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## Trial Court Arbitrability Decisions

Posted 10/16/08 [Mark Trachtenberg](#) and [Christina Crozier, Haynes and Boone, LLP](#)

### PATHWAYS TO REVIEW OF TRIAL COURT ARBITRABILITY DECISIONS

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

**Review of Orders Hostile to Arbitration under the TAA in State Court.** The TAA allows for interlocutory appeals of (1) an order denying an application to compel arbitration and (2) an order granting an application to stay arbitration. See TEX. CIV. PRAC. & REM. CODE §171.098(a).

**Review of Orders Favorable to Arbitration under the TAA in State Court.** The TAA does not provide for interlocutory appeals of orders compelling arbitration or denying a motion to stay arbitration. The Texas Supreme Court has not addressed whether mandamus relief is available where the trial court erroneously compels arbitration under the TAA, but most courts of appeals have concluded that it is. See, e.g., *In re Kepka*, 178 S.W.3d 279, 286 (Tex. App.—Houston [1st Dist.] 2005, orig. proceeding); *Glazer's Wholesale Distrib., Inc. v. Heineken USA, Inc.*, 95 S.W.3d 286, 294 (Tex. App.—Dallas 2001, pet. dismissed by agr.); *In re Godt*, 28 S.W.3d 732, 738 (Tex. App.—Corpus Christi 2002, orig. proceeding).

**Review of Orders Hostile to Arbitration under the FAA in State Court.** The Texas Supreme Court repeatedly has held that an order denying arbitration under the FAA is reviewable by mandamus. See, e.g., *In re Bank One*, 216 S.W.3d 825, 826 (Tex. Feb. 23, 2007) (per curiam); *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).

**Review of Orders Favorable to Arbitration under the FAA in State Court.** The question of whether mandamus review is likewise available to review orders favorable to arbitration under the FAA in Texas courts is not altogether clear. In 1994, the Texas Supreme Court held that it could review an order granting arbitration under the FAA by mandamus. See *Fries v. Canales*, 877 S.W.2d 283, 284 (Tex. 1994). However, in 2006, the Court overruled *Fries* and held that mandamus relief generally is *not* available in these circumstances. *In re Palacios*, 221 S.W.3d 564, 565-66 (Tex. June 30, 2006) (per curiam). The Court declined to decide whether mandamus review was precluded in *all* circumstances, however, and instead 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 565.

*Palacios* created some confusion about whether mandamus may ever be proper to review an order compelling arbitration. Several courts of appeals interpreted *Palacios* to mean that orders compelling arbitration may be reviewable by mandamus if the relator satisfies a heightened burden of proof, and proceeded to the merits of the mandamus petitions. See, e.g., *In re Great Western Drilling, Ltd.*, 211 S.W.3d 828, 835 (Tex. App.—Eastland 2006, orig. proceeding); *In re Premont Indep. Sch. Dist.*, 225 S.W.3d 329, at 332 (Tex. App.—San Antonio Feb. 7, 2007, orig. proceeding); *In re Wolff*, No. 231 S.W.3d 466, at 468 (Tex. App.—Dallas July 27, 2007, orig. proceeding). In many other cases, however, courts denied mandamus relief based on the general rule in *Palacios* that orders compelling arbitration under the FAA ordinarily are not reviewable until a final judgment is entered. See, e.g., *In re Jim Walter Homes, Inc.*, 207 S.W.3d 888, 894-95 (Tex. App.—Houston [14th Dist.] 2006, orig. proceeding).

The Texas Supreme Court recently compounded the confusion in its *In re Poly-America* decision when it addressed the merits of

mandamus petition challenging an order compelling arbitration. See ---S.W.3d---, 2008 WL 3990993 (Tex. Aug. 29, 2008).

Notwithstanding its *Palacios* decision two years earlier, the Court began by stating that "[m]andamus is the proper means by which to seek review of an order compelling arbitration under the FAA." *Id.* at \*\*2-3. The court qualified, however, that mandamus is rarely granted in such a situation, and "courts must be hesitant to intervene." *Id.* Justice Brister, in a vigorous dissent, observed: "Today the Court comes full circle, saying once again that mandamus review of orders compelling arbitration is 'proper,' though courts should be 'hesitant' about it. Apparently so long as one expresses qualms, *Palacios* is a dead letter." *Id.* at \*16 (Brister, J., dissenting).

**Review of decisions hostile to arbitration under the FAA in federal court.** In federal court, where federal procedural law controls, the FAA permits an appeal from an order refusing to stay litigation pending arbitration, 9 U.S.C. §16(a)(1)(A), or an order denying a motion to compel arbitration, 9 U.S.C. §16(a)(1)(B).

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

In reconciling Section 16(a)(3) and Section 16(b) of the FAA, the United States Supreme Court has held that when a district court compels arbitration and dismisses the remainder of the action, the order is a final judgment and immediately appealable. *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 dismissing 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.*

**The need for dual proceedings in challenging orders hostile to arbitration in state court.** 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 v. Tipps*, 842 S.W.2d 266, 272 (Tex. 1992)

Justice Brister recently urged that court discontinue requiring litigants to pursue parallel mandamus and interlocutory appeal proceedings. *In re D. Wilson Constr. Co.*, 196 S.W.3d 774, 784 (Tex. 2006) (Brister, J. concurring). 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 780 n.4.