# ARBITRATION-RELATED LITIGATION AND APPEALS

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# ARBITRATION - RELATED LITIGATION AND APPEALS

## I. INTRODUCTION

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 parties to the contract often litigate the enforceability and scope of the arbitration clause before any arbitration proceeding commences. Second, after an arbitration panel renders its decision and issues an award, parties frequently turn to the courts to confirm, modify, or vacate the award. A steady stream of arbitration-related decisions has emanated from the Fifth Circuit and Texas appellate courts in recent years, including fourteen from the Texas Supreme Court alone since 2004. This paper, updating a series of papers by Elizabeth (Heidi) Bloch, is intended to provide an overview of these decisions.[1]

## 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. Possible Sources of Governing Law

#### 1. The TAA and FAA

The two most common statutory sources of the governing law for arbitration agreements in Texas 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"). Both of these statutes encourage and support arbitration, but they also have some limitations to their applicability.

The FAA, for example, does not apply to employment contracts of "seamen, railroad employees, or any other class of workers engaged in foreign or interstate commerce." 9 U.S.C. A. § 1.

The TAA expressly excludes the following from its scope:

1) collective bargaining agreements;
2) workers' compensation benefit claims;
3) any agreements made before January 1, 1966.

TEX. CIV. PRAC. & REM. CODE § 171.002(a). In addition, the TAA does not apply to (1) a claim 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. *Id.* § 171.002(b), (c).

The FAA applies to all suits pending in state and federal court when the dispute concerns a "contract evidencing a transaction involving commerce." *Perry v. Thomas*, 482 U.S. 483, 489 (1987); *see also* 9 U.S.C. § 1 ("'commerce' . . . means commerce among the several States").

Both state and federal courts have applied this test very liberally in favor of application of the FAA. As defined in the FAA, "interstate commerce" is not limited to the interstate shipment of goods. Instead, it includes all contracts "relating to" interstate commerce. *In re FirstMerit Bank*, 52 S.W.3d 749, 754 (Tex. 2001). The FAA "extends to any contract affecting commerce, as far as the Commerce Clause of the United States Constitution will reach." *In re L & L Kempwood Assoc.*, 9 S.W.3d 125, 127 (Tex. 1999).

An expansive view of "involving commerce" can be found in *In re Nasr*, 50 S.W.3d 23, 25-26 (Tex. App.—Beaumont 2001, orig. proceeding), where the court had "no problem" finding that the contract for the construction of a home evidenced a "transaction involving commerce," because discovery answers in the record listed "Wal-Mart" as one of the subcontractors who participated in the design or construction of the home. *See also In re Profanchik,* 31 S.W.3d 381 (Tex. App.—Corpus Christi 2000, no pet.).

#### 2. Other Statutory Sources

Other statutory sources for arbitration include the Texas Family Code (*see, e.g.*, TEX. FAM. CODE § 6.601, § 153.0071); collective bargaining agreement disputes, covered under Chapter 102 of the Texas Labor Code; Worker's Compensation Benefit disputes, covered under Chapter 410 of the Texas Labor Code; and disputes involving residential construction, covered by Chapter 436 of the Texas Property Code.

#### 3. Common Law

In addition, an agreement may be enforceable under common law even if it does not meet statutory requirements. *L.H. Lacy Co. v. City of Lubbock*, 559 S.W.2d 348, 350 (Tex. 1977); *Mullinax, Wells, Baab & Cloutman, P.C. v. Sage*, 692 S.W.2d 533, 535 (Tex.

[1] The authors thank Heidi Bloch, for allowing us to build upon her earlier outstanding work, and Christine McMillan, a Haynes and Boone LLP summer associate, for her assistance on this project.

App.—Dallas 1985, writ ref'd n.r.e.). In *Hoeppner v. Statewide Remodeling, Inc.*, 2003 WL 21357277 (Tex. App.—Waco 2003, pet. denied), the court concluded that it need not address whether there was sufficient evidence to establish that the FAA applied to a particular arbitration clause because the clause would be enforceable in any event under common law, which would require the arbitration provision to be enforced according to its plain terms.

The statutory and the common law schemes regarding both the enforceability of arbitration agreements and grounds for setting aside arbitration awards seem to exist side by side in Texas. *Id.*; *Monday v. Cox,* 881 S.W.2d 381, 385 n.1 (Tex. App.—San Antonio 1994, writ denied); *Massey v. Galvan,* 822 S.W.2d 309, 315-16 (Tex. App.—Houston [14th Dist.] 1992, writ denied).

B. FAA Preemption

The Texas Supreme Court recently reemphasized that the FAA and TAA are not mutually exclusive. *See In re D. Wilson Const. Co.*, 2006 WL 1792021, at *3 (Tex. June 30, 2006). Rather, "the FAA only preempts contrary state law, not consonant state law." *Id.* 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. *Southland Corp. v. Keating*, 465 U.S. 1, 14-16 (1984).

The Texas Supreme Court has promulgated a four-part test for determining whether the TAA would thwart the goals and policies of the FAA in a particular case. The FAA preempts the TAA only if: "(1) the agreement is in writing, (2) it involves interstate commerce, (3) it can withstand scrutiny under traditional contract defenses [under state law], and (4) state law affects the enforceability of the agreement." *See In re D. Wilson Const. Co.*, 2006 WL 1792021, at *3 (citing *In re Nexion Health at Humble, Inc.*, 173 S.W.3d 67, 69 (Tex. 2005)). 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. *Id.*

FAA preemption has two practical effects. First, as indicated above, if the FAA applies, it will nullify a state statute purporting to limit the ability of parties to arbitrate their claims in a manner inconsistent with the FAA. *See, e.g.*, *In re Nexion Health at Humble, Inc.*, 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.").

Second, whether the FAA applies to an arbitration agreement and preempts the TAA significantly impacts the appropriate procedure for appellate review of a trial court's order compelling or denying arbitration in state court. As discussed in more detail below, mandamus relief is generally available when the trial court refuses to compel arbitration under the FAA and when the trial court compels arbitration under the TAA. In contrast, an interlocutory appeal is the appropriate way to challenge a trial court's refusal to compel arbitration under the TAA. *See infra* Part III.E.

C. Choice of Law Agreements

Arbitration clauses often contain specific provisions stating that either the TAA or the FAA will apply, or the arbitration clauses may be contained in a contract with a general choice of law provision. Such clauses may or may not be determinative as to which statute applies.

The Texas Supreme Court has concluded that a general choice of law provision stating that the contract will be governed by "the law of the place where the project is located"—Houston—did not preclude application of the FAA since Houston is subject to federal law as well as to Texas law. *In re L & L Kempwood Assoc.*, 9 S.W.3d 125, 127 (Tex. 1999). This holding is consistent with the concept that choice of law provisions generally address the applicability of one state's law over another state's law, not state versus federal law.

Citing *L & L Kempwood*, the court in *In re Valle Redondo*, 47 S.W.3d 655, 660-62 (Tex. App.—Corpus Christi 2001, orig. proceeding), went even further, holding that a choice of law provision in the contract requiring that it be construed and interpreted in accordance with the laws of the State of Texas did not preclude application of the FAA.

Although the Texas Supreme Court has not specifically addressed the issue, several courts of appeals have held that an agreement between the parties to arbitrate under the FAA establishes the applicability of the FAA, even without a showing that the transaction affects or involves interstate commerce. *In re Ledet*, 2004 WL 2945699, at *2 (Tex. App.—San Antonio Dec. 22, 2004, orig. proceeding); *In re Kellogg Brown & Root*, 80 S.W.3d 611 (Tex. App.—Houston [1st Dist.] 2002, orig. proceeding); *In Re Choice Homes, Inc.*, 174 S.W.3d 408, 412 (Tex. App.—Houston [14th Dist.] 2005, orig. proceeding).

In *In re FirstMerit Bank*, the supreme court was faced with a specific clause in the arbitration agreement stating that the underlying transaction

"involves interstate commerce…and shall be governed by the Federal Arbitration Act" and yet the court nonetheless examined whether the transaction did, in fact, involve interstate commerce. 52 S.W.3d at 754. This analysis at least indicates that an agreement that the FAA governs may not necessarily be sufficient.

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 that the FAA applies. In contrast, a statement that the TAA applies likely will not be effective if the contract does, in fact, involve interstate commerce.

## 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 is enforceable (i.e., was there a valid agreement to arbitrate) and (2) does the dispute fall within the scope of the clause? *In re FirstMerit Bank, N.A.*, 52 S.W.3d 749, 753-54 (Tex. 2001).

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

### A. Enforceability of Arbitration Clauses

#### 1. Interplay between the FAA and the TAA

As noted above, if the FAA applies to an arbitration agreement, then the FAA will preempt any contrary state laws governing the enforceability of arbitration clauses. If a state arbitration statute requires the signature of a witness, for example, then the FAA will preempt such requirement and render a non-conforming arbitration agreement enforceable if the contract relates to interstate commerce. *See In re Nexion Health at Humble, Inc.*, 173 S.W.3d 67, 69 (Tex. 2005).

But it is also important to keep in mind that the FAA will not validate an arbitration agreement that is otherwise unenforceable under general contract principles. Even if the FAA applies, an agreement to arbitrate must still be valid under general principles of state contract law. *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).

In addition, Texas procedure under the TAA controls the determination of whether an arbitration clause is enforceable in litigation in Texas state courts. *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, no pet.). In other words, the procedures set forth in the TAA, such as filing an application in court to compel arbitration, apply to an arbitration clause whose enforceability is governed by the FAA. The only exception to this rule appears to be the interlocutory appeal procedures set forth in the TAA, which courts have concluded are not available to review a decision regarding the enforceability of an agreement covered by the FAA. *See infra* Part III.E.1.

#### 2. Existence of an Agreement to Arbitrate

The intention to have disputes resolved through arbitration must be expressed with certainty. In *Tenet Healthcare Ltd. v. Cooper,* 960 S.W.2d 386 (Tex. App.—Houston [14th Dist.] 1998, pet. dism'd w.o.j.), the court held that a company handbook, which stated that its contents were "guidelines," did not create an enforceable contract requiring arbitration despite a policy provision in the handbook stating a preference for arbitration to resolve disputes.

Despite the policy and presumptions favoring arbitration, "arbitration has long been recognized as a contractual matter and, in the absence of a contractual agreement to arbitrate, a party cannot be forced to forfeit the constitutional protections of the judicial system and submit its dispute to arbitration." *Glazer's Wholesale Distribs., Inc. v. Heineken USA, Inc.,* 95 S.W.3d 286, 296 (Tex. App.—Dallas 2001, jdmt vacated by agmt); *Freis v. Canales,* 877 S.W.2d 283, 284 (Tex. 1994) (per curiam).

##### a. State Contract Law Principles

The existence of an agreement to arbitrate, even one governed by the FAA, is determined under state law general contract principles. *In re Palm Harbor Homes, Inc.*, -- S.W.3d --, 2006 WL 1562546, at *3 (Tex. June 9, 2006). In *Massey v. Galvan,* 822 S.W.2d 309, 315-16 (Tex. App.—Houston [14th Dist.] 1992, writ denied), the court concluded that a series of letters between attorneys on behalf of their respective clients constituted a series of writings sufficient to demonstrate an agreement to arbitrate. While the TAA and FAA both require a written agreement, there is support for the proposition that an oral agreement to arbitrate can be enforceable under common law. *Id.; L. H. Lacy Co. v. City of Lubbock,* 559 S.W.2d 348 (Tex. 1977). But a party seeking to compel arbitration still must establish the existence of an agreement to arbitrate. *In re Bunzl USA, Inc.*, 155 S.W.3d 202, 209 (Tex. App.—El Paso 2004, orig.

proceeding). In *Bunzl*, there was a written employment agreement containing an arbitration clause, but it was not signed by the employee. The court denied arbitration because the record was insufficient to establish that the parties intended to be bound by the agreement regardless of whether it was signed.

An arbitration agreement contained in a separate agreement can be incorporated into the parties' contract by reference. *In re D. Wilson Constr. Co*., -- S.W.3d --, 2006 WL 1792021 (Tex. June 30, 2006). 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. *Teal Constr. Co./Hillside Villas Ltd. v. Darren Casey Interests, Inc*., 46 S.W.3d 417, 420 (Tex. App.—Austin 2001, pet. denied).

b. Agreement to be bound

The general rule is that parties need not expressly state that an award is binding. At least one court has recognized that arbitration is, by definition, binding under the TAA even without the term "binding" appearing in the agreement. *Porter & Clements, LLP. v. Stone,* 935 S.W.2d 217, 220-22 (Tex. App.—Houston [1st Dist.] 1997, no writ). There is certainly no requirement in either the TAA or the FAA that an agreement state that it is binding in order for the parties to be bound by an arbitration award. *Nabors Drilling USA v. Carpenter*, -- S.W.3d --, 2006 WL 708275, at *3 (Tex. App.—San Antonio, no pet.).

However, there are some exceptions for non-TAA arbitration clauses arising under certain statutes. The Family Code makes a distinction between binding and non-binding arbitration and provides the parties will not be bound by an arbitration award unless they have expressly so agreed. Similarly, under the new Texas Residential Construction Commission Act, an "action" is defined to include an "arbitration," and an "arbitration" means the procedure described in TEX. CIV. PRAC. & REM. CODE § 154.027. That section states that an arbitration will be non-binding unless the parties "stipulate in advance" that the award will be binding.

There is one other noteworthy case relating to the use of the term "binding." In *High Valley Homes, Inc. v. Fudge,* 2003 WL 1882261 (Tex. App.—Austin 2003, no pet.), the court concluded that a contract provision requiring "mandatory, binding mediation" required arbitration despite the use of the word "mediation."

c. Enforcement by or against 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." *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.).

Federal courts have recognized six theories which 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. *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). The Fifth Circuit analyzes application of these theories under federal law. *Wash. Mut. Fin. Group, LLC v. Bailey*, 364 F.3d 260, 267 (5th Cir. 2004). The Texas Supreme Court has chosen to rely on state law, but explained that its reliance is "informed by persuasive and well-reasoned federal precedent." *In re Kellogg*, 166 S.W.3d at 739.

Of these six bases listed above, the Texas Supreme Court has focused extensively on the scope of the equitable estoppel doctrine in recent years.

<u>Estoppel</u>. The Fifth Circuit has held that "application of equitable estoppel is warranted when the signatory to the contract containing an arbitration clause raises allegations of substantially interdependent and concerted misconduct by both the nonsignatory and one or more of the signatories to the contract." *Grigson v. Creative Artist Agency, L.L.C.,* 210 F.3d 524, 527 (5th Cir. 2000). In *Grigson*, the party to the arbitration clause could not escape enforcement of the clause by including a non-signatory in its suit when the claims against the non-signatory were intertwined with those against the other party to the arbitration agreement. *See also Cash Am. Int'l., Inc. v. Exch. Servs., Inc.,* 83 S.W.3d 183 (Tex. App.—Amarillo 2002, no pet.) (claimant cannot avoid arbitration simply by adding a non-signatory as a defendant). *But see Bridas S.A.P.I.C. v. Gov't of Turkmenistan*, 345 F.3d 347, 361 (5th Cir. 2003) (finding the reverse of *Grigson* is not true: "a signatory may not estop a nonsignatory from avoiding arbitration regardless of how closely affiliated that nonsignatory is with another signing party.")

"Direct benefits estoppel" is a species of estoppel in which "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." *In re Kellogg*, 166 S.W.3d at 739. Put another way, "A nonparty cannot both have his contract and defeat it too." *In re*

*Weekley Homes, L.P.*, 180 S.W.3d 127, 135 (Tex. 2005).

The Texas Supreme Court has recently examined direct benefits estoppel in several cases and has determined that parties may be bound to arbitrate under estoppel theories: (1) when the non-party pursues a claim "on the contract"; and (2) when the non-party seeks and obtains substantial benefits from the contract. *In re Weekley Homes*, 180 S.W.3d at 131-33. A non-signatory will not be bound simply because a claim is *related* to a contract with an arbitration provision. *In re Kellogg*, 166 S.W.3d at 741. Rather, the Court has explained that "a non-signatory should be compelled to arbitrate a claim only if its seeks, through the claim, to derive a direct benefit from the contract containing the arbitration provision." *Id.*

Thus, a non-signatory subcontractor in *In re Kellogg* 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. 166 S.W.3d at 741. In contrast, a non-signatory in *In re Weekley Homes*, 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. 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, parents could not bind their children to arbitrate merely on the basis of the parent-child relationship).

The Texas Supreme Court also recently addressed the question of whether a claim of tortious interference against non-signatories was arbitrable. *In re Vesta Ins. Group, Inc*. 192 S.W.3d 759, 761-62 (Tex. 2006) (per curiam). The court began by explaining that under direct-benefits estoppel, nonparties generally must arbitrate claims arising from the contract, but not if the claim arises from general legal obligations. *Id.* at 761. While the court found that a tortious interference claim arises from both the contract and general law, it fell "on the arbitration side of the scale." *Id.* at 762. Thus, non-signatories may be bound to arbitrate a tortious interference claim. *Id.*

Finally, 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." *In re Kellogg*, 166 S.W.3d at 741 n.9 (citing cases). However, the Court did not reach the question of whether this form of direct benefits estoppel would be available under Texas law. *Id.*

Incorporation by reference. A court can also use incorporation by reference to bind a non-signatory. The court in *Cappadonna Electrical Management v. Cameron County* recently declined to apply incorporation by reference to compel arbitration when subcontractors did not attempt to incorporate the terms of the Prime Contract into their subcontract, and the Prime Contract was the only contract that incorporated an arbitration clause. 180 S.W.3d 364, 373 (Tex. App.—Corpus Christi 2005, no pet.). The court found that incorporation by reference applies when a party binds *itself* by incorporating a document by reference into its own contract, but non-signatory non-parties could not use the doctrine to enforce a provision of a document it did not sign or incorporate. *Id.*

Affiliated Companies. Federal courts have consistently held that affiliated companies, including parent, subsidiary, and successor corporations, can be forced to arbitrate when the claims against them arise from the same operative facts and are inherently inseparable from claims against an affiliate or predecessor corporation that is a party to an arbitration agreement. *In re Koch Indus., Inc.,* 49 S.W.3d 439, 447 (Tex. App.—San Antonio 2001, orig. proceeding), and cases cited therein.

Third party beneficiary. A party resisting arbitration on the grounds that he or she has not signed an agreement to arbitrate may nonetheless be required to arbitrate as a third party beneficiary of the agreement. *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).

Finally, it is important to keep in mind that a non-signatory must establish, in a proceeding to compel arbitration, the grounds that give it a basis for compelling arbitration. In *Mohamed v. Auto Nation USA Corp.,* 89 S.W.3d 830 (Tex. App.—Houston [1st Dist.] 2002, no pet.), a non-signatory attempted to enforce arbitration, and would likely have succeeded in doing so, but failed to prove its status as an assignee of the contract containing the arbitration agreement.

3. Defenses to Enforcement

As noted above, since an arbitration agreement is governed under general state contract principles, any defense available to avoid other contractual obligations is similarly available to challenge the enforceability of an arbitration agreement. It is important at the outset, however, to note the distinction between those defenses that would invalidate only the agreement to arbitrate, which can be determined initially by a court addressing a motion to compel arbitration, and those that involve procedural questions or would void the contract as a

whole (as opposed to just the arbitration clause), which are generally for the arbitrator to decide. This distinction will be pointed out, where relevant, below.

a. Conditions Precedent

It is not uncommon for an arbitration clause to include certain prerequisites or conditions precedent to arbitration. These may include an agreement to first attempt mediation, to send a particular type of notice of default or demand for arbitration, or perhaps to provide for an opportunity to cure. *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).

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. *See Valero Energy Corp. v. Teco Pipeline Co.*, 2 S.W.3d 576, 583 (Tex. App.—Houston [14th Dist.] 1999, no pet.) (citing cases). That debate appears to have been resolved by the United States Supreme Court's decision in *Howsam v. Dean Witter Reynolds, Inc.*, 537 U.S. 79, 84 (2002), which determined that this issue was for the arbitrator to decide.

At least two Texas court of appeals have recognized that the prior circuit split has been resolved by *Howsam*. *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 of Tyler, Inc.*, 146 S.W.3d 699, 705 (Tex. App.—Tyler 2004, orig. proceeding).

b. Fraud

Under both state and federal law, claims of fraud that would invalidate the entire contract are subject to arbitration, and thus determinable by the arbitrator. *Prima Paint Corp. v. Flood & Conklin Mfg. Co.*, 388 U.S. 395, 404 (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). In contrast, a claim that the arbitration clause itself has been induced by fraud may be adjudicated by the court. *Prima Paint Corp.*, 388 U.S. at 403-04.

In *Teal Construction*, the court noted that there is some authority for the proposition that under state law, fraudulent inducement voids a contract *ab initio*, and therefore an arbitration clause in such a contract is invalid. 46 S.W.3d at 421. However, that court rejected the contention that fraudulent inducement of the construction contract had rendered the arbitration clause invalid since the issues of payment and performance, which were the bases of the fraudulent inducement claim, were subject to arbitration. *Id.*

c. Unconscionability

As with fraud, defenses to arbitration such as unconscionability, duress, and revocation must specifically relate to the arbitration clause itself, not to the contract as a whole. *In re FirstMerit Bank, N.A.*, 52 S.W.3d 749, 756 (Tex. 2001). If a defense of unconscionability or duress is asserted against the entire contract, those issues are to be arbitrated. *Id.*

In evaluating the validity of an arbitration clause, courts may consider both procedural and substantive unconscionability. *In re Halliburton Co.*, 80 S.W.3d 566, 571 (Tex. 2002); *see also* TEX. CIV. PRAC. & REM. CODE § 171.022 (stating that "a court may not enforce an agreement to arbitrate if the court finds the agreement was unconscionable at the time the agreement was made).

Procedural unconscionability refers to circumstances surrounding the adoption or execution of the arbitration provision. *In re Halliburton Co*, 80 S.W.3d at 571. Substantive unconscionability refers to the fairness of the arbitration provision itself. *Id.* 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." *In re Palm Harbor Homes, Inc.*, -- S.W.3d --, 2006 WL 1562546, at *4 (Tex. June 9, 2006) (quoting *In re FirstMerit Bank*, 52 S.W.3d 749, 757 (Tex. 2001)).

It is difficult to strike down an arbitration clause on the grounds of unconscionability because there is nothing inherently unconscionable about an arbitration agreement or a contract of adhesion. *See In re Palm Harbor Homes,* 2006 WL 1562546, at *5. A party who has had an opportunity to read an arbitration agreement is presumed to know its contents. *EZ Pawn Corp. v. Mancias*, 934 S.W.2d 87, 90 (Tex. 1996). Thus, ignorance of the inclusion of the clause will not defeat it. *See id.*

Furthermore, unconscionability will not negate a bargain simply because one party is in a less advantageous bargaining position. *In re Palm Harbor Homes,* 2006 WL 1562546, at *4 (finding no unconscionability when parties claimed they would not have signed the arbitration agreement had the concept of arbitration been explained to them). 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. *In re AdvancePCS Health L.P.*, 172 S.W.3d 603, 606 (Tex. 2005).

While unconscionability is difficult to prove, a court may find an arbitration agreement unconscionable due to excessive costs. *See FirstMerit Bank, N.A.*, 52 S.W.3d 749, 756 (Tex. 2001). A party opposing arbitration on this basis must prove with specific information the likelihood of incurring excessive costs. *Id.* 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. 180 S.W.3d 212, 214-16 (Tex. App.—San Antonio 2005, pet. filed). 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. *Id.* at 215-16.

d. Duress

A party might also avoid arbitration by proving economic duress. In *In re RLS Legal Solutions, L.L.C.*, an employee alleged that her employer withheld pay for work already performed until she signed an arbitration agreement. 156 S.W.3d 160, 164 (Tex. App.—Beaumont 2005, orig. proceeding). When she finally signed the agreement, she told the employer she did so under duress. *Id.* The court of appeals denied mandamus relief on the trial court's finding of economic duress, because "the trial court reasonably could have found the restraint was imminent and [the employee] had no means of protection from the threat." *Id.* at 165-66.

e. Waiver

Whether a party waives its right to seek arbitration is an issue for the court. *In re Bruce Terminix Co,* 988 S.W.2d 702 (Tex. 1998). The most common basis for a waiver argument is that the other party has pursued or participated in litigation, thereby waiving its right to arbitrate. The two-prong test for waiver is the same under both the TAA and the FAA: (i) did the party seeking arbitration substantially invoke the judicial process; and (ii) did the opposing party prove that it suffered prejudice as a result? *Prudential Sec., Inc. v. Marshall*, 909 S.W.2d 896, 898 (Tex. 1995) (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); *In re Koch Indus., Inc.*, 49 S.W.3d 439, 445 (Tex. App.—San Antonio 2001, orig. proceeding) (applying the FAA).

In either case, there is a strong presumption against waiver. *In re Vesta Ins. Group, Inc.*, 192 S.W.3d 759, 763 (Tex. 2006) (per curiam). While a party waives arbitration by substantially invoking the judicial process to the opponent's detriment, mere participation in litigation is not enough to establish waiver. *Id.*

For example, in *In re Vesta*, the Texas Supreme Court found no waiver even though the parties had litigated in trial court for two years and the plaintiff had incurred more than $200,000 in expenses and fees. *Id.* at 763. The court determined that much of the plaintiff's pre-trial costs were "self-inflicted" and that he failed to demonstrate prejudice when he conceded that the discovery would be useful in arbitration. *Id.*

Similarly, in *In re D. Wilson Construction Co.*, the Court found that petitioners did not waive their right to arbitration by asserting cross-actions against the respondent in a separate related suit or by seeking injunctive relief to preserve evidence in the present suit, because respondent did not show that the litigation worked to its detriment. -- S.W.3d --, 2006 WL 1792021, at *6 (Tex. June 30, 2006).

f. Lack of Consideration/Lack of Mutuality

Arbitration agreements must be supported by consideration. *In re Palm Harbor Homes*, 2006 WL 1562546, at *3. 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. *Id.*

Consideration and mutuality are common issues in arbitrations arising from employment agreements. *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).

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. *In re Dallas Peterbilt, Ltd.*, No. -- S.W.3d --, 2006 WL 1651694, at *1 (Tex. June 16, 2006) (per curiam). An employee accepts the terms of the arbitration policy as a matter of law if he continues working after receiving notice of the policy. *Id.* at *2.

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. *Id.* The court found this summary to be sufficient notice. *Id.*

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. *In re Dillard Dep't Stores,*

*Inc.*, -- S.W.3d --, 2006 WL 508629, at *3 (Tex. Mar. 3, 2006) (per curiam).

In *In re Halliburton Company*, an employer adopted a dispute resolution program and sent its employees a notice that continuing employment would constitute acceptance of the plan. 80 S.W.3d 566, 568 (Tex. 2002). A disgruntled employee filed suit and alleged that the arbitration agreement was illusory and without consideration since the employment was at will and the employer retained the option of either discontinuing employment or changing the policy. *Id*. at 569.

The Court concluded that the agreement was binding and enforceable on both parties, noting that the employer could not avoid its promise to arbitrate, because the agreement required ten days notice of modification and any such amendment would apply only prospectively. *Id.* at 569-70. *But see J.M. Davidson, Inc. v. Webster*, 128 S.W.3d 223, 230 (Tex. 2003) (implying that an arbitration clause reserving the right to unilaterally modify without prior notice would be improper).

g. Ambiguity

A determination of ambiguity is for the court, and the court may conclude a contract is ambiguous even if the parties do not contend that it is. *J.M. Davidson, Inc.*, 128 S.W.3d at 229, 231.

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. *Id.* at 230. The clause was included in a separate paragraph which addressed employment issues, but did not relate to alternative dispute resolution. *Id.* at 229.

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. *Id*. at 230. The court explained, "While we generally favor arbitration agreements, we should not reflexively endorse an agreement so lacking in precision that a court must first edit the document for comprehension, and then rewrite it to ensure its enforceability." *Id*. at 231.

h. Statutory Preemption

Parties pursuing a statutory cause of action have often complained that an agreement to arbitrate undercuts their ability to seek statutory relief. As noted above, the supremacy clause of the United States Constitution dictates that the FAA "takes precedence over state attempts, legislative or judicial, to undercut the enforceability of arbitration agreements." *In re Turner Brothers Trucking Co.*, 8 S.W.3d 370, 374 (Tex. App.—Texarkana 1999, orig. proceeding); *Perry v. Thomas*, 482 U.S. 483, 492 n. 9 (1987). Therefore, a contention that federally mandated arbitration runs afoul of a state statutory scheme is generally irrelevant. *In re David's Supermarkets*, 43 S.W.3d 94, 98 (Tex. App.—Waco 2001, orig. proceeding); *Jack B. Anglin Company, Inc. v. Tipps*, 842 S.W.2d 266, 268 (Tex. 1992) (arbitration agreement enforceable under FAA for DTPA claims).

With respect to a federal statutory cause of action, only a contrary congressional command can override the FAA's mandate to enforce arbitration agreements. *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). The test articulated by the United States Supreme Court in *McMahon* requires the party opposing arbitration to show a clear congressional intent to override the FAA's mandate to enforce arbitration agreements, which intent must be evidenced in the statute's text or history or through an inherent conflict between arbitration and the statute's purposes. *McMahon*, 482 U.S. at 227; *American Homestar*, 50 S.W.3d at 485. Claims such as those arising under the Securities Exchange Act and the Age Discrimination in Employment Act have been held to be subject to arbitration.

In *American Homestar*, the Texas Supreme Court addressed whether the Magnuson-Moss Warranty Act, which provides for informal dispute settlement mechanisms as a prerequisite to litigation, rendered a binding arbitration clause unenforceable. The FTC has concluded that the informal dispute settlement mechanisms could not be binding, and the court of appeals had reasoned that this meant the Magnuson-Moss Act prohibited the use of binding arbitration clauses in written warranties. *In re Van Blarcum,* 19 S.W.3d 484, 491 (Tex. App.—Corpus Christi 2000), *vacated, In re Am. Homestar,* 50 S.W.3d 480 (Tex. 2001). The Texas Supreme Court held otherwise, noting that expressly providing for one type of out-of-court settlement mechanism does not necessarily preclude enforcing an agreement to participate in another. *American Homestar*, 50 S.W.3d at 487. Ultimately, the court found nothing in either the text of the Act or in its legislative history that would preclude arbitration, nor was there any inherent conflict between the FAA and the purposes of the Magnuson-Moss Act.

In addition, as one court has noted, there is some authority for the proposition that a state-based claim with a parallel federal underpinning is not arbitrable if the parallel federal statutory scheme reflects a congressional intent that such claims not be arbitrated.

*See In re David's Supermarkets, Inc.*, 43 S.W.3d 94, 99 (Tex. App.—Waco 2001, orig. proceeding), and cases cited therein.

B. Scope of Arbitration Clauses

1. Presumptions

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 a court. *See, e.g.*, *In re Choice Homes, Inc.*, 174 S.W.3d 408, 413 (Tex. App—Houston [14th Dist.] 2005, orig. proceeding).

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. *American Realty Trust, Inc., v. JDN Real Estate-McKinney, L.P.,* 74 S.W.3d 527 (Tex. App.—Dallas 2002, pet. denied); *Lost Creek Munic. Util. Dist. v. Travis Indus. Painters, Inc.,* 827 S.W.2d 103, 105 (Tex. App.—Austin 1992, writ denied).

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. *In re D. Wilson Constr. Co.*, -- S.W.3d --, 2006 WL 1792021 (Tex. June 30, 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). Presumptions are often necessary so that a court will not be forced to intrude on the merits of a case in determining the scope of an arbitration agreement. *See In re BP America Prod. Co.,* 97 S.W.3d 366 (Tex. App.—Houston [14th Dist.] 2003, orig. proceeding).

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." *In re Kellogg*, 166 S.W.3d at 737-38 (internal citations omitted).

To determine whether a claim falls within the scope of an arbitration agreement, courts look at the terms of the agreement and the factual allegations in the petition, rather than the legal causes of action asserted. *Prudential Sec., Inc. v. Marshall,* 909 S.W.2d 896, 900 (Tex. 1995). 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." *Id.* at 899; *see also In re D. Wilson*, 2006 WL 1792021, at *7. 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. *Prudential,* 909 S.W.2d at 900.

2. Related Claims

The test for determining whether related claims are subject to an arbitration clause is looser than the "inextricably intertwined" test found in other areas of the law. Generally, 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, the claim will be arbitrable. *In re Medallion, Ltd.* 70 S.W.3d 284 (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). Arbitration should not be denied unless it can be said with positive assurance that the particular dispute is not covered. *Prudential*, 909 S.W.2d 899; *Emerald Texas, Inc. v. Peel*, 920 S.W.2d 398, 403 (Tex. App.—Houston [1st Dist.] 1996, no writ).

When a contract contains a broad arbitration clause, related tort claims arising out of the contract will be arbitrable as well. If a particular tort claim is so interwoven with the contract that it could not stand alone, it will be subject to arbitration. *Valero Energy Corp., v. Teco Pipeline Co.,* 2 S.W.3d 576, 590 (Tex. App.—Houston [14th Dist.] 1999, no pet.); *In re Medallion,* 70 S.W.3d at 828. In contrast, if 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, the claim is not subject to arbitration. *In re Medallion,* 70 S.W.3d at 828.

Under this test, a broad range of tort or statutory claims will be covered under an agreement covering contract claims. *See Prima Paint Corp., v. Flood & Conklin Mfg. Co.,* 388 U.S. 395, 398 (1967) (fraudulent inducement claims); *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth Co., Inc.,* 473 U.S. 614 (1985) (antitrust claims arising from the contract); *Am. Employers Ins. Co., v. Aiken,* 942 S.W.2d 156 (Tex. App.—Fort Worth 1997, no writ) (tortious interference and infliction of emotional distress claims); *Prudential Sec., Inc. v. Marshall,* 909 S.W.2d 896 (Tex. 1995) (defamation and DTPA claims factually intertwined with the contract); *In re Sun Communications, Inc.,* 86 S.W.3d 313 (Tex. App.—Austin 2002, orig. proceeding) (claims of breach of fiduciary duty and conversion were inextricably intertwined with the contract); *In re First Texas Homes, Inc.*, 120 S.W.3d 868 (Tex. 2003) (alleged violations of the state and federal Fair Housing Acts and claims for intentional infliction of emotional distress were within the broad arbitration clause).

C. Who gets to Decide Preliminary Issues--the Court or the Arbitrator?

As indicated above, in considering a motion to compel arbitration, a trial court often is faced with numerous factual and legal disputes that bear upon the enforceability and scope of an arbitration clause. For example, the existence of an agreement to arbitrate may turn on the incorporation of one contract into another by reference, the scope of an agent's authority to bind a principal to an agreement, issues involving non-signatories, and the like. Questions relating to the scope of the agreement are generally more clear-cut since they are resolved by comparing the language of the agreement with the factual allegations, as discussed in more detail below. Trial courts are also often faced with various defenses to enforcement. There has been much litigation over who gets to decide these issues, the court or the arbitrator.

The United States Supreme Court narrowed the role of courts in addressing preliminary issues in *Howsam v. Dean Witter Reynolds, Inc.,* 537 U.S. 79 (2002). The Court held that generally, the question of whether the parties have submitted a particular dispute to arbitration, *i.e.* the "*question of arbitrability,*" is "an issue for judicial determination." *Id.* at 83 (emphasis added)). Although recognizing that any potentially dispositive gateway question could be a "question of arbitrability," the Court emphasized that the phrase actually has a very limited scope. *Id*. Questions of arbitrability that are for a court to decide include whether the parties are bound by a given arbitration clause and whether the clause applies to the dispute at issue. *Id*. at 84. A question of whether an arbitration agreement is binding on a nonparty is also a gateway matter for the court. *In re Weekley Homes, L.P*., 180 S.W.3d 127, 743 (Tex. 2005).

However, if a challenge is to the validity of a contract as a whole, rather than to the arbitration clause specifically, then the question is for the arbitrator, regardless of whether the challenge is brought in state or federal court. *Buckeye Check Cashing, Inc. v. Cardegna*, 126 S. Ct. 1204, 1210 (2006). "Procedural" questions that grow out of the dispute and bear on its final disposition are for the arbitrator to decide. *Howsam*, 537 U.S. at 84. For example, arbitrator issues include conditions precedent to arbitrability, and "waiver, delay, or a like defense to arbitrability." *Id.* In addition, deciding whether an arbitration claim is time-barred, for example, is a question for the arbitrator. *In re Global Constr. Co.,* 166 S.W.3d 795, 799 (Tex. App.—Houston [14th Dist.] 2005, orig. proceeding).

The analysis as to whether a court or arbitrator should consider defenses to enforcement of an arbitration clause is set out in large part in Part III.A.3 above. A few other related holdings are worth mentioning:

Class Actions. Both the United States and the Texas Supreme Courts have concluded that class certification issues are for an arbitrator to decide. *Green Tree Fin. v. Bazzle*, 539 U.S. 444 (2003); *In re Wood*, 140 S.W.3d 367, 368 (Tex. 2004).

Illegality. The United States Supreme Court has held that even if a party challenges that the contract is illegal and void *ab initio*, the question still should be considered by the arbitrator. *Cardegna*, 126 S. Ct. at 1210.

Standing. In *Hisaw & Associates General Contractors, Inc. v Cornerstone Concrete Systems, Inc.,* the court was faced, in a post-arbitration suit to confirm an award, with the issue of whether the arbitrator had exceeded its authority in determining the standing of the claimant to bring the claim in the face of an assignment of that claim to a third party. 115 S.W.3d 16, 19 (Tex. App.—Fort Worth 2003, pet. denied) (per curiam). The court concluded that the broad arbitration clause at issue gave the arbitrator the authority to make the determination as to whether the claimant was the properly named party. *Id*. at 20.

D. Pre-Arbitration Litigation in the Trial Court

1. Actions to Compel Arbitration

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 litigation 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:

1. an agreement to arbitrate; and
2. the opposing party's refusal to arbitrate.

TEX. CIV. PRAC. & REM. CODE § 171.021. If the party opposing the application denies the *existence* of an agreement to arbitrate, "the court shall summarily determine that issue." *Id.* § 171.021(b).

The Texas Supreme Court first addressed how a trial court is to summarily determine the applicability of an arbitration clause in *Anglin*. There, the Court concluded that a trial court may summarily decide whether to compel arbitration on the basis of affidavits, pleadings, discovery, and stipulations. *Anglin,* 842 S.W.2d at 269. If the material facts necessary to determine the issue are controverted, by opposing affidavit or otherwise, the trial court must conduct an evidentiary hearing to determine the disputed material facts. *Id.* Such an evidentiary

hearing must itself be held "summarily." *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).

If a dispute is to be resolved through arbitration, the court should avoid any scrutiny of the merits of the dispute. TEX. CIV. PRAC. & REM. CODE § 171.026. In *In re H20 Plumbing, Inc.,* the court ruled that a trial court had abused its discretion in entering findings of fact relating to the merits of the dispute while, at the same time, compelling the parties to proceed to arbitration. 115 S.W.3d 79, 81 (Tex. App.—San Antonio 2003, orig. proceeding). The court recognized the potential harm if one party presented those findings to the arbitrator. *Id*.

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. Otherwise, a movant should abide by the TAA's independent venue provision. TEX. CIV. PRAC. & REM. CODE §§ 171.024, 171.096.

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 issued. TEX. CIV. PRAC. & REM. CODE §§ 171.025(a). However, if the arbitrable issues are severable, the stay applies only to those issues. *Id.* § 171.025(b). A court can only stay the lawsuit when it compels arbitration; it cannot dismiss the suit in its entirety. *Brooks v. Pep Boys Auto. Supercenters*, 104 S.W.3d 656, 659-60 (Tex. App.—Houston [1st Dist.] 2003, no pet.).

A trial court cannot avoid appellate scrutiny by refusing to rule on a motion to compel arbitration until after discovery has been completed. *In re MHI P'ship Ltd.,* 7 S.W.3d 918, 922 (Tex. App.—Houston [1st Dist.] 1999, orig. proceeding). Instead, the term "summarily" describes not only the procedure, but the speed with which a court should rule. *Id.*

2. Actions to Stay Arbitration

A party attempting to resist an actual or threatened arbitration may apply to a court for an order staying the arbitration proceeding. TEX. CIV. PRAC. & REM. CODE § 171.023.

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." *Id.* If the court rejects the application, it should order the parties to arbitrate. *Id.*

3. Federal Forum

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. *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).

The procedures for such litigation are capably described in William Dorsaneo's *Texas Litigation Guide*, Vol. 3, Ch. 44, § 44.07(3).

E. Appellate Review

1. Proceedings in State Court

a. Cases arising under the TAA

An appeal is, of course, available to review a trial court's final judgment confirming, modifying, or vacating an arbitration award without directing a rehearing, since these are final orders or judgments. TEX. CIV. PRAC. & REM. CODE § 171.098 (a). In addition, the TAA allows for an interlocutory appeal of two types of orders:

1. an order denying an application to compel arbitration; and
2. an order granting an application to stay arbitration.

*Id.* In other words, **an interlocutory appeal is available under the TAA to challenge a trial court's refusal to enforce an arbitration agreement, but is not available to challenge an order compelling arbitration.**

There is some unfortunate language contained in the *Anglin* decision that has caused some confusion about whether an interlocutory appeal is available when the trial court compels arbitration. In *Anglin,* the Supreme Court stated that "both the Texas and federal acts permit a party to appeal from an interlocutory order *granting or* denying a request to compel arbitration." *Anglin v. Tipps,* 842 S.W.2d 266, 271-72 (Tex. 1992) (emphasis added). While this is true under the FAA, the TAA permits an interlocutory appeal only from an order denying a request to compel arbitration, not from an order granting one. While some courts have dismissed this statement as dictum, it is actually just an incorrect statement about the TAA. *See Trico Marine Services, Inc. v. Stewart and Stevenson Technical Services, Inc.,* 73 S.W.3d 545 (Tex. App.—Houston [1st Dist.] 2002, no pet.); *Glazer's Wholesale Distrib., Inc. v. Heineken USA, Inc.,* 95 S.W.3d 286 (Tex. App.—Dallas 2001, jdmt vacated by agmt); *Mohamed v. Auto Nation USA Corp.,* 89 S.W.3d 830 (Tex. App.—Houston [1st Dist.] 2002, orig. proceeding).

It is clear that under the TAA, no interlocutory appeal is available to challenge a trial court's order

compelling arbitration. While the Texas Supreme Court has not addressed whether mandamus relief is available in these circumstances, most courts of appeals have concluded that it is. In *Glazer's*, the court analyzed the case under traditional mandamus principles, and reasoned that "if a trial court erroneously requires a party to participate in binding arbitration, a party will not have an adequate appellate remedy to protect its substantial right to litigate the issues in open court." *Glazer's,* 95 S.W.3d at 294. Borrowing from cases under the FAA, the court concluded that a party who is compelled to arbitrate without having agreed to do so will have lost its right to have the dispute resolved by litigation. *Id.*

Similarly, the court in *In re Godt,* 28 S.W.3d 732, 738 (Tex. App.—Corpus Christi 2002, orig. proceeding), held that mandamus relief is available to challenge an order compelling arbitration, because a party who is compelled to arbitrate without having agreed to do so will have lost its right to litigate the dispute, and will have no adequate remedy by appeal.

In *Mohamed v. Auto Nation USA Corp.,* 89 S.W.3d 830 (Tex. App.—Houston [1st Dist.] 2002, orig. proceeding), the court held that mandamus relief was available to challenge an order compelling arbitration under either the TAA or the FAA. *See also In re Kepka*, 178 S.W.3d 279 (Tex. App.—Houston [1st Dist.] 2005, orig. proceeding).

b. Cases arising under the FAA

In contrast to the TAA, a state trial court's order regarding an arbitration agreement governed by the FAA is not reviewable by interlocutory appeal in Texas courts. *Anglin,* 842 S.W.2d at 272.

The Texas Supreme Court has repeatedly held that an order denying arbitration under the FAA is reviewable by mandamus. *See, e.g., In re Weekley Homes, L.P.,* 180 S.W.3d 127, 130 (Tex. 2005); *In re Nexion Health at Humble, Inc.,* 173 S.W.3d 67, 69-70 (Tex. 2005).

However, the Court recently held that mandamus relief is not available for review of an order compelling arbitration under the FAA. *In re Palacios*, -- S.W.3d --, 2006 WL 1791683 (Tex. June 30, 2006). The Court declined to hold that mandamus review was precluded in all circumstances. It 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.'" *Id.* at *2 (quoting *Apache Bohai Corp., LDC v. Texaco China, B.V.*, 330 F.3d 307, 310-11 (5th Cir. 2003)).

The *Palacios* decision resolves an inconsistency between Texas and federal law. In 1994, the Texas Supreme Court had held that an order granting arbitration under the FAA can be reviewed on mandamus. *See Freis v. Canales*, 877 S.W.2d 283, 284 (Tex. 1994). In 2000, the United States Supreme Court held that the FAA only allows review of an order granting arbitration under the FAA if the underlying case is dismissed. *Green Tree Fin. Corp. v. Randolph*, 531 U.S. 79 (2000). The *Green Tree* court reasoned that such review would create tension with the legislative intent of the FAA, which "generally permits immediate appeal of orders hostile to arbitration," but "bars appeal of interlocutory orders favorable to arbitration." 531 U.S. at 86. In overruling *Freis*, the Texas Supreme Court noted that while "Texas courts applying the FAA follow Texas rather than federal procedure . . . it is important for federal and state law to be as consistent as possible in the area, because federal and state courts have concurrent jurisdiction." *Palacios*, 2006 WL 1791683, at * 1.

c. Dual Proceedings

Because of the different appellate remedies available under the TAA and the FAA and the frequent uncertainty about which statute applies, a party seeking review of an order denying a motion to compel or an order staying arbitration must pursue both an interlocutory appeal (in the event the TAA governs) and a petition for writ for mandamus (in the event the FAA governs). *Anglin,* 842 S.W.2d at 272.

The Texas Supreme Court recently issued a reminder that the FAA typically does not preempt the TAA (unless a provision in the TAA would subvert enforcement of the agreements at issue), so in an agreement involving interstate commerce, the court of appeals will have jurisdiction via either procedural route. In *re D. Wilson Constr. Co*., -- S.W.3d --, 2006 WL 1792021 (Tex. June 30, 2006).

In a concurring opinion in the same case, Justice Brister urged that court discontinue requiring litigants to pursue parallel mandamus and interlocutory appeal proceedings. *Id.* at **7-8 (Brister, J., concurring). He stated, "This unnecessary duplication makes arbitration more cumbersome and costly than other cases, rather than the 'simplicity, informality and expedition' intended for them." *Id*. at *7 (quotation omitted). Brister explained that he would allow parties to file either an interlocutory appeal or an original proceeding, and "have the appellate courts treat it as they think proper." *Id*.

While the majority sympathized with Justice Brister's sentiments, it concluded that the problem was one for the Legislature to address, and it again called upon the Legislature to do so. *Id.* at * 3 n.4. (repeating earlier request made in *Anglin*, 842 S.W.2d at 272).

Elizabeth (Heidi) Bloch persuasively has argued that the Legislature already has amended the TAA in a way that solves this problem. *See* Elizabeth (Heidi) Bloch, *Stop the Madness: There's No Need for Dual Proceedings*, 16 APPELLATE ADVOCATE 9 (Spring 2003).

2. Proceedings in Federal Court

In federal court, where federal procedural law controls, the FAA permits an appeal from:

- 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);
- an order refusing to stay litigation pending arbitration, 9 U.S.C. § 16(a)(1)(A);
- an order denying a motion to compel arbitration, 9 U.S.C. § 16(a)(1)(B).

Unless a party obtains permission to take an interlocutory appeal under 28 U.S.C. § 1292(b), a party may not appeal from an interlocutory order compelling arbitration or granting a stay of litigation in favor of arbitration. 9 U.S.C. § 16(b). In reconciling Section 16(a)(3) and Section 16(b), the United States Supreme Court has held that when an district court compels arbitration and dismisses the remainder of the action, the order is a final judgment and immediately appealable. *Green Tree Fin. Corp. Alabama v. Randolph*, 531 U.S. 79, 89 (2000). However, where the district court stays the litigation pending completion of arbitration, rather than dismiss the case, the order is interlocutory and appellate review is unavailable. *Mire v. Full Spectrum Lending, Inc.*, 389 F.3d 163, 167 (5th Cir. 2004). This is true even where the district court administratively closes the case. *Id.*

3. Standard of Review

Federal courts review a grant or denial of a petition to compel arbitration *de novo*. *Banc One Acceptance Corp. v. Hill*, 367 F.3d 426, 428 (5th Cir. 2004).

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." 128 S.W.3d 223, 233 (Tex. 2003). Even after *Webster*, however, several courts of appeal have maintained that a no-evidence standard is proper to review factual questions concerning denial of a motion to compel arbitration. *See Colosi v. Guidry*, 2004 WL 1065442, at *1 (Tex. App.—Houston [1st Dist.] 2004, no pet.); *Forest Oil Corp. v. McAllen*, 2005 WL 3435061, at *2 (Tex. App.—Corpus Christi 2005, pet. filed); *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).

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. 128 S.W.3d 223, 233 (Tex. 2003) (Schneider, J., dissenting). 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. *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).

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. *Bates v. MTH Homes-Texas, L.P.*, 177 S.W.3d 419, 422 (Tex. App.—Houston [1st Dist.] 2005, no pet.).

## IV. POST-ARBITRATION LITIGATION

Post-arbitration litigation often is necessary when the losing party fails to fully comply with the arbitrator's decision. The prevailing party may seek judicial confirmation of an award to take advantage of the additional enforcement mechanisms available for a court judgment. The losing party often will ask a court to modify or vacate the award, either in response to the winning party's application for confirmation or on its own motion.

A. Procedural considerations prior to initiation of litigation

Before initiating post-arbitration litigation, a party should consider a number of factors, including:

1. Is the arbitration award final?

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." Thomas

H. Oehmke, *Appealing Adverse Arbitration Awards*, 94 Am. Jur. Trials 211, at § 40 (2006).

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. *Lincoln v. C & N Group, Inc.*, 1997 WL 672626 (Tex. App.—Dallas Oct. 30, 1997, no pet.).

2. Federal or state forum?

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 (*see infra* Part IV.E.2).

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. *Southland Corp. v. Keating*, 465 U.S. 1, 12 (1984).

The FAA provides that "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. 9 U.S.C. §§ 9, 10(a). 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. *See, e.g.*, *Smith v. Rush Retail Centers, Inc*., 360 F.3d 504 (5th Cir. 2004).

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.

3. What are the deadlines for action?

a. State Court

The TAA imposes deadlines for parties seeking to modify or vacate arbitration awards, which apply to all cases in Texas courts, regardless of whether the FAA applies to the substantive dispute. *Hamm v. Millennium Income Fund, L.L.C.*, 178 S.W.3d 256, 260 n.3 (Tex. App.—Houston [1st Dist.] 2005, pet. denied).

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). TEX. CIV. PRAC & REM. CODE §§ 171.088(b). Similarly, an application to modify or correct an award must be made no later than the 90th day after the date of delivery of a copy of the award to the applicant (again, subject to the possible acceleration of this deadline described below). *Id.* § 171.091(b). In contrast, there is no statutory limitations period for the filing of an application to confirm an award. *Id.* § 171.087.

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. *See Smith v. J-Hite, Inc.,* 2003 WL 22966318 (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.)

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.*, 178 S.W.3d 256 (Tex. App.—Houston [1st Dist.] 2005, pet. denied), 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. *Id.* at 262-68. 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. *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).

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. *See East Texas Salt Water Disposal Co. v.*

*Hughes*, 2006 WL 300410 (Tex. App.—Tyler, Feb. 8, 2006, pet. denied).

Finally, a request for modification or correction presented to an arbitrator pursuant to TEX. CIV. PRAC. & REM. CODE § 171.054, prior to the initiation of litigation, does not toll the 90-day statutory periods referenced above. *See Teleometrics Int'l Inc. v. Hall*, 922 S.W.2d 189, 192 (Tex. App.—Houston [1st Dist.] 1995, writ denied). 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. *Louisiana Natural Gas Pipeline, Inc. v. Bludworth Bond Shipyard, Inc.*, 875 S.W.2d 458, 462 (Tex. App.—Houston [1st Dist.] 1994, writ denied).

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." 9 U.S.C. § 9. 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." *Id.* § 12. 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 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." TEX. CIV. PRAC & REM. CODE § 171.092(b). Several courts have concluded that this language allows the recovery of court costs alone, and not attorneys' fees. *See, e.g.*, *Monday v. Cox,* 881 S.W.2d 381 (Tex. App.—San Antonio 1994, writ denied). This is true even if the underlying dispute (such as a breach of contract claim) would have allowed recovery of attorneys fees. *Kline v. O'Quinn,* 874 S.W.2d 776 (Tex. App.—Houston [14th Dist.] 1994, writ denied).

It is not at all unusual for parties to spend significant attorneys' fees in seeking to confirm an award through the trial court and appeal. Once an arbitrator has made an award, there is no statutory basis for recovery of attorneys' fees incurred in seeking to either confirm or vacate that award. One possible solution to this problem is to ask the arbitrator to award conditional attorneys fees in the event of a challenge to the award. This request would be no different than a trial court awarding conditional fees in the event of an appeal. Such fees, of course, would be permissible only if fees are recoverable in the first instance, either because the arbitration agreement allows for their recovery, or because the claim is one for which fees are recoverable.

Given the strong public policy favoring arbitration as a less expensive alternative to litigation, it makes sense to provide financial disincentives to a party seeking to overturn an award. A award of fees to the prevailing party could help to fix this problem.

5. Considerations Specific to a Motion for Vacatur

a. Was error preserved?

Before initiating a challenge to an arbitration award, counsel should confirm that the error was properly preserved in the arbitration proceeding.

"A party may not sit idly by during an arbitration procedure and then collaterally attack that procedure on grounds not raised before the arbitrator when the result turns out to be adverse." *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). 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. *See Kendall Builders, Inc. v. Chesson,* 149 S.W.3d 796 (Tex. App.—Austin 2004, pet. denied).

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 a *de facto* record." Thomas H. Oehmke, *Appealing Adverse Arbitration Awards*, 94 Am. Jur. Trials 211, at § 77 (2006). "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." *Id.*

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. *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.*

*Tennessee Gas Pipeline Co*., 918 F.2d 1215, 1219 n. 3 (5th Cir. 1990).

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). *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."); *A.G. Edwards & Sons, Inc. v. McCollough*, 967 F.2d 1401, 1403 (9th Cir. 1992). 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." Oehmke, *supra* at § 43.

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. *Id.*

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 forth a complete record that establishes [its] basis for relief." *Anzilotti v. Gene D. Liggin, Inc*., 899 S.W.2d 264, 267 (Tex. App.—Houston [14th Dist.] 1995, no writ). When there is no transcript of the arbitration proceedings available, a reviewing court will presume that evidence supported arbitration panel's award. *Thomas v. Prudential Sec., Inc*., 921 S.W.2d 847 (Tex. App.—Austin 1996. no writ). For example, 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." *Kline v. O'Quinn*, 874 S.W.2d 776, 783 (Tex. App.—Houston [14th Dist.] 1994, writ denied).

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. *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. And discovery is generally available in federal court. *See Matter of Andros Compania Maritima, S.A.*, 579 F.2d 691, 702 (2d Cir. 1978). 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. *Legion Ins. Co. v. Ins. Gen. Agency, Inc.*, 822 F.2d 541, 543 (5th Cir. 1987); Oehmke, *supra* at § 105. Generally, other testimonial evidence will be limited to the rare cases in which it would be helpful in establish 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 thusfar have been reluctant to award sanctions in unsuccessful vacatur actions. In *Baker Hughes Oilfield Operations, Inc. v. Hennig Prod. Co.,* 164 S.W.3d 438 (Tex. App.—Houston [14th Dist.] 2005, no pet.), 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." *Id.* at 448. The court refused to award sanctions because the record did not reveal "truly egregious" conduct. *Id.*

However, courts elsewhere have become more aggressive in awarding sanctions. In *B.L. Harbert, Int'l, LLC v. Hercules Steel Co*., 441 F.3d. 905 (11th Cir. 2006), 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." *Id.* at 906. 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." *Id.* at 913-14. The Seventh Circuit recently issued a

similar warning. *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." *Universal Computer Sys., Inc. v. Dealer Solutions*, 183 S.W.3d 741, 752 (Tex. App.—[1st Dist.] 2005. pet. denied) (citations omitted). A reviewing court may not substitute its judgment for that of the arbitrators merely because it would have reached a different result. *Id.* Every reasonable presumption must be indulged to uphold the arbitrators' decision, and none is indulged against it. *Id.* (citing *CVN Group, Inc. v. Delgado*, 95 S.W.3d 234, 238 (Tex. 2002)). The court may not review the arbitrators' decision on the merits even if it is alleged that the decision is based on factual error or it misinterprets the parties' agreement. *Major League Baseball Players Ass'n v. Garvey,* 532 U.S. 504, 509 (2001).

Appellate courts apply a *de novo* standard of review of a district court's order confirming an arbitration award. *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.). 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. *Positive Software Solutions, Inc. v. New Century Mortgage Corp*., 436 F.3d 495 (5th Cir. 2006). Both the Fifth Circuit and Texas courts emphasize that appellate review is "intended to reinforce the strong deference due an arbitrative tribunal." *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).

2. Modification by Contract

Both the Fifth Circuit and at least one Texas appellate court have held that parties to an arbitration agreement can contractually agree for a different or expanded scope of appellate review, although such an intent must be clearly and unmistakably expressed. *Gateway Technologies, Inc. v. MCI Telecomm. Corp.*, 64 F.3d 993 (5th Cir. 1995); *Tanox, Inc. v. Akin Gump, Strauss, Hauer & Feld, L.L.P.* 105 S.W.3d 244, 252 (Tex. App.—Houston [14th Dist.] 2003, pet. denied).

In *Gateway*, the Fifth Circuit enforced an arbitration provision that provided that the "arbitration decision shall be final and binding on both parties, except that errors of law shall be subject to appeal." 64 F.3d at 996. The Fifth Circuit expanded upon its holding in *Hughes Training, Inc. v. Cook*, 254 F.3d 588, 590 (5th Cir. 2001), when it enforced an arbitration clause that permitted review of an arbitrator's findings of fact under the same standard that an appellate court would apply to a trial court's findings.

The *Gateway* holding has been adopted by the Third and Fourth Circuits, but rejected by the Eighth, Ninth and Tenth Circuits, creating a circuit split that will require resolution by the United States Supreme Court. *See* Kratovil, *Judicial Review of Arbitration Awards*, UT State and Federal Appeals Conference (June 2006); Margaret Moses, *Can Parties Tell Courts What To Do? Expanded Judicial Review Of Arbitral Awards*, 52 U. KAN. L. REV. 429, 465 (2004). A Supreme Court decision rejecting the *Gateway* holding could deny parties to an existing arbitration agreement the judicial safety net for which they contracted.

Less certain is the degree to which parties can contractually limit or eliminate appellate review. In *Barsness v. Scott*, 126 S.W.3d 232 (Tex. App.—San Antonio 2003, pet. denied), the court held that, notwithstanding a contractual provision barring judicial review of an arbitration award, it would consider a challenge that the award was tainted by fraud, misconduct, or gross mistake. *Id.* at 238. It also held that the statutory grounds for vacating or modifying an award could not be waived. *Id.*

Federal circuit courts have also weighed in on this question. In *MACTEC, Inc. v. Gorelick*, 427 F.3d 821 (10th Cir. 2005), the Tenth Circuit held that a clear and unequivocal agreement foreclosing judicial review of an arbitration award *beyond the district court level* is enforceable. 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." *Id.* at 826. The court cautioned, however, that a clause precluding judicial review of any kind probably would be unenforceable. In *Hoeft v. MVL Group, Inc.*, 343 F.3d 57, 64 (2d Cir. 2003), 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."

C. Confirming an Award

The procedures for confirming an award set forth in the TAA are equally available with respect to an arbitration clause whose enforceability is governed by the FAA. *Jack B. Anglin Co., Inc. v. Tipps,* 842 S.W.2d 266, 268-69 (Tex. 1992). The TAA requires a court, on application of a party, to confirm an arbitration award unless grounds are offered for vacating, modifying, or correcting the award. TEX. CIV. PRAC. & REM. CODE § 171.087. The FAA contains a nearly identical provision. 9 U.S.C. § 9.

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. *See Baker Hughes Oilfield Operations, Inc. v. Hennig Prod. Co.,* 164 S.W.3d 438, 442-443 (Tex. App.—Houston [14th Dist.] 2005, no pet.).

Although an arbitration award has the same effect as a judgment of a court of last resort, confirming an award through court allows the successful party to take advantage of all enforcement proceedings that are available for other judgments. *Southland Corp. v. Keating*, 465 U.S. 1, 12 (1984); *City of Baytown v. C.L. Winter, Inc.,* 886 S.W.2d 515, 518 (Tex. App.—Houston [1st Dist.] 1994, writ denied); TEX. CIV. PRAC. & REM. CODE § 171.092; 9 U.S.C. § 13.

D. Modifying an Award

1. State Law

The grounds for modifying an award in court are extremely limited. Under the TAA, an award may be modified only if the award contains "an evident miscalculation of numbers," or "an evident mistake in the description of a person, thing, or property referred to in the award." TEX. CIV. PRAC. & REM. CODE § 171.091(a)(1). In addition, an award may be modified or corrected in a manner that does not affect the merits if the arbitrators have made an award with respect to a matter not submitted to them, or if the form of the award is imperfect. *Id.* § 191.091(2) and (3).

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. *Id.* § 171.054. However, any modification cannot affect the merits of, and must be consistent with, the original arbitral decision. *Barsness v. Scott*, 126 S.W.3d 232 (Tex. App.—San Antonio 2003, pet. denied).

2. Federal Law

The grounds for modifying an award under the FAA are virtually identical to those under the TAA. 9 U.S.C. § 11. In addition, courts are authorized to substitute their own judgment for that of an arbitrator if the arbitration award, left unchanged, would violate public policy. *W.R. Grace & Co. v. Local Union 759,* 461 U.S. 757, 766 (1983).

E. Vacating an Award

1. Grounds

a. State Law

(1) TAA

Grounds for vacating an award under the TAA are limited. Because of the great deference courts must give to arbitration awards, judicial scrutiny focuses on the integrity of the process, not the propriety of the result. *Tuco, Inc. v. Burlington N. R. Co,* 912 S.W.2d 311, 315 (Tex. App.—Amarillo 1995), *modified on other grounds*, 960 S.W.2d 629 (Tex. 1997). Even the fact that the relief granted by the arbitrators could not or would not be granted by a court of law or equity is not a ground for vacating or refusing to confirm an arbitration award. TEX. CIV. PRAC. & REM. CODE § 171.090.

In addition, courts must indulge in every reasonable presumption to uphold an arbitrator's decision. *IPCO-G & C Joint Venture v. A.B. Chance Co.*, 65 S.W.3d 252 (Tex. App.—Houston [1st Dist.] 2001, pet. denied). A trial court may not substitute its judgment for the arbitrator's merely because it would have reached a different conclusion. *City of Baytown v. C.L. Winter, Inc.,* 886 S.W.2d 515, 518 (Tex. App.—Houston [1st Dist.] 1994, writ denied). Absent a statutory or common law ground to vacate or modify an arbitration award, a reviewing court lacks jurisdiction to review complaints, including the sufficiency of the evidence or errors of substantive law. *J.J. Gregory Gourmet Services, Inc., v. Antone's Import,* 927 S.W.2d 31, 33 (Tex. App.—Houston [1st Dist.] 1995, no writ).

The grounds for vacating an award set forth in the TAA are follows:

- 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.

*Id.* § 171.088(a)(1)-(4).

**Examples of recent successful vacaturs:**

Under Section 171.088(a)(2). In *Houston Village Builders v. Falbaum*, 105 S.W.3d 28 (Tex. App.—Houston [14th Dist.] 2003, pet. denied), the court upheld a trial court's decision to vacate an arbitration award based on "evident partiality" by the sole arbitrator. The dispute involved a construction claim against a homebuilder that was a member of the Greater Houston Builders Association. The arbitrator revealed that he too was a member of that association, but failed to reveal that he had, in the past, represented the association as an attorney. The court concluded that evident partiality was established from the nondisclosure itself, regardless of whether the non-disclosed information necessarily established partiality or bias.

In doing so, the court relied on the Supreme Court's holding in *Burlington Northern Railroad Co. v. Tuco, Inc.,* 960 S.W.2d 629 (Tex. 1997), 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. In *Tuco*, the court found evident partiality where an arbitrator failed to disclose the acceptance of substantial referral from the law firm of non-neutral co-arbitrator during the course of the arbitration.

In *J.D. Edwards World Solutions v. Estes, Inc.*, 91 S.W.3d 836, 844 (Tex. App.—Fort Worth 2002, pet. denied), 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.

In *Mariner Fin. Group, Inc. v. Bossley*, 79 S.W.3d 30, 32-35 (Tex. 2002), 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.

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. *Peacock v. Wave Tec Pools, Inc.,* 107 S.W.3d 631 (Tex. App.—Waco 2003, no pet.). An award may not, however, be vacated based on an "evident mistake" in failing to award damages. *Callahan & Assoc. v. Orangefield ISD,* 92 S.W.3d 841 (Tex. 2002).

In *Peacock,* 107 S.W.3d at 631, a swimming pool contractor and homeowner executed an agreement to arbitrate, in an effort to resolve a dispute over a construction contract. Because the arbitration agreement, and not the construction contract, defined scope of 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.

In *Robinson v. West*, 2004 WL 178586 (Tex. App.—Eastland 2004), *rev'd on other grounds*, 180 S.W.3d 575 (Tex. 2005), 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.

In *Barsness v. Scott*, 126 S.W.3d 232 (Tex. App.—San Antonio 2003, pet. denied), 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.

(2) Common Law Grounds

Since statutory arbitration is cumulative of the common law, an arbitration award governed by the TAA may also be set aside on common law grounds. *Massey v. Galvan,* 822 S.W.2d 309, 315-16 (Tex. App.—Houston [14th Dist.] 1992, writ denied). Such grounds, however, are similarly limited, in that common law allows a trial court to set aside an arbitration award "only if the decision is tainted with fraud, misconduct, or gross mistake as would imply bad faith and failure to exercise honest judgment." *Teleometrics Int'l, Inc. v. Hall,* 922 S.W.2d 189, 193 (Tex. App.—Houston [1st Dist.] 1995, writ denied); *IPCO-G&C Joint Venture v. A.B. Chance Co.,* 65 S.W.3d 252, 256 (Tex. App.—Houston [1st Dist.] 2001, pet. denied).

In addition, under the common law, a trial court can vacate an arbitrator's award if the award violates public policy or exceeds the scope of the arbitrator's authority. *Lee v. El Paso County,* 965 S.W.2d 668, 672 (Tex. App.—El Paso 1998, pet. denied). In *CVN Group, Inc. v. Delgado,* 95 S.W.3d 234 (Tex. 2002),

the court noted that an illegal contract (for gambling, for example) that is unenforceable through litigation cannot gain legitimacy through arbitration. At issue in *CVN Group* was the arbitrator's declaration of a valid mechanic's lien, despite the homeowners' arguments that the constitutional and statutory requirements had not been satisfied, and that the award was thus against public policy. Noting that the evidence regarding the validity of the lien was disputed, the court refused to second-guess the arbitrator's conclusion that the lien was, in fact, valid.

Interestingly, the Texas Supreme Court in both *CVN Group* and in *Callahan*, suggested that it may be an open question in Texas as to whether the statutes governing arbitration have preempted common law grounds for attacking an arbitrator's award. In neither case was the issue raised by the parties, and the court assumed, without deciding, that common law grounds are still viable. The court could have been signaling that it would be willing to address the issue if it is properly raised.

b. Federal Law

The grounds for vacating an award under the FAA are similar to those found in the TAA:

- Where the award was procured by corruption, fraud, or undue means;
- Where there were 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;
- 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.

9 U.S.C. § 10(a).

Under the common law, a trial court can vacate an arbitrator's award if the award violates public policy or the law. *United Paperworkers Int'l Union v. Misco, Inc.,* 484 U.S. 29, 42, (1987). The party making the challenge must direct the court to "laws and legal precedents" that are "explicit, well defined, and dominant." *Prestige Ford v. Ford Dealer Computer Servs., Inc.*, 324 F.3d 391, 396 (5th Cir. 2003).

In addition, the Fifth Circuit has joined other courts of appeals that allow an arbitration award to be vacated when the arbitrators have acted in "manifest disregard of the law." *Brabham v. A.G. Edwards & Sons, Inc.*, 376 F.3d 377, 382-86 (5th Cir. 2004). However, the court emphasized the extremely limited nature of this ground for relief. A reviewing court can vacate an award under this ground only if it finds 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. *Id.* at 392.

**Examples of recent successful vacaturs:**

In *Positive Software Solutions, Inc. v. New Century Mortgage Corp.*, 436 F.3d 495 (5th Cir. 2006), the court vacated an arbitration award for "evident partiality" because an arbitrator did not disclose that, 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. The Fifth Circuit has granted rehearing en banc. The case is set for submission to the en banc court during the week of September 25, 2006.

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. *See* Lawrence R. Mills et al., *Vacating Arbitration Awards*, Vol. 11, No. 4, DISPUTE RESOLUTION JOURNAL 23 (Summer 2005).

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.

Of the 182 cases in which vacatur was sought, the motion to vacate succeeded 37 times, or in 20% of the cases. *Id.* at 24. 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. *Id.* 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.

The authors of this paper, seeking more Texas-specific data, reviewed all Texas state and federal cases from January 1, 2003 through August 1, 2006 in which a court reached the merits of a motion to vacate. After excluding collective bargaining cases and other cases not arising under the TAA or FAA, we found 31 such cases, in which there was a total of 45 grounds for vacatur asserted. During this period, the courts granted vacatur in whole or in part on 5 occasions, which constituted 16.1% of the total cases or 11.1% of the total grounds for vacatur asserted. While the small sample size undoubtedly affects utility of this data, it was interesting that the numbers were comparable to the national study.

3. Remedy if Vacated

a. State Court

If an arbitration award is vacated on grounds other than TEX. CIV. PRAC. & REM. CODE § 171.098(a)(4), then the court may order a rehearing before new arbitrators 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. TEX. CIV. PRAC. & REM. CODE § 171.089(a). 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. *Id.* § 171.089(b).

The El Paso Court of Appeals concluded that that the use of the phrase "*may*" rather than "shall" (as used in some sections of the TAA) suggested that the ordering of a rehearing was permissive, rather than mandatory. *Tri-Star Petroleum Co. v. Tipperary Corp.,* 107 S.W.3d 607 (Tex. App.—El Paso 2003, pet. denied).

*Tri-Star* involved an effort to set aside the determination of an accounting firm, which the parties had agreed would be binding. After the accounting procedure was concluded, however, Tipperary alleged that Tri-Star had breached the arbitration agreement itself in several respects, thus undermining the arbitration process. The court agreed, concluding that this material breach was a valid ground for revoking the arbitration agreement, as well as for setting aside the award. The court declined to follow the holding in *Koch v. Koch,* 27 S.W.3d 93, 97 (Tex. App.—San Antonio 2000, no pet.), prohibiting a trial court from setting a case for trial after vacating an award.

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." 9 U.S.C. § 10(b). "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." Thomas H. Oehmke, *Appealing Adverse Arbitration Awards*, 94 Am. Jur. Trials 211, at § 246 (2006). However, a district court does not have the authority to dictate procedures for a second arbitration. *Positive Software Solutions, Inc. v. New Century Mortgage Corp.*, 436 F.3d 495, 505 (5th Cir. 2006).

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." Oehmke, *supra*, at § 245.

4. Appellate Court Review of Vacatur Orders

The TAA authorizes an appeal of a trial court order vacating an arbitration award, so long as the trial court does not grant a rehearing before the arbitral panel or order a new arbitration. TEX. CIV. PRAC. & REM. CODE § 171.098(a)(5). Conversely, an appellate court lacks jurisdiction to review an order that vacates an arbitration award while granting a new arbitration hearing, which has been analogized to a grant of a motion for new trial. *Stolhandske v. Stern,* 14 S.W.3d 810 (Tex. App.—Houston [1st Dist.] 2000), pet. denied). This limitation on appellate jurisdiction applies not only to cases arising under the TAA, but also to FAA cases brought in state court, because such cases are subject to state procedural rules. *See J.D. Edwards World Solutions Co. v. Estes, Inc.*, 91 S.W.3d 836, 839 (Tex. App.—Fort Worth 2002, pet. denied).

FAA cases brought in federal court are not subject to this jurisdictional limitation. *See* 9 U.S.C. § 16 (permitting appeal from an order "modifying, correcting, or vacating an award"); *Atlantic Aviation, Inc. v. EBM Group, Inc.*, 11 F.3d 1276, 1280 (5th Cir. 1994).

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. *Chicago v. Typographical Union No. 16 v Chicago Sun-Times, Inc.*, 935 F.2d 1501 (7th Cir. 1991); Christopher D. Kratovil, *Judicial Review of Arbitration Awards*, UT State and Federal Appeals Conference (June 2006). Kratovil convincingly sets out the advantages of such an approach in terms of efficiency, flexibility and confidentiality.

JAMS has adopted an optional appeal procedure that is available if both parties agree to the procedure. It is essentially an administrative appeal process whereby an appeal panel will review the arbitration record, may conduct an 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, which will then be binding upon the parties.