Chapter 4

Arbitration[1]

4-1 INTRODUCTION

With increasing frequency, practitioners encounter an arbitration clause that facially covers a dispute with a departing employee. Typically, the arbitration clause is broad and attempts to reach any and all disputes between the employee and employer that touch upon the employment relationship, including post-employment disputes. In Texas, courts routinely send these types of cases to arbitration.[2] Another typical arbitration provision is one that contains a "carve-out", which allows the employer to obtain injunctive relief at the courthouse and then proceed to arbitration for the remainder of the case.[3] In this chapter, we will deal first with the developing body of law concerning enforceability of an arbitration provision and then discuss tactics and remedies in arbitration.

[1.] The author gratefully acknowledges the substantive and organizational assistance provided by Scott McElhaney in his paper of March 19, 2012, entitled "Enforcing and Avoiding Arbitration Clauses Under Texas Law."

[2.] *In re H.E. Butt Grocery Co.*, 17 S.W.3d 360, 378 (Tex. App.—Houston [14th Dist.] 2000, no pet.) (directing trial court to vacate its order denying the defendant's motion to compel arbitration).

[3.] *See BossCorp, Inc. v. Donegal, Inc.*, 370 S.W.3d 68, 76 (Tex. App.—Houston [14th Dist.] 2012, no pet.) ("Where an arbitration agreement contains carve-outs and exceptions providing judicial remedies for disputes, something more than mere reference to the AAA Rules for the conduct of the arbitration is needed to show that the parties clearly and unmistakably intended to delegate arbitrability to the arbitrator instead of the court.").

4-2 ENFORCEABILITY OF AN ARBITRATION PROVISION

4-2:1 The Federal Arbitration Act

Although courts have historically resisted enforcing arbitration agreements, the passage of the Federal Arbitration Act (FAA)[4] and the Texas General Arbitration Act (TAA) altered that trend.[5] Since the passage of the statutes, parties frequently invoke the FAA, which courts regularly use to enforce arbitration agreements.[6]

Courts normally analyze an arbitration agreement under the requirements of a particular state's general contract law.[7] Congress intended the FAA to "exercise Congress' commerce power to the full[est]."[8] Initially, there were some arguments that the language of FAA § 1 precluded the FAA from covering employment contracts,[9] but the Supreme Court held that this exception narrowly applies only to "workers actually engaged in the movement of goods in interstate commerce."[10]

The FAA requires a court to order a party to arbitrate its claims when there is an arbitration agreement to that effect.[11] Indeed, the FAA mandates a stay of a case until the arbitration has been completed.[12] Additionally, a court may not delay arbitration pending discovery or pending mediation.[13] However, a court may issues a preliminary injunction to preserve the status quo before the court determines that the issue is referable to arbitration.[14]

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4. 9 U.S.C. § 1.

5. Tex. Civ. Prac. & Rem. Code § 171.

6. *See, e.g., Thomas Petroleum, Inc. v. Morris*, 355 S.W.3d 94, 97 (Tex. App.—Houston [1st Dist.] 2011, pet. denied) (a party waived any objection to arbitration by invoking the FAA in court); *Ancor Holdings, LLC v. Peterson, Goldman & Villani, Inc.*, 294 S.W.3d 818, 829 (Tex. App.—Dallas 2009, no pet.).

7. *See, e.g., In re AdvancePCS Health L.P.*, 172 S.W.3d 603, 606 (Tex. 2005).

8. *Allied-Bruce Terminix Cos. v. Dobson*, 513 U.S. 265, 277 (1995).

9. FAA § 1 excluded coverage of "contracts of employment of Seaman, Railroad employees, or any other class of workers engaged in foreign or interstate commerce."

10. *Circuit City Stores, Inc. v. Adams*, 532 U.S. 105, 112 (2001).

11. 9 U.S.C. § 4.

12. 9 U.S.C. § 3.

13. *In re Champion Techs., Inc.*, 173 S.W.3d 595, 599 (Tex. App.—Eastland 2005, pet. denied); *In re Heritage Bldg. Sys., Inc.*, 185 S.W.3d 539, 542 (Tex. App.—Beaumont 2006, no pet.).

14. *Janvey v. Alguire*, 647 F.3d 585, 594-95 (5th Cir. 2011) ("'[C]ongressional desire to enforce arbitration agreements would frequently be frustrated if the courts were precluded

TX_Litigator's_Guide_CH04.indd 72 11/4/15 6:32:48 PM

Because arbitration requires only that an agreement "involves commerce," seldom will the FAA not be invoked.[15] The parties can choose to arbitrate under state arbitral rules alone,[16] but a reference to adoption of Texas substantive law in an arbitration clause does not preclude application of the FAA.[17] Moreover, when the parties specifically adopt the FAA in their agreement, no additional showing is necessary.[18] If the arbitration agreement refers to the TAA alone, then the FAA probably is excluded.[19] But, if the arbitration agreement does not specify, then both the TAA and the FAA apply.[20]

4-2:2 The Texas General Arbitration Act

The TAA mirrors most of the substantive parts of the FAA[21]; however, the TAA excludes collective bargaining agreements and claims for workers' compensation benefits.[22] Because of the supremacy clause, the FAA, which does not contain these exceptions, will pre-empt the TAA.[23] Further, the TAA requires enforcement of arbitration agreements,[24] and the trial court may not refuse to order arbitration.[25] Unlike under the FAA where an arbitration award may not be subject to additional contractual appellate review,[26] in Texas, the parties can contract for appellate

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from issuing preliminary injunctive relief to preserve the status quo pending arbitration and, ipso facto, the meaningfulness of the arbitration process.'")

15. *See Lost Creek Mun. Util. Dist. v. Travis Indus. Painters, Inc.*, 827 S.W.2d 103, 105 (Tex. App.—Austin 1992, writ denied); *Mesa Operating Ltd., P'ship v. La. Intrastate Gas Corp.*, 797 F.2d 238, 243-44 (5th Cir. 1986).

16. *See Volt Info. Scis., Inc. v. Bd. of Trs. of Leland Stanford Junior Univ.*, 489 U.S. 468, 479 (1989).

17. *Mesa Operating, L.P. v. Louisiana Intrastate Gas Corp.*, 797 F.2d 238, 243-44 (5th Cir. 1986).

18. *In re AdvancePCS Health L.P.*, 172 S.W.3d 603, 606 n. 3 (Tex. 2005).

19. *Atlas Gulf-Coast, Inc. v. Stanford*, 299 S.W.3d 356, 358 (Tex. App.—Houston [14th Dist.] 2009, no pet.).

20. *In re Devon Energy Corp.*, 332 S.W.3d 543, 547 (Tex. App.—Houston [1st Dist.] 2009, orig. proceeding).

21. *See generally* Tex. Civ. Prac. & Rem. Code § 171.

22. *See* Tex. Civ. Prac. & Rem. Code § 171.002(a).

23. *In re Nexion Health at Humble, Inc.*, 173 S.W.3d 67, 69 (Tex. 2005).

24. *See* Tex. Civ. Prac. & Rem. Code § 171.021.

25. *See In re MHI P'ship, Ltd.*, 7 S.W.3d 918, 923 (Tex. App.—Houston [1st Dist.] 1999, orig. proceeding).

26. *Hall St. Assocs., L.L.C. v. Mattel, Inc.*, 552 U.S. 576, 590 (2008).

TX_Litigator's_Guide_CH04.indd 73 11/4/15 6:32:48 PM

review of an arbitrator's decision.[27] However, both the FAA and TAA specifically exclude immediate appellate review of orders compelling arbitration and when review is permissible the appellant must show that they lack an adequate appellate remedy.[28]

4-2:3 Enforceability of Arbitration Agreements

In general, courts favor arbitration agreements[29] and address the validity of such agreements.[30] In comparison, in a case involving the enforceability of a noncompetition agreement, the U.S. Supreme Court confirmed the general rule that attacks on the validity of a contract, as opposed to attacks on the validity of an arbitration clause, should be presented to and decided by the arbitrator rather than the courts.[31] Texas law also provides that an arbitrator must decide an attack on the validity of a contract and not just an arbitration clause.[32] The parties may waive this rule by express provision in their arbitration agreement or by adoption of an arbitration rule to the same effect.[33]

Ordinarily, the first step in an arbitral proceeding is to determine whether the parties agreed to arbitrate a particular dispute. No specific language is required, as long as the parties and court

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27. *Compare Nafta Traders, Inc. v. Quinn*, 339 S.W.3d 84, 93 (Tex. 2011) (express authorization for appellate review) with *Forest Oil Corp. v. El Rucio Land & Cattle Co., Inc.*, 446 S.W.3d 58, 87 (Tex. App.—Houston [1st Dist.] 2014), *reh'g overruled* (Oct. 21, 2014), *petition for review abated* (July 24, 2015) ("Arbitration provision here does not show a clear agreement by the parties to provide courts with the authority to review . . .[w]ithout clear language in the arbitration agreement, we have no authority to conduct expanded judicial review").

28. *Frontera Generation Ltd. v. Mission Pipeline Co.*, 400 S.W.3d 102, 113 (Tex. App.—Corpus Christi 2012, no pet.) (Mandamus relief is "generally not available to review orders compelling arbitration except upon a showing that "the district court did not have the discretion to stay the proceedings pending arbitration" or if the order compelling arbitration also "dismisses the entire case and is therefore a final rather than interlocutory, order.").

29. *In re Olshan Found. Repair Co.*, 328 S.W.3d 883, 893 (Tex. 2010); *Valero Energy Corp. v. Teco Pipeline Co.*, 2 S.W.3d 576, 590 (Tex. App.—Houston [14th Dist.] 1999, no pet.).

30. *Rent-A-Center W., Inc. v. Jackson*, 130 S. Ct. 2772, 2777-78 (2010); *Forest Oil Corp. v. McAllen*, 268 S.W.3d 51, 61 (Tex. 2008).

31. *Nitro-Lift Techs., L.L.C. v. Howard*, 133 S. Ct. 500, 503 (2012).

32. *In re Labatt Food Serv., L.P.*, 279 S.W.3d 640, 648 (Tex. 2009).

33. *See, e.g.*, AAA Commercial Arbitration Rules & Mediation Procedures, ¶ R-7.

TX_Litigator's_Guide_CH04.indd 74 11/4/15 6:32:49 PM

generally understand the arbitration obligation.[34] Neither do the parties need to sign the agreement if they have evidence of assent.[35] Arbitration agreements do not need to be in the same contract that is at issue in the dispute; they can be incorporated by reference.[36]

From time to time, the issue of mutuality of obligation arises. For example, an employer's right to modify or alter an arbitration agreement retroactively is not enforceable,[37] but an arbitration clause that reserves only a forward-looking right to amend is enforceable.[38] The Texas Supreme Court also has held that an arbitration "policy" is binding on employees when published and when the employees are given notice; therefore, the employee is required to follow the program.[39]

General contract defenses are available for arbitration agreements, such as fraud, misrepresentation, or deceit, which may invalidate an arbitration agreement.[40] A court will rule on these issues. To illustrate, whether a party lacked mental capacity to assent to an arbitration contract was for the court to decide,[41] as compared to an arbitrator deciding whether the entire agreement was unenforceable.[42] Moreover, a material breach of an arbitration agreement can excuse a party from obligations under an arbitration clause.[43] A Texas court found that a material breach by a party's interference with an accounting firm hired under an arbitration agreement to perform an accounting of production on a national gas project justified vacation of an arbitration award and a refusal to reorder arbitration.[44]

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34. *Belmont Constructors v. Lyondell Petrochemical Co.*, 896 S.W.2d 352, 356 (Tex. App.—Houston [1st Dist.] 1995, no pet.)

35. *In re AdvancePCS Health L.P.*, 172 S.W.3d 603, 606 (Tex. 2005); *Glass Producing Co., Inc. v. Jared Res., Ltd.*, 422 S.W.3d 68, 80 (Tex. App.—Texarkana 2014, no pet.) (Theories binding nonsignatories to "an arbitration clause [are]: '(1) incorporation by reference; (2) assumption; (3) agency; (4) alter ego; (5) equitable estoppel, and (6) third-party beneficiary'").

36. *In re AdvancePCS Health L.P.*, 172 S.W.3d 603, 606 (Tex. 2005).

37. *J.M. Davidson, Inc. v. Webster*, 128 S.W.3d 223, 238 (Tex. 2003).

38. *In re Odyssey Healthcare, Inc.*, 310 S.W.3d 419, 421, 424 (Tex. 2010).

39. *In re Halliburton Co.*, 80 S.W.3d 566, 568-69 (Tex. 2002).

40. *In re McKinney*, 167 S.W.3d 833, 835 (Tex. 2005).

41. *In re Morgan Stanley & Co., Inc.*, 293 S.W.3d 182, 190 (Tex. 2009).

42. *Will-Drill Res., Inc. v. Samson Res. Co.*, 352 F.3d 211, 212 (5th Cir. 2003).

43. *Hooters of Am., Inc. v. Phillips*, 173 F.3d 933, 935, 938, 940 (4th Cir. 1999).

44. *Tri-Star Petroleum Co. v. Tipperary Corp.*, 107 S.W.3d 607, 614-15 (Tex. App.—El Paso 2003, pet. denied).

TX_Litigator's_Guide_CH04.indd 75 11/4/15 6:32:49 PM

Additionally, a party may waive the right to compel arbitration if it "substantially invokes" the judicial process prior to seeking an order compelling arbitration,[45] although the courts tend to be quite forgiving of parties who take multiple steps at the courthouse before invoking arbitration. For instance, filing a motion to transfer venue, mediating a case, engaging in written discovery, and conducting depositions when discovery was available in the arbitral forum did not waive arbitration.[46] To the contrary, moving for summary judgment or taking any other step to seek final resolution of the dispute constituted substantially invoking the judicial process to preclude compelling arbitration.[47]

Lastly, burdensome costs may invalidate an arbitration agreement. Courts have grappled with arbitration clauses that put substantial costs on an employee or former employee. The U.S. Supreme Court noted that requiring a current or former employee to pay substantial arbitration costs may invalidate an arbitration agreement.[48] Under Fifth Circuit law, the court determines the arbitration cost issue on a case-by-case basis which must be established upon an affirmative showing that the costs would prevent the litigant from having a full opportunity to pursue his or her claim.[49] The Texas Supreme Court has adopted a similar approach.[50]

4-3 LITIGATION OF DISPUTES IN ARBITRATION

4-3:1 Instituting an Arbitration Proceeding

Once one or more of the parties to a dispute determines that a matter should be arbitrated, an arbitration proceeding must be instituted. There are three ways to commence the arbitration process.

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45. *In re Serv. Corp. Int'l*, 85 S.W.3d 171, 174 (Tex. 2002); *Structured Capital Res. Corp. v. Arctic Cold Storage, LLC*, 237 S.W.3d 890, 896 (Tex. App.—Tyler 2007, no pet.).

46. *Granite Constr. Co. v. Beaty*, 130 S.W.3d 362, 367 (Tex. App.—Beaumont 2004, no pet.).

47. *Williams Indus., Inc. v. Earth Dev. Sys. Corp.*, 110 S.W.3d 131, 134, 139-40 (Tex. App.—Houston [1st Dist.] 2003, no pet.).

48. *Green Tree Fin. Corp. v. Randolph*, 531 U.S. 79, 90-91 (2000).

49. *Williams v. Cigna Fin. Advisors, Inc.*, 197 F.3d 752, 763 (5th Cir. 1999).

50. *In re FirstMerit Bank, N.A.*, 52 S.W.3d 749, 756 (Tex. 2001).

TX_Litigator's_Guide_CH04.indd 76 11/4/15 6:32:49 PM

4-3:1.1 Submission

This usually occurs when there is no prior agreement to arbitrate. Essentially, the parties' counsel determine the "recipe" for the arbitration process. Recipe factors to consider include:

1. The scope of the arbitration;
2. Whether other parties will need to be included;
3. Whether the entire dispute should be arbitrated;
4. Whether and how the arbitration will be administered;
5. The number of arbitrators that will compose the arbitral panel;
6. Whether the parties will want to select the arbitrators before arbitration or will agree on a process for arbitrator selection;
7. How the costs of arbitration will be determined and allocated;
8. Whether the parties will want to limit discovery, motions, or any other procedures;
9. Whether arbitrator authority will be limited; and
10. Whether remedies will be limited.

The submission agreement that outlines the determined arbitration process can be simple by relying upon the rules of the administrative authority, or it can be detailed. However the more detailed the document, the more difficult the submission by arbitration because the parties probably are already embroiled in a dispute.

4-3:1.2 Initiation by Demand or Notice

Arbitration most commonly begins by this method. One party provides a demand or notice to the other in accordance with an arbitration clause. The demand generally looks like a scaled-down petition or complaint, establishing the subject matter of the dispute and giving notice to the arbitral institution. Either the demand or the institution will determine the applicable rules, the arbitrators who will preside over the dispute, and the location for the proceeding. Common practice is to prepare the arbitration demand consistent

TX_Litigator's_Guide_CH04.indd 77 11/4/15 6:32:49 PM

with a contract's arbitration clause and applicable rules and to request the arbitrator to order a remedy. The opposing party may submit an answer or answering statement to the demand and also may make a counterclaim. An answer, while not always required, is usually filed, especially if the opposing party chooses to raise specific defenses other than a general denial. It is beneficial to set out in detail the issues in dispute in the demand and answer (and counterclaim), which frame the dispute.

Arbitral institutions allow for expedited procedures[51] in certain matters, which regularly involve amounts in controversy below a specific threshold.[52] Even in larger arbitrations, the parties can agree to expedited procedures. Indeed, some arbitration clauses specify that an arbitration award must be granted within days of the initial submission to arbitration.

After the demand is filed, the administrating authority sets an administrative conference for the parties and the selected arbitrator(s) to plan a scheduling order. The arbitrator(s) then issues an order that outlines in fairly great detail all time limitations, the amount of discovery to be taken, the form of the award, and various other matters.

4-3:1.3 Court Order

If the court order is a result of a motion to compel arbitration, then the court will order one party to make a demand for arbitration. When the arbitration is court-annexed, or court-mandated, the court initiates the arbitration by an order that includes decisions concerning arbitrator selection, location, and rules. Depending on the circumstances, court-annexed arbitration may or may not be binding.

4-4 SELECTION OF THE ARBITRATOR

One of the greatest benefits of arbitration is that you can choose the arbitrator(s). Arbitrator selection is crucial because the arbitrator is the judge of both the law and the facts. Except in very limited instances, absent prejudicial misconduct that justifies vacature of the award, the arbitrator's decision is largely immune

51. *See, e.g.*, AAA Commercial Rules, ¶¶ E-1 – E-10.
52. *See, e.g.*, AAA Commercial Rules, ¶ E-2.

TX_Litigator's_Guide_CH04.indd 78 11/4/15 6:32:49 PM

from judicial supervision or review. The most common method of arbitrator selection comes with the help of an administrative body. The American Arbitration Association (AAA) outlines the traditional and best-known arbitrator-selection process The AAA assembles a list of five to ten appropriate arbitrators from a larger pool of qualified panelists and provides the parties with the arbitrators' biographical information. Then the parties select from that list the arbitrators to sit on their panel. The parties can choose to alternatively "strike" a panelist until only one remains, or to select certain panelists and, to the extent their selections overlap, allow the administrator to choose an arbitrator acceptable to both parties. A third selection method is for each party to rank the arbitrators in order of preference, after which the administrator chooses the highest-ranked panelists that overlap each list.

In the case of three panelists, often the parties' arbitration agreement requires two "party-appointed" arbitrators, one selected by each side, and one jointly selected "neutral arbitrator", a process that is unnecessary, expensive, and cumbersome. In the past, particularly in labor arbitrations, the party-appointed arbitrator would maintain contact with the parties throughout the arbitration process, but now this is the exception rather than the rule.[53] Today, the most common practice is for the "party-appointed arbitrator" to communicate with the appointing party only until the jointly-appointed "neutral" is selected, after which all three arbitrators become "neutral."[54]

Cooperation between counsel about arbitration selection varies. Each party communicates almost entirely with the case manager and designates respective preferences according to the applicable process. Occasionally, counsel may give additional input to the case administrator concerning attributes of a neutral arbitrator that they would find most acceptable. In some instances, adverse counsel may even agree on arbitrator selection.

Once a particular candidate is suggested or a list is provided, diligent counsel engages in collecting information about the potential arbitrators. Paradoxically, the more first-hand knowledge

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53. *See, e.g.*, AAA Commercial Rules, ¶ R-17.
54. *See, e.g.*, AAA Commercial Rules, ¶ R-18.

TX_Litigator's_Guide_CH04.indd 79 11/4/15 6:32:49 PM

that counsel or one of the parties has about an arbitrator, the more likely that arbitral prospect will be stricken as unsuitable. The ability to obtain information about arbitral candidates is limited only by the creativity of counsel. Below is a list of common sources of information.

> Spend the necessary time on arbitrator selection. Choice of arbitrator is often the single most important decision you will make in your case.

4-4:1 Biographical Resumes

All arbitrators provide biographical information, usually in the form of a resume. The resumes are detailed and specific, particularly given the burden that current case law places upon arbitrators regarding disclosure.[55] Under recent AAA practices, arbitrators' biographies have become even more detailed and elaborate. Additionally, each time arbitrators are appointed, their biographies are furnished to the parties, and they must certify that their information is current. Certainly, the parties should not limit themselves to the biographical information furnished by the AAA. Other sources, such as directories, may provide additional biographical information. Certainly, the internet hosts a wealth of information, like the biographies posted on personal, organizational, and other professional webpages of alternative dispute resolutions professionals. Counsel should also search for biographical information in professional or general social media or other databases.

4-4:2 Books and Articles

Any books, articles, or CLE papers given by a candidate may contain personal information about that candidate. These writings may indicate an arbitrator's understanding of certain subject matters, as well as potentially provide insight into an arbitrator's approach to and views about the arbitral process or the subject matter at hand.

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55. *See, e.g., Blue Cross Blue Shield v. Juneau*, 114 S.W.3d 126, 133 (Tex. App.—Austin 2003, no pet.); *see also Karlseng v. Cooke*, 346 S.W.3d 85, 91 (Tex. App.—Dallas 2011, pet. denied).

TX_Litigator's_Guide_CH04.indd 80 11/4/15 6:32:49 PM

4-4:3 Word-of-Mouth

A time-honored method for determining whether an arbitrator is suitable is "word-of-mouth." Inquiries to members of one's firm, members of former firms where the arbitrator has served, professional friends and colleagues, and anyone who practiced in front of the arbitrator often provide the richest information about the arbitrator. Occasionally, firms or services may provide copies of opinions or other information about the arbitrators. As in all cases, the sources must be evaluated for reliability and relevancy, with a more recent arbitral experience likely being the most reliable.

Concerning the qualities one should expect from an arbitrator, the foremost is fairness. An arbitrator should be a person of integrity and sound judgment and, if possible, should have expertise or specialized knowledge in the involved subject matter. The arbitrator should be completely impartial, having no interest in the outcome. Accordingly, before selection, each candidate must disclose any potential conflicts of interest after reviewing a list of the parties, counsel, witnesses, and other relevant information. Arbitrators have a duty to provide supplemental disclosures at any time appropriate, particularly when new parties or potential witnesses are added, or if information comes to mind that was not considered previously.

The arbitrator should avoid any appearance of impropriety. For that reason, arbitrators may not engage in any direct communication with the parties or their counsel after neutral arbitration selection (except when the opposition is present). An advantage of an arbitral administrator is that communications can be made through the administrator to create a buffer. Additionally, counsel first sends filings to the administrator, although some procedures allow for direct submission to the arbitrator with copies sent to the administrator. The foregoing procedures are important and valuable in maintaining arbitrator neutrality.

4-5 EXPEDITED PROCEDURES

In the case of a claim for injunction, time is extraordinarily important to the prosecuting party. It is imperative to make the administrative body aware that a party is seeking expedited relief for a claim.

TX_Litigator's_Guide_CH04.indd 81 11/4/15 6:32:49 PM

Courts do not address specifically the actions parties and their counsel should take when there is a broad-based arbitration clause with no carve-out; however, the AAA commercial arbitration rules do address this issue. Rule 34(a) states: "the arbitrator may take whatever interim measures he or she deems necessary, including injunctive relief and measures for the protection or conservation of property and the disposition of perishable goods." Rule 34(c) also states: "The request for interim measures addressed by a party to a judicial authority shall not be deemed incompatible with the agreement to arbitrate or a waiver of the right to arbitrate."

You will often want to use expedited procedures in departing employee cases. Know the rules, and be firm (but polite) with your case administrator about taking advantage of them.

4-6 EMERGENCY ARBITRATION

4-6:1 Appointment of Emergency Arbitrator

After a party who needs emergency protection notifies the AAA and other pertinent parties in writing of the relief's nature and the reasons that the relief needs to be emergent, then (within one business day of receipt) the AAA will appoint a single emergency arbitrator from a designated panel that rules on emergency applications.[56] Immediately after being selected, the arbitrator will then divulge any circumstances that might affect his or her objectivity. Any challenge to the selection of the emergency arbitrator must be stated within one business days from the time the AAA discloses their choice.[57]

4-6:2 Schedule

Within two business days (at the very latest), the emergency arbitrator must create a schedule for consideration of the

[56] *See, e.g.*, AAA Emp't Arbitration Rules & Mediation Procedures, ¶ O-2.
[57] *See, e.g.*, AAA Emp't Arbitration Rules & Mediation Procedures, ¶ O-2.

TX_Litigator's_Guide_CH04.indd 82 11/4/15 6:32:49 PM

application for emergency relief.[58] In the schedule, all parties must be given a reasonable opportunity to be heard. However, telephone and written communications may be allowed in the alternative to formal hearings.[59]

4-6:3 Interim Award

Once the arbitrator is persuaded that instant, irreparable damage will occur without granting the seeking, entitled party emergency relief, the arbitrator is able to grant an interim award that gives the necessary party the emergency relief and both parties the reasoning behind the grant.[60]

4-6:4 Constitution of the Panel

While a party may apply to the emergency arbitrator, the panel is the body that will act and rule on an application for the modification of an interim reward. The only power an emergency arbitrator has over the modification is if he or she is included on the panel.[61]

4-6:5 Security

The AAA Employment Arbitration Rules and Mediation Procedure state that, "[a]ny interim award of emergency relief may be conditioned on provision by the party seeking such relief of appropriate security."[62]

4-6:6 Special Master

The agreement (or waiver of the right) to arbitrate and a request for interim actions that a party asks of the court shall not be deemed irreconcilable. If the court directs the AAA to nominate a special master to contemplate the request, the AAA will act in accordance with Section O-1 of these rules.[63]

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58. *See, e.g.*, AAA Emp't Arbitration Rules & Mediation Procedures, ¶ O-3.
59. *See, e.g.*, AAA Emp't Arbitration Rules & Mediation Procedures, ¶ O-3.
60. *See, e.g.*, AAA Emp't Arbitration Rules & Mediation Procedures, ¶ O-4.
61. *See, e.g.*, AAA Emp't Arbitration Rules & Mediation Procedures, ¶ O-5.
62. AAA Emp't Arbitration Rules & Mediation Procedures, ¶ O-6.
63. *See, e.g.*, AAA Emp't Arbitration Rules & Mediation Procedures, ¶ O-7.

TX_Litigator's_Guide_CH04.indd 83 11/4/15 6:32:49 PM

4-7 THE MANAGEMENT CONFERENCE

Regardless of a need for expedited relief, an arbitrator will arrange for a management conference during which the parties discuss with the arbitrator their preferred procedures and timelines for the arbitration hearing. The items decided at a management conference include:

1. The date of the hearing;
2. The length of the hearing;
3. The damages amounts from any claims and counterclaims;
4. Any discovery to be provided and deadlines for submission;
5. The deadlines for exchange of witness lists with outlines of testimonies;
6. The deadlines for exchange of expert designations and exchange of expert witness reports;
7. Whether any other discovery should be had, such as document production and interrogatories;
8. The location of the hearing;
9. Whether briefs will be exchanged before or after the hearing;
10. The deadline for exchange of trial exhibits;
11. The deadline for stipulation of uncontested facts;
12. The type of award to be rendered by the arbitrator;
13. The deadlines for dispositive motions, if any; and
14. A possible date for additional preliminary hearings or pretrial hearings prior to arbitration.[64]

Most often, this hearing is held via telephone conference. It is wise for the parties to confer and agree on as many deadlines as possible before the management conference.

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64. In this context, "pretrial" means before the final arbitral hearing.

TX_Litigator's_Guide_CH04.indd 84 11/4/15 6:32:49 PM

4-8 DISCOVERY AND DEADLINES

Arbitrators do not provide discovery as a matter of right as under most rules of civil procedure. Usually, the arbitrator and counsel agree to conduct limited discovery, which often involves stipulating limitations on the number of hours for deposition, the number of requests for production or interrogatories, and some type of preliminary exchange of information (such as under Fed. R. Civ. P. 26 and the like). An arbitrator then includes these limitations in the order following the management conference. Sometimes, the arbitration procedure will set forth the manner and method of conducting discovery, which the arbitrator will follow unless the parties otherwise agree.

One advantage of arbitration is that the arbitrator can resolve discovery disputes in short order. Arbitrators generally can make themselves available within a day or two of a discovery dispute that arises, and they commonly schedule discovery conferences via telephone to resolve the dispute without need of further motions or paperwork. Of course, if the dispute is more complicated and not remediable by such procedure, an arbitrator will set a rapid briefing schedule to address outstanding disputes. As a result, many parties find that arbitrators deal quickly with discovery disputes that would otherwise slow down a case.

4-9 TYPE OF AWARD

An arbitrator has the option to grant one of three types of awards: the standard award, the reasoned award, and findings of fact and conclusions of law. The standard award is very short and simply states the result: who wins, who loses, and the damages or other remedies granted. A reasoned award is the most common and is similar to a *per curiam* opinion, generally containing a summary of the facts and the arbitrator's line of reasoning. Findings of fact and conclusions of law mirror a judge's entering judgment with detailed findings of all facts and conclusions of law.

4-10 PROTECTIVE ORDERS

A party may request a protective order to protect confidential documents or witness testimony. Then, counsel will confer and propose a protective order to the arbitrator, which arbitrators routinely sign. In the rare instance where the parties cannot agree,

TX_Litigator's_Guide_CH04.indd 85 11/4/15 6:32:49 PM

they can request a hearing with the arbitrator to determine an appropriate protective order.

4-11 SUBPOENAS

Arbitrators also routinely sign subpoenas prepared on forms provided by the arbitral authority staff. What few involved in arbitration fully understand is the limited power of arbitrators to enforce subpoenas. In fact, enforcement of a subpoena requires judicial intervention.

Arbitral subpoenas are usually only an issue when they are directed at a non-party. The question then becomes whether an arbitrator has the power to subpoena a non-party to appear at a hearing as a witness or to bring requested documents. The arbitral subpoena power can be found in the Federal Arbitration Act (FAA), which states:

> The arbitrators selected either as prescribed in this title or otherwise, or a majority of them, may summon in writing any person to attend before them or any of them as a witness and in a proper case to bring with him or them any book, record, document, or paper which may be deemed material as evidence in the case. The fees for such attendance shall be the same as the fees of witnesses before masters of the United States courts. Said summons shall issue in the name of the arbitrator or arbitrators, or a majority of them, and shall be signed by the arbitrators, or a majority of them, and shall be directed to the said person and shall be served in the same manner as subpoenas to appear and testify before the court; if any person or persons so summoned to testify shall refuse or neglect to obey said summons, upon petition the United States district court for the district in which such arbitrators, or a majority of them, are sitting may compel the attendance of such person or persons before said arbitrator or arbitrators, or punish said person or persons for contempt in the same manner provided by law for securing the attendance of witnesses or their punishment for

TX_Litigator's_Guide_CH04.indd 86 11/4/15 6:32:49 PM

> neglect or refusal to attend in the courts of the United States.[65]

Additionally, Rule 31(d) of the AAA Commercial Rules states:

> "[a]n arbitrator or other person authorized by law to subpoena witnesses or documents may do so upon the request of any party or independently."[66]

Courts are split as to whether a non-party must comply with an arbitrator's pre-hearing document subpoena. The Eighth Circuit[67] in *In re Sec. Life Ins. Co. of Am.* held that the arbitrators had "implicit" power to subpoena relevant documents for review by a non-party prior to the hearing, since they had power to subpoena relevant documents for production at the hearing. The Third Circuit, however, has taken a contrary position.[68] There, the court found that, in an arbitration governed by the FAA, arbitrators did not have the authority to issue discovery subpoenas for documents to non-parties. Alternatively, the Fourth Circuit[69] in *COMSAT Corp. v. National Science Foundation*, held it would enforce the arbitral orders for pre-hearing discovery of non-parties only upon a showing of "special need." In addition to its holding regarding the subpoena power, the Eighth Circuit[70] has also found that, implicit in an arbitration panel's power to subpoena relevant documents for production at a hearing, is the power to order the production of relevant documents for review by a party prior to the hearing.

Judge Fitzwater has eloquently articulated what will be the likely result in Texas Federal Courts:

> The court adopts the reasoning of the Third and Second Circuits and holds that § 7 of the FAA does not authorize arbitrators to compel production of documents from a non-party, unless they are doing so in connection with the non-party's attendance at an arbitration hearing. As the Third Circuit

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65. 9 U.S.C. § 7.

66. *See, e.g.*, AAA Commercial Rules, ¶ R-31(d).

67. *In Re Sec. Life Ins. Co. of Am.*, 228 F.3d 865, 870-71 (8th Cir. 2000).

68. *See Hay Group, Inc. v. E.B.S. Acquisition Corp.*, 360 F.3d 404, 406 (3d Cir. 2004).

69. *COMSAT Corp. v. Nat'l Sci. Found.*, 190 F.3d 269, 278 (4th Cir. 1999).

70. *Sec. Life Ins. Co. of Am. v. Duncanson & Holt (in Re Sec. Life Ins. Co. of Am.)*, 228 F.3d 865, 870-71 (8th Cir. 2000).

TX_Litigator's_Guide_CH04.indd 87 11/4/15 6:32:49 PM

> reasoned, the text of § 7 mentions only orders to produce documents when brought with a witness to a hearing. *Hay Group*, 360 F.3d at 407. The text is "straightforward and unambiguous." *Life Receivables*, 549 F.3d at 216. Further, the section is similar to a previous version of Fed. R. Civ. P. 45, which before 1991 did not allow pre-hearing subpoenas of documents from non-parties. See *Hay Group*, 360 F.3d at 407; *Life Receivables*, 549 F.3d at 216 ("The FAA was enacted in a time when pre-hearing discovery in civil litigation was generally not permitted."). Finally, the court declines to read greater powers into the text of § 7 despite policy preferences favoring arbitration efficiency, because the court's policy preferences cannot override the clear text of the statute. *See Hay Group*, 360 F.3d at 406 (citing *Eaves v. County of Cap May*, 239 F.3d 527, 531-32 (3d Cir. 2000)).[71]

Section 7 of the FAA clearly grants power to the district court in the districts in which the arbitrator is sitting to enforce arbitral subpoenas directed to parties as well as non-parties. The Federal Rules of Civil Procedure require that an order seeking enforcement of a subpoena of a non-party must be made in the district where the discovery is being or is to be taken.[72] Moreover, an arbitrator has the authority to require non-parties to be witnesses and to produce documents at a hearing.[73]

The Texas Arbitration Act allows pre-hearing discovery in arbitration.[74] Of course, when the witness is more than 150 miles from the arbitration location, discovery from that witness may be difficult to obtain.[75] To subpoena a witness outside the 150 mile radius, counsel must file an ancillary action in the Texas district where the witness resides (that supports the arbitrator-issued subpoena) and then serve a subpoena with that caption. Should the

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71. *Empire Financial Group, Inc., v. Pension Financial Services, Inc., et al.*, 2010 U.S. Dist. LEXIS 8782 No. 3:09-CV-2155-D, 285-86 (N.D. Tex. 2010) (mem. op.)

72. Fed. R. Civ. P. 37(a)(1).

73. 9 U.S.C. § 7.

74. Tex. Civ. Prac. & Rem. Code § 171.051.

75. Tex. R. Civ. P. 176.3(a).

TX_Litigator's_Guide_CH04.indd 88 11/4/15 6:32:49 PM

witness be from another state, which will not enforce the subpoena of the arbitrator, then probably the best course is for counsel is to file an ancillary action where the arbitration is pending, request a commission (or whatever the other state requires), and comply with the additional requirements of that state.

Many practicioners overlook the difficulty in procuring testimony from a reluctant non-party witness. If applicable, this is something that should be considered early in the process.

4-12 ALTERNATIVE METHODS OF PROCURING TESTIMONY

Another benefit of arbitration is an arbitrator's flexibility in presentation. For example, arbitrators routinely take witnesses out of order for the parties' or witnesses' convenience, and they may take witness testimony by video conference, Skype, telephone conference, or any other effective method. Arbitrators can take testimony by deposition and review the testimony at a time when the parties are not present. Occasionally, arbitrators take affidavit testimony, which is considered by most arbitrators to be unpersuasive as to any contested issue. Arbitrators often dispense with prove-up of documents via records custodians, instead requesting or requiring the parties' stipulation to the authenticity of documents, unless authenticity is genuinely at issue.

4-13 CONTINUANCE

Arbitrators view the processes as driven by the parties and will grant generally continuances or postponements, provided that the parties agree. However, many are reluctant to grant continuances because of the perceived benefit of expedited resolution through arbitration. Therefore, arbitrators often require the attorneys' clients either to sign-off on a motion for continuance or to be present at any hearing at which a party requests a continuance.

4-14 CONFIDENTIALITY

Arbitrations are private. Uniformly among all arbitral authorities, no outsiders may be involved in an arbitral process absent consent

TX_Litigator's_Guide_CH04.indd 89 11/4/15 6:32:49 PM

from both parties agreeing to arbitration. Any person who attends arbitration must have a direct interest in the case, either as a party or party representative, witness, or attorney. Beyond that, others may attend only if the parties agree, and the arbitrator grants permission.

4-15 COURT REPORTERS

Under the rules of most arbitral authorities, court reporters are optional. Indeed, many arbitrators discourage court reporters as an unnecessary, additional cost. Typically, the rules require the party requesting the transcript to pay for it and to provide a copy to the opposing party. Certainly, a transcript assists the arbitrator in any situations where the prior testimony was unclear. But, in general, arbitrators take sufficient notes and have adequate recollection, making a transcript unnecessary.

4-16 THE FINAL HEARING

4-16:1 Opening Statements

Arbitrators usually request opening statements of the parties, which tend to be rather brief. An effective opening statement provides the arbitrator with a road map of what the advocate intends to prove throughout the case. Most arbitrators are not interested in long or argumentative opening statements.

4-16:2 The Rule

Almost all arbitral authorities provide in their rules the ability to invoke the "Rule."[76] The parties may waive invocation of the Rule.

4-16:3 Evidence

Unless the arbitration agreement provides otherwise, most arbitration agreements provide a relaxed version of the rules of evidence. In almost all cases, arbitrators will admit any reasonable evidence proffered by a party. Objections to evidence are frequently met by an arbitral response that the evidence will be admitted for

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[76.] The "Rule" is sequestration of witnesses to avoid one witness testimony influencing another testimony.

TX_Litigator's_Guide_CH04.indd 90 11/4/15 6:32:49 PM