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Challenging Arbitration Awards

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CHALLENGING ARBITRATION AWARDS

I. Introduction

Your client has been hit with a large adverse arbitration award, and calls you, his trusty appellate lawyer, to help him out of his predicament. Given the limited grounds for vacating an arbitration award and the onerous standard of review, you know that the odds are stacked heavily against a successful vacatur action. But a party that loses big in arbitration is often willing to roll the dice. This paper discusses a number of substantive and procedural factors to consider before advising your client how and whether to proceed.

II. Substantive Considerations

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

A. The Applicable Law

1. General Arbitration Statutes

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

The TAA is intended to apply broadly, with only limited “carve outs” in the statutory text. For example, the TAA does not apply to collective bargaining agreements, workers’ compensation benefit claims, or any agreements made before January 1, 1966.1 Nor does it apply to (1) a claim based on a transaction with an individual where the consideration is less than $50,000 or (2) a claim for personal injury, unless the arbitration agreements are in writing and signed by each party and his or her attorney.2

The FAA also applies broadly to all suits pending in state and federal court when the dispute concerns a “contract evidencing a transaction involving commerce,”3 with the exception of “contracts of employment of seamen, railroad employees, or any other class of workers

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1 TEX. CIV. PRAC. & REM. CODE § 171.002(a).
2 Id. § 171.002(b), (c); Bison Bldg. Materials, Ltd. v. Aldridge, 422 S.W.3d 582, 585 (Tex. 2012).
3 9 U.S.C. §§ 1, 2.
engaged in foreign or interstate commerce.”\footnote{9 U.S.C. § 1.} Both state and federal courts have construed the “involving commerce” phrase very liberally in favor of application of the FAA. The United States Supreme Court has held that the FAA extends to any contract “affecting commerce,” as far as the Commerce Clause will reach.\footnote{Citizens Bank v. Alafabco, Inc., 539 U.S. 52, 56 (2003); see also In re Nexion Health at Humble, Inc., 173 S.W.3d 67, 69 (Tex. 2005).} Similarly, the Texas Supreme Court has held that “‘interstate commerce’ is not limited to the interstate shipment of goods, but includes all contracts ‘relating to’ interstate commerce.”\footnote{In re FirstMerit Bank, N.A., 52 S.W.3d 749, 754 (Tex. 2001).}

2. FAA Preemption of the TAA

The FAA and TAA are not mutually exclusive.\footnote{See In re D. Wilson Constr. Co., 196 S.W.3d 774, 779 (Tex. 2006).} Rather, “the FAA only preempts contrary state law, not consonant state law.”\footnote{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.\footnote{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.”\footnote{In re D. Wilson Constr. Co., 196 S.W.3d at 780 (citing In re Nexion Health at Humble, Inc., 173 S.W.3d 67, 69 (Tex. 2005)).} 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 \textsc{tex. civ. prac. \\& rem. code} § 171.002(a)), or (2) the TAA has imposed an enforceability requirement not found in the FAA.\footnote{Id.}

Thus, the FAA will nullify a state statute purporting to limit the ability of parties to arbitrate their claims in a manner inconsistent with the FAA.\footnote{In re Nexion Health at Humble, Inc., 173 S.W.3d at 69; In re Jim Walter Homes, Inc., 207 S.W.3d 888, 896 (Tex. App.—Houston [14th Dist.] 2006, orig. proceeding).} For example, if a state arbitration statute requires the signature of an attorney, then the FAA, if it applies, will preempt such
requirement and render a non-conforming arbitration agreement enforceable. However, the FAA will not validate an agreement that is otherwise unenforceable under general contract principles. Even if the FAA applies, an agreement to arbitrate still must be valid under general principles of state contract law.

As noted infra Part III.E, the FAA does not confer federal subject matter jurisdiction. Parties seeking a federal forum for disputes arising out of FAA-governed arbitration agreements must be able to invoke diversity or federal question jurisdiction. Therefore, many disputes involving arbitration agreements governed by the FAA are heard in state court. While state courts apply federal substantive law in these cases, Texas law, as set forth in the TAA, provides the procedural framework.

3. Common Law

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

4. Impact of Parties’ Choice of Law

Parties generally are free to choose which law shall apply in any arbitration proceeding. Most Texas courts of appeals have held that if the parties agree to arbitrate under the FAA, then

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13 Jones v. Halliburton Co., 583 F.3d 228, 234 (5th Cir. 2009); In re Nexion Health, 173 S.W.3d at 69 (“The TAA interferes with the enforceability of the arbitration agreement by adding an additional requirement—the signature of a party’s counsel—to arbitration agreements in personal injury cases.”).

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


17 Vaden, 129 S. Ct. at 1271-72; Chatman, 288 S.W.3d at 556.

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

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

the FAA applies, and it is not necessary to make a further showing that the transaction affects or involves interstate commerce.\textsuperscript{21}

Parties may contract to be bound by the TAA rather than the FAA—even where the FAA would otherwise apply—as long as they "specifically exclude the application of federal law."\textsuperscript{22} Under this test, it is not enough to simply state that an agreement will be governed by Texas law. Courts have repeatedly held that where a choice of law provision states that an agreement will be interpreted under the laws of Texas, the FAA applies concurrently with the TAA, under the theory that the FAA is part of the law of Texas.\textsuperscript{23}

On the other hand, the TAA alone applies where the choice of law provision states that any dispute between the parties will be resolved pursuant to the TAA.\textsuperscript{24} The specific reference to the TAA, rather than Texas law generally, is required preclude application of the FAA.\textsuperscript{25}

\textbf{B. Grounds for Vacatur}

\textbf{1. Statutory Grounds under TAA and FAA}

The grounds for vacating an award under the TAA are limited and are focused on “the integrity of the process rather than the propriety of the result.”\textsuperscript{26} An arbitration award is not

\begin{itemize}
\item \textsuperscript{22} In re L & L Kempwood Assoc., L.P., 9 S.W.3d 125, 127-28 (Tex. 1999).
\item \textsuperscript{23} In re Olshan Found. Repair Co., LLC, 328 S.W.3d 883, 890 (Tex. 2010) (holding that provision stating that disputes arising out of the contract shall be resolved by arbitration administered “pursuant to the arbitration laws in your state” did not preclude application of the FAA); L & L Kempwood, 9 S.W.3d at 127-28 (holding that provision stating the contract would be governed by “the law of the place where the Project is located” did not preclude application of the FAA); see also Roehrs v. FSI Holdings, Inc., 246 S.W.3d 796, 803 (Tex. App.—Dallas 2008, pet. denied) (holding that both the FAA and TAA applied where a choice of law provision stated, “This Agreement shall be governed by and construed in accordance with the laws of the State of Texas, without giving effect to its ruled [sic] governing conflict of laws.”); Dewey v. Wegner, 138 S.W.3d 591, 596 n.5 (Tex. App.—Houston [14th Dist.] 2004, no pet.); see also Action Indus., Inc. v. U.S. Fidelity & Guar. Co., 358 F.3d 337, 340-42 (5th Cir. 2004) (holding the FAA applied where the agreement stated that Tennessee law governed).
\item \textsuperscript{24} In re Olshan Found. Repair, 328 S.W.3d at 891 (holding the FAA did not apply where the agreement stated that disputes would be resolved “pursuant to the Texas General Arbitration Act”); \textit{Ford v. NYLCare Health Plans of Gulf Coast, Inc.}, 141 F.3d 243, 249-50 (5th Cir. 1998) (holding the TAA applied where the agreement stated arbitration would be settled “in accordance with the Texas General Arbitration Act”).
\item \textsuperscript{25} In re Olshan Found. Repair, 328 S.W.3d at 891; \textit{Ford}, 141 F.3d at 249-50.
\item \textsuperscript{26} TUCO, Inc. v. Burlington N. R.R. Co., 912 S.W.2d 311, 315 (Tex. App.—Amarillo 1995), \textit{modified on other grounds}, 960 S.W.2d 629 (Tex. 1997).
\end{itemize}
subject to vacatur even if the relief granted by the arbitrators could not or would not be granted by a court of law or equity.27

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

- If the award was obtained by corruption, fraud, or other undue means;
- If the rights of a party were prejudiced by evident partiality by a neutral arbitrator, corruption in an arbitrator, or misconduct or willful behavior of an arbitrator;
- If the arbitrators exceed their powers, refused to postpone the hearing after a showing of sufficient cause, refused to hear evidence material to the controversy, or conducted a hearing contrary to the TAA or in a manner that substantially prejudiced the rights of a party; or
- If there was no agreement to arbitrate, the parties were not compelled by the court to arbitrate, and the party opposing the arbitration did not participate in the hearing without raising the objection.28

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

- Where the award was procured by corruption, fraud, or undue means;
- Where there was evident partiality or corruption in the arbitrators;
- Where the arbitrators were guilty of misconduct in refusing to postpone the hearing, upon sufficient cause shown, or in refusing to hear evidence pertinent and material to the controversy, or of any other misbehavior by which the rights of any party have been prejudiced; or
- Where the arbitrators exceeded their powers, or so imperfectly executed them that a mutual, final, and definite award upon the subject matter submitted was not made.29

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

27 TEX. CIV. PRAC. & REM. CODE § 171.090.
28 TEX. CIV. PRAC. & REM. CODE § 171.088(a)(1)-(4).
a. **Evident Partiality (CPRC § 171.088(a)(2)(A) & 9 USC § 10(a)(2)).**

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

The test for “evident partiality” under the FAA in the Fifth Circuit is whether an arbitrator’s nondisclosure involves a “significant compromising relationship” — a standard adopted by the en banc court in *Positive Software Solutions, Inc. v. New Century Mortgage Corp.* The court held that that the “draconian remedy” of vacatur cannot be based on the nondisclosure of a trivial or insubstantial prior relationship between the arbitrator and the parties to the proceeding. Accordingly, the court concluded that vacatur was not appropriate merely because an arbitrator did not disclose that, more than seven years before the arbitration, he had served as co-counsel with one of the lawyers for a party to the arbitration in unrelated litigation. The contacts made during that representation were “tangential, limited, and stale.”

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

- In *Infobilling, Inc. v. Transaction Clearing, LLC*, the party seeking vacatur alleged that the opposing counsel—an officer of a PAC that raised money for the county Republican party—had significant political ties to one of the arbitrators, a former state judge, and that the arbitrator and lawyer may have seen each other regularly at fundraisers and other campaign activities. The district court found that these allegations “stated a claim for vacatur” and warranted limited discovery into whether the arbitrator had “significant political ties” with the lawyer.

- In *Dealer Computer Services, Inc. v. Michael Motor Co.*., the district court found that there was a “reasonable impression of bias” caused by the arbitrator’s failure to disclose the fact that she served as an arbitrator in a case involving the same defendant, similar contractual language, and the same damages expert. However,

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31 476 F.3d 278, 286 (5th Cir.) (en banc), cert. denied, 127 S. Ct. 2943 (June 11, 2007) (No. 06-1352).
32 *Id.* at 283.
33 *Id.* at 284-85.
35 *Id.*
the Fifth Circuit reversed the vacatur based on its determination that the petitioner had waived its complaint by failing to object to the arbitrator’s participation on the panel despite being on inquiry notice of her involvement in the related case.\(^{37}\)

The test for “evident partiality” is slightly more lenient in Texas state courts. In the leading case of Burlington Northern Railroad Co. v. TUCO, Inc., the Texas Supreme Court found evident partiality where an arbitrator failed to disclose that he had accepted a substantial referral from the law firm of a non-neutral co-arbitrator during the course of the arbitration.\(^{38}\)

The court held:

[A] prospective neutral arbitrator selected by the parties or their representatives exhibits evident partiality if he or she does not disclose facts which might, to an objective observer, create a reasonable impression of the arbitrator’s partiality. We emphasize that this evident partiality is established from the non-disclosure itself, regardless of whether the nondisclosed information necessarily establishes partiality or bias.\(^{39}\)

The Texas Supreme Court revisited the evident partiality standard five years later in Mariner Financial Group, Inc. v. Bossley.\(^ {40}\) In that case, the court found that a fact issue existed as to whether the chair of the arbitration panel was “evidently partial” based on the arbitrator’s failure to disclose a prior adverse relationship with one of the parties’ expert witnesses. The court emphasized that under TUCO’s objective test, the “consequences for nondisclosure are directly tied to the materiality of the unrevealed information.”\(^ {41}\) Whereas in TUCO, the undisclosed relationship was obviously known to the arbitrator, the record in Mariner was silent as to whether the arbitrator remembered or knew the expert witness, and thus the Court required additional fact-finding before it could determine whether the undisclosed relationship was material to the issue of evident partiality.\(^ {42}\)

Several Texas intermediate courts have vacated arbitration decisions under the TUCO standard. For example:

- In Karlseng v. Cooke, the arbitrator stated in his disclosure statement that he did not have a significant personal relationship with the parties or their counsel. As it turned out, the arbitrator, a former judge, had a decades-long social relationship with one of the attorneys, received valuable gifts and meals from the attorney, and yet the two presented themselves as “complete strangers” at the arbitration hearing. The Dallas

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\(^{37}\) 485 Fed. Appx. 724, 727-28 (5th Cir. 2012)

\(^{38}\) 960 S.W.2d 629 (Tex. 1997).

\(^{39}\) Id. at 636.

\(^{40}\) 79 S.W.3d 30, 32-35 (Tex. 2002).

\(^{41}\) Id. at 32.

\(^{42}\) Id. at 33.
Court of Appeals vacated a $22 million arbitration award based on its finding of evident partiality.43

- In *Alim v. KBR (Kellogg, Brown & Root) – Halliburton*, the Dallas Court of Appeals held that vacatur was proper where an arbitrator failed to disclose that a party representative had appeared before him in a prior arbitration.44

- In *Amoco D.T. Co. v. Occidental Petroleum Corp.*, the Houston Court of Appeals held that vacatur was proper where an arbitrator failed to disclose that another attorney in his law firm represented a parent company of one of the parties.45

- In *J.D. Edwards World Solutions Co. v. Estes, Inc.*, the Fort Worth Court of Appeals found that the neutral arbitrator’s failure to disclose a business relationship with one of the parties, including the provision of legal advice, established evident partiality.46

- In *Houston Village Builders v. Falbaum*, the Houston Court of Appeals found evident partiality where an arbitrator failed to disclose that he had an attorney-client relationship with a trade association to which one of the parties belonged established.47

- In *Texas Commerce Bank v. Universal Technical Institute of Texas, Inc.*, the Houston Court of Appeals affirmed a vacatur on evident partiality grounds where the arbitrator failed to disclose that he had served as lead counsel for one of the parties in a lawsuit six years earlier.48

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

- In *Port Arthur Steam Energy LP v. Oxbow Calcining LLC*, the Houston Court of Appeals found no evident partiality where the arbitrator’s prior law firm was involved in unrelated litigation against the law firm (but not the specific lawyer) representing one of the parties, and the arbitrator had no financial interest in, and was unaware of, the connection to the other litigation.49

- In *Ponderosa Pine Energy, LLC v. Tenaska Energy, Inc.*, the Dallas Court of Appeals reversed the trial court’s vacatur of a $125 million arbitration award and held that the

43 346 S.W.3d 85, 87-94, 96-100 (Tex. App.—Dallas 2011, no pet.).
44 331 S.W.3d 178, 182 (Tex. App.—Dallas 2011, no pet.).
45 343 S.W.3d 837, 848, 850 (Tex. App.—Houston [14th Dist.] 2011, pet. denied).
48 985 S.W.2d 678 (Tex. App.—Houston [1st Dist.] 1999, pet. dism’d w.o.j.).
petitioner had failed to establish evident partiality. It found that an arbitrator’s disclosure of prior arbitrations and business dealings with one of the parties’ law firms, Nixon Peabody, put the complaining party on inquiry notice of the facts that formed the basis of their evident partiality complaint, including allegations that the arbitrator had personal ties to the lawyers involved in the arbitration and a minor ownership interest in an entity that did business with Nixon Peabody.\(^5^0\) However, the Texas Supreme Court has granted review in this case, and will soon weigh in on whether these facts give rise to a finding of evident partiality under \textit{TUCO}.

Notably, even when construing arbitration agreements under the FAA rather than the TAA, Texas courts follow the Texas Supreme Court’s standard for evident partiality established in \textit{TUCO} rather than the Fifth Circuit’s \textit{Positive Software} standard.\(^5^1\)

\textbf{b. Exceeding the scope of the arbitrator’s authority (CPRC § 171.088(a)(3)(A) & 9 USC § 10(a)(4)).}

\textit{(1) Texas cases}

The most common vacatur ground invoked by those challenging arbitration awards is the “exceed powers” ground. Arbitrators “exceed their powers” when they decide matters that are not properly before them or their award is not rationally inferable from the parties agreement.\(^5^2\) To evaluate this vacatur ground, courts must review the arbitration agreement from which the arbitrator’s authority is derived—which may limit the arbitrator’s authority to deciding the matters submitted either expressly or by necessary implication—as well as the factual allegations pertinent to the claim.\(^5^3\) Courts also look to the parties’ submission agreement and pleadings in arbitration to determine what issues the parties agreed to arbitrate.\(^5^4\)

Arbitration clauses can range from very broad to very narrow. For example, the clauses with the broadest scope are those that encompass “any and all disputes between the parties,”\(^5^5\)

\(^5^0\) 376 S.W.3d 358, 372-74 (Tex. App.—Dallas 2012, pet. granted).

\(^5^1\) See \textit{Amoco D.T. Co.}, 343 S.W.3d at 843.


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

\(^5^4\) See \textit{Centex/Vestal}, 314 S.W.3d at 685-86; see also \textit{City of Baytown v. C.L. Winter, Inc.}, 886 S.W.2d 515, 518-19 (Tex. App.—Houston [1st Dist.] 1994, writ denied).

and only slightly narrower are those that provide for arbitration of “any and all disputes arising under or relating to” the contract at issue. Courts have labeled these clauses as “extremely broad” and “capable of expansive reach.”56 On the other hand, there are many ways in which parties can limit the scope of an arbitration clause, such as (1) limiting arbitration only to certain categories of disputes, (2) limiting arbitration to disputes arising out of one contract in a multi-contract relationship, or (3) restricting the arbitrator’s authority to award certain remedies, such as punitive damages.

Broad arbitration clauses have been held to support awards rendered on a variety of grounds,57 including those not specifically argued to the arbitrators.58 Broad clauses make “exceeding their powers” challenges particularly difficult because any doubts concerning the scope of arbitrability must be resolved in favor of arbitration.59

Unless an arbitration agreement under the TAA expressly provides otherwise (see infra Part II.B.3), an arbitrator does not exceed his authority by misinterpreting the contract or misapplying the law.60 Rather, a court’s task is limited to determining whether the arbitrator was authorized by the parties’ agreement to decide the dispute, not whether he decided the dispute correctly.61

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

- In Jones v. Brelsford, the Houston Court of Appeals held that arbitrator exceeded its authority in ordering a trust beneficiary to convey her interest in a ranch to a co-beneficiary under a settlement agreement, when the divested beneficiary was not a signatory to the agreement containing the arbitration clause.62

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

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


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


62 390 S.W.3d 486, 494 (Tex. App.—Houston [1st Dist.] 2012, no pet.).
In *Townes Telecommunications, Inc. v. Travis, Wolff & Co., L.L.P.*, the Dallas Court of Appeals held that the arbitrators exceeded their authority by ordering the parties to allocate costs and attorneys’ fees among the parties in direct contravention of the arbitration agreement, which required that costs and fees “shall be borne entirely by the non-prevailing party (to be designated by the arbitration panel in the award) and may not be allocated between the parties by the arbitration panel.”63 The court therefore vacated the portion of the arbitration decision pertaining to costs and fees.

In *Lee v. Daniels & Daniels*, the San Antonio Court of Appeals held that an arbitrator exceeded his powers in assessing all of his fees against the client in an attorney-client dispute, when the engagement agreement expressly provided that the cost of arbitration would be split 50%-50%.64

In *Pettus v. Pettus*, the trial court vacated an award upon finding that the arbitrators had deviated from procedures they had established concerning the inclusion of other parties in the arbitration.65 The Fort Worth Court of Appeals affirmed the vacatur, concluding that the arbitrators had exceeded the scope of their authority by failing to follow these procedures.66

In *In Burlington Resources Oil & Gas Co. v. San Juan Basin Royalty Trust*, the parties agreed to arbitrate only those issues included in an exhibit to their arbitration agreement.67 The Houston Court of Appeals held that the arbitrator exceeded his authority when he decided a question which was not included in the exhibit, and therefore vacated that part of the arbitration award.68

In *Robinson v. West*, the Eastland Court of Appeals concluded that the arbitrator exceeded his authority by entering an award that did not dissolve the firm when the parties’ agreement to submit the dispute to an arbitrator stated that the firm would be dissolved.69

In *Peacock v. Wave Tec Pools, Inc.*, the Waco Court of Appeals concluded that an arbitrator exceeded his authority by ordering a remedy outside the specific remedies contemplated in the arbitration agreement. The court held that the scope

66 *Id.* at 420.
68 *Id.* at 45-46.
of the permissible award was defined by the arbitration agreement, and not the underlying construction agreement.\textsuperscript{70}

- In \textit{Barsness v. Scott}, the San Antonio Court of Appeals vacated an arbitration panel’s modified award because the panel exceeded its authority in modifying the award to the extent that the modification rendered the award inconsistent with the merits of the original arbitral decision.\textsuperscript{71}

As discussed in greater detail in Part II.B.3, the Texas Supreme Court’s decision in \textit{Nafta Traders, Inc. v. Quinn} also may encourage further reliance on this vacatur ground. Under \textit{Nafta Traders}, parties have the option, under the TAA, to draft arbitration provisions that prohibit arbitrators from misapplying the law. Arbitration awards rendered under such provisions may be vacated under the “exceed their powers” ground if the award is legally erroneous.\textsuperscript{72}

\textbf{(2) Federal cases}

Federal case law under 9 U.S.C. § 10(a)(4) is generally consistent with the state law cases. An arbitrator exceeds his powers when he acts “contrary to express contractual provisions.”\textsuperscript{73} If a contract “creates a plain limitation on the authority of an arbitrator, [courts] will vacate an award that ignores the limitation.”\textsuperscript{74} However, “limitations on an arbitrator’s authority must be plain and unambiguous” and a reviewing court will “resolve all doubts in favor of arbitration.”\textsuperscript{75}

The Fifth Circuit will sustain an arbitration award “as the arbitrator’s decision ‘draws its essence’ from the contract — even if [it] disagree[s] with the arbitrator’s interpretation of the contract.”\textsuperscript{76} The court is not limited to the panel’s explanation of the award; rather, the court looks only to the result reached.\textsuperscript{77} “The single question is whether the award, however arrived at, is rationally inferable from the contract.”\textsuperscript{78}

Vacaturs under section 10(a)(4) in the Fifth Circuit are few and far between. The most oft-cited example is \textit{Totem Marine Tug & Barge, Inc. v. North American Towing, Inc.}\textsuperscript{79} There,

\textsuperscript{70} 107 S.W.3d 631 (Tex. App.—Waco 2003, no pet.).
\textsuperscript{71} 126 S.W.3d 232 (Tex. App.—San Antonio 2003, pet. denied).
\textsuperscript{72} 339 S.W.3d 84 (Tex. 2011).
\textsuperscript{73} \textit{Apache Bohai Corp. LDC v. Texaco China BV}, 480 F.3d 397, 401 (5th Cir. 2007).
\textsuperscript{74} Id.
\textsuperscript{75} Id. at 404.
\textsuperscript{76} \textit{Timegate Studios, Inc. v. Southpeak Interactive, L.L.C.}, 713 F.3d 797, 802 (5th Cir. 2013) (quoting \textit{Executone}, 26 F.3d at 1320).
\textsuperscript{77} \textit{Executone}, 26 F.3d at 1325.
\textsuperscript{78} Id.
\textsuperscript{79} 607 F.2d 649 (5th Cir. 1979).
the court held that an arbitration panel exceeded its powers when it awarded damages that the prevailing party in the arbitration never requested. The dispute arose out of a charter agreement in which Totem was to use one of North American’s vessels. In its claim against Totem, North American sought expenses for the return of the vessel. Instead, the arbitration panel found that North American should have asked for damages for charter hire, which included “the balance of charter hire due under the charter less the earnings of the vessel during that period.”80 In vacating the award, the Fifth Circuit emphasized the importance of notice, stating that “[a]ll parties in an arbitration proceeding are entitled to notice and an opportunity to be heard.”81 The court reasoned that because North American did not submit the issue of charter hire damages, Totem prepared and argued a case about return expenses, not charter hire. The Court concluded that “[b]y awarding charter hire, the arbitrators ignored the arbitral dispute submitted by the parties and dispensed their ‘own brand of industrial justice.’”82

In 2010, the Supreme Court rendered a seemingly anomalous section 10(a)(4) decision in Stolt-Neilsen S.A. v. Animalfeeds International Corp.83 There, the Court vacated an arbitral decision allowing for class arbitration of claims under section § 10(a)(4), finding that the arbitrators “exceeded their powers” in imposing class arbitration on parties whose arbitration clauses were silent on the issue of class treatment. This opinion is noteworthy because, as discussed above, courts typically have looked to the arbitration clause and the submission agreement to determine the scope of the arbitrator’s powers and to determine whether those powers have been exceeded.84 However, in Stolt-Nielsen, the parties mutually agreed to empower the arbitrators to decide whether class arbitration was available under the parties’ agreement.85 The Court vacated the arbitrators’ decision that class arbitration was available – not based on their lack of authority to render the decision, but rather on their failure to base their analysis on applicable FAA, maritime or New York law.86

In 2013, the Supreme Court revisited section 10(a)(4) in Oxford Health Plans LLC v. Sutter.87 A unanimous Court led held that an arbitrator’s decision to allow class arbitration could not be overturned because the decision was based on the arbitrator’s interpretation of the parties’ contract, even though the interpretation likely was incorrect. The Court found that the limited scope of review available under section 10(a)(4) did not permit a substantive review of the arbitrator’s decision on the merits. The Court distinguished Stolt-Nielsen on the ground that the arbitration panel in that case imposed its own “policy choice” in ordering class arbitration despite the absence of any contractual basis for the order.

80 Id. at 650.
81 Id. at 651.
82 Id. at 652.
83 130 S. Ct. 1758, 1767-70 (2010).
84 DiRussa v. Dean Witter Reynolds Inc., 121 F.3d 818, 824 (2d Cir. 1997).
85 Stolt-Nielsen, 130 S. Ct. at 1765.
86 Id. at 1768-70.
87 133 S. Ct. 2064 (2013).
c. Award procured by “corruption, fraud or undue means” (CPRC § 171.088(a)(2)(B)-(C) & 9 USC § 10(a)(1)).

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

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

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

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

In considering what constitutes “sufficient cause” for postponement of a hearing under the TAA, some Texas courts look to the grounds that a trial court would find sufficient to grant a

89 Forsythe Int’l, S.A. v. Gibbs Oil Co. of Tex., 915 F.2d 1017, 1022 (5th Cir. 1990).
93 Id.
motion for continuance under Rule 251 of the Texas Rules of Civil Procedure. The Fifth Circuit, on the other hand, has held that to establish that a panel was guilty of misconduct under section 10(a)(3) of the FAA for denying postponement of an arbitration hearing, the movant must show that (1) there was no reasonable basis for the panel’s refusal to postpone the hearing, and (2) it suffered prejudice as a result of the refusal to postpone, i.e., that a continuance might have altered the outcome of the arbitration. A rare example of a successful vacatur on this ground occurred where the panel refused to continue the hearing to allow for the testimony of an official whose testimony was central to the fraudulent inducement claims at issue and was not cumulative of any other evidence in the record.

To vacate an arbitration award based on the refusal to hear and material evidence, the evidentiary error “must be one that is not simply an error of law but which so affects the rights of a party that it may be said he was deprived of a fair hearing.” Arbitrators are not bound by the rules of evidence. Nor are they required to hear all the evidence tendered by the parties as long as each party is given an adequate opportunity to present evidence and arguments.

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

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

Typically, disputes about the scope, validity, or existence of an arbitration agreement are resolved prior to arbitration through a motion to compel or stay arbitration. However, if a

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party proceeds directly to arbitration without being compelled to by a court, and objects to the arbitration on the ground that there is no enforceable arbitration agreement, it may seek to vacate any adverse arbitration award issued on that basis under the TAA (but not the FAA). Specifically, section 171.088(a)(4) of the TAA provides that an award may be vacated “[i]f there was no agreement to arbitrate, the parties were not compelled by the court to arbitrate, and the party opposing the arbitration did not participate in the hearing without raising the objection.” On at least three occasions in the last decade, Texas appellate courts have determined that vacatur was appropriate under section 171.088(a)(4) because of the absence of a valid arbitration agreement.104

2. Non-statutory grounds for vacatur

a. Common law grounds.

Because the TAA does not supplant common law, an arbitration award governed by the TAA may also be set aside on limited common law grounds in Texas courts. Under Texas common law, a trial court may set aside an arbitration award if: (1) the decision is tainted with fraud, misconduct, or gross mistake as would imply bad faith and failure to exercise honest judgment; (2) the award violates public policy; or (3) the arbitrators acted in manifest disregard of the law (meaning they clearly recognized the applicable law but chose to ignore it). The Texas Supreme Court repeatedly has declined to hold that the TAA preempted common law grounds for attacking an arbitrator’s award.

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


107 CVN Group, Inc. v. Delgado, 95 S.W.3d 234 (Tex. 2002) (nothing that arbitration award could have been vacated under public policy ground had it allowed mechanic’s lien to eviscerate the protections given to the homestead under the Texas Constitution and Property Code); Lee v. El Paso County, 965 S.W.2d 668, 672 (Tex. App.—El Paso 1998, pet. denied) (arbitrator’s award of payment for unused sick leave accrued before amendment to collective bargaining agreement violated Article III, Section 53 of the Texas Constitution).

108 Home Owners Mgmt Enters., Inc. v. Dean, 230 S.W.3d 766, 768 (Tex. App.—Dallas 2007, no pet.).

Before the United States Supreme Court’s decision in *Hall Street Associates, L.L.C. v. Mattel, Inc.*, the Fifth Circuit similarly had recognized two common law grounds for vacatur, allowing vacatur where an award violates public policy or where arbitrators have acted in “manifest disregard of the law.”\(^{110}\) But the Fifth Circuit has since held that these federal common law vacatur grounds did not survive *Hall Street’s* determination that the FAA statutory vacatur grounds are exclusive.\(^{111}\) While many other courts agree with the Fifth Circuit that federal common law grounds for vacatur have been extinguished,\(^{112}\) the Second, Fourth, Sixth, and Ninth Circuits have concluded that the “manifest disregard of the law” doctrine survives, at least as a judicial gloss on the federal statutory grounds.\(^{113}\) The United States Supreme Court has acknowledged this split but declined to resolve it.\(^{114}\)

b. **Re-urging arguments made in opposition to a motion to compel after an arbitration award has issued.**

In Texas state court, if a party is compelled to arbitration over its objections (e.g., that the arbitration agreement does not exist, is unenforceable, or the dispute is outside the scope of the agreement), the case is typically stayed while the arbitration proceeds.\(^{115}\) If the party that resists arbitration then suffers an adverse result during arbitration, it can then raise its challenge to the arbitrability of the dispute in court after final judgment is entered, under a more favorable standard of review than a typical vacatur motion.\(^{116}\) This is true even where that party deciding, that the common law grounds are still viable, but holding that sufficient showing was not made; *Callahan & Assoc. v. Orangefield Indep. Sch. Dist.*, 92 S.W.3d 841, 844 (Tex. 2002) (same).

\(^{110}\) *Sarofim v. Trust Co. of the West*, 440 F.3d 213, 216 (5th Cir. 2006). The “manifest disregard of the law” ground was an extremely limited one, available only upon a showing that (1) the arbitrators knew of a governing legal principle yet refused to apply it or ignored it altogether, (2) the law ignored by the arbitrators was well-defined, explicit, and clearly applicable to the case; and (3) the award results in significant injustice to the losing party. *See Brabham v. A.G. Edwards & Sons, Inc.*, 376 F.3d 377, 392 (5th Cir. 2004).

\(^{111}\) *See Citigroup Global Markets, Inc. v. Bacon*, 562 F.3d 349 (5th Cir. 2009).

\(^{112}\) *See, e.g., Ramos-Santiago v. United Parcel Serv.*, 524 F.3d 120, 124 n.3 (1st Cir. 2008) (dicta); *Affymax, Inc. v. Ortho-McNeil-Jansen Pharm.*, Inc., 660 F.3d 281, 284 (7th Cir. 2011); *Medicine Shoppe Int’l, Inc. v. Turner Invs.*, Inc., 614 F.3d 485, 489 (8th Cir. 2010); *Frazier v. CitiFinancial Corp., LLC*, 604 F.3d 1313, 1324 (11th Cir. 2010).


\(^{114}\) *See Stolt-Nielsen SA*, 130 S. Ct. at 1768 n.3.

\(^{115}\) *In re Gulf Exp.*, LLC, 289 S.W.3d 836, 840 (Tex. 2009).

\(^{116}\) *Perry Homes v. Cull*, 258 S.W.3d 580, 586-87 (Tex. 2008).
unsuccessfully challenged the order compelling arbitration in a pre-arbitration mandamus proceeding.\footnote{Id. at 586.}

In federal court, the availability of post-arbitration review of a motion compelling arbitration depends on whether the case was stayed or dismissed upon the grant of the motion. If a district court compels arbitration and dismisses the remainder of the action, the order is a final judgment and immediately appealable, meaning that a party cannot wait until after the arbitration concludes to challenge the district court’s arbitrability determination.\footnote{Green Tree Fin. Corp. Alabama v. Randolph, 531 U.S. 79, 89 (2000).} However, in most cases in which arbitration is compelled, the district court also stays the litigation, meaning that the order compelling arbitration is interlocutory. Under 9 U.S.C. § 16(b), a party may not appeal from such an interlocutory order unless it obtains permission to take an interlocutory appeal under 28 U.S.C. § 1292(b).\footnote{Mire v. Full Spectrum Lending, Inc., 389 F.3d 163, 167 (5th Cir. 2004); see also In re Great W. Drilling, Ltd., 289 S.W.3d 836, 839 (Tex. 2009).} This is true even where the district court administratively closes the case.\footnote{Mire, 389 F.3d at 167.} In such circumstances, as in state court, a complaining party can raise the arbitrability issue on appeal after the arbitration takes place and a final judgment is entered.\footnote{See, e.g., Morrison v. Amway Corp., 517 F.3d 248, 253 (5th Cir. 2008); Perry Homes, 258 S.W.3d at 586-87 (citing cases).}

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

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

Such a provision will not help if the arbitration agreement is governed by the FAA. In *Hall Street Associates, L.L.C. v. Mattel, Inc.* the United States Supreme Court held that Sections 10 and 11 of the FAA provide the exclusive grounds for vacating, modifying or correcting an arbitration award.\footnote{552 U.S. 576, 586 (2008) (citing 9 U.S.C. §§ 10-11).} These limited FAA grounds for vacatur cannot be supplemented or expanded by contract.\footnote{Id. at 578.}

The *Hall Street* Court left the door open for parties to expand or modify the scope of review for arbitration agreements governed by state arbitration statutes or the common law.\footnote{Id. at 590.}
governed by the TAA. Instead, the court held in *Nafta Traders, Inc. v. Quinn* that “the TAA presents no impediment to an agreement that limits the authority of an arbitrator in deciding a matter and thus allows for judicial review of an arbitration award for reversible error.” In other words, although expanded judicial review is not available for agreements governed by the FAA, it is available for arbitration agreements governed by the TAA. The Texas Supreme Court went a step further and held that where an agreement is governed both by the TAA and the FAA, the FAA does not preempt enforcement of an agreement for expanded judicial review of an arbitration award enforceable under the TAA.

C. **Grounds for modification or correction of an arbitration award.**

An arbitration award may be modified or corrected by a court under extremely limited circumstances. The TAA allows a court to modify an award if: (1) the award contains an “evident miscalculation of numbers”; (2) the award contains “an evident mistake in the description of a person, thing, or property referred to in the award”; (3) the award addresses a matter not submitted to the arbitrator, and it may be corrected without affecting the merits of the decision on issues that were actually submitted; or (4) the form of the award is imperfect in a manner that does not affect the merits of the controversy. For example, a court may add a missing date to an arbitration award to enable the calculation of pre-judgment interest.

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. The party seeking modification must provide notice to the opposing party, which triggers a ten-day deadline for filing any objections to the modification request. Any modification cannot affect the merits of, and must be consistent with, the original arbitral decision.

The grounds for modifying an award under the FAA are nearly identical to those under the TAA. A court may modify or correct the award “to effect the intent thereof and promote justice between the parties.” Application for modification must be made in “the United States

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126 *Id.*

127 *Id.* at 101.

128 **TEX. CIV. PRAC. & REM. CODE** § 171.091(a).


130 **TEX. CIV. PRAC. & REM. CODE** § 171.054.


133 *Id.*
court in and for the district wherein the award was made.”134 Unlike the TAA, the FAA does not have a procedure whereby a party can seek modification from the arbitrator first.

D. Standard of Review.

Any party seeking to vacate an arbitration award must take into account the very onerous standard of review. In both federal and state courts, judicial review of an arbitration decision is “extraordinarily narrow” because both Texas law and federal policy strongly favor arbitration.135 A reviewing court may not substitute its judgment for that of the arbitrator’s merely because it would have reached a different result, or for a mere mistake of fact or law.136 Every reasonable presumption must be indulged to uphold the arbitrator’s decision, and none is indulged against it.137 The court may not review the arbitrator’s decision on the merits even if it is alleged that the decision is based on factual error or it misinterprets the parties’ agreement.138

Both state and federal appellate courts apply a de novo standard of review of a district court’s order confirming an arbitration award.139 In reviewing an order granting a vacatur, Texas courts apply a de novo standard and review the trial court’s resolution of disputed facts for legal and factual sufficiency,140 while the Fifth Circuit accepts findings of fact that are not clearly erroneous and applies a de novo standard to questions of law and the application of law to facts.141 Both the Fifth Circuit and Texas courts emphasize that appellate review is “intended to reinforce the strong deference due an arbitrative tribunal.”142

134 Id.


136 Dealer Solutions, 183 S.W.3d at 752; ConocoPhillips Co., 674 F.3d at 472.

137 Dealer Solutions, 183 S.W.3d at 752 (citing CVN Group, Inc. v. Delgado, 95 S.W.3d 234, 238 (Tex. 2002)).


141 Hughes Training, Inc. v. Cook, 254 F.3d 588, 592 (5th Cir. 2001).

III. Procedural Considerations

A. 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.”\(^{143}\) 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.\(^{144}\)

The Dallas Court of Appeals recently addressed a tricky finality issue in *Yaseen Educational Society v. Islamic Association of Arabi, Ltd.*\(^{145}\) The parties in that case agreed (1) to submit their dispute about the ownership of a mosque to a panel of American-based Islamic scholars, and (2) that the panel’s decision would then be sent to Islamic scholars in India for a separate review and decision. The prevailing party in the initial arbitral decision issued by the American-based scholars sought confirmation of the award, claiming that the Indian-based scholars orally approved the American panel’s decision. The court of appeals disagreed, finding that the absence of an unambiguous decision by the Indian-based scholars caused the decision of the American panel to be incomplete and non-final.\(^{146}\)

Citing *Yaseen*, the Dallas Court held that an arbitration panel’s “partial final award” ruling that it had jurisdiction to adjudicate the merits of the parties’ dispute was not final, and thus not reviewable by vacatur, because the award did finally resolve any of the ultimate disputes among the parties and left significant factual and legal issues open for further determination.\(^{147}\)

B. 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.”\(^{148}\) For example, a party can waive an


\(^{145}\) 406 S.W.3d 385 (Tex. App.—Dallas 2013, no pet.)

\(^{146}\) *Armstrong v. SCA Promotions, Inc.*, No. 05-14-00300-CV, 2014 WL 1678988 (Tex. App.—Dallas Apr. 24, 2014, no. pet. h.).

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.\footnote{149}{See Kendall Builders, Inc. v. Chesson, 149 S.W.3d 796 (Tex. App.—Austin 2004, pet. denied); see also TUCO, 960 S.W.2d at 637 n.9 (“Of course, a party who learns of a conflict before the arbitrator issues his or her decision must promptly object to avoid waiving the complaint.”); Skidmore Energy, Inc. v. Maxus (U.S.) Exp. Co., 345 S.W.3d 672 (Tex. App.—Dallas 2011, pet. denied).}

One prominent commentator advises that to preserve error, a party should make an objection “to the arbitrator and opposing parties orally, followed by a writing that is also sent to the arbitrator, opponents, and any tribunal administrator” so that there is a “paper trail detailed enough for a reviewing court to treat as a \textit{de facto} record if there is no stenographic record.”\footnote{150}{Oehmke, supra note 143, § 77.}

“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.”\footnote{151}{Id.}

\textbf{C. Is there a reasoned decision?}

In general, under either the TAA or FAA, an arbitrator need not explain the rationale behind the award.\footnote{152}{Gray v. Noteboom, 159 S.W.3d 750, 754 (Tex. App.—Fort Worth 2005, pet. denied); \textit{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); \textit{Anderman/Smith Operating Co. v. Tenn. Gas Pipeline Co.}, 918 F.2d 1215, 1219 n.3 (5th Cir. 1990).}

Even if the parties request findings of facts and conclusions of law, the arbitrator is not obligated to make such findings.\footnote{153}{Noteboom, 159 S.W.3d at 753-54; see TEX. CIV. PRAC. & REM. CODE § 171.053(a) (The TAA requires only that the arbitration award “be in writing and signed by each arbitrator joining in the award”).}

The absence of a reasoned decision can preclude effective judicial review under some of the available grounds for vacatur (e.g., manifest disregard of the law, exceeding powers).\footnote{154}{See, e.g., \textit{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.”).}

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.”\footnote{155}{Oehmke, supra note 143 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. A case currently pending in the First Court of Appeals will address whether an award can be vacated when an arbitrator fails to comply (or insufficiently complies) with the parties’ agreement requiring a “reasoned award.”

D. What is the state of the “record”?

A party contemplating filing a motion for vacatur should consider whether there is an adequate record to support the anticipated challenge, because it will bear the “burden to bring forth a complete record that establishes [its] basis for relief.” When there is no transcript of the arbitration proceedings available, a reviewing court will presume that evidence supported the arbitration panel’s award. For example, a court held it could not review a claim that an arbitrator exceeded the scope of her authority where the appellant failed to furnish a record of the arbitration proceedings. Another court held that a party could not vacate an award for “refusing to hear material evidence” when the record did not establish the substance of the excluded expert testimony at issue. Also, when a losing party asserted that its adversary was not entitled to an award of punitive damages, the court rejected the challenge because, in the absence of a transcription of the arbitration proceedings, it was “unable to determine what claims were submitted or what evidence was offered before the arbitrators.”

E. In what forum should you bring the vacatur action?

A party seeking to vacate an award should consider whether a federal forum is available and desirable. A choice of forum may implicate a variety of economic and legal factors, including the governing law, the applicable procedure, and the chances of success.

State courts are available for the adjudication of post-arbitration litigation, regardless of whether the arbitration agreement is governed by the TAA or FAA. Indeed, the FAA requires federal courts to recognize the enforceability of any arbitral award entered under the Act, including those confirmed in state court.

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156 Id.
162 Kline v. O’Quinn, 874 S.W.2d 776, 783 (Tex. App.—Houston [14th Dist.] 1994, writ denied).
The FAA provides that the “United States court in and for the district wherein the award was made” has the authority to (1) vacate an arbitration award, or (2) confirm an arbitration award if no court is specified in the agreement of the parties. The provision is not a mandatory venue provision. Thus, a party may face circumstances in which a motion to confirm is filed in one district and a motion to vacate is filed in another district. 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.

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.

If filing a motion to vacate in state court, the appropriate venue is the county in which the arbitration was held, even if the parties had specified a different county in their agreement.

F. What are the deadlines for action?

1. 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. 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). 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

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166 See, e.g., Smith v. Rush Retail Ctrs., Inc., 360 F.3d 504 (5th Cir. 2004).
168 In re David Lopez, 372 S.W.3d 174, 176 (Tex. 2012) (discussing TEX. CIV. PRAC. & REM. CODE § 171.096(e)).
170 TEX. CIV. PRAC. & REM. CODE § 171.088(b).
In contrast, there is no statutory limitations period for the filing of an application to confirm an award.\(^{172}\)

A party seeking to confirm an award might delay filing an application for confirmation for at least 90 days, hoping that its adversary will fail to move for vacatur within the statutory period, at which point its application for confirmation could proceed unimpeded.\(^{173}\) Alternatively, 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 \textit{Hamm v. Millennium Income Fund, L.L.C.}, where the court concluded that a motion to vacate or modify an award had to be pending or already ruled upon at the time a court considered an application for confirmation.\(^{174}\) 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.\(^{175}\)

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 \textsc{Tex. Civ. Prac. \\& Rem. Code} § 171.088, not the common law grounds discussed above in Part II.B.2.a.\(^{176}\)

Finally, a request for modification or correction presented to an arbitrator pursuant to \textsc{Tex. Civ. Prac. \\& Rem. Code} § 171.054, prior to the initiation of litigation, does not toll the 90-day statutory periods referenced above.\(^{177}\) 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.\(^{178}\)

\(^{171}\) \textit{Id.} § 171.091(b).

\(^{172}\) \textit{Id.} § 171.087.

\(^{173}\) See \textit{Smith v. J-Hite, Inc.}, 127 S.W.3d 837 (Tex. App.—Eastland 2003, no pet.) (when successful party at arbitration filed an application to confirm the award after 90 days had run, the losing party could not assert a counterclaim to set aside the award, notwithstanding the counterclaim savings statute).


\(^{175}\) \textit{Id.}; see also \textit{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).


\(^{178}\) \textit{Louisiana Natural Gas Pipeline, Inc. v. Bludworth Bond Shipyard, Inc.}, 875 S.W.2d 458, 462 (Tex. App.—Houston [1st Dist.] 1994, writ denied).
2. 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.”\(^{179}\) 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.”\(^{180}\) 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.

G. Is discovery available to supplement the record?

In most cases, the “record” for a vacatur action will consist of (1) the arbitration award, (2) the underlying contract between the parties, (3) the transcript of the arbitration proceedings, and (4) any written briefing or documentary evidence submitted to the arbitrators. While case law is sparse 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.\(^{181}\) For example, where a court found that the petitioner’s allegations of evident partiality “stated a claim for vacatur,” limited discovery was warranted to explore whether the arbitrator had “significant political ties” with counsel for one of the parties.\(^{182}\) 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.\(^{183}\) Generally, other testimonial evidence will be limited to the rare cases in which it would be helpful in establishing the intent of the parties, the meaning of disputed terms in the underlying agreement, or the procedural history of the dispute.

H. Is there a good faith basis for a vacatur action?

To avoid sanctions, a party should proceed with a vacatur motion only if they have a good faith basis for challenging the arbitral award. Texas courts thus far have been reluctant to award sanctions in unsuccessful vacatur actions. In *Baker Hughes Oilfield Operations, Inc. v. Hennig Prod. Co.*, the prevailing party sought sanctions, alleging that the party seeking vacatur “presented an incomplete record on appeal, raised critical issues for the first time on appeal, and filed an inadequate brief misstating the record and making unsupported accusations.”\(^{184}\) The


\(^{180}\) Id. § 12.

\(^{181}\) See George Chamberlain, *Cause of Action to Vacate Arbitration Award on Ground of Excess of Powers by Arbitrator*, 27 CAUSES OF ACTION 113, §§ 18-19, 26-27; see also *See Matter of Andros Compania Maritima, S.A.*, 579 F.2d 691, 702 (2d Cir. 1978).


\(^{184}\) 164 S.W.3d 438, 448 (Tex. App.—Houston [14th Dist.] 2005, no pet.).
court nevertheless refused to award sanctions because the record did not reveal “truly egregious” conduct.\textsuperscript{185}

However, courts elsewhere have become more aggressive in awarding sanctions. In \textit{B.L. Harbert, Int’l, LLC v. Hercules Steel Co.}, the Eleventh Circuit warned that “[i]f we permit parties who lose in arbitration to freely relitigate their cases in court, arbitration will do nothing to reduce congestion in the judicial system; dispute resolution will be slower instead of faster; and reaching a final decision will cost more instead of less.”\textsuperscript{186} 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.”\textsuperscript{187} The Seventh Circuit has issued a similar warning.\textsuperscript{188}

**I. Can I still bring a vacatur action even if the arbitration provision says that an award is “non-appealable”?**

Courts are not inclined to permit parties to contractually limit or eliminate appellate review. For example, the San Antonio Court of Appeals considered a provision in an arbitration agreement that stated: “An award or determination of the arbitration tribunal shall be final and conclusive upon the parties . . . and no appeal thereof shall be made by the parties.”\textsuperscript{189} It held that, notwithstanding this provision, it would consider a challenge that the award was tainted by fraud, misconduct, or gross mistake – a ground for vacatur available under the common law.\textsuperscript{190} It also held that the statutory grounds for vacating or modifying an award, set forth in Sections 171.088 and 171.091 of the Texas Civil Practice and Remedies Code, could not be waived.\textsuperscript{191}

Federal circuit courts have also weighed in on this question. In \textit{Hoeft v. MVL Group, Inc.}, the Second Circuit held that the vacatur grounds set forth in 9 U.S.C. § 10 and in the common law “represent a floor for judicial review of arbitration awards below which parties cannot

\textsuperscript{185} Id.

\textsuperscript{186} 441 F.3d. 905, 906 (11th Cir. 2006).

\textsuperscript{187} Id. at 913-14.

\textsuperscript{188} 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.”).

\textsuperscript{189} Barsness v. Scott, 126 S.W.3d 232, 238 (Tex. App.—San Antonio 2003, pet. denied); see also Circle Zebra Fabricators, Ltd. v. Ams. Welding Corp., Nos. 13-10-00504-CV & 13-10-00591-CV, 2011 Tex. App. LEXIS 1945, at **13-14 (Tex. App.—Corpus Christi Mar. 17, 2011, no pet.) (holding that clause providing that “the parties agree that there shall be no appeal from the arbitrator's decision,” indicated only that “a party may not appeal the merits of the arbitration, not that the parties agreed to waive the right to appeal the trial court's decision to compel arbitration or that the parties waived the right to appeal the district court's judgment confirming or vacating the arbitration decision.”).

\textsuperscript{190} Barsness, 126 S.W.3d at 238.

\textsuperscript{191} Id.
require courts to go, no matter how clear the parties’ intentions.”¹⁹² The Ninth Circuit has similarly found that contractual language providing that an arbitration award is “non-appealable” is unenforceable to the extent it is construed to eliminate judicial review under the FAA.¹⁹³ But in MACTEC, Inc. v. Gorelick, the Tenth Circuit held that a clear and unequivocal agreement foreclosing judicial review of an arbitration award beyond the district court level is enforceable.¹⁹⁴ 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.”¹⁹⁵ The court cautioned, however, that a clause precluding judicial review of the FAA vacatur grounds in the district court probably would be unenforceable.

J. What is the remedy if the vacatur action succeeds?

1. State Court

If an arbitration award is vacated on grounds other than Tex. Civ. Prac. & Rem. Code § 171.088(a)(4), then the court may order a rehearing before new arbitrators, who shall be 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.¹⁹⁶ If an arbitration award is vacated under Section 171.088(a)(3), then the court may order a rehearing before the arbitrators who made the original award or their appointed successors.¹⁹⁷

Texas courts have disagreed about the scope of a trial court’s authority after it has vacated an arbitration award. The San Antonio Court of Appeals has held that after vacating an award, the trial court may only modify the award or order a rehearing.¹⁹⁸ The El Paso Court of Appeals, however, has held that the trial court’s authority is not limited to ordering a rehearing.¹⁹⁹

2. Federal Court

The FAA provides that “if an award is vacated and the time within which the agreement required the award to be made has not expired, the court may, in its discretion, direct a rehearing

¹⁹³ In re Wal-Mart Wage & Hour Emp’t Practices Litig., 737 F.3d 1262, 1268 (9th Cir. 2013).
¹⁹⁴ 427 F.3d 821 (10th Cir. 2005).
¹⁹⁵ Id. at 826.
¹⁹⁷ Id. § 171.089(b).
by the arbitrators.”

“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.” However, a district court does not have the authority to dictate procedures for a second arbitration.

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.”

3. Further appellate review.

An appeal is generally available to review a trial court’s final judgment confirming, modifying, or vacating an arbitration award without directing a rehearing, because these are final orders or judgments. However, the TAA does not authorize an appeal from an order that vacates an arbitration award while granting a new arbitration hearing. This limitation on appellate jurisdiction generally has been applied not only to cases arising under the TAA, but also to FAA cases brought in state court because such cases are subject to state procedural rules.

One exception to this rule occurs when the trial court vacates an arbitration award and directs a rehearing while simultaneously denying a motion to confirm an arbitration award. Under these circumstances, the Texas Supreme Court has held that an appeal is proper under TEX. CIV. PRAC. & REM CODE § 171.098(a)(3), which allows an appeal of an order denying confirmation, and the fact that a court also vacates an award and directs a rehearing will not preclude an appeal. If, however, the trial court only partially confirms and vacates to address unresolved questions, an appeal is unavailable, because the award is incomplete and does not fall under any part of Section 171.098.

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201 Oehmke, supra note 143, at § 246.
203 Oehmke, supra note 143, at § 245.
204 TEX. CIV. PRAC. & REM. CODE § 171.098(a).
Note that FAA cases brought in federal court are not subject to this jurisdictional limitation, as the FAA permits an appeal from an order “modifying, correcting, or vacating an award.”

**K. Is partial vacatur of an award permitted?**

If only a portion of an arbitration award is deemed invalid, that portion can be vacated and the remainder of the award will be unaffected only if the valid and invalid parts “are so distinct and independent that the valid part will truly express the judgment of the arbitrator.”

Otherwise, the entire award must be stricken. Most federal courts address the issue in similar fashion.

**IV. Conclusion**

Challenging an arbitration award is always an uphill battle, but your odds are still better than a Houston sports team winning a championship! Those teams still try, year after year, and occasionally so should a party suffering an adverse result in arbitration. Hopefully, this paper will help you guide your clients on whether and how to take on the challenge.

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209 9 U.S.C. § 16; see also Atl. Aviation, Inc. v. EBM Group, Inc., 11 F.3d 1276, 1280 (5th Cir. 1994).


211 See Centralab, Inc. v. Local No. 816, Int’l Union of Elec., Radio & Machine Workers, 827 F.2d 1210 (8th Cir. 1987) (affirming a district court decision that confirmed one part of an arbitration award and used section 10 to vacate another part of the award); Swift Indus., Inc. v. Botany Indus., Inc., 466 F.2d 1125 (3d Cir. 1972) (same); Kyocera Corp. v. Prudential-Bache Trade Servs., Inc., 341 F.3d 987, 998 (9th Cir. 2003) (en banc) (FAA “allows a federal court to . . . strike all or a portion of an award pertaining to an issue not at all subject to arbitration”); Katz v. Feinberg, 167 F. Supp. 2d 556 (S.D.N.Y. 2001) (granting motion to vacate portion of arbitration award and confirming remainder).