W.3d at 349-53.
127. *Id*. at 351-53.
128. *Id*. at 359-60.

### *c. Failure to Comply with a Condition Precedent*

Arbitration clauses sometimes include conditions precedent to arbitration, such as participating in mediation prior to arbitration, giving notice, or demanding arbitration.[129]

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.[130] The United States Supreme Court reached the issue in *Howsam v. Dean Witter Reynolds, Inc*. and determined that this issue was for the arbitrator to decide.[131] At least two Texas courts of appeal have recognized that the prior circuit split has been resolved by *Howsam*.[132] Despite *Howsam*, however, some courts have recognized a rare exception which would allow a court to refuse to compel arbitration if "no rational mind" could question that the parties intended for a procedural provision to preclude arbitration and that the breach of the procedural requirement was clear.[133]

### *d. Waiver*

Whether a party waives its right to seek arbitration by its litigation conduct is an issue for the court.[134] A party waives arbitration by substantially invoking the judicial process to the

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129. *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 prior to arbitration).

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

131. 537 U.S. 79, 84 (2002).

132. *See In re Global Constr. Co*., 166 S.W.3d 795, 798-99 (Tex. App.—Houston [14th Dist.] 2005, orig. proceeding); *In re R & R Pers. Specialists*, 146 S.W.3d at 705.

133. *See General Warehousemen & Helpers Union Local 767 v. Albertson's Distrib., Inc*., 331 F.3d 485, 488 (5th Cir. 2003) (refusing to apply the exception where a rational mind could have concluded that the district court should have compelled arbitration); *In re Pisces Foods, L.L.C*., 228 S.W.3d 349, 353 (Tex. App.—Austin 2007, orig. proceeding) (holding that where it was undisputed that the parties had not complied with a mediation pre-requisite, the trial court did not abuse its discretion in refusing to compel arbitration).

134. *Perry Homes v. Cull*, 258 S.W.3d 580, 587 (Tex. 2008).

other party's detriment.[135] To determine whether a party has waived its right to arbitration, courts look to the totality of the circumstances, considering the following factors: (1) when the movant knew of the arbitration clause; (2) how much discovery has been conducted; (3) who initiated it; (4) whether it related to the merits rather than arbitrality or standing; (5) how much of it would be useful in arbitration; and (6) whether the movant sought judgment on the merits.[136]

There is a strong presumption against waiver.[137] Mere participation in litigation is not enough to establish waiver.[138] 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.[139] 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.[140] 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. In contrast, the court held that waiver did occur 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 begin.[141]

A party attempting to establish waiver must also show that it has been prejudiced. Prejudice in this context is "the inherent

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135. *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).
136. *Perry Homes*, 258 S.W.3d at 591-92.
137. *Id.* at 590.
138. *In re Vesta Ins. Group, Inc.*, 192 S.W.3d 759, 763 (Tex. 2006) (per curiam); *see also In re D. Wilson Construction Co.*, 196 S.W.3d 774, 783 (Tex. 2006); *In re Bank One, N.A.*, 216 S.W.3d at 827.
139. *In re Fleetwood Homes of Texas, L.P.*, 257 S.W.3d 692, 694 (Tex. 2008).
140. *In re Citigroup Global Markets, Inc.*, 258 S.W.3d 623, 625-26 (Tex. 2008).
141. *Perry Homes*, 258 S.W.3d at 596-97.

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."[142] 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.[143]

### *e. Lack of Consideration*

Arbitration agreements must be supported by consideration.[144] 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.[145]

Consideration and mutuality are common issues in arbitrations arising from employment agreements.[146] 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.[147] An employee accepts the terms of the arbitration policy as a matter of law if he continues working after receiving notice of the policy.[148] In *In re Dallas 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.[149] The court found this summary to be sufficient notice.[150]

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.[151]

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142. *Id.* at 597.
143. *Id*.
144. *In re Palm Harbor Homes*, 195 S.W.3d at 676.
145. *Id*.
146. *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).
147. *In re Dallas Peterbilt, Ltd*., 196 S.W.3d 161, 162 (Tex. 2006) (per curiam).
148. *Id*. at 163.
149. *Id*.
150. *Id*.
151. *In re Dillard Dep't Stores, Inc*., 198 S.W.3d 778, 782 (Tex. 2006) (per curiam).

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.[152] 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.[153] The Court further held that the agreement was not illusory even though the employer retained the right to modify or discontinue the program.[154] 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.[155]

The Fifth Circuit distinguished *In re Halliburton* in finding an arbitration agreement illusory and unenforceable in *Morrison v. Amway Corporation*.[156] In that case, 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 prior to amendment, a fact that distinguished the case from *In re Halliburton*, where any amendment would have applied only prospectively. The Fifth Circuit 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.[157]

### *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

152. *In re Halliburton Co.*, 80 S.W.3d 566, 567 (Tex. 2002).
153. *Id*. at 569.
154. *Id*. at 569-70.
155. *Id*. at 569-70.
156. 517 F.3d 248 (5th Cir. 2008).
157. *Id.* at 256-57.

mental incapacity because it is a defense that goes to the entire agreement, rather than the arbitration clause itself.[158] The Texas Supreme Court declined to follow the Fifth Circuit, instead finding that the issue of mental incapacity is for the court to decide rather than the arbitrator, because it is a formation defense calling into question the very existence of a contract.[159]

#### *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.[160]

### *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.[161]

#### *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.[162] 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."[163]
- Only slightly narrower are those clauses that provide for arbitration of "any and all disputes arising under or relating to" the contract at issue. Courts have labeled

158. *Primerica. Life Ins. Co. v. Brown*, 304 F.3d 469, 472 (5th Cir. 2002).
159. *In re Morgan Stanley & Co.*, 293 S.W.3d 182, 189-90 (Tex. 2009) (orig. proceeding).
160. *Buckeye Checking Cashing, Inc. v. Cardegna*, 546 U.S. 440, 446 (2006).
161. *See, e.g.*, *Pennzoil Exploration 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).
162. *See, e.g.*, *I.D.E.A. Corp. v. WC & R Interests, Inc.*, 545 F. Supp. 2d 600, 605 (W.D. Tex. 2008).
163. *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).

these clauses as "extremely broad" and "capable of expansive reach."[164] 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."[165] Unlike the broader clause referenced above, however, this clause requires that the dispute be tied to the performance of duties specified in the contract.[166]

- On the narrow 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.[167]
- Finally, there are a 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.

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.[168] However, under the FAA, "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."[169]

To determine whether a claim falls within the scope of an arbitration agreement, courts look at the terms of the agree-

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164. *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)).
165. *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 Conseco Fin. Serv. Corp.*, 19 S.W.3d 562, 570 (Tex. App.—Waco 2000, orig. proceeding).
166. *Telecom Corp.*, 248 F.3d 1109, 1116 (11th Cir. 2001).
167. *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].").
168. *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).
169. *In re Kellogg*, 166 S.W.3d at 737-38 (internal citations omitted).

ment and the factual allegations in the petition, rather than the legal causes of action asserted.[170] 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.[171] 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."[172] 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.[173]

### *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.[174] 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.[175]

Some courts have taken a more restrictive approach when arbitration is sought under a contractual provision and tort claims are asserted.[176] 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.[177]

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170. *Prudential Sec., Inc. v. Marshall,* 909 S.W.2d 896, 900 (Tex. 1995).
171. *American 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).
172. *Marshall*, 909 S.W.2d at 899; *see also In re D. Wilson Constr.*, 196 S.W.3d at 783.
173. *Marshall*, 909 S.W.2d at 900.
174. *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).
175. *In re Medallion*, 70 S.W.3d at 288.
176. *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).
177. *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

### *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.[178]

#### *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.[179] If the party opposing the application denies the existence of an agreement to arbitrate, "the court shall summarily determine that issue."[180]

In adjudicating an application to compel arbitration, the court should not address the merits of the dispute.[181] For example, the San Antonio Court of 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.[182] 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.[183]

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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).

178. *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).

179. Tex. Civ. Prac. & Rem. Code § 171.021 (Vernon 2005).

180. *Id.* § 171.021.

181. Tex. Civ. Prac. & Rem. Code § 171.026 (Vernon 2005).

182. *In re H20 Plumbing, Inc.*, 115 S.W.3d 79, 81 (Tex. App.—San Antonio 2003, orig. proceeding).

183. *Id*.

### *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.[184]

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. . ..[185]

### *b. Summary Judgment-Type Procedure*

A motion to compel arbitration is evaluated under a burden-shifting scheme akin to a motion for partial summary judgment, and it is subject to the same evidentiary standards.[186] The process can be divided into three steps.

*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.[187] 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

184. TEX. CIV. PRAC. & REM. CODE § 171.024(a) (Vernon 2005).
185. *Id.* § 171.024(b) (incorporating by reference TEX. CIV. PRAC. & REM. CODE § 171.096).
186. *In re Jebbia*, 26 S.W.3d 753, 756-57 (Tex. App.—Houston [14th Dist.] 2000, orig. proceeding).
187. *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).

not require the movant to disprove the nonmovant's potential affirmative defenses.[188] Submission of an authenticated copy of the agreement containing the arbitration clause generally will satisfy this initial burden.[189] Additional proof may be needed, however, if a party's right to enforce the agreement is not obvious from the face of the agreement.[190] For example, a non-signatory to an arbitration agreement should produce evidence that it is entitled to enforce the agreement.[191] 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.[192]

Next, as discussed *supra* Part III.B, the party seeking arbitration must show that the claims in dispute fall within the scope of the arbitration clause.[193]

*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 opposing party to raise defenses to arbitration.[194] 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.[195] Alternatively, the party opposing arbitration may present evidence supporting an affirmative defense to enforcement of the arbitration clause, such as those discussed *supra* Part II.A.3.[196] To defeat arbitration, these defenses must specifically relate to the arbitration clause.[197] Under the "separability doc-

188. *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.).
189. *In re H.E. Butt Grocery Co.*, 17 S.W.3d 360, 367 (Tex. App.—Houston [14th Dist.] 2000, orig. proceeding).
190. *See Mohamed v. Auto Nation US Corp*., 89 S.W.3d 830, 836 (Tex. App.—Houston [1st Dist.] 2002, orig. proceeding).
191. *Id*. at 836-38.
192. *Id.*
193. *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).
194. *Emery*, 186 S.W.3d at 113.
195. *Nabors Drilling USA, LP v. Carpenter*, 198 S.W.3d 240, 246 (Tex. App.—San Antonio 2006, orig. proceeding).
196. *In re Oakwood Mobile Homes*, 987 S.W.2d at 573.
197. *In re FirstMerit Bank, N.A.*, 52 S.W.3d 749, 756 (Tex. 2001).

trine," if the defenses relate to the entire agreement, then they must be adjudicated in arbitration, rather than by the trial court.[198]

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.[199]

*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.[200] 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.[201] Such an evidentiary hearing must be held "summarily."[202] The term "summarily" describes not only the procedure, but the speed with which a court should rule.[203]

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 arbitrality, the trial court may order pre-arbitration discovery.[204] 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.[205] Any reasonable discovery should be resolved without delay.[206]

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

199. *In re H.E. Butt Grocery*, 17 S.W.3d at 367.

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

201. *In re Jebbia*, 26 S.W.3d at 757.

202. *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).

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

204. Tex. Civ. Prac. & Rem. Code § 171.086(a)(4), (6) (Vernon 2005); *In re Houston Pipeline Co*., No. 08-0800, —S.W.3d—, 2009 WL 1901640, at *2 (Tex. July 3, 2009).

205. *In re Houston Pipeline Co.*, 2009 WL 1901640, at *2.

206. *Id*. at **2-3.

#### *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.[207] However, if the arbitrable issues are severable, the stay applies only to those issues.[208] A court can only stay the lawsuit when it compels arbitration; it cannot dismiss the suit in its entirety.[209]

### *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.[210] The same venue rules that govern applications to compel arbitration govern applications to stay arbitration as well. *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."[211] If the court rejects the application, it should order the parties to arbitrate.[212]

### *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.[213]

In federal court, the FAA provides for two different devices that can be used to enforce an arbitration agreement.[214] The first is an affirmative order to engage in arbitration.[215] The second is a stay of litigation in a case involving arbitrable disputes.[216] These two remedies are independent, meaning that

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207. Tex. Civ. Prac. & Rem. Code § 171.025(a) (Vernon 2005).
208. *Id.* § 171.025(b).
209. *Brooks v. Pep Boys Auto. Supercenters*, 104 S.W.3d 656, 659-60 (Tex. App.—Houston [1st Dist.] 2003, no pet.).
210. Tex. Civ. Prac. & Rem. Code § 171.023 (Vernon 2005).
211. *Id.*
212. *Id.*
213. *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).
214. *Brown v. Pac. Life Ins. Co.*, 462 F.3d 384, 389 n.1 (5th Cir. 2006).
215. 9 U.S.C. § 4 (2009).
216. 9 U.S.C. § 3 (2009).

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.[217]

### *a. Compelling Arbitration*

A petition to compel arbitration is a request that the court grant specific performance of an agreement to arbitrate.[218] 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.[219] Under the FAA, a party may file a petition to compel arbitration in the federal district court where the arbitration is to take place.[220]

The substantive issues involved in deciding a motion to compel parallel those considered by state courts.[221] 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.[222]

### *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.[223] 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."[224]

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217. *See Midwest Mech. Contractors, Inc. v. Commonwealth Const. Co.*, 801 F.2d 748, 750-51 (5th Cir. 1986).
218. *Id.* at 750.
219. *Vaden v. Discover Bank*, 129 S. Ct. 1262, 1273 (2009).
220. 9 U.S.C. § 4 (2009); *see also Econo-Car Int'l, Inc. v. Antilles Car Rentals, Inc.*, 499 F.2d 1391 (3d Cir. 1974).
221. *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).
222. 9 U.S.C. § 4 (2009).
223. *Midwest Mech. Contractors*, 801 F.2d at 750.
224. 9 U.S.C. § 3 (2009).

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.[225] 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.[226] If the court decides that all issues in a case must be submitted to arbitration, it may dismiss the case rather than stay it.[227]

#### *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.[228]

### *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 trial court is a 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).

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225. *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). Nonsignatories 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*, 129 S. Ct. 1896, 1902 (2009).

226. *Wick v. Atl. Marine*, 605 F.2d 166, 168 (5th Cir. 1979).

227. *Alford v. Dean Witter Reynold, Inc.*, 975 F.2d 1161, 1164 (5th Cir. 1992).

228. *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).

### *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.[229]

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."[230] 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.[231]

The Texas Supreme Court has not specifically addressed whether mandamus relief is available when the trial court erroneously compels arbitration under the TAA, but most courts of appeals have concluded that it is.[232] These courts reason that if a party is compelled to participate in binding arbitration in the absence of an agreement to arbitrate, it will have lost its right to litigate the dispute and have no adequate remedy by appeal.[233] Nevertheless, the breadth of the rationale offered by the Texas Supreme Court in precluding mandamus review of

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229. Tex. Civ. Prac. & Rem. Code § 171.098 (Vernon 2005).
230. *In re Gulf Exploration, LLC*, 289 S.W.3d 836, 840-41 (Tex. 2009).
231. *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 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").
232. *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) .
233. *See, e.g.*, *Glazer's Wholesale Distrib., Inc. v. Heineken USA, Inc.*, 95 S.W.3d 286, 294 (Tex. App.—Dallas 2001) pet. granted, judg't vacated

orders compelling arbitration under the FAA (see the *In re Gulf Exploration* discussion in the next section) arguably calls into question the availability of mandamus review under the TAA as well.

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

Until recently, a state court's order regarding an arbitration agreement governed by the FAA was never reviewable by interlocutory appeal in Texas courts.[234] The Texas Civil Practice and Remedies Code has recently been amended to allow an interlocutory appeal of a court order *denying* arbitration for actions filed on or after September 1, 2009.[235] Thus, it is no longer necessary to review an order hostile to arbitration by mandamus, as it has been in the past.[236]

Although interlocutory appeal remains unavailable to review orders *favorable* to arbitration, mandamus might be appropriate in rare circumstances.[237] 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.[238] 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."[239] 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.[240] 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.[241]

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w.r.m., (Tex. 2003); *In re Godt*, 28 S.W.3d 732, 738 (Tex. App.—Corpus Christi 2002, orig. proceeding).

234. *Anglin,* 842 S.W.2d at 272.
235. Tex. Civ. Prac. & Rem. Code § 51.016 (Vernon Supp. 2009). 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.
236. *See, e.g.*, *In re Bank One*, 216 S.W.3d 825, 826 (Tex. 2007) (per curiam).
237. *See In re Gulf Exploration, LLC*, 289 S.W.3d 836 (Tex. 2009).
238. *Id*. at 842.
239. *Id.*
240. *Id*. at 842-43.
241. *Id.* at 842.

*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.'"[242] *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.[243]

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.'"[244] 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.[245]

### *c. Dual Proceedings Unnecessary*

The Texas Supreme Court has previously advised parties seeking review of an order denying a motion to compel or an order staying arbitration to file both an interlocutory appeal (in the event the TAA governs) *and* a petition for writ for mandamus (in the event the FAA governs).[246] Because interlocutory appeal is now available under both the TAA and the FAA, dual proceedings are no longer necessary for those actions covered by CPRC § 51.061.[247]

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242. 221 S.W.3d 564, 565-66 (Tex. 2006) (per curiam).
243. *In re Gulf Exploration, LLC*, 289 S.W.3d at 841.
244. *Id.* at 843.
245. *Id*. (citing *In re Poly-America*, 262 S.W.3d 337, 352 (Tex. 2008)).
246. *Anglin*, 842 S.W.2d at 272.
247. 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.

### *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).[248]

#### *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 has held that when a district court compels arbitration and dismisses the remainder of the action, the order is a final judgment and immediately appealable.[249] 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.[250] This is true even where the district court administratively closes the case.[251] In such circumstances, a complaining party can raise the arbitrability issue only after the arbitration takes place and a final judgment is entered.[252]

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248. *Arthur Andersen, LLP v. Carlisle*, 129 S. Ct. 1896, 1900 (2009).

249. *Green Tree Fin. Corp. Alabama v. Randolph*, 531 U.S. 79, 89 (2000).

250. *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).

251. *Mire*, 389 F.3d at 167.

252. *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).

### *3. Standard of Review*

Federal courts review a grant or denial of a petition to compel arbitration on a *de novo* basis.[253] The Texas standard is less clear. In *J.M. Davidson, Inc. v. Webster*, the Texas Supreme Court stated that "determination of an arbitration agreement's validity is a legal question subject to *de novo* review."[254] Even after *Webster*, however, several courts of appeals have maintained that a no-evidence standard is proper to review factual questions concerning denial of a motion to compel arbitration.[255]

In his dissenting opinion in *Webster*, Justice Schneider explained that Texas courts review denial of a motion to compel arbitration under a "legal sufficiency" or "no-evidence" standard when factual findings are in dispute.[256] However, if no findings of fact were made, and the only issue is the legal interpretation of an arbitration clause, then the court applies a *de novo* standard.[257]

To the extent that the court may consider a decision to grant a motion to compel arbitration via mandamus, the court likely would review such an order for abuse of discretion.[258]

## *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.

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253. *Banc One Acceptance Corp. v. Hill*, 367 F.3d 426, 428 (5th Cir. 2004).
254. 128 S.W.3d 223, 227 (Tex. 2003).
255. *See Colosi v. Guidry*, No. 01-03-01198-CV, 2004 WL 1065442, at *1 (Tex. App.—Houston [1st Dist.] 2004, no pet.); *Forest Oil Corp. v. McAllen*, No. 13-05-419-CV, 2005 WL 3435061, at *2 (Tex. App.—Corpus Christi 2005), *rev'd on other grounds*, 268 S.W.3d 51 (Tex. 2008); *Woodhaven Homes, Inc. v. Alford*, 143 S.W.3d 202, 204 (Tex. App.—Dallas 2004, no pet.). *But see ANCO Ins. Servs. of Houston v. Romero*, 27 S.W.3d 1, 5 (Tex. App.—San Antonio 2000, pet. denied) (opting to apply an abuse of discretion standard to factual questions, rather than a no-evidence standard).
256. 128 S.W.3d 223, 233 (Tex. 2003) (Schneider, J., dissenting).
257. *Id.*; *see also Certain Underwriters at Lloyd's of London v. Celebrity, Inc.*, 950 S.W.2d 375, 377 (Tex. App.—Tyler 1996, no writ).
258. *Bates v. MTH Homes-Texas, L.P.*, 177 S.W.3d 419, 422 (Tex. App.—Houston [1st Dist.] 2005, no pet.).

Alternatively, 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.

### *A. Procedural Considerations Prior to Initiation of Post-Arbitration Litigation*

#### *1. The Finality of the Arbitration Award*

An arbitral award must be final and definite before it can be reviewed by a court. "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."[259] 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.[260]

#### *2. The Forum in Which to 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.[261]

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.[262]

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259. Thomas H. Oehmke, *Appealing Adverse Arbitration Awards*, 94 Am. Jur. Trials 211, at § 40 (2006).
260. *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).
261. *See infra* Part IV.E.2.
262. *Southland Corp. v. Keating*, 465 U.S. 1, 12 (1984).

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.[263] 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.[264] 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.[265]

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.[266]

### *3. 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.[267] 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).[268] 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 accelera-

263. 9 U.S.C. §§ 9, 10(a) (2009).

264. *See Cortez Byrd Chips, Inc. v. Bill Harbert Construction Co.*, 529 U.S. 193 (2000).

265. *See, e.g.*, *Smith v. Rush Retail Ctrs., Inc.*, 360 F.3d 504 (5th Cir. 2004).

266. See Chicago Typographical Union No. 16 v. Chicago Sun-Times, Inc., 935 F.2d 1501, 1505 (7th Cir. 1991).

267. *Hamm v. Millennium Income Fund, L.L.C.*, 178 S.W.3d 256, 260 n.3 (Tex. App.—Houston [1st Dist.] 2005, pet. denied).

268. Tex. Civ. Prac. & Rem. Code § 171.088(b) (Vernon 2005).

tion of this deadline described below).[269] In contrast, there is no statutory limitations period for the filing of an application to confirm an award.[270]

A party seeking to confirm an award should consider two strategic options. First, it can 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.[271] Second, it can move quickly to file an application for confirmation and set it for a prompt 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.[272] 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.[273]

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 *infra* at Part IV.E.1.a.[274]

Finally, a request for modification or correction presented to an arbitrator pursuant to TEX. CIV. PRAC. & REM. CODE

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269. *Id.* § 171.091(b).
270. *Id.* § 171.087.
271. *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 aside the award, notwithstanding the counterclaim savings statute).
272. 178 S.W.3d 256, 262-68 (Tex. App.—Houston [1st Dist.] 2005, pet. denied).
273. *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).
274. *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.).

§ 171.054, prior to the initiation of litigation, does not toll the 90-day statutory periods referenced above.[275] 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.[276]

#### *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."[277] On the other hand, a party challenging an award must serve its notice of a motion to vacate, modify or correct the award "upon the adverse party or his attorney within three months after the award is filed or delivered."[278] 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. Attorneys' Fees Generally Not Recoverable*

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."[279] Several Texas courts have declined to award attorneys' under this provision, concluding that this language allows only the recovery of court costs.[280] This is true even if the underlying dispute (such as a breach of contract claim) would have allowed recovery of attorneys' fees.[281]

Likewise, "[t]he FAA does not provide for attorney's fees to a party who is successful in confirming an arbitration award in

275. *See Teleometrics Int'l, Inc. v. Hall*, 922 S.W.2d 189, 192 (Tex. App.—Houston [1st Dist.] 1995, writ denied).
276. *Louisiana Natural Gas Pipeline, Inc. v. Bludworth Bond Shipyard, Inc.*, 875 S.W.2d 458, 462 (Tex. App.—Houston [1st Dist.] 1994, writ denied).
277. 9 U.S.C. § 9 (2009).
278. *Id.* § 12.
279. Tex. Civ. Prac & Rem. Code § 171.092(b) (Vernon 2005).
280. *See, e.g.*, *Monday v. Cox,* 881 S.W.2d 381 (Tex. App.—San Antonio 1994, writ denied).
281. *Kline v. O'Quinn,* 874 S.W.2d 776, 780 (Tex. App.—Houston [14th Dist.] 1994, writ denied).

federal court."[282] 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."[283]

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 proceeds should be upheld.[284]

### *5. Considerations Specific to Motions 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."[285] 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.[286]

One commentator wisely 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

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282. *Trans Chem. Ltd. and China Nat'l Mach. Import & Export Corp*., 978 F. Supp. 266, 311 (S.D. Tex.1997) (citing *Menke v. Monche-court*, 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).

283. *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).

284. *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").

285. *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).

286. *See Kendall Builders, Inc. v. Chesson,* 149 S.W.3d 796 (Tex. App.—Austin 2004, pet. denied).

a *de facto* record."[287] "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."[288]

### *b. Absence of Rationale for Arbitral Decision*

In general, under either the TAA or FAA, an arbitrator need not explain the rationale behind the award.[289] Even if the parties request findings of facts and conclusions of law, the arbitrator is not obligated to make such findings.[290] 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).[291] 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."[292]

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.[293]

### *c. 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

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287. Thomas H. Oehmke, *Appealing Adverse Arbitration Awards*, 94 AM. JUR. TRIALS 211, at § 77 (2006).
288. *Id.*
289. *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).
290. *Noteboom*, 159 S.W.3d at 753-54; *see* TEX. CIV. PRAC. & REM. CODE § 171.053(a) (Vernon 2005) (The TAA requires only that the arbitration award "be in writing and signed by each arbitrator joining in the award").
291. *See, e.g.*, *Pfeifle v. Chemoil Corp*., 73 Fed. Appx. 720 (5th Cir. 2003) ("Stated simply, we cannot determine from the arbitrators' decision what, if any, rationale produced their [damages] award.").
292. Oehmke, *supra* note 287 at § 43.
293. *Id.*

forth a complete record that establishes [its] basis for relief."[294] When there is no transcript of the arbitration proceedings available, a reviewing court will presume that evidence supported the arbitration panel's award.[295] 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.[296] 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."[297]

#### *d. Availability of Discovery 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. While no Texas cases have shed light on the availability of discovery to bolster this record, commentators suggest that parties should have at least a limited opportunity to obtain written and oral discovery in certain situations.[298] Discovery also is generally available in federal court.[299] An arbitrator may 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.[300] Generally, other testimonial evidence will be limited to the rare cases in which it would

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294. *Anzilotti v. Gene D. Liggin, Inc.*, 899 S.W.2d 264, 267 (Tex. App.—Houston [14th Dist.] 1995, no writ) .
295. *Thomas v. Prudential Sec., Inc.*, 921 S.W.2d 847 (Tex. App.—Austin 1996, no writ).
296. *Grand Homes 96, L.P. v. Loudermilk*, 208 S.W.3d 696, 706 (Tex. App.—Fort Worth 2006, pet. denied).
297. *Kline v. O'Quinn*, 874 S.W.2d 776, 783 (Tex. App.—Houston [14th Dist.] 1994, writ denied).
298. *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.
299. *See Matter of Andros Compania Maritima, S.A.*, 579 F.2d 691, 702 (2d Cir. 1978).
300. *Legion Ins. Co. v. Ins. Gen. Agency, Inc.*, 822 F.2d 541, 543 (5th Cir. 1987); Oehmke, *supra* note 287, at § 105.

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. Possibility of Sanctions for Frivolous Appeal*

Finally, to avoid sanctions, a party should proceed with a vacatur motion only if they have 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."[301] The court refused to award sanctions because the record did not reveal "truly egregious" conduct.[302]

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 less."[303] 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."[304] The Seventh Circuit recently issued a similar warning.[305]

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301. 164 S.W.3d 438, 448 (Tex. App.—Houston [14th Dist.] 2005, no pet.).
302. *Id.*
303. 441 F.3d. 905, 906 (11th Cir. 2006).
304. *Id.* at 913-14.
305. *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.").

## *B. Standard of Review*

### *1. Default Standard*

Judicial review of an "arbitration decision is 'extremely narrow' because Texas law favors arbitration."[306] A reviewing court may not substitute its judgment for that of the arbitrator's merely because it would have reached a different result.[307] Every reasonable presumption must be indulged to uphold the arbitrator's decision, and none is indulged against it.[308] 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.[309]

Appellate courts apply a *de novo* standard of review of a district court's order confirming an arbitration award.[310] In reviewing an order granting a vacatur, 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.[311] Both the Fifth Circuit and Texas courts emphasize that appellate review is "intended to reinforce the strong deference due an arbitrative tribunal."[312]

### *2. Modification by Contract*

#### *a. Expanded Judicial Review*

Until 2008, federal circuits were split on the question of whether parties to an arbitration agreement could contractually agree to an expanded scope of judicial review, with the First, Third, Fourth, Fifth, and Sixth Circuits concluding that they

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306. *Universal Computer Sys., Inc. v. Dealer Solutions*, 183 S.W.3d 741, 752 (Tex. App.—Houston [1st Dist.] 2005, pet. denied) (citations omitted).
307. *Id.*
308. *Id.* (citing *CVN Group, Inc. v. Delgado*, 95 S.W.3d 234, 238 (Tex. 2002)).
309. *Major League Baseball Players Ass'n v. Garvey,* 532 U.S. 504, 509 (2001).
310. *Executone Info Sys., Inc. v. Davis*, 26 F.3d 1314, 1320 (5th Cir. 1994); *Peacock v. Wave Tec Pools, Inc.*, 107 S.W.3d 631 (Tex. App.—Waco 2003, no pet.).
311. *Hughes Training, Inc. v. Cook*, 254 F.3d 588, 592 (5th Cir. 2001).
312. *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) .

could[313] and the Eighth, Ninth, and Tenth Circuits reaching the opposite conclusion.[314]

The United States Supreme Court resolved this circuit split in *Hall Street Associates, L.L.C. v. Mattel, Inc*.[315] The Court found that in arbitration agreements governed by the FAA, Sections 10 and 11 of the FAA provide the exclusive grounds for vacating, modifying or correcting an arbitration award.[316]

The Supreme 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,[317] although parties seeking to take advantage of this opening "would be well advised to expressly and unambiguously opt out of the FAA for review of arbitral awards."[318] Citing this language in *Hall Street*, the California Supreme Court held that the California Arbitration Act authorized parties to contract for merits review of an arbitrator's decision.[319]

However, the availability of expanded review under the TAA is uncertain. Most of the Texas cases discussing expanded review addressed arbitration agreements governed by the FAA, not the TAA, and were thus overruled by *Hall Street*.[320] Both a federal court and the Dallas Court of Appeals have concluded

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313. *See Puerto Rico Tel. Co. v. U.S. Phone Mfg. Corp*., 427 F.3d 21, 31 (1st Cir. 2005); *Jacada (Europe), Ltd. v. Int'l Mktg. Strategies, Inc*., 401 F.3d 701, 710 (6th Cir. 2005); *Roadway Package Sys., Inc. v. Kayser*, 257 F.3d 287, 288 (3d Cir. 2001); *Gateway Technologies, Inc. v. MCI Telecomm. Corp*., 64 F.3d 993, 997 (5th Cir. 1995); *Syncor Int'l Corp. v. McLeland*, 120 F.3d 262 (4th Cir. 1997).

314. *See Kyocera Corp. v. Prudential-Bache Trade Servs., Inc*., 341 F.3d 987, 1000 (9th Cir. 2003); *Bowen v. Amoco Pipeline Co*., 254 F.3d 925, 936 (10th Cir. 2001).

315. 128 S. Ct. 1396 (2008).

316. *Id.* at 1404 (citing 9 U.S.C. §§ 10-11).

317. *Id.* at 1406.

318. Judge Gray H. Miller & Emily Buchanan Buckles, *Essay, Reviewing Arbitration Awards in Texas*, 45 HOUS. L. REV. 939, 950 (2008).

319. *See Cable Connection, Inc. v. DIRECTV, Inc*., 190 P.3d 586, 599 (Cal. 2008).

320. *See Ascension Orthopedics, Inc. v. Curasan, AG*, No. H-07-4033, 2008 WL 20740548 (S.D. Tex. May 14, 2008) (citing *Mariner Fin. Group. v. Bossley*, 79 S.W.3d 30, 36 n. 4 (Tex. 2002), *Bison Bldg. Materials, Ltd. v. Aldridge*, 263 S.W.3d 69, 77 (Tex. App.—Houston [1st Dist.] Sept. 14, 2006, pet. granted), and *Tanox, Inc. v. Akin, Gump, Strauss, Hauer & Feld*, 105 S.W.3d 244, 250 (Tex. App.—Houston [14th Dist.] 2003, pet. denied)).

that expanded judicial review is not available under the TAA.[321] However, the federal court's reasoning is questionable, and the Texas Supreme Court granted a petition for review filed in the Dallas case. The decision is pending.

Parties seeking to incorporate some measure of expanded "appellate" review of an arbitral decision should consider contracting for a private appellate arbitration panel, an option not implicated by *Hall Street*. *See infra* Part IV.F. One court recently approved a provision allowing for a second arbitrator to review an arbitration award "according the law and procedures applicable to appellate review of a civil judgment."[322] Some commentators also have argued that expanded judicial review may be available if parties specifically opt out of the FAA and TAA review schemes and decide to be governed instead under Texas common law.[323]

### *b. Restricted 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."[324] 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 available under the common law.[325] 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.[326]

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321. *Id.* at *3 (citing *Callaghan & Assocs. v. Orangefield Indep. Sch. Dist.*, 92 S.W.3d 841, 844 (Tex. 2002) as support for its conclusion, even though the case did not involve contractually-expanded judicial review under the TAA); *Quinn v. NAFTA Traders, Inc.*, 257 S.W.3d 795, 798 (Tex. App.—Dallas 2008, pet. granted); *see also* Miller & Buckles, *supra* note 318, at 950-53.
322. *See Redish v. Yellow Transp., Inc.*, No. 3-07-CV-0065-0, 2008 WL 2572658, at *4 (N.D. Tex. June 24, 2008).
323. *See* Miller & Buckles, *supra* note 318, at 955-62.
324. *Barsness v. Scott*, 126 S.W.3d 232, 238 (Tex. App.—San Antonio 2003, pet. denied).
325. *Id.*
326. *Id.*

Federal circuit courts have also weighed in on this question in several pre-*Hall Street* decisions. In *Hoeft 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."[327] 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.[328] 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."[329] The court cautioned, however, that a clause precluding judicial review of the FAA vacatur grounds in the district court probably would be unenforceable.

### *C. Confirming an Award*

The procedures for confirming an award set forth in the TAA are applicable in any confirmation proceeding in state court, whether the arbitration agreement was governed by the TAA or FAA. 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.[330] The FAA contains a nearly identical provision.[331]

If no proceeding is before the court, a party may initiate one by filing a compliant 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.[332]

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.[333]

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327. 343 F.3d 57, 64 (2d Cir. 2003).
328. 427 F.3d 821 (10th Cir. 2005).
329. *MACTEC, Inc. v. Gorelick*, 427 F.3d 821, 826 (10th Cir. 2005).
330. Tex. Civ. Prac. & Rem. Code § 171.087 (Vernon 2005).
331. 9 U.S.C. § 9 (2009).
332. *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.).
333. *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 (Vernon 2005); 9 U.S.C. § 13 (2009).

### *D. Modifying an Award*

#### *1. State Law*

An arbitration award may be modified by the court under extremely limited circumstances. The TAA allows the 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.[334]

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.[335] However, any modification cannot affect the merits of, and must be consistent with, the original arbitral decision.[336]

#### *2. Federal Law*

The grounds for modifying an award under the FAA are nearly identical to those under the TAA.[337] Application for modification must be made in "the United States court in and for the district wherein the award was made."[338]

### *E. Vacating an Award*

#### *1. Grounds*

##### *a. State Law*

###### *(1) TAA*

The grounds for vacating an award under the TAA are limited and are focused on the integrity of the process, not the propriety of the result.[339] An arbitration award is not subject to

334. Tex. Civ. Prac. & Rem. Code § 171.091(a) (Vernon 2005).
335. *Id.* § 171.054.
336. *Barsness*, 126 S.W.3d at 241.
337. 9 U.S.C. § 11 (2009).
338. *Id.*
339. *TUCO, Inc. v. Burlington N. R.R.,* 912 S.W.2d 311, 315 (Tex. App.—Amarillo 1995), *modified on other grounds*, 960 S.W.2d 629 (Tex. 1997).

vacatur even if the relief granted by the arbitrators could not or would not be granted by a court of law or equity.[340]

A court must indulge every reasonable presumption in favor of the arbitrator's decision[341] and may not substitute its judgment for the arbitrator's merely because it would have reached a different conclusion.[342] A party challenging an arbitration award must rely on the statutory or recognized common law grounds for vacatur or modification, as a reviewing court lacks jurisdiction to review any other complaints, including complaints that the evidence was insufficient to support the arbitrator's fact findings or that the arbitrator made an error of substantive law.[343]

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.[344]

*Rare Examples of Successful Vacaturs*:

*Under Section 171.088(a)(2).* An award may be vacated when a party is prejudiced by evident partiality of the arbitrator.

In *Burlington Northern Railroad Co. v. Tuco*, the Texas Supreme Court found evident partiality where an arbitrator failed to disclose the acceptance of a substantial referral from the law

340. Tex. Civ. Prac. & Rem. Code § 171.090 (Vernon 2005).
341. *IPCO-G & C Joint Venture v. A.B. Chance Co.*, 65 S.W.3d 252 (Tex. App.—Houston [1st Dist.] 2001, pet. denied).
342. *City of Baytown v. C.L. Winter, Inc.,* 886 S.W.2d 515, 518 (Tex. App.—Houston [1st Dist.] 1994, writ denied).
343. *J.J. Gregory Gourmet Services, Inc., v. Antone's Import,* 927 S.W.2d 31, 33 (Tex. App.—Houston [1st Dist.] 1995, no writ).
344. Tex. Civ. Prac. & Rem. Code § 171.088(a)(1)-(4) (Vernon 2005).

firm of a non-neutral co-arbitrator during the course of the arbitration.[345] The Court held that a prospective neutral arbitrator 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.[346]

In *Mariner Financial Group, Inc. v. Bossley*, the Texas Supreme 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.[347]

In *Houston Village Builders v. Falbaum*, the court found that an arbitrator's failure to disclose that he had an attorney-client relationship with a trade association to which one of the parties belonged established evident partiality.[348]

In *J.D. Edwards World Solutions v. Estes, Inc*., the court found that an arbitrator's failure to disclose a business relationship between one of the parties and the neutral arbitrator established evident partiality.[349]

*Under Section 171.088(a)(3).* An award can be vacated if the arbitrator has exceeded his or her powers by issuing an award that goes beyond the scope of the agreement of the parties.[350] However, an award may not be vacated based on an "evident mistake" in failing to award damages.[351]

In *Peacock*, a swimming pool contractor and homeowner executed an agreement to arbitrate in an effort to resolve a dispute over a construction contract.[352] Because the arbitration agreement, and not the construction contract, defined the scope of the arbitrator's authority, the arbitrator exceeded his authority in ordering homeowner to pay an amount in addition to contract price for rock removal, even though construction contract provided for an additional payment for "unforeseen circumstances," where contractor did not seek such payment in the arbitration agreement.

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345. 960 S.W.2d 629 (Tex. 1997).
346. *Id*. at 636.
347. 79 S.W.3d 30, 32-35 (Tex. 2002).
348. 105 S.W.3d 28, 35 (Tex. App.—Houston [14th Dist.] 2003, pet. denied).
349. 91 S.W.3d 836, 844 (Tex. App.—Fort Worth 2002, pet. denied).
350. *Peacock v. Wave Tec Pools, Inc.,* 107 S.W.3d 631 (Tex. App.—Waco 2003, no pet.).
351. *Callahan & Assoc. v. Orangefield Indep. Sch. Dist.,* 92 S.W.3d 841 (Tex. 2002).
352. 107 S.W.3d at 631.

In *Robinson v. West*, the court 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.[353]

In *Barsness v. Scott*, the court vacated an arbitration panel's modified award because the panel exceeded its authority in modifying the award to the extent that the modification rendered the award inconsistent with the merits of the original arbitral decision.[354]

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.[355] The court of appeals affirmed the vacatur, concluding that the arbitrators had exceeded the scope of their authority by failing to follow these procedures.[356]

Finally, in *In Burlington Res. 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.[357] The 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.[358]

### *(2) Common Law Grounds*

Because the statutory arbitration scheme does not supplant common law, an arbitration award governed by the TAA may also be set aside on limited common law grounds.[359] Under common law, a trial court may set aside an arbitration award if: (1) the decision is tainted with fraud, misconduct, or gross mistake as would imply bad faith and failure to exercise honest

353. No. 11-03-00028-CV, 2004 WL 178586 (Tex. App.—Eastland 2004), *rev'd on other grounds*, 180 S.W.3d 575 (Tex. 2005).

354. 126 S.W.3d 232 (Tex. App.—San Antonio 2003, pet. denied).

355. 237 S.W.3d 405, 418 (Tex. App.—Fort Worth 2007, pet. denied).

356. *Id.* at 420.

357. 249 S.W.3d 34, 37 (Tex. App.—Houston [1st Dist.] 2007, pet. denied).

358. *Id.* at 45-46.

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

judgment;[360] (2) the award violates public policy; or (3) the award exceeds the scope of the arbitrator's authority.[361]

Significantly, the Texas Supreme Court has suggested that the TAA might have preempted common law grounds for attacking an arbitrator's award.[362] In two separate cases, the court assumed, without deciding, that the common law grounds are still viable, but it appeared to leave the issue open for future debate.[363]

### *b. Federal Law*

#### *(1) FAA*

An arbitration award may be vacated under the FAA on grounds that are similar to those found in the TAA:[364]

- 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.

The United States Supreme Court recently vacated an arbitral decision allowing for class arbitration of claims under 9 U.S.C. §10(4), finding that the arbitrators "exceeded their pow-

360. *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).

361. *Lee v. El Paso County,* 965 S.W.2d 668, 672 (Tex. App.—El Paso 1998, pet. denied).

362. *CVN Group, Inc. v. Delgado*, 95 S.W.3d 234, 237-38 (Tex. 2002); *Callahan & Assoc. v. Orangefield Indep. Sch. Dist.*, 92 S.W.3d 841, 844 (Tex. 2002).

363. *Id*.

364. 9 U.S.C. § 10(a) (2009).

ers" in imposing class arbitration on parties whose arbitration clauses were silent on the issue of class treatment.[365]

And the Fifth Circuit, acting en banc, recently explored the scope of the "evident partiality" grounds for vacatur in *Positive Software Solutions, Inc. v. New Century Mortgage Corp*.[366] The district court had vacated an arbitration award because the arbitrator did not disclose that, more than seven years before the arbitration, he had served as co-counsel with one of the lawyers for a party to the arbitration in unrelated litigation. After a panel affirmed the district court's decision, the Fifth Circuit reviewed the case en banc and reversed the district court's vacatur.[367] The court held that an arbitration award may not be vacated based on a trivial or insubstantial prior relationship between the arbitrator and the parties to the proceeding.[368] The court explained that on its face, the FAA sets out a stern standard, requiring bias to be clearly evident.[369] The court held that the "draconian remedy" of vacatur is warranted only when a nondisclosure involves "a significant compromising relationship."[370]

### *(2) Common Law Grounds*

Prior to the United States Supreme Court's holding in *Hall Street Associates, L.L.C. v. Mattel, Inc.* that the FAA statutory vacatur grounds are exclusive, the Fifth Circuit had recognized two common law grounds for vacatur, allowing vacatur where

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365. *Stolt-Neilsen SA v. Animalfeeds Int'l Corp.*, 559 U.S. —-, 2010 WL 1655826, at *9 (U.S. Apr. 27, 2010).

366. 476 F.3d 278 (5th Cir.) (en banc), *cert. denied*, 127 S. Ct. 2943 (June 11, 2007) (No. 06-1352).

367. *Id*. at 279-80.

368. *Id*. at 283.

369. *Id*. at 281.

370. *Id*. at 286. The Texas Supreme Court has adopted a more lenient standard. *See Burlington Northern R.R., v. TUCO, Inc.*, 960 S.W.2d 629 (Tex. 1997) (holding a neutral arbitrator's failure to disclose his acceptance of a substantial referral from the law firm of a non-neutral co-arbitrator during the course of the arbitration proceedings established evident partiality as a matter of law); *see also* Stephen K. Huber, *Addressing Undisclosed Arbitrator Bias: The Law of "Evident Partiality,"* 39 THE ADVOCATE (STATE BAR LITIGATION SECTION REPORT) at 49 (Summer 2007) ("The rule adopted by the Texas Supreme Court can be stated concisely: an arbitration award will be vacated if a neutral arbitrator fails to 'disclose facts which might, to an objective observer, create a reasonable impression of the arbitrator's partiality.'").

an award violates public policy or where arbitrators have acted in "manifest disregard of the law."[371]

The Fifth Circuit held that the common law vacatur grounds do not survive *Hall Street*.[372] While many other courts have reached the same conclusion,[373] the Second, Sixth, and Ninth Circuits have concluded that the doctrine survives, at least as a judicial gloss on the federal statutory grounds.[374] The United States Supreme Court recently acknowledged this split but declined to resolve it.[375]

### *2. Likelihood of Success*

Given the limited grounds for vacating an arbitration award and the onerous standard of review, the conventional wisdom is that vacaturs rarely are successful. A recent study has shed light on the degree of difficulty of vacating an award, as well as which grounds for vacatur are most successful.[376]

Lawrence Mills reviewed every case, state and federal, published and unpublished, reported between January 1, 2004, and October 31, 2004, in which a court decided a motion to vacate on any of the FAA grounds, excluding employment termination and discrimination suits, as well as statutorily mandated arbitrations in insurance and public contracting disputes.

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371. *Sarofim v. Trust Co. of the West*, 440 F.3d 213, 216 (5th Cir. 2006). The "manifest disregard of the law" ground was 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).

372. *See Citigroup Global Markets, Inc. v. Bacon*, 562 F.3d 349 (5th Cir. 2009).

373. *See, e.g.*, *Ramos-Santiago v. United Parcel Serv.*, 524 F.3d 120, 124 n. 3 (1st Cir. 2008) (dicta); *Robert Lewis Rosen Assocs., Ltd. v. Webb*, 566 F. Supp. 2d 228, 233 (S.D.N.Y. 2008); *Prime Therapeutics LLC v. Omnicare*, *Inc*., 555 F. Supp. 2d 993, 999 (D. Minn. 2008).

374. *See, e.g.*, *Coffee Beanery, Ltd. v. WW, L.L.C.*, 300 Fed. Appx. 415, 418-19, 2008 WL 4899478, at *4 (6th Cir. Nov. 14, 2008); *Stolt-Nielsen SA v. Animalfeeds Int'l Corp.*, 548 F.3d. 85, 93-95 (2d Cir. 2008); *Comedy Club Inc. v. Improv West Assocs*., 553 F.3d 1277, 1290 (9th Cir. 2009)

375. *See Stolt-Neilsen SA*, , 2010 WL 1655826, at *7 n.3.

376. *See* Lawrence R. Mills et al., *Vacating Arbitration Awards*, Vol. 11, No. 4, Dispute Resolution Journal 23 (Summer 2005).

Of the 182 cases in which vacatur was sought, the motion to vacate succeeded 37 times, or in 20% of the cases.[377] This percentage fell substantially if the comparison is to the total number vacatur grounds asserted in these cases. The parties successfully asserted only 40, or about 14%, of the 277 grounds advanced for vacatur.[378] State courts were much more likely to vacate than federal courts (25.8% to 9.7%).

The most frequently asserted and most successful of the grounds for vacatur was the allegation that the arbitrators had "exceeded their powers, or so imperfectly executed them that a . . . final and definitive award upon the subject matter submitted was not made." This ground was asserted 101 times in the cases, and succeeded in 21, or about 20.8%, of them. The next most-cited ground, that arbitrators "manifestly disregarded the law," was much less successful, succeeding in only 2 out of 52 cases.

### *3. Remedy if Vacated*

#### *a. 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.[379] 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.[380]

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.[381] The El Paso Court of Appeals, however, has held

377. *Id.* at 24.

378. *Id.*

379. TEX. CIV. PRAC. & REM. CODE § 171.089(a) (Vernon 2005).

380. *Id.* § 171.089(b).

381. *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.).

that the trial court's authority is not limited to ordering a rehearing.[382]

### *b. 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."[383] "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."[384] However, a district court does not have the authority to dictate procedures for a second arbitration.[385]

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."[386]

### *4. 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.[387] However, the TAA does not authorize an appeal from an order that vacates an arbitration award while granting a new arbitration hearing.[388] This limitation on appellate jurisdiction generally has been applied not only to cases arising under the TAA, but also to FAA cases brought in state

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382. *Tri-Star Petroleum Co. v. Tipperary Corp.*, 107 S.W.3d 607, 614-15 (Tex. App.—El Paso 2003, pet denied).
383. 9 U.S.C. § 10(b) (2009).
384. Thomas H. Oehmke, *Appealing Adverse Arbitration Awards*, 94 AM. JUR. TRIALS 211, at § 246 (2006).
385. *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).
386. Oehmke*, supra* note 384, at § 245.
387. TEX. CIV. PRAC. & REM. CODE § 171.098(a) (Vernon 2005).
388. § 171.098(a)(5); *Stolhandske v. Stern,* 14 S.W.3d 810 (Tex. App.—Houston [1st Dist.] 2000, pet. denied).

court because such cases are subject to state procedural rules.[389]

One exception to this rule occurs when the trial court vacates an arbitration award and directs a rehearing while simultaneously denying a motion to confirm an arbitration 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.[390]

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."[391]

### *F. The Wave of the Future? Non-Judicial Appellate Tribunals*

Given the expense and time-consuming nature of post-award litigation, both 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.[392] One commentator convincingly sets out 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

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389. *See J.D. Edwards World Solutions Co. v. Estes, Inc.*, 91 S.W.3d 836, 839 (Tex. App.—Fort Worth 2002, pet. denied).

390. *See East Tex. Salt Water Disposal Co., v. Werline*, —S.W.3d—, No. 07-0135, 2010 WL 850161, at **2-4 (Tex. Mar. 12, 2010).

391. 9 U.S.C. § 16; *see also Atlantic Aviation, Inc. v. EBM Group, Inc.*, 11 F.3d 1276, 1280 (5th Cir. 1994).

392. *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).

set a schedule for more expedited review than would be available in the courts.[393]

The Judicial Arbitration and Mediation Services (JAMS) has crafted an optional appeal procedure that is available upon the agreement of both parties.[394] 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.[395]

393. Kratovil, *supra* note 392, at 14.
394. *See* JAMS Optional Arbitration Appeal Procedure, http://www.jamsadr.com/rules-optional-appeal-procedure/ (last visited March 22, 2010).
395. The authors thank Elizabeth (Heidi) Bloch for allowing us to build upon a series of continuing legal education papers that she authored on this subject.