

# Chapter 1

## Alternative Dispute Resolution—Issues in Business Litigation

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### **NAVIGATING COVID-19**

The COVID-19 pandemic had a definite impact on mediations and arbitrations. In the early days of the virus, when people were not proficient in Zoom and other platforms, mediations and arbitrations often were postponed. As the pandemic continued and people began to adjust to the “new normal” and use Zoom and other platforms, mediations and arbitrations resumed remotely. However, virtual mediations and arbitrations are not without their challenges. While a virtual mediation is convenient, especially for those parties or adjusters who are located outside of your immediate area or out-of-state, there is no doubt that something is lost in translation by not connecting with the mediator in person. There is a concern that individuals can “disengage” from the process more easily if they are attending remotely than they can when they are face-to-face. Another concern expressed by parties who are appearing remotely relates to confidentiality. As we all know, confidentiality is a cornerstone of the mediation process. Parties tend to worry about “who’s in the room” when they are appearing remotely; therefore, security measures need to be in place to ensure that the “virtual rooms” are secure. An additional issue with virtual mediations surrounds execution of the mediated settlement agreement. A

mediated settlement agreement certainly can be executed in a virtual mediation; however, there is a bit more back-and-forth by email to finalize the MSA (including signatures), as opposed to putting pen-to-paper in person before the parties leave the mediator's offices.

Since arbitration is essentially a bench trial without appeal, it is not as logistically challenging as a jury trial might be to conduct remotely. However, there are important considerations when deciding if and how to conduct a virtual arbitration. First, unless the parties' agreement specifically excludes a virtual arbitration, Rule 32(c) of the AAA Commercial Arbitration Rules allows for an arbitrator to order an arbitration be conducted virtually:

When deemed appropriate, the arbitrator may also allow for the presentation of evidence by alternative means including video conferencing, internet communication, telephonic conferences and means other than in-person presentation.<sup>1</sup>

A virtual arbitration can be more cost-effective for parties, especially for those and their witnesses, expert and otherwise, who are out-of-state and can appear remotely rather than travel to Texas. When planning a virtual arbitration, make sure to refer to the AAA-ICDR Model Order and Procedures for a Virtual Hearing by Videoconference for guidance.<sup>2</sup> There are many details to consider in your approach to a virtual arbitration. For instance, using documents remotely can be difficult, especially if they are voluminous. Here are some items to consider when you are deciding how best to utilize documents during a virtual arbitration:

- (1) How to present documents to the witness, particularly those you want to use for cross-examination that you don't want to highlight ahead of the witness' testimony.
- (2) How to present the documents to the arbitrator. For instance, the arbitrator may request Dropbox or he/she may request hard copies of documents instead.

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<sup>1</sup> R. 32(c) AAA Commercial Arbitration Rules and Mediation Procedures (amended and effective Oct. 1, 2013), (Fee Schedule Amended and Effective July 1, 2016) *available at* <https://adr.org/sites/default/files/Commercial%20Rules.pdf>.

<sup>2</sup> See AAA-ICDR Model Order and Procedures for a Virtual Hearing by Videoconferencing *available at* <https://go.adr.org>.

Some other issues to consider when setting up a virtual arbitration:

- (1) If you are going to have a court reporter, consider where he/she will be located during the arbitration. Some parties object to the court reporter being present in the room with one of the parties versus the other; and prefer that the court reporter either be present with the arbitrator(s) or in another neutral location.
- (2) Work with the other party to reach an agreement on sharing a videoconferencing company. Consider having a back-up conference line to call if the internet connection is lost during a witness' testimony.
- (3) Make sure that security measures are put in place by the hearing hosts to safeguard the proceeding from being improperly recorded or viewed.
- (4) Make sure that measures are in place to enforce "The Rule" (e.g., no virtual background) – ensuring that there are no unauthorized individuals in the room when the witness is testifying.

After a year in this pandemic world and the hint of a post-pandemic future, it seems clear that virtual mediations and arbitrations will continue on some level. Therefore, it is important to be prepared for the possibility of a remote mediation or arbitration; they may well be the most efficient and beneficial option for a particular case.

## 1-1 INTRODUCTION

There are several types of Alternative Dispute Resolution procedures available for the resolution of business disputes in Texas. In practice, however, two methods clearly dominate the field, mediation and arbitration. For that reason, this chapter is limited to a discussion of those processes.

## 1-2 LAW GOVERNING MEDIATION IN TEXAS

### 1-2:1 The Process in Texas

The 1987 Alternative Dispute Resolution Procedures Act provides an all-inclusive format for Alternative Dispute Resolution

(ADR) practice in Texas.<sup>3</sup> There are several different types of ADR addressed in the Act, but they are all confidential and nonbinding.<sup>4</sup>

**PRACTICE POINTER:**

It is important to note that ADR in Texas is not a substitute for a trial by jury, nor is it a deterrent to the same. Instead, ADR in Texas is a tool offered to litigants to assist in fully exploring settlement before deciding whether or not a trial is necessary. Even in court-ordered mediation, no party can be compelled to settle.

The ADR Act's mandate of confidentiality is comprehensive in scope. Any communications during the mediation process are absolutely confidential and may not be used as evidence in any judicial or administrative proceeding.<sup>5</sup> It is important to note that

<sup>3</sup> Tex. Civ. Prac. & Rem. Code § Ann., Chapter 154.

<sup>4</sup> Tex. Civ. Prac. & Rem. Code § Ann. 154.023. Mediation. (a) Mediation is a forum in which an impartial person, the mediator, facilitates communication between parties to promote reconciliation, settlement or understanding among them. (b) A mediator may not impose his own judgment on the issues for that of the parties. (c) Mediation includes victim-offer mediation by the Texas Department of Criminal Justice described in Article 56.13, Code of Criminal Procedure. Added by Acts 1987, 70th Leg., ch. 1121, Sec. 1, eff. June 20, 1987. Amended by Acts 2001, 77th Leg., ch. 1034, Sec. 12, eff. Sept. 1, 2001. Sec. 154.024. Mini-trial. (a) A mini-trial is conducted under an agreement of the parties, (b) Each party and counsel for the party present the position of the party, either before selected representatives for each party or before an impartial third party, to define the issues and develop a basis for realistic settlement negotiations. (c) The impartial third party may issue an advisory opinion regarding the merits of the case. (d) The Advisory opinion is not binding on the parties unless the parties agree that it is binding and enter into a written settlement agreement. Added by Acts 1987, 70th Leg., ch. 1121, eff. June 20, 1987. Sec. 154.025. Moderated Settlement Conference. (a) A moderated settlement conference is a forum for case evaluation and realistic settlement negotiations. (b) Each party and counsel for the party present the position of the party before a panel of impartial third parties.

The Panel may issue an advisory opinion regarding the liability or damages of the parties or both. (d) The advisory opinion is not binding on the parties. Added by Acts 1987, 70th Leg., Ch. 1121, Sec. 1, eff. June 20, 1987. Sec. 154.026. Summary Jury Trial. (a) A summary jury trial is a forum for early case evaluation and development of realistic settlement negotiations. (b) Each party and counsel for the party present the position of the party before a panel of jurors. (c) The number of jurors on the panel is six unless the parties agree otherwise. (d) The panel may issue an advisory opinion regarding the liability or damages of the parties or both. (e) The advisory opinion is not binding on the parties. Added by Acts 1987, 70th Leg., ch. 1121, Sec. 1, eff. June 20, 1987. Sec. 154.027. Arbitration. (a) Nonbinding arbitration is a forum in which each party and counsel for the party present the position of the party before an impartial third party, who renders a specific award. (b) If the parties stipulate in advance, the award is binding and is enforceable in the same manner as any contract obligation. If the parties do not stipulate in advance that the award is binding, the award is not binding and serves only as a basis for the parties' further settlement negotiations. Added by Acts 1987, 70th Leg., ch. 1121, sec. 1, eff. June 20, 1987.

<sup>5</sup> Tex. Civ. Prac. & Rem. Code § Ann., Chapter 154.073(a).

if communications are otherwise discoverable or admissible, the confidentiality requirement of mediation will not protect them.<sup>6</sup> Confidentiality extends not only to the party participants, but also to the neutral mediator.<sup>7</sup>

Finally, there is no particular predicate required for mediation in Texas. The process can be by agreement or compelled by judicial order and can be held at any stage of the dispute—pre-suit, during litigation and/or post-judgment.<sup>8</sup>

### 1-2:2 The Facilitator

Section 154.052 of the ADR Act sets forth the qualifications of the neutral mediator. Other than some minimal mandatory training to receive a court appointment or referral (which can be waived), there are no qualifications required.<sup>9</sup>

#### **PRACTICE POINTER:**

In practice, mediators in business disputes in Texas are generally lawyers skilled in business litigation matters or non-lawyers with the specific industry background. The important requirements are that of impartiality and to serve in facilitating the settlement rather than coercing or compelling settlement.<sup>10</sup>

<sup>6</sup> Tex. Civ. Prac. & Rem. Code § Ann., Chapter 154.073(c).

<sup>7</sup> Tex. Civ. Prac. & Rem. Code § Ann., Chapter 154.073(a).

<sup>8</sup> Tex. Civ. Prac. & Rem. Code § Ann., Chapter 154.021.

<sup>9</sup> Tex. Civ. Prac. & Rem. Code § Ann., Chapter 154.052. Qualifications of Impartial Third Party. (a) Except as provided by Subsections (b) and (c), to qualify for an appointment as an impartial third party under this subchapter a person must have completed a minimum of 40 classrooms hours of training in dispute resolution techniques in a course conducted by an alternative dispute resolution system or other dispute resolution organization approved by the court making the appointment. (b) To qualify for an appointment as an impartial third party under this subchapter in a dispute relating to the parent-child relationship, a person must complete the training required by Subsection (a) and an additional 24 hours of training in the fields of family dynamics, child development, and family law. (c) In appropriate circumstances, a court may in its discretion appoint a person as an impartial third party who does not qualify under Subsection (a) or (b) if the court bases its appointment on legal or other professional training or experience in particular dispute resolution processes. Added by Acts 1987, 70th Leg., ch. 1121, sec. 1, eff. June 20, 1987.

<sup>10</sup> Tex. Civ. Prac. & Rem. Code § Ann., Chapter 154.053.

**1-2:3 Texas Courts Ethical Guidelines for Mediators**

Mediators in Texas do not have required credentialing or licensing, nor do they have to possess a law degree or any particular educational background. There are, however, ethical rules promulgated by the Advisory Committee on Court-Annexed Mediation.<sup>11</sup> The committee drafted aspirational guidelines depending primarily on voluntary compliance, secondarily upon reinforcement by peer process and public opinion, and when necessary, by enforcement by the courts through their inherent powers and rules.<sup>12</sup> On June 13, 2005, these ethical rules were adopted by the Texas Supreme Court.<sup>13</sup> The Ethical Guidelines for Mediators should be known by counsel and mediators alike, and counsel should seek redress in the court if a violation is noted. The Guidelines are as follows:

*Mediation Defined.* Mediation is a private process in which an impartial person, a mediator, encourages and facilitates communications between parties to a conflict and strives to promote reconciliation, settlement, or understanding. A mediator should not render a decision on the issues in dispute. The primary responsibility for the resolution of a dispute rests with the parties.

Comment. A mediator's obligation is to assist the parties in reaching a voluntary settlement. The mediator should not coerce a party in any way. A mediator may make suggestions, but all settlement decisions are to be made voluntarily by the parties themselves.

*Mediator Conduct.* A mediator should protect the integrity and confidentiality of the mediation process. The duty to protect the integrity and confidentiality of the mediation process commences with the first communication to the mediator, is continuous in nature, and does not terminate upon the conclusion of the mediation.

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<sup>11</sup>. Order Creating Advisory Committee on Court-Annexed Mediations, Misc. Docket No. 96-9125 (May 7, 1996 – Texas).

<sup>12</sup>. Order for Approval of Ethical Guidelines for Mediators, Misc. Docket No. 05-9107 (June 13, 2005, amended April 11, 2011 – Texas).

<sup>13</sup>. Order for Approval of Ethical Guidelines for Mediators, Misc. Docket No. 05-9107 (June 13, 2005, amended April 11, 2011 – Texas).

Comment (a). A mediator should not use information obtained during the mediation for personal gain or advantage.

Comment (b). The interests of the parties should always be placed above the personal interests of the mediator.

Comment (c). A mediator should not accept mediations which cannot be completed in a timely manner or as directed by a court.

Comment (d). Although a mediator may advertise the mediator's qualifications and availability to mediate, the mediator should not solicit a specific case or matter.

Comment (e). A mediator should not mediate a dispute when the mediator has knowledge that another mediator has been appointed or selected without first consulting with the other mediator or the parties unless the previous mediation has been concluded.

Comment (f). A mediator should not simultaneously conduct more than one mediation session unless all parties agree to do so.

*Mediation Costs.* As early as practical, and before the mediation session begins, a mediator should explain all fees and other expenses to be charged for the mediation. A mediator should not charge a contingent fee or a fee based upon the outcome of the mediation. In appropriate cases, a mediator should perform mediation services at a reduced fee or without compensation.

Comment (a). A mediator should avoid the appearance of impropriety in regard to possible negative perceptions regarding the amount of the mediator's fee in court-ordered mediations.

Comment (b). If a party and the mediator have a dispute that cannot be resolved before commencement of the mediation as to the mediator's fee, the mediator should decline to serve so that the parties may obtain another mediator.

*Disclosure of Possible Conflicts.* Prior to commencing the mediation, the mediator should make full disclosure of any known relationships with the parties or their counsel that may affect or give

the appearance of affecting the mediator's neutrality. A mediator should not serve in the matter if a party makes an objection to the mediator based upon a conflict or perceived conflict.

Comment (a). A mediator should withdraw from a mediation if it is inappropriate to serve.

Comment (b). If after commencement of the mediation the mediator discovers that such a relationship exists, the mediator should make full disclosure as soon as practicable.

*Mediator Qualifications.* A mediator should inform the participants of the mediator's qualifications and experience.

Comment. A mediator's qualifications and experience constitute the foundation upon which the mediation process depends; therefore, if there is any objection to the mediator's qualifications to mediate the dispute, the mediator should withdraw from the mediation. Likewise, the mediator should decline to serve if the mediator feels unqualified to do so.

*The Mediation Process.* A mediator should inform and discuss with the participants the rules and procedures pertaining to the mediation process.

Comment (a). A mediator should inform the parties about the mediation process no later than the opening session.

Comment (b). At a minimum, the mediator should inform the parties of the following: (1) the mediation is private (Unless otherwise agreed by the participants, only the mediator, the parties and their representatives are allowed to attend.); (2) the mediation is informal (There are no court reporters present, no record is made of the proceedings, no subpoena or other service of process is allowed, and no rulings are made on the issues or the merits of the case.); and (3) the mediation is confidential to the extent provided by law.<sup>14</sup>

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<sup>14</sup>. See, e.g., Tex. Civ. Prac. & Rem. Code, Chapter 154.053 and 154.073.

*Convening the Mediation.* Unless the parties agree otherwise, the mediator should not convene a mediation session unless all parties and their representatives ordered by the court have appeared, corporate parties are represented by officers or agents who have represented to the mediator that they possess adequate authority to negotiate a settlement, and an adequate amount of time has been reserved by all parties to the mediation to allow the mediation process to be productive.

Comment. A mediator should not convene the mediation if the mediator has reason to believe that a *pro se* party fails to understand that the mediator is not providing legal representation for the *pro se* party. In connection with *pro se* parties, see also Guidelines #9, 11 and 13 and associated comments below.

*Confidentiality.* A mediator should not reveal information made available in the mediation process, which information is privileged and confidential, unless the affected parties agree otherwise or as may be required by law.

Comment (a). A mediator should not permit recordings or transcripts to be made of mediation proceedings.

Comment (b). A mediator should maintain confidentiality in the storage and disposal of records and should render anonymous all identifying information when materials are used for research, educational or other informational purposes.

Comment (c). Unless authorized by the disclosing party, a mediator should not disclose to the other parties information given in confidence by the disclosing party and should maintain confidentiality with respect to communications relating to the subject matter of the dispute. The mediator should report to the court whether or not the mediation occurred, and that the mediation either resulted in a settlement or an impasse, or that the mediation was either recessed or rescheduled.

Comment (d). In certain instances, applicable law may require disclosure of information revealed in the mediation process. For example, the Texas Family

Code may require a mediator to disclose child abuse or neglect to the appropriate authorities. If confidential information is disclosed, the mediator should advise the parties that disclosure is required and will be made.

*Impartiality.* A mediator should be impartial toward all parties.

Comment. If a mediator or the parties find that the mediator's impartiality has been compromised, the mediator should offer to withdraw from the mediation process. Impartiality means freedom from favoritism or bias in word, action, and appearance; it implies a commitment to aid all parties in reaching a settlement.

*Disclosure and Exchange of Information.* A mediator should encourage the disclosure of information and should assist the parties in considering the benefits, risks, and the alternatives available to them.

Comment (a). A mediator should not knowingly misrepresent any material fact or circumstance in the course of mediation.

*Professional Advice.* A mediator should not give legal or other professional advice to the parties.

Comment (a). In appropriate circumstances, a mediator should encourage the parties to seek legal, financial, tax or other professional advice before, during or after the mediation process.

Comment (b). A mediator should explain generally to *pro se* parties that there may be risks in proceeding without independent counsel or other professional advisors.

*No Judicial Action Taken.* A person serving as a mediator generally should not subsequently serve as a judge, master, guardian ad litem, or in any other judicial or quasi-judicial capacity in matters that are the subject of the mediation.

Comment. It is generally inappropriate for a mediator to serve in a judicial or quasi-judicial capacity in a matter in which the mediator has had communications with

one or more parties without all other parties present. For example, an attorney-mediator who has served as a mediator in a pending litigation should not subsequently serve in the same case as a special master, guardian ad litem, or in any other judicial or quasi-judicial capacity with binding decision-making authority. Notwithstanding the foregoing, where an impasse has been declared at the conclusion of a mediation, the mediator if requested and agreed to by all parties, may serve as the arbitrator in a binding arbitration of the dispute, or as a third-party neutral in any other alternative dispute proceeding, so long as the mediator believes nothing learned during private conferences with any party to the mediation will bias the mediator or will unfairly influence the mediator's decisions while acting in the mediator's subsequent capacity.

*Termination of Mediation Session.* A mediator should postpone, recess, or terminate the mediation process if it is apparent to the mediator that the case is inappropriate for mediation or one or more of the parties is unwilling or unable to participate meaningfully in the mediation process.

*Agreements In Writing.* A mediator should encourage the parties to reduce all settlement agreements to writing.

*Mediators Relationship with the Judiciary.* A mediator should avoid the appearance of impropriety in the mediator's relationship with a member of the judiciary or the court staff with regard to appointments or referrals to mediation.

## **1-2:4 Legal Issues in Mediation**

### **1-2:4.1 Enforceability of a Mediated Settlement Agreement**

The Mediated Settlement Agreement is a contract and is therefore governed by the same rules of construction applicable to all contracts.<sup>15</sup> Thus, in construing the Mediated Settlement Agreement, our primary concern is ascertaining the true intent of

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<sup>15</sup> See *Doe v. Tex. Ass'n of Sch. Bds., Inc.*, 283 S.W.3d 451, 458 (Tex. App.—Fort Worth 2009, pet. denied).

the parties as expressed in the agreement.<sup>16</sup> “Words in a contract must carry their ordinary, generally accepted meanings unless the contract itself shows that the terms have been used in a technical or different sense. In construing a contract, we may not rewrite it or add to its language.”<sup>17</sup> The interpretation of an unambiguous contract is a matter of law to be determined by the trial court.<sup>18</sup>

**PRACTICE POINTER:**

Written settlement agreements and Rule 11 agreements may be enforced as contracts even if one party withdraws consent before judgment is entered on the agreement.<sup>19</sup> When consent is withdrawn, an agreed judgment based on the settlement agreement is inappropriate; instead, the party seeking enforcement of the settlement agreement must pursue a claim for breach of contract.<sup>20</sup>

An independent suit can be filed to enforce a Mediated Settlement Agreement or an amended pleading in the original cause, but the court also will entertain a motion to enforce the

<sup>16</sup>. See *Doe v. Tex. Ass’n of Sch. Bds., Inc.*, 283 S.W.3d 451, 458 (Tex. App.—Fort Worth 2009, pet. denied) (citing *NP Anderson Cotton Exch., L.P. v. Potter*, 230 S.W.3d 457, 463 (Tex. App.—Fort Worth 2007, no pet.)); see *Republic Nat’l Bank of Dallas v. Nat’l Bankers Life Ins. Co.*, 427 S.W.2d 76, 79-80 (Tex. Civ. App.—Dallas 1968, writ ref’d n.r.e) (noting that courts should not consider the “intention which the parties may have had, but failed to express in the instrument”).

<sup>17</sup>. See *Doe v. Tex. Ass’n of Sch. Bds., Inc.*, 283 S.W.3d 451, 458 (Tex. App.—Fort Worth 2009, pet. denied) (citation omitted).

<sup>18</sup>. *Gulf Ins. Co. v. Burns Motors, Inc.*, 22 S.W.3d 417, 423 (Tex. 2000).

<sup>19</sup>. *Ford Motor Co. v. Castillo*, 279 S.W.3d 656, 663 (Tex. 2009); *Padilla v. La France*, 907 S.W.2d 454, 461 (Tex. 1995); see Tex. Civ. Prac. & Rem. Code Ann. 154.071(a) (West 2011) (“If the parties reach a settlement and execute a written agreement disposing of the dispute, the agreement is enforceable in the same manner as any other written contract”); Tex. R. Civ. P. § 11; *City of Roanoke v. Town of Westlake*, 111 S.W.3d 617, 626 (Tex. App.—Fort Worth 2003, pet. denied); *Duque v. Wells Fargo, N.A.*, 462 S.W.3d 542, 547 (Tex. App.—Houston [1st Dist.] 2015, no pet.) (“an agreed judgment is to be construed in the same manner as a contract”).

<sup>20</sup>. *Ford Motor Co. v. Castillo*, 279 S.W.3d 656, 663 (Tex. 2009); *Padilla v. LaFrance*, 907 S.W.2d 454, 461 (Tex. 1995) (“Although a court cannot render a valid agreement absent consent at the time it is rendered, this does not preclude the court, after proper notice and hearing, from enforcing a settlement agreement ... even though one side no longer consents to the settlement”); *Alcantar v. Okla. Nat’l Bank*, 47 S.W.3d 815, 819 (Tex. App.—Fort Worth 2001, no pet.). However, in family law, when consent is withdrawn a court may decline to enter a judgment on a Mediated Settlement agreement if the court finds that a party to the agreement was a victim of family violence, and that the circumstance impaired the party’s ability to make decisions, and the agreement is not in the child’s best interest. See *In re Lee*, 411 S.W.3d 445, 455 n.10 (Tex. 2013).

Mediated Settlement Agreement.<sup>21</sup> If the motion satisfies the general purpose of pleadings, which is to give the other party fair notice of the claim and the relief sought, it is sufficient to allow the trial court to render judgment enforcing the settlement.<sup>22</sup>

Since the Mediated Settlement Agreement is enforceable just as any contract, defenses to enforcement are those available to any contract.<sup>23</sup> If the agreement's language can be given a certain and definite meaning, the agreement is not ambiguous, and the Mediated Settlement Agreement's construction is a matter for the court.<sup>24</sup> But if the agreement is susceptible to more than one reasonable interpretation, the agreement is ambiguous, creating a fact issue as to the parties' intent.<sup>25</sup> If a Mediated Settlement Agreement is ambiguous, the court or trier of fact will have to determine its meaning before enforcing it.<sup>26</sup>

#### 1-2:4.2 The Mediation Privilege

The confidentiality of the mediation is of extreme importance. In fact, the sanctity of the process and the communications among counsel can only be pierced if something was done in the mediation that would be grounds for a new and independent tort.<sup>27</sup>

<sup>21</sup>. See *Neashitt v. Warren*, 105 S.W.3d 113, 117 (Tex. App.—Fort Worth 2003, no pet.); see also *Twist v. McAllen Nat'l Bank*, 248 S.W.3d 351, 361 (Tex. App.—Corpus Christi 2007, orig. proceeding [mand. denied]) (holding that an oral motion to enforce a settlement agreement was sufficient because “[a]s long as the motion recites the terms of the agreement, states that the other party has revoked its previously stated consent to the agreement, and requests the trial court to grant relief, the motion is sufficient”); *Bayway Servs., Inc. v. Ameri-Build Constr., L.C.*, 106 S.E.3d 156, 160 (Tex. App.—Houston [1st Dist.] 2003, no pet.).

<sup>22</sup>. *Twist v. McAllen Nat'l Bank*, 248 S.W.3d 351, 361 (Tex. App.—Corpus Christi, 2007, orig. proceeding [mandamus denied]); *Neashitt v. Warren*, 105 S.W.3d 113, 117 (Tex. App. Fort Worth 2003, no pet.).

<sup>23</sup>. *Ford Motor Co. v. Castillo*, 279 S.W.3d 656, 663 (Tex. 2009); *Padilla v. La France*, 907 S.W.2d 454, 461 (Tex. 1995); see Tex. Civ. Prac. & Rem. Code Ann. § 154.071(a) (West 2011) (“If the parties reach a settlement and execute a written agreement disposing of the dispute, the agreement is enforceable in the same manner as any other written contract.”); Tex. R. Civ. P. § 11.

<sup>24</sup>. *Chrysler Ins. Co. v. Greenspoint Dodge of Houston, Inc.*, 297 S.W.3d 248, 252 (Tex. 2009) (pet. curiam).

<sup>25</sup>. *J.M. Davidson, Inc. v. Webster*, 128 S.W.3d 223, 229 (Tex. 2003).

<sup>26</sup>. See *Milner v. Milner*, 361 S.W.3d 615 (Tex. 2012).

<sup>27</sup>. *Hydroscience Technologies, Inc. v. Hydroscience, Inc.*, 401 S.W.3d 783, 795 (Tex. App.—Dallas, 2013, writ denied) (In affirming summary judgment, the court of appeals sustained the exclusion of parol evidence regarding discussions during mediation that would have altered the settlement and consent judgment ultimately reached in the wake of that mediation. The appeals court reaffirmed a prior decision holding that the mediation privilege may be pierced to support “a new and independent tort” that occurred during the

This exception is narrowly and strictly construed.<sup>28</sup> A reading of caselaw establishes that it is clearly the intent of the courts that the sanctity of the mediation privilege will not be breached even if it would affect or change the agreement reached at mediation.<sup>29</sup>

### **PRACTICE POINTER:**

The preparation of a mediation checklist with dates certain for performance is a valuable tool for a successful mediation. Suggestions for the checklist are as follows:

#### **30 Days Before Mediation**

- Calendar date, time and location of mediation;
- Advise client (and all interested parties) of details and tell client to be at location 45 minutes before scheduled start. Determine primary decision maker(s) for your client and make sure they are informed on all pertinent issues;
- Prepare mediation memo in format requested by the mediator. Be sure to educate the mediator on unique legal issues or client concerns;
- Contact any interested party or lender by phone and in writing. Get written confirmation of any claimed interest. Start/continue negotiations with those parties. Educate on high risk of litigation and incentives needed for your client to pursue your case, settle or try;
- Verify the decision makers for the other side of litigation whether it is a private party or corporate entity or the government. Initiate phone or email contact with opposing counsel if possible. Determine that adversary has all information necessary for evaluation. If mediation goal is

mediation, but found that exception to the privilege inapplicable here. Further, the court held the appellant could not be allowed to attack or alter the final consent judgment that flowed from the mediation, because appellant had never filed a bill of review with respect to that judgment and the time had long passed for it to do so.)

<sup>28</sup> See *Hydroscience Technologies, Inc. v. Hydroscience, Inc.*, 401 S.W.3d 783, 796 (Tex. App.—Dallas, 2013, writ denied) (“A cloak of confidentiality surrounds mediation, and the cloak should be breached only sparingly”, citing *Allison v. Fire Ins. Exch.*, 98 S.W. 3d 260 (Tex. App.- Austin 2002, pet. granted, judgment vacated w.r.m.).

<sup>29</sup> *In re Empire Pipeline Corporation*, 323 S.W.3d 308 (Tex. App.—Dallas 2010, orig. proceeding).

settlement rather than information gathering, do not withhold information that helps your opponent explain your position to decision makers that may not be present at mediation; and

- Research any other issues that might motivate settlement. If opposing party is publicly traded, look at reporting requirements and upcoming deadlines; if it is a private company, do research to determine if it is being marketed for sale or has other pending matters that might motivate or prevent resolution of claim. Other matters include personal issues affecting management or ownership. If nothing else, use Google!

#### 14 Days Before Mediation

- Outline mediation presentation and what, if any, exhibits you wish to discuss with opponents. If exhibit or deposition testimony is to be discussed at mediation, have a copy for opponent representatives and mediator;
- Send demand (or solicit a demand) at least 2 weeks before mediation date. Provide as much information in demand as possible without compromising trial strategy. If helpful, any expert reports;
- Review and update all discovery answers and responses to pending motions; and
- Confirm that you have all information on persons with interest in property and have analyzed all legal obligations to them. Contact again to negotiate if possible. Advise client in writing of status and issues.

#### 7 Days Before Mediation

- Meet with client and proposed mediation representatives at least one week before mediation and discuss mediation process, offers and demands, and necessity of not speaking in front of mediator. Explore client issues and discuss different types of compensation, funding, payment dates, potential business solutions in lieu of cash, confidentiality and disparagement concerns;

- Run through any electronic mediation presentation. Make sure it works;
- Contact mediator's office and determine what, if any, technical support you need to bring for presentation; and
- Send letter to opposing lawyers and tell them who will be attending on behalf of client and request written notice of who will be attending on their behalf. Copy mediator. Have your office call until information received.

#### 1 Day Before Mediation

- Contact client and confirm attendance and confirm time and location;
- Contact opposing party and verify names of attendees at mediation;
- Contact anyone who may not be at mediation, but whose interest may affect mediation. Get phone contact information to allow access during mediation if necessary; and
- Review presentation and exhibits. Have copies of exhibits ready.

### 1-3 LAW GOVERNING ARBITRATION IN TEXAS

Although new to many Texas lawyers, merchants and commercial interests have used arbitration to resolve disputes for centuries.<sup>30</sup> In fact, most business disputes in England were decided by arbitration up to the time of Lord Mansfield.<sup>31</sup> Although the courts have been the primary tribunal for the resolution of business disputes since that time, many business interests prefer

<sup>30</sup> Paul L. Sayre, *Development of Commercial Arbitration Law*, 37 Yale L.J. 595, 598 (1928); Harry Baum & Leon Pressman, *The Enforcement of Commercial Arbitration Agreements in the Federal Courts* (pts. 1 & 2), 8 N.Y.U. L. Q. Rev. 238, 242 (1930-1931); see also *Castle-Curtis Arbitration*, 64 Conn. 501, 505 (1894) (Arbitration is the submission of some disputed matter to selected persons and the substitution of their decision or award for the judgment of the established tribunals of justice.).

<sup>31</sup> See Julius H. Cohen, *Commercial Arbitration and the Law* (1918) (discussing arbitration in England and colonial America).

private arbitration.<sup>32</sup> They thus seek to implement arbitration by agreement. More frequently, they include arbitration clauses in commercial contracts under which they agree to arbitrate disputes that might later arise from the contractual relationship.

Despite the widespread use of arbitration and arbitration agreements among merchants and other business interests in England and the United States, the common law in both countries was hostile to arbitration agreements.<sup>33</sup> While courts usually enforced arbitration awards once they were rendered, they refused to enforce prospective agreements to arbitrate.<sup>34</sup> The result was that an agreement to arbitrate was revocable at the whim of any party until an arbitration award actually was rendered.<sup>35</sup> Pressure from business interests eventually brought about legislation that reversed the common law and required courts to enforce some or all agreements to arbitrate.<sup>36</sup>

Although arbitration enjoys favored status in American law, such status came about only as a result of purposeful legislative efforts. In Texas, the two main statutes governing arbitration agreements are the Federal Arbitration Act<sup>37</sup> (FAA) and the Texas Arbitration Act<sup>38</sup> (TAA).

### 1-3:1 The Federal Arbitration Act

Congress enacted the FAA in 1925 to make written pre-dispute arbitration provisions in maritime transactions and contracts involving interstate commerce enforceable.<sup>39</sup> Based on the idea

<sup>32</sup> See Stephen B. Goldberg, *Dispute Resolution: Negotiation, Mediation, and Other Processes*, 199-207 (2d ed. 1992) (discussing advantages and disadvantages of arbitration).

<sup>33</sup> Harry Baum & Leon Pressman, *The Enforcement of Commercial Arbitration Agreements in the Federal Courts* (pts. 1 & 2), 8 N.Y.U. L. Q. Rev. 238, 242 (1930-31).

<sup>34</sup> Harry Baum & Leon Pressman, *The Enforcement of Commercial Arbitration Agreements in the Federal Courts* (pts. 1 & 2), 8 N.Y.U. L. Q. Rev. 238, 242 (1930-31) (citing *Hall v. Hardy*, 24 Eng. Rep. 1023, 1025 (1733)).

<sup>35</sup> Harry Baum & Leon Pressman, *The Enforcement of Commercial Arbitration Agreements in the Federal Courts* (pts. 1 & 2), 8 N.Y.U. L. Q. Rev. 238, 242 (1930-1931) (citing *Kinney v. Baltimore & O. Employees' Relief Ass'n*, 14 S.E. 8 (W.Va. 1891); *Condon v. South Side R.R. Co.*, 55 Va. 302 (14 Gratt. 1858)).

<sup>36</sup> See Julius H. Cohen & Kenneth Dayton, *The New Federal Arbitration Law*, 12 Va. L. Rev. 265, 266 (1926).

<sup>37</sup> 9 U.S.C. § 1 et seq.

<sup>38</sup> Tex. Civ. Prac. & Rem. Code § 171.001 et seq.

<sup>39</sup> See 9 U.S.C. § 2 (declaring that a written provision to arbitrate, in maritime transactions or contracts involving interstate commerce, shall be valid and enforceable "save upon such grounds as exist at law or in equity for the revocation of any contract").

that arbitration would be faster, cheaper, and more efficient than litigation, Congress, through the FAA, sought to cure judicial hostility towards arbitration.<sup>40</sup>

Section 2 of the FAA states:

A written provision in any maritime transaction or a contract evidencing a transaction involving [interstate] commerce to settle by arbitration a controversy thereafter arising out of such contract or transaction, or the refusal to perform the whole or any part thereof, or an agreement in writing to submit to arbitration an existing controversy arising out of such contract, transaction, or refusal, shall be valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract.<sup>41</sup>

The United States Supreme Court has declared that Congress's purpose in enacting the FAA was "to reverse the longstanding judicial hostility to arbitration agreements . . . and to place arbitration agreements upon the same footing as other contracts."<sup>42</sup> Congress sought to achieve two goals under the FAA: (1) to cure disparity in the treatment of arbitration agreements; and (2) to promote arbitration between two commercial parties with equal bargaining power.<sup>43</sup>

The United States Supreme Court has interpreted the FAA as a body of substantive law enacted pursuant to Congress's Commerce Clause power,<sup>44</sup> enforceable in both state and federal courts.<sup>45</sup>

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<sup>40</sup>. See Margaret M. Harding, *The Clash Between Federal and State Arbitration Law and the Appropriateness of Arbitration As a Dispute Resolution Process*, 77 Neb. L. Rev. 397, 399–401 (1998) (advocating that, at the time of the FAA's enactment, arbitration was "believed to be more efficient than litigation, less costly and a better process for parties with continuing business relationships").

<sup>41</sup>. 9 U.S.C. § 2.

<sup>42</sup>. *Green Tree Fin. Corp.-Ala. v. Randolph*, 531 U.S. 79, 89 (2000) (quoting *Gilmer v. Interstate/Johnson Lane Corp.*, 500 U.S. 20, 24 (1991)).

<sup>43</sup>. See *Keymer v. Mgmt. Recruiters Int'l, Inc.*, 169 F.3d 501, 504 (8th Cir. 1999) (indicating that Congress's purpose in enacting the FAA "was to reverse judicial hostility to arbitration agreements and to place arbitration agreements on equal footing with other contracts").

<sup>44</sup>. See *Prima Paint Corp. v. Flood & Conklin Mfg. Co.*, 388 U.S. 395, 405 (1967) ("And it is clear beyond dispute that the federal arbitration statute is based upon . . . the incontestable federal foundations of 'control over interstate commerce. . . .'""); see also U.S. Const. art. I, § 8, cl. 3 (declaring that Congress has the power to regulate commerce).

<sup>45</sup>. See *Southland Corp. v. Keating*, 465 U.S. 1, 11–2 (1984) (asserting that the FAA is a body of substantive law, enacted pursuant to the Commerce Clause, that is enforceable

In *Southland Corp. v. Keating*,<sup>46</sup> the Supreme Court noted that by enacting Section 2 of the FAA, “Congress declared a national policy favoring arbitration and withdrew the power of the states to require a judicial forum for the resolution of claims which the contracting parties agreed to resolve by arbitration.”<sup>47</sup> Further, the Supreme Court has declared that Section 2 of the FAA “embodies a clear federal policy of requiring arbitration unless the agreement to arbitrate is not part of a contract evidencing interstate commerce or is revocable upon such grounds as exist at law or in equity for the revocation of any contract.”<sup>48</sup> Thus, through endorsement of the FAA, “Congress intended to foreclose state legislative attempts to undercut the enforceability of arbitration agreements.”<sup>49</sup>

**PRACTICE POINTER:**

True to its purpose, the FAA provides substantive rules that apply in federal and state courts to prevent states from limiting the enforceability of arbitration agreements. The FAA applies to all suits in state and federal court when the dispute concerns a “contract evidencing a transaction involving commerce.”<sup>50</sup>

But, “[t]he precise boundary between national and state power over commerce has never yet been, and doubtless never can be, delineated by a single abstract definition. The most widely accepted

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in both state and federal courts); see also *Moses H. Cone Mem'l Hosp. v. Mercury Constr. Corp.*, 460 U.S. 1, 24 (1983) (expressing that the effect of Section 2 of the FAA was “to create a body of federal substantive law of arbitrability, applicable to any arbitration agreement within the coverage of the Act”); Anne Brafford, *Arbitration Clauses in Consumer Contracts of Adhesion: Fair Play or Trap for the Weak and Unwary?*, 21 J. Corp. L. 331, 338 (1996) (indicating that “[t]he Supreme Court held that the purpose of the FAA was to create a body of federal substantive law that governs in both state and federal courts”).

<sup>46</sup> *Southland Corp. v. Keating*, 465 U.S. 1 (1984).

<sup>47</sup> *Southland Corp. v. Keating*, 465 U.S. 1, 10 (1984) (stating the purpose and effects of Congress’s passing of the FAA).

<sup>48</sup> *Perry v. Thomas*, 482 U.S. 483, 489 (1987).

<sup>49</sup> *Southland Corp. v. Keating*, 465 U.S. 1, 16 (1984); *Venture Cotton Coop. v. Freeman*, 435 S.W.3d 222, 227 (Tex. 2014) (“Special state rules for interpreting arbitration agreements cannot coexist with the FAA because Congress intended the act as its response to a ‘longstanding judicial hostility to arbitration agreements.’”).

<sup>50</sup> *Jack B. Anglin Co. Inc. v. Tipps*, 842 S.W.2d 266, 269–70 (Tex. 1992); see also *Citizens Bank v. Alafabco, Inc.*, 539 U.S. 52, 56 (2003) (holding that “involving commerce” was equivalent to “affecting commerce,” placing the FAA within the ambit of the broadest possible exercise of Commerce Clause power).

general description of that part of commerce which is subject to federal power is that given in 1824 by Chief Justice Marshall. ‘Commerce, undoubtedly, is traffic, but it is something more: it is intercourse. It describes the commercial intercourse between nations, and parts of nations, in all its branches.’”<sup>51</sup>

The FAA applies broadly to all arbitration agreements concerning “any contract evidencing a transaction involving commerce.”<sup>52</sup> The phrase “involving commerce” means commerce among

<sup>51</sup>. See *United States v. South-Eastern Underwriters Ass’n*, 322 U.S. 533, 550–51 (1944) (footnote and citation omitted).

<sup>52</sup>. 9 U.S.C. § 2 et seq. Because the FAA’s scope is intentionally expansive, few disputes fall outside the sweeping definition of “commerce.” See, e.g., *In re Nexion Health at Humble, Inc.*, 173 S.W.3d 67, 69 (Tex. 2005) (holding dispute based on Medicare payments to healthcare provider on defendant’s behalf qualified as interstate commerce); *In re Nasr*, 50 S.W.3d 23, 25–6 n.1 (Tex. App.—Beaumont 2001, orig. proceeding) (finding interstate commerce included a contract to build Texas residence and listed Wal-Mart as a subcontractor); *Palm Harbor Homes, Inc. v. McCoy*, 944 S.W.2d 716, 720 (Tex. App. Fort Worth 1997, orig. proceeding) (holding purchase of mobile home manufactured in Texas that was comprised of components manufactured in other states established interstate commerce). More particularly in *Allied-Bruce Terminix Cos. v. Dobson*, the United States Supreme Court construed the FAA to extend as far as the Commerce Clause will reach. 513 U.S. 265, 273, 276-81 (1995). In reaching this conclusion, the Court said that the words “evidencing a transaction involving commerce” from Section 2 of the FAA must turn out, in fact, to have involved interstate commerce, even if the parties did not contemplate an interstate commerce connection. Article I, Section 8 of the United States Constitution contains the Commerce Clause, which states in relevant part: “The Congress shall have Power . . . To regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes[.]” From this, the United States Supreme Court has made clear that there is a “national interest in keeping interstate commerce free from interferences which seriously impede it.” *Southern Pac. Co. v. Arizona*, 325 U.S. 761, 795 (1945) (Douglas, J., dissenting) (“[T]he question presented is whether the total effect of Arizona’s train-limit as a safety measure is so slight as not to outweigh the national interest in keeping interstate commerce free from interferences which seriously impede or burden it.”). Similarly, Article VI, Section 2 of the United States Constitution contains the Supremacy Clause, which states: “This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding.” Regarding this provision, the United States Supreme Court said long ago that if laws of a state “come into collision with an act of Congress . . . [they] must yield to the law of Congress[.]” *Gibbons v. Ogden*, 14 U.S. 1, 210 (9 Wheat 1) (1824). The FAA invokes both of these constitutional provisions, and the language of what the FAA covers provides: “A written provision in any maritime transaction or a contract evidencing a transaction involving commerce to settle by arbitration a controversy thereafter arising out of such contract or transaction, or the refusal to perform the whole or any part thereof, or an agreement in writing to submit to arbitration an existing contract, transaction, or refusal, shall be valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract.” 9 U.S.C. § 2. The FAA is applicable in state courts and pre-emptive of state law because of the Commerce and Supremacy Clauses. See *Southerland Corp. v. Keating*, 465 U.S. 1, 16 (1984) (“In creating a substantive rule applicable in state as well as federal courts, Congress intended to foreclose state legislative attempts to undercut the enforceability of arbitration agreements.”) (footnotes omitted) and at 17 (Stevens, J., concurring in part and dissenting in part) (“The Court holds that an

different states or with foreign nations.<sup>53</sup> Courts have interpreted the term “commerce” liberally to ensure that the widest possible range of transactions fall within the Act’s scope.<sup>54</sup>

**PRACTICE POINTER:**

The power of the federal government to regulate commerce, though broad indeed, has limits.<sup>55</sup> A contract, taken alone, that does not have a substantial effect on interstate commerce may still be regulated by federal legislation, *but only if*—the aggregate economic activity would represent a general practice that bears on interstate commerce in a substantial way.<sup>56</sup> The FAA is not directed at any given industry—the focus when the FAA was adopted was not on any particular industry’s impact on interstate commerce.<sup>57</sup>

Because Congress is without legislative authority to regulate activities through the Commerce Clause in purely local matters that do not affect interstate commerce,<sup>58</sup> a party seeking to compel arbitration under the FAA must first establish its right to arbitrate under the FAA by showing that the transaction affects interstate commerce.<sup>59</sup>

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arbitration clause that is enforceable in an action in a federal court is equally enforceable if the action is brought in a state court. I agree with that conclusion.”).

<sup>53.</sup> 9 U.S.C. § 1.

<sup>54.</sup> See, e.g., *Perry v. Thomas*, 482 U.S. 483, 490 (1987) (explaining that the FAA provides for the enforcement of arbitration agreements “within the full reach of the Commerce Clause”).

<sup>55.</sup> *Maryland v. Wintz*, 392 U.S. 183, 196–97 n.27 (1968) (“Neither here nor in *Wickard v. Filburn* has the Court declared that Congress may use a relatively trivial impact on commerce as an excuse for broad general regulation of state or private activities. The Court has said only that when a general regulatory statute bears a substantial relation to commerce, the de minimus character of individual instances arising under that statute is of no consequence.”).

<sup>56.</sup> *Citizens Bank v. Alafabco, Inc.*, 539 U.S. 52, 56–7 (2003).

<sup>57.</sup> See *Southern Pacific Co. v. Arizona ex rel. Sullivan*, 325 U.S. 761, 769–70 (1945) (“Congress has undoubted power to redefine the distribution of power over interstate commerce. It may either permit the states to regulate commerce in a manner which would otherwise not be permissible, or exclude state regulation even of matters of peculiarly local concern which nevertheless affect interstate commerce.”) (citations omitted).

<sup>58.</sup> *Allied-Bruce Terminix Co. v. Dobson*, 513 U.S. 265, 268 (1995).

<sup>59.</sup> See *Teal Construction Co. v. Darren Casey Interests, Inc.*, 46 S.W.3d 417, 419 n.1 (Tex. App.—Austin 2001, pet. denied); *Ikon Office Solutions, Inc. v. Eijfert*, 2 S.W.3d 688, 696 (Tex. App.—Houston [14th Dist.] 1999, no pet.). Nonetheless, where the movant’s allegations of a transaction affecting interstate commerce within the scope of the arbitration agreement were not controverted, the movant had no obligation to offer evidence to substantiate the

Despite its broad reach, the FAA specifically does not apply to employment contracts of “seamen, railroad employees, or any other class of workers engaged in foreign or interstate commerce.”<sup>60</sup>

### 1-3:1.1 Ambit of the Federal Arbitration Act

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,”<sup>61</sup> with the exception of “contracts of employment of seamen, railroad employees, or any other class of workers engaged in foreign or interstate commerce.”<sup>62</sup> Both state and federal courts have construed the “involving commerce” phrase very liberally in favor of application of the FAA.<sup>63</sup> The United States Supreme Court has held that the FAA extends to any contract “affecting commerce,” as far as the Commerce Clause will reach.<sup>64</sup> 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.”<sup>65</sup>

### 1-3:1.2 Preemption of State Law

When it applies, the FAA governs proceedings in state courts and preempts state laws adverse to arbitration.<sup>66</sup>

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allegation. *See Maxum Foundations, Inc. v. Salus Corp.*, 779 F.2d 974, 978 n.4 (4th Cir. 1985); *In re Pisgah Contractors, Inc.*, 215 B.R. 679, 684 (W.D.N.C. 1995); *Pitkin v. Fidelity Nat'l Title Ins. Co.*, No. B146419, 2002 WL 462506, at \*4 (Cal. App. 2d Dist. March 27, 2002) (not for publication).

<sup>60</sup> 9 U.S.C. § 1.

<sup>61</sup> 9 U.S.C. §§ 1, 2 (2009).

<sup>62</sup> 9 U.S.C. § 1.

<sup>63</sup> *See Brand FX, LLC v. Rhine*, 458 S.W.3d 195, 202 (Tex. App.—Fort Worth 2015, no pet.) (“[The burden to show that the FAA governed the arbitration agreement] is not onerous and is satisfied with evidence that the contract in fact has some link to interstate commerce.”) (citing *IKON Office Solutions Inc. v. Eifert 2*, S.W.3d 688, 694 (Tex. App.—Houston [14th Dist.] 1999, no pet.); William M. Howard, Annotation, When Does Contract Evidence Transaction Involving Commerce Within Meaning of Federal Arbitration Act (FAA) Legal Issues and Principles, 10 A.L.R. Fed. 2d 489 (2006).

<sup>64</sup> *Citizens Bank v. Alafabco, Inc.*, 539 U.S. 52, 56-7 (2003); *see also In re Nexion Health at Humble, Inc.*, 173 S.W.3d 67, 69 (Tex. 2005).

<sup>65</sup> *In re FirstMerit Bank*, 52 S.W.3d 749, 754 (Tex. 2001).

<sup>66</sup> *See Jack B. Anglin Co. Inc. v. Tipps*, 842 S.W.2d 266, 271 (Tex. 1992) (holding that the FAA applies in Texas state courts and preempts state laws hostile to arbitration); *In re R&R Personnel Specialists*, 146 S.W.3d. 699, 703-04 (Tex. App.—Tyler 2004, orig. proceeding) (same); *Southland Corp. v. Keating*, 465 U.S. 1 (1984) (same; also holding that the California Franchise Investment Law’s requirement of judicial determination of claims brought under

**PRACTICE POINTER:**

Although in most instances, the FAA and the TAA are substantially identical, there are important differences which make the analysis of whether the agreement to arbitrate is governed by the FAA an extremely important one. The primary differences are the available appellate remedies which will be discussed later in this chapter and the FAA's ability to abrogate state statutes which are inconsistent with arbitration.<sup>67</sup> Since the FAA does not confer federal jurisdiction, there must be diversity or a federal question to have the matter in the federal court.<sup>68</sup> Therefore, the analysis of whether or not the FAA is applicable will most likely be done in Texas state court.

**1-3:1.3 Remedies Under the Federal Arbitration Act**

The FAA mandates that the court order arbitration as soon as the existence of an agreement to arbitrate has been demonstrated.<sup>69</sup> The court has no discretion and must stay the case pending the completion of the arbitration.<sup>70</sup> Most significantly, no discovery can be ordered pending an arbitration ruling.<sup>71</sup>

**PRACTICE POINTER:**

Because it is difficult to waive one's right to arbitration in Texas, a decision to do discovery before moving to compel arbitration may well be in the best interest of the client. The discovery in state and federal court is typically faster, cheaper and more assured than that which may be allowed in arbitration.

that statute was pre-empted by the FAA); see *Fredricksburg Care Co., L.P. v. Perez*, 461 S.W.3d 513, 528 (Tex. 2015) (Section 74.451 of the Texas Civil Practice and Remedies Code, a state law concerning agreements to arbitrate health care liability, was preempted by the FAA).

<sup>67</sup>. *Marmet Health Care Ctr. Inc. v. Brown*, 132 S. Ct. 1201, 1203 (2012); *In re Poly-America*, 262 S.W.3d 337, 349 (Tex. 2008).

<sup>68</sup>. *Vaden v. Discover Bank*, 129 S. Ct. 1262, 1271 (2009); *Moses H. Cone Hosp. v. Mercury Constr. Corp.*, 460 U.S. 1, 25 (1983).

<sup>69</sup>. 9 U.S.C. § 4.

<sup>70</sup>. 9 U.S.C. § 4.

<sup>71</sup>. See *In re Champion Technologies, Inc.*, 173 S.W.3d 595, 599 (Tex. App.—Eastland, orig. proceeding); see also *In re Heritage Bldg. Sys., Inc.*, 185 S.W.3d 539, 542 (Tex. App.—Beaumont 2006, orig. proceeding).

**1-3:2 The Texas Arbitration Act**

Texas has its own arbitration act. In fact, statutory arbitration has existed in Texas since 1846.<sup>72</sup> Thus, Texas arbitration statutes were passed almost 80 years before federal legislation was passed.

The modern TAA, enacted in 1966, is similar to the FAA in most regards.<sup>73</sup> Notably, however, the TAA requires parties to sign the agreement for a claim of personal injury or when the consideration is less than or equal to \$50,000.<sup>74</sup> Both statutes include nearly identical provisions for appellate procedure and statutory grounds for vacatur and modification of an arbitration award.<sup>75</sup> Like the FAA, the TAA dictates a strong policy in favor of arbitration, mandating that courts compel arbitration upon a showing of an agreement to arbitration.<sup>76</sup> Also, like the FAA, a valid agreement under the TAA can be a pre-dispute agreement or post-dispute agreement, and agreements to arbitrate generally are not revocable.<sup>77</sup>

Under the TAA, an agreement to arbitrate is enforceable if: (1) the agreement is in writing;<sup>78</sup> (2) the dispute or agreement is not a collective bargaining agreement, a claim for workers' compensation benefits, or made before January 1, 1966;<sup>79</sup> (3) the agreement is signed, if necessary, under Section 171.002(b) or Section 171.002(c);<sup>80</sup> (4) the agreement was not unconscionable at the time the agreement was made;<sup>81</sup> and (5) the matter in dispute is within the scope of the arbitration agreement.<sup>82</sup>

<sup>72</sup> Act approved Apr. 25, 1846, 1st Leg., reprinted in 2 H.P.N. Gammel, *The Laws of Texas 1822–97*, at 1433, 1433–34 (Austin, Gammel Book Co. 1898).

<sup>73</sup> Compare Tex. Civ. Prac. & Rem. Code §§ 171.001–.098 (West 2012), with 9 U.S.C. §§ 1–307.

<sup>74</sup> See Tex. Civ. Prac. & Rem. Code Ann. § 171.002. Additionally, Section 171.002 requires the advice and signature of legal counsel for personal injury claims (§ 171.002(c)) and requires the advice of counsel when the consideration is less than or equal to \$50,000 (§ 171.002(b)).

<sup>75</sup> Compare Tex. Civ. Prac. & Rem. Code Ann. § 171.088, with 9 U.S.C. § 10(a).

<sup>76</sup> See Tex. Civ. Prac. & Rem. Code Ann. § 171.021(a).

<sup>77</sup> Tex. Civ. Prac. & Rem. Code Ann. § 171.001.

<sup>78</sup> Tex. Civ. Prac. & Rem. Code Ann. § 171.001(a).

<sup>79</sup> Tex. Civ. Prac. & Rem. Code Ann. § 171.002(a).

<sup>80</sup> Tex. Civ. Prac. & Rem. Code Ann. § 171.002.

<sup>81</sup> Tex. Civ. Prac. & Rem. Code Ann. § 171.022.

<sup>82</sup> See *Dallas Cardiology Assocs., P.A. v. Mallick*, 978 S.W.3d 209, 212 (Tex. App.—Texarkana 1998, pet. denied).

The TAA applies to any written agreement to arbitrate a controversy that exists at the time of the agreement or arises between the parties after the date of the agreement.<sup>83</sup> Therefore, unless preempted by the FAA, a state court has jurisdiction under the TAA.<sup>84</sup>

While the TAA applies broadly, the Texas Legislature has carved out certain exceptions.<sup>85</sup> For example, the TAA does not apply to agreements that were unconscionable when made,<sup>86</sup> collective bargaining agreements,<sup>87</sup> workers' compensation benefit claims,<sup>88</sup> or agreements made before January 1, 1966.<sup>89</sup> Nor does it apply to: (1) a claim based on a transaction where the consideration is less than \$50,000<sup>90</sup> or (2) a personal injury claim,<sup>91</sup> unless the arbitration agreement is in writing and signed by each party and each party's attorney.<sup>92</sup>

<sup>83</sup> Tex. Civ. Prac. & Rem. Code § 171.001(a).

<sup>84</sup> *In re D. Wilson Construction Co.*, 196 S.W.3d 774, 780 (Tex. 2006). For the FAA to preempt the TAA, state law must refuse to enforce an arbitration agreement that the FAA would enforce, either because (1) the TAA has expressly exempted the agreement from coverage or (2) the TAA has imposed an enforceability requirement not found in the FAA. *In re D. Wilson Construction Co.*, 196 S.W.3d 774, 780 (Tex. 2006). In fact, the standard for determining waiver of the right to arbitration is the same under both the TAA and the FAA. *Southwind Group, Inc. v. Landwehr*, 188 S.W.3d 730, 735 (Tex. App.—Eastland 2006, no pet.); *Brown v. Anderson*, 102 S.W.3d 245, 250 (Tex. App.—Beaumont 2003, pet. denied).

<sup>85</sup> Arbitration under state law is not new. The First Constitution of Texas required the Legislature to enact arbitration legislation, and the Legislature complied, enacting the statute on April 25, 1846. Tex. Const. of 1845, art. VII, § 15; *see also Cox v. Giddings*, 9 Tex. 44, 46 (1852) (citing Act approved Apr. 25, 1846, 1st Leg., reprinted in Oliver C. Hartley, A Digest of the Laws of Texas 89–90 (1850)). In 1879, the State of Texas codified its statutes, including those governing arbitration. *Carpenter v. N. River Ins. Co.*, 436 S.W.2d 549, 551 (Tex. Civ. App.—Houston [14th Dist.] 1968, writ ref'd n.r.e.). The arbitration statute was recodified in 1925. *Carpenter v. N. River Ins. Co.*, 436 S.W.2d 549, 551 (Tex. Civ. App.—Houston [14th Dist.] 1968, writ ref'd n.r.e.). Later, in 1965, the Legislature amended the statute to add provisions for the enforcement of awards. *Carpenter v. N. River Ins. Co.*, 436 S.W.2d 549, 551 (Tex. Civ. App.—Houston [14th Dist.] 1968, writ ref'd n.r.e.). Today's version of the TAA may be found at Title 7, Chapter 171 of the Texas Civil Practice and Remedies Code. Tex. Civ. Prac. & Rem. Code Ann. §§ 171.001–171.098.

<sup>86</sup> Tex. Civ. Prac. & Rem. Code § 171.022.

<sup>87</sup> Tex. Civ. Prac. & Rem. Code § 171.002(a)(1).

<sup>88</sup> Tex. Civ. Prac. & Rem. Code § 171.002(a)(4).

<sup>89</sup> Tex. Civ. Prac. & Rem. Code § 171.002(a)(5).

<sup>90</sup> Tex. Civ. Prac. & Rem. Code § 171.002(a)(2).

<sup>91</sup> Tex. Civ. Prac. & Rem. Code § 171.002(a)(3).

<sup>92</sup> Tex. Civ. Prac. & Rem. Code §§ 171.002(b)(1–2), (c)(1–2).

**1-3:2.1 Ambit of the Texas Arbitration Act**

The Texas Arbitration Act was enacted 40 years after its federal counterpart and follows its language in many respects and is intended to have a broad application.<sup>93</sup> There are, however, specific agreements excluded from the TAA's broad application. Referenced above, these exclusions include collective bargaining agreements, workers compensation claims and consumer agreements for less than \$50,000.<sup>94</sup> Although the TAA can include personal injury claims, the requirements are much higher. For a TAA governed arbitration agreement to be applicable to a personal injury claim, the agreement must be in writing and must be signed by the person or his attorney.<sup>95</sup>

**PRACTICE POINTER:**

The exclusions or limitations found in the TAA are particularly important to clients wishing to enforce or resist mandatory arbitration agreements in consumer purchase agreements. Immediate analysis of the clause is required to determine which law applies. It may be mandated by the language of the clause or may be the result of whether or not the agreement involves interstate commerce.

**1-3:2.2 Remedies Under the Texas Arbitration Act**

Just as arbitrations that are subject to the Federal Arbitration Act, the TAA mandates that arbitration be ordered upon the showing of an enforceable arbitration agreement.<sup>96</sup> Once the order to arbitrate is issued, the court then must stay the case pending its outcome.<sup>97</sup> The only discovery allowed is specifically mandated by the TAA to be limited to that which is necessary for the court to have sufficient information regarding the scope of the arbitration provision or other issues of arbitrability to make the determination as to whether or not arbitration should be compelled.<sup>98</sup>

<sup>93</sup> Tex. Civ. Prac. & Rem. Code § 171.002 (a) (Vernon 2005).

<sup>94</sup> Tex. Civ. Prac. & Rem. Code §§ 171.002 (a)(3), (b)(2) (Vernon 2005).

<sup>95</sup> Tex. Civ. Prac. & Rem. Code §§ 171.002 (a)(3), (b)(2) (Vernon 2005).

<sup>96</sup> Tex. Civ. Prac. & Rem. Code § 171.021.

<sup>97</sup> Tex. Civ. Prac. & Rem. Code § 171.025.

<sup>98</sup> *In re Houston Pipe Line Co.*, 311 S.W.3d 449 (Tex. 2009).

### 1-3:3 Ascertaining Which Law Applies

#### **PRACTICE POINTER:**

Given the differences between federal and state arbitration law, the determination of which law governs the enforcement of an arbitration agreement can be critical. The choice between federal and state law can have a substantial—even determinative—impact on the enforceability of an arbitration agreement or award, and even on the outcome of a case. Determining which law governs an arbitration agreement depends on the terms of the agreement and the type of claim involved.

A formal concession in the pleadings that an agreement is subject to the FAA is a binding judicial admission.<sup>99</sup> “[I]t has the effect of withdrawing a fact from contention” and “is conclusive, unless the court allows it to be withdrawn.”<sup>100</sup> Likewise, “[t]he invited error doctrine provides that ‘a party may not complain on appeal of errors that he himself invited or provoked the court . . . to commit.’”<sup>101</sup>

#### 1-3:3.1 When Agreement Specifies

#### **PRACTICE POINTER:**

The parties’ intent, as memorialized in the arbitration agreement, dictates which law governs.<sup>102</sup> Accordingly, if an agreement requires arbitration under the FAA, then a party can compel arbitration under the FAA without regard to whether the transaction involved interstate

<sup>99</sup>. *Martinez v. Bally’s, La., Inc.*, 244 F.3d 474, 476 (5th Cir. 2001).

<sup>100</sup>. *Martinez v. Bally’s, La., Inc.*, 244 F.3d 474, 476 (5th Cir. 2001).

<sup>101</sup>. *Munoz v. State Farm Lloyds of Tex.*, 522 F.3d 568, 573 (5th Cir. 2008) (quoting *United States v. Sharpe*, 996 F.2d 125, 129 (6th Cir. 1993)) *see also Maxum Foundations, Inc. v. Salus Corp.*, 779 F.2d 974, 978 n.4 (4th Cir. 1985) (“Where the party seeking arbitration alleges that the transaction is within the scope of the [FAA], and the party opposing application of the Act does not come forward with evidence to rebut jurisdiction under the federal statute, we do not read into the Act a requirement of further proof by the party invoking the federal law.”).

<sup>102</sup>. *In re Olshan Found. Repair Co., LLC*, 328 S.W.3d 883, 891 (Tex. 2010).

commerce.<sup>103</sup> The same is true for the TAA.<sup>104</sup> Furthermore, if the agreement provides for arbitration under the FAA *and* the TAA, then both laws govern.<sup>105</sup>

### 1-3:3.2 When Agreement Does Not Specify

#### **PRACTICE POINTER:**

An agreement to arbitrate may be silent as to which law governs. Under those circumstances, both laws apply as long as the agreement involves interstate commerce.<sup>106</sup> Similarly, if an agreement does not specify which law governs but includes a law-of-the-place provision (*i.e.*, “governed by the arbitration laws in your state”), then both laws apply.<sup>107</sup>

It follows that an arbitration agreement that does not expressly invoke the FAA or the TAA, but includes a law-of-the-place provision, may invoke the FAA without showing the contract involved interstate commerce. To invoke only the TAA, a law-of-the-place provision must expressly exclude application of the FAA.<sup>108</sup> If an arbitration agreement (1) does not specify that either the FAA or the TAA applies, (2) does not involve interstate commerce, and (3) does not contain a law-of-the-place provision, then only the TAA applies.

### 1-3:3.3 Common Law

The law is so well-developed under the FAA and TAA that it is rare for the general common law to be addressed by the courts regarding arbitration. It is important to note, however, that Texas

<sup>103.</sup> *In re Kellogg Brown & Root*, 80 S.W.3d 611, 617 (Tex. App.—Houston [1st Dist.] 2002, orig. proceeding).

<sup>104.</sup> *In re Olshan Found. Repair Co., LLC*, 328 S.W.3d 883, 890–91 (Tex. 2010).

<sup>105.</sup> *In re D. Wilson Constr. Co.*, 196 S.W.3d 774, 780 (Tex. 2006). When both the FAA and the TAA apply, preemption may render the TAA unenforceable. For a further discussion of the preemption of state law, see 1-3:3.4.

<sup>106.</sup> *In re D. Wilson Constr. Co.*, 196 S.W.3d 774, 778–79 (Tex. 2006).

<sup>107.</sup> *In re L&L Kempwood Assocs.*, 9 S.W.3d 125, 127–28 (Tex. 1999) (FAA applied because the choice-of-law provision did not specifically exclude the application of federal law).

<sup>108.</sup> *In re Olshan Found. Repair Co., LLC*, 328 S.W.3d 883, 890 (Tex. 2010).

common law does recognize arbitration, and it exists in those circumstances governed by the TAA. The concept of arbitral immunity, for example, is a product of Texas common law and *stare decisis* and is not addressed by the TAA.<sup>109</sup> Additionally, when analyzing whether or not an arbitration award should be vacated, the court must look to the TAA and common law. If the award does not comply with the TAA, it may still be valid if it complies with the common law.<sup>110</sup>

### 1-3:3.4 Preemption of State Law

The FAA creates a body of federal substantive law applicable in both state and federal courts.<sup>111</sup> Although the FAA itself does not specifically address its relationship with conflicting state law, after a string of litigation, “[t]he FAA’s displacement of conflicting state law is ‘now well-established.’”<sup>112</sup> State and federal courts must equally acknowledge the “national policy” favoring arbitration. This policy serves to foreclose attempts by legislatures to undermine the enforceability of arbitration agreements.<sup>113</sup> Thus, although the FAA ostensibly leaves states some room to draft their own arbitration statutes, the FAA aims to ensure the enforceability of private agreements to arbitrate according to their own terms.<sup>114</sup>

<sup>109.</sup> *Blue Cross Blue Shield of Tex. v. Juneau*, 114 S.W.3d 126, 133 (Tex. App.—Austin 2003, no pet.).

<sup>110.</sup> *Blue Cross Blue Shield of Tex. v. Juneau*, 114 S.W.3d 126, 134 n.5 (Tex. App.—Austin 2003, no pet.) (citing *L.H. Lacy Co. v. City of Lubbock*, 559 S.W.2d 348, 351 (Tex. 1977) (common law provides three instances to overturn award: fraud, mistake or misconduct)); *Patten v. Johnson*, 429 S.W.3d 767, 779-780 (Tex. App.—Dallas 2014, pet. denied).

<sup>111.</sup> *See Moses H. Cone Mem’l Hosp. v. Mercury Constr. Corp.*, 460 U.S. 1, 25 n.32 (1982); *see also Volt Info. Scis., Inc. v. Bd. of Trs. of Leland Stanford Junior Univ.*, 489 U.S. 468, 485 (1989) (Brennan, J., dissenting).

<sup>112.</sup> *Preston v. Ferrer*, 552 U.S. 346, 352 (2008) (quoting *Allied-Bruce Terminex Cos. v. Dobson*, 513 U.S. 265, 272 (1995)).

<sup>113.</sup> *Southland Corp. v. Keating*, 465 U.S. 1, 16 (1984).

<sup>114.</sup> For example in *Southland Corporation v. Keating*, 465 U.S. 1, 14-15 (1984), the Supreme Court rejected the proposition that the FAA created a procedural rule applicable only in federal courts and held that “the ‘involving commerce’ requirement in § 2, [should be viewed] not as an inexplicable limitation on the power of the federal courts, but as a necessary qualification on a [state] statute intended to apply in state and federal courts.” The Court reasoned that confining the scope of the FAA to parties seeking to enforce arbitration agreements in federal courts would frustrate Congress’s broad enactment in light of the policies behind the FAA. The *Southland* Court specifically mentioned two of these policies: Congress’s intent to overcome the traditional judicial hostility toward arbitration and the failure of state arbitration statutes to adequately protect a party’s right to enforce arbitration agreements.

At times, this requires that a court simply invalidate the state's conflicting provisions.<sup>115</sup>

The preemption analysis is based on the concept that Congress may only legislate in certain areas of law.<sup>116</sup> In most of those areas, state legislatures may also make laws.<sup>117</sup> Thus, there are significant areas of law where federal and state powers overlap.<sup>118</sup> In areas where Congress has authority to legislate, however, it also has the power to preempt—or displace—state law.<sup>119</sup>

Congress's power to preempt state law is derived from the Supremacy Clause,<sup>120</sup> and courts, in discharging their duty to interpret the law, determine whether federal law preempts state law.<sup>121</sup> The answer is ultimately a question of congressional intent.<sup>122</sup>

The United States Supreme Court has identified three categories of preemption that can occur: express preemption, field preemption, and conflict preemption. Express preemption occurs when a federal law includes a clause that expressly removes legislative authority from the states in a particular area of law.<sup>123</sup> Though Congress's authority to expressly preempt state law is well settled,<sup>124</sup> the Supreme Court favors reading express preemption clauses narrowly.<sup>125</sup> This is especially true when Congress is legislating in an area that is traditionally within the scope of the

<sup>115</sup> See, e.g., *Doctor's Assocs., Inc. v. Casarotto*, 517 U.S. 681, 683 (1996).

<sup>116</sup> *McCulloch v. Maryland*, 17 U.S. (4 Wheat.) 316, 322 (1819) (noting that Congress “may exercise only those powers enumerated in the Constitution”).

<sup>117</sup> E.g., *Printz v. United States*, 521 U.S. 898, 918–20 (1997) (acknowledging concurrent state and federal authority).

<sup>118</sup> Caleb Nelson, *Preemption*, 86 Va. L. Rev. 225, 225 (2000).

<sup>119</sup> Caleb Nelson, *Preemption*, 86 Va. L. Rev. 225, 225 (2000).

<sup>120</sup> U.S. Const. art. VI, cl. 2 (“This Constitution, and the Laws of the United States which shall be made in Pursuance thereof . . . shall be the supreme Law of the Land . . .”).

<sup>121</sup> *Gade v. Nat'l Solid Wastes Mgmt. Ass'n*, 505 U.S. 88, 108 (1992); see *City of Philadelphia v. New Jersey*, 430 U.S. 141, 142 (1977) (*per curiam*).

<sup>122</sup> *Barnett Bank v. Nelson*, 517 U.S. 25, 30 (1996); see also *Retail Clerks Int'l Ass'n, Local 1625 v. Schermerhorn*, 375 U.S. 96, 103–04 (1963) (“The purpose of Congress is the ultimate touchstone.”).

<sup>123</sup> *Barnett Bank v. Nelson*, 517 U.S. 25, 30 (1996); see, e.g., 46 U.S.C. § 4306 (2006) (containing an express preemption provision).

<sup>124</sup> *Pacific Gas & Elec. Co. v. State Energy Res. Conservation & Dev. Comm'n*, 461 U.S. 190, 203 (1983) (“It is well established that within constitutional limits Congress may preempt state authority by so stating in express terms.”) (citing *Jones v. Rath Packing Co.*, 430 U.S. 519, 525 (1977)).

<sup>125</sup> See *Cipollone v. Liggett Group, Inc.*, 505 U.S. 504, 517–18 (1992).

states' power to pass laws for the health, safety, and welfare of their citizens.<sup>126</sup>

Field preemption occurs where Congress has impliedly occupied the entire field of a particular area of law.<sup>127</sup> Field preemption occurs when Congress has legislated “so pervasive[ly]” that it has “left no room” for states to pass additional laws in that field.<sup>128</sup> It may also occur where Congress is legislating in an area and the federal interest in that area is so dominant that states should not be permitted to enforce their own laws on the subject.<sup>129</sup> Field preemption, however, is rare,<sup>130</sup> and Congress has not preempted the entire field of arbitration law with the FAA.<sup>131</sup>

Federal law also preempts state law when the two “actually conflict [ ]” with each other.<sup>132</sup> This is called conflict preemption, and it may occur when compliance with both the state law and federal law is a “physical impossibility.”<sup>133</sup> It may also occur when the state law “stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress.”<sup>134</sup> This type of conflict preemption is called obstacle preemption.<sup>135</sup>

The doctrine of conflict preemption prevents a state law from “stand[ing] as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress.”<sup>136</sup> This requirement leads to the core principle of FAA preemption: “state arbitration

<sup>126</sup> *Medtronic, Inc. v. Lohr*, 518 U.S. 470, 485 (1996).

<sup>127</sup> *Rice v. Santa Fe Elevator Corp.*, 331 U.S. 218, 230 (1947).

<sup>128</sup> *Rice v. Santa Fe Elevator Corp.*, 331 U.S. 218, 230 (1947).

<sup>129</sup> See *Southland Corp. v. Keating*, 465 U.S. 1, 18 (1984) (Stevens, J., concurring in part and dissenting in part).

<sup>130</sup> Caleb Nelson, *Preemption*, 86 Va. L. Rev. 225, 225 (2000).

<sup>131</sup> *Rice v. Santa Fe Elevator Corp.*, 331 U.S. 218, 230 (1947).

<sup>132</sup> *Volt Info. Scis., Inc. v. Bd. of Trs. of Leland Stanford Junior Univ.*, 489 U.S. 468, 477 (1989).

<sup>133</sup> *English v. Gen. Elec. Co.*, 496 U.S. 72, 79 (1990).

<sup>134</sup> *Hines v. Davidowitz*, 312 U.S. 52, 67 (1941) (citing *Savage v. Jones*, 225 U.S. 501, 533 (1912)).

<sup>135</sup> *Volt Info. Scis., Inc. v. Bd. of Trs. of Leland Stanford Junior Univ.*, 489 U.S. 468, 477 (1989).

<sup>136</sup> *Hines v. Davidowitz*, 312 U.S. 52, 67 (1941) (citing *Savage v. Jones*, 225 U.S. 501, 533 (1912)).

law cannot limit or obstruct FAA provisions”<sup>137</sup> as the FAA does not have an express preemption provision.<sup>138</sup>

The Texas Supreme Court case *Fredricksburg Care Co., LP v. Perez* illustrates how the doctrine of conflict preemption may invalidate a state law that conflicts with the FAA.<sup>139</sup> In that case, the Texas Supreme Court ruled that Texas Civil Practice and Remedies Code 74.461, regulating agreements to arbitrate within the context of health care liability and under which the initial plaintiff could not compel arbitration, was preempted by the FAA because the transactions in question involved interstate commerce and the Texas law directly conflicted with the FAA.<sup>140</sup>

Most of the Supreme Court’s jurisprudence on the preemptive effect of the FAA involves the application of Section 2 to state laws that attempt to limit arbitrability of claims. The Court’s decisions in this area rely on the assertion that Congress’s primary purpose in enacting Section 2 was to hold parties to their agreements to arbitrate by making the agreements enforceable in court.<sup>141</sup> Thus, the FAA created a “national policy favoring arbitration,” and it therefore preempts state laws that undermine Section 2’s command that arbitration agreements be held “valid, irrevocable, and enforceable.”<sup>142</sup>

<sup>137.</sup> *Doctor’s Associates, Inc. v. Casarotto*, 517 U.S. 681 (1996); *Allied-Bruce Terminix Cos. v. Dobson*, 513 U.S. 265, 269 (1995); *Perry v. Thomas*, 482 U.S. 483, 491 (1987); *Southland Corp. v. Keating*, 465 U.S. 1, 16 (1984).

<sup>138.</sup> *Volt Info. Seis., Inc. v. Bd. of Trs. of Leland Stanford Junior Univ.*, 489 U.S. 468, 477 (1989). *But see* Caleb Nelson, *Preemption*, 86 Va. L. Rev. 225, 229 (2000) (“But § 2 [of the FAA] can readily be recast in the form of an express preemption clause; for most purposes, it is identical to a provision that ‘no state or local government shall adopt or enforce any law or policy that makes a written arbitration agreement in a contract evidencing a transaction involving commerce invalid, revocable, or unenforceable, save upon such grounds as exist at law or in equity for the revocation of any contract.’”).

<sup>139.</sup> *Fredricksburg Care Co., L.P. v. Perez*, 461 S.W.3d 513, 520 (Tex. 2015).

<sup>140.</sup> *Fredricksburg Care Co., L.P. v. Perez*, 461 S.W.3d 513, 525 (Tex. 2015).

<sup>141.</sup> *Doctor’s Associates, Inc. v. Casarotto*, 517 U.S. 681 (1996); *Allied-Bruce Terminix Cos. v. Dobson*, 513 U.S. 265, 269 (1995); *Perry v. Thomas*, 482 U.S. 483, 491 (1987); *Southland Corp. v. Keating*, 465 U.S. 1, 16 (1984).

<sup>142.</sup> *See Southland Corp. v. Keating*, 465 U.S. 1, 10 (1984); *see DIRECTV, Inc. v. Imburgia*, 136 S. Ct. 463, 471 (2015) (Finding that California’s interpretation of the phrase “the law of your state” to nullify a class action arbitration waiver does not place arbitration contracts “on equal footing” with other contracts and thus unenforceable under the FAA, *quoting* *Buckeye Check Cashing, Inc. v. Cardenga*, 546 U.S. 440, 126 S. Ct. 1204, 163 L. Ed. 2d 1038 (2016); *see also* *Venture Cotton Coop. v. Freeman*, 435 S.W.3d 222, 227 (Tex. 2016). (“Special state rules for interpreting arbitration agreements cannot coexist with the FAA because Congress intended the act as its response to a longstanding judicial hostility to arbitration agreements.”); *PAK Foods Houston, LLC v. Garcia*, 433 S.W.3d 171, 175 (Tex.

In *Southland Corporation v. Keating*,<sup>143</sup> the United States Supreme Court dealt with a provision of the California Franchise Investment Law<sup>144</sup> that the California Supreme Court interpreted to require a judicial, rather than arbitral, forum for resolving disputes that arose under the law.<sup>145</sup> As a result, the California Supreme Court refused to enforce the parties' arbitration agreement, at least to the extent that it involved claims under the Franchise Investment Law.<sup>146</sup> The United States Supreme Court held that the California law requiring a judicial forum for resolution was preempted.<sup>147</sup> After determining that § 2 of the FAA applied in state court, the Court concluded that the California law was an "attempt[ ] to undercut the enforceability of [the] arbitration agreement[ ]."<sup>148</sup> The California law, the Court reasoned, was in conflict with Congress's purpose in enacting Section 2.<sup>149</sup> Therefore, it violated the Supremacy Clause and was preempted.

Subsequently, in *DIRECTV, Inc. v. Imburgia*,<sup>150</sup> the United States Supreme Court held that the FAA preempted enforcement of a California state law provision prohibiting the enforcement of an anti-class action arbitration waiver because it directly conflicted with the FAA.<sup>151</sup> In their reasoning, the Court held that the state law provision was preempted by the FAA because it did not place arbitration contracts "on equal footing" with all other contracts and did not give "due regard...to the federal policy favoring arbitration."<sup>152</sup>

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App.—Houston [14th Dist.] 2014, pet. dism'd) ("The United States Supreme Court has emphasized that the FAA's purpose is to make arbitration agreements as enforceable as other contracts, but not more so.").

<sup>143</sup> *Southland Corp. v. Keating*, 465 U.S. 1 (1984).

<sup>144</sup> Cal. Corp. Code § 31512 (West 2006).

<sup>145</sup> *See Southland Corp. v. Keating*, 465 U.S. 1, 10 (1984).

<sup>146</sup> *See Southland Corp. v. Keating*, 465 U.S. 1, 10 (1984).

<sup>147</sup> *See Southland Corp. v. Keating*, 465 U.S. 1, 10 (1984).

<sup>148</sup> *See Southland Corp. v. Keating*, 465 U.S. 1, 10 (1984).

<sup>149</sup> *See Southland Corp. v. Keating*, 465 U.S. 1, 10 (1984).

<sup>150</sup> *DIRECTV, Inc. v. Imburgia*, 136 S. Ct. 463 (2015).

<sup>151</sup> *DIRECTV, Inc. v. Imburgia*, 136 S. Ct. 463, 467 (2015).

<sup>152</sup> *DIRECTV, Inc. v. Imburgia*, 136 S. Ct. 463, 471 (2015).

**PRACTICE POINTER:**

If a contract is silent as to which law applies to an arbitration agreement, counsel should analyze whether the contract involves interstate commerce. If a contract affects interstate commerce, then the FAA governs an arbitration provision within a contract. If the parties' contract specifies that the TAA applies, even if the contract affects interstate commerce, then state law likely will apply.

In those instances, however, when the FAA and the TAA could both apply, the FAA will preempt the TAA to the extent that the application of the TAA will deny substantive rights to a party that he or she would otherwise have under the FAA. The supremacy clause of the U.S. Constitution obligates a court to apply federal law if the FAA provides substantive rights not found under the TAA.

The Texas Supreme Court articulated a four-factor test to determine whether the TAA thwarts the goals and policies in a particular case and, as a result, would be preempted by the FAA.<sup>153</sup> The FAA only preempts the TAA if: “(1) the agreement is in writing, (2) it involves interstate commerce, (3) it can withstand scrutiny under traditional contract defenses, and (4) state law affects the enforceability of the agreement.”<sup>154</sup>

Texas courts may regulate arbitration agreements under ordinary contract principles without triggering preemption.<sup>155</sup> They may not, however, “decide that a contract is fair enough to enforce all its basic terms (price, service, credit), but not fair enough to enforce its arbitration clause. The [Federal Arbitration Act] makes any such state policy unlawful, for that kind of policy would place arbitration clauses on an unequal ‘footing,’ directly contrary to the Act’s language and Congress’ intent.”<sup>156</sup>

<sup>153.</sup> *In re Nexion Health at Humble, Inc.*, 173 S.W.3d 67, 69 (Tex. 2005) (per curiam).

<sup>154.</sup> *In re D. Wilson Construction Co.*, 196 S.W.3d 774, 780 (Tex. 2006).

<sup>155.</sup> 9 U.S.C. § 2.

<sup>156.</sup> *Allied-Bruce Terminix Cos. v. Dobson*, 513 U.S. 265, 281 (1995); see *Volt Information Scis., Inc. v. Bd. of Trs. of Leland Stanford Junior Univ.*, 489 U.S. 468, 109 S. Ct. 1248, 103 L. Ed. 2d 488 (1989).

## 1-4 ENFORCEMENT OF ARBITRATION AGREEMENT

Any party subject to the arbitration agreement can compel arbitration or be compelled to arbitrate. The party seeking to compel arbitration bears the burden of proving that a valid arbitration agreement exists.<sup>157</sup>

### 1-4:1 Parties Subject to Agreement

#### **PRACTICE POINTER:**

Any signatory to an arbitration agreement can compel arbitration or be compelled to arbitrate. Non-signatories to an agreement may be bound to the agreement when rules of law or equity would bind them to the contract generally.<sup>158</sup> In addition, whether an arbitration agreement binds a non-signatory is a gateway matter to be decided by the court, rather than the arbitrator.<sup>159</sup> Texas courts recognize six theories that may bind non-signatories to an arbitration agreement: (1) incorporation by reference; (2) assumption; (3) agency; (4) alter ego; (5) third-party beneficiary; and (6) equitable estoppel.<sup>160</sup>

Two types of estoppel exist: direct-benefits estoppel and concerted-misconduct estoppel. Under direct benefits estoppel, a non-signatory who is seeking the benefits of a contract or seeking to enforce it is estopped from simultaneously trying to avoid the contract's burdens, such as the obligation to arbitrate disputes.<sup>161</sup> The theory is that a person "cannot both have his contract and defeat it too."<sup>162</sup> Whether a claim seeks a direct benefit from a contract containing an arbitration clause depends on the substance of the claim, as opposed to artful

<sup>157</sup> *Ellis v. Schlimmer*, 337 S.W.3d 860, 861 (Tex. 2011); see *In Estate of Guerrero*, 465 S.W.3d 693, 703 (Tex. App.—Houston [14th Dist.] 2002, orig. proceeding) ("... a prerequisite to compelling arbitration is to prove the existence and execution of the arbitration agreement.")

<sup>158</sup> *In re Weekley Homes, L.P.*, 180 S.W.3d 127, 131 (Tex. 2005).

<sup>159</sup> *In Estate of Guerrero*, 465 S.W.3d 693, 700 (Tex. App.—Houston [14th Dist.] 2002, orig. proceeding).

<sup>160</sup> *In re Kellogg Brown & Root, Inc.*, 166 S.W.3d 732, 738–39 (Tex. 2005).

<sup>161</sup> *Rachal v. Reitz*, 403 S.W.3d 840, 846 (Tex. 2013), quoting *In re Kellogg Brown & Root, Inc.*, 166 S.W.3d 732, 738–39 (Tex. 2005).

<sup>162</sup> *In re Weekley Homes, L.P.*, 180 S.W.3d 127, 135 (Tex. 2005).

pleading.<sup>163</sup> Under concerted-misconduct estoppel, a non-signatory may be compelled to arbitrate when one signatory to the contract claims that the non-signatory and one or more of the other signatories engaged in substantially interdependent and concerted misconduct. Although the Fifth Circuit Court of Appeals has recognized concerted-misconduct estoppel, neither the United States Supreme Court nor the Texas Supreme Court has compelled arbitration based solely on this theory.

In determining whether a non-signatory may be compelled to arbitrate, the analysis focuses on the non-party's conduct during the performance of the contract.<sup>164</sup> For example:

[A] firm that uses a trade name pursuant to an agreement containing an arbitration clause cannot later avoid arbitration by claiming to have been a non-party. Nor can non-signatories who received lower insurance rates and the ability to sail under the French flag due to a contract avoid the arbitration clause in that contract.<sup>165</sup>

Unless the parties clearly express otherwise, courts—not arbitrators—must decide whether a non-signatory may enforce or be bound by an arbitration agreement because that depends on the validity of the arbitration clause itself.<sup>166</sup>

#### **PRACTICE POINTER:**

The presumption in favor of arbitration has in recent years resulted in a broadening of the enforcement of arbitration clauses on non-signatories. When arguing against or for the enforcement against a party who has not signed the agreement, the equitable arguments form the basis of the legal rulings. Argue the equities.

<sup>163.</sup> *Southwestern Bell Tel. Co. v. DeLamney*, 809 S.W.2d 493, 495 (Tex. 1991).

<sup>164.</sup> *In re Weekley Homes, L.P.*, 180 S.W.3d 127, 135 (Tex. 2005); see also *First Light Fed. Credit Union v. Loya*, 478 S.W.3d 157 (Tex. App. – El Paso 2015, no pet.).

<sup>165.</sup> *In re Weekley Homes, L.P.*, 180 S.W.3d 127, 133 (Tex. 2005) (internal citations omitted).

<sup>166.</sup> *In re Labatt Food Serv.*, 279 S.W.3d 640, 643 (Tex. 2009) (“[W]hether an arbitration agreement binds a nonsignatory is a gateway matter to be determined by courts rather than arbitrators unless the parties clearly and unmistakably express otherwise.”); see also *PAK Foods Houston, LLC v. Garcia*, 433 S.W.3d 171, 178 (Tex. App.—Houston [14th Dist.] 2014, pet. dism’d) (mother of defendant was not bound as a non-signatory as arbitration agreement because underlying arbitration agreement was voidable).

### 1-4:1.1 State Contract Law

#### **PRACTICE POINTER:**

The party seeking to compel arbitration must prove that an agreement to arbitrate exists.<sup>167</sup> The initial analysis is the same as that which any contract is subject to under Texas law.<sup>168</sup> The elements are: (1) an offer, (2) an acceptance, (3) a meeting of the minds, (4) each party's consent to the terms, and (5) execution and delivery of the contract with the intent that it be mutual and binding.<sup>169</sup>

### 1-4:1.2 Signature Requirements

Although an agreement to arbitrate must be in writing, there is no general requirement that it be signed.<sup>170</sup> The Texas General Arbitration Act (the TAA) imposes signature requirements in certain contracts. In some instances, an agreement to arbitrate may not be enforceable under the TAA. And, where there is an agreement for property, services, money, or credit, the value of which is less than \$50,000, the agreement must be in writing and signed by each party and each party's attorney; otherwise, the agreement to arbitrate is unenforceable.<sup>171</sup> Similarly, if the claim is one for personal injury, an agreement to arbitrate is unenforceable unless each party received advice of counsel before entering into the agreement and the agreement is in writing and signed by each party's attorney.<sup>172</sup>

### 1-4:2 Within Scope of Valid Agreement

The party seeking to compel arbitration must show that the claim is subject to a valid arbitration agreement and falls within

<sup>167.</sup> *J.M. Davidson, Inc. v. Webster*, 138 S.W.3d 223, 227 (Tex. 2003).

<sup>168.</sup> The Houston Court of Appeals has recently emphasized the requirement that the agreement to arbitrate needs to be authenticated either by testimony or the equivalent thereof at an evidentiary hearing in order to be enforced. *See In Estate of Guerrero*, 465 S.W.3d 693, 704-05 (Tex. App.—Houston [14th Dist.] 2015, pet. filed).

<sup>169.</sup> *Angelou v. African Overseas Union*, 33 S.W.3d 269, 278 (Tex. App.—Houston [14th Dist.] 2000, no pet.).

<sup>170.</sup> *In re Advance PCS Health, L.P.*, 172 S.W.3d 603, 606 n.5 (Tex. 2005).

<sup>171.</sup> Tex. Civ. Prac. & Rem. Code § 171.002(a)(2) and (b).

<sup>172.</sup> Tex. Civ. Prac. & Rem. Code § 171.002(a)(3) and (c).

the scope of that agreement.<sup>173</sup> An arbitration agreement is valid if it meets the ordinary requirements of state contract law.<sup>174</sup> A valid agreement does not require the parties' signatures,<sup>175</sup> nor need it even contain an arbitration clause,<sup>176</sup> but it must be in writing.<sup>177</sup> In determining whether a claim is within the scope of the agreement, courts look to the terms of the agreement and the "factual allegations of the complaint rather than the legal claims asserted."<sup>178</sup> The terms of an agreement often provide that "any controversy or claim arising out of, or relating to" the contract is subject to arbitration.<sup>179</sup> If the factual allegations have a "significant relationship to" or are "factually intertwined" with the contract that is subject to the arbitration agreement, then the claim falls within the scope of the agreement and is therefore arbitrable.<sup>180</sup>

<sup>173.</sup> *In re Dillard Dept. Stores*, 186 S.W.3d 514, 515 (Tex. 2006); *PAK Foods Houston, LLC v. Garcia*, 433 S.W.3d 171, 174 (Tex. App.—Houston [14th Dist.] 2014, pet. dism'd); *In Estate of Guerrero*, 465 S.W.3d 693, 600-700 (Tex. App.—Houston [14th Dist.] 2015, pet. filed); *G.T. Leach Builders, LLC v. Sapphire V.P., LP*, 458 S.W.3d 502, 525 (Tex. 2015).

<sup>174.</sup> *In re Rubiola*, 334 S.W.3d 220, 224 (Tex. 2011).

<sup>175.</sup> *In re Macy's Tex., Inc.*, 291 S.W.3d 418, 419 (Tex. 2009); see, e.g., *LDF Constr., Inc. v. Texas Friends of Chabad Lubavitch, Inc.*, 459 S.W.3d 720, 729 (Tex. App.—Houston [14th Dist.] 2015, no pet.) (holding an arbitration clause enforceable even though the signed contract did not specifically refer to the arbitration clause).

<sup>176.</sup> *LDF Constr., Inc. v. Texas Friends of Chabad Lubavitch, Inc.*, 459 S.W.3d 720, 728-29 (Tex. App.—Houston [14th Dist.] 2015, no pet.) (a valid agreement to arbitrate exists when a signed contract incorporates by reference another document containing the arbitration clause).

<sup>177.</sup> 9 U.S.C. § 4; *Dean Witter Reynolds, Inc. v. Byrd*, 470 U.S. 213, 218 (1985).

<sup>178.</sup> See *In re Rubiola*, 334 S.W.3d 220, 225 (Tex. 2011).

<sup>179.</sup> See, e.g., *Richmont Holdings, Inc. v. Superior Recharge Sys., L.L.C.*, 392 S.W.3d 633, 634 n.1 (Tex. 2013); *Glassell Producing Co., Inc. v. Jared Res., Ltd.*, 422, S.W.3d 68, 78 (Tex. App.—Texarkana 2014, no pet.) (holding arbitration clauses in which the scope is defined using relating to and similar wide-reaching phrases are interpreted broadly); *BBVA Compass Inv. Sols., Inc. v. Brooks*, 456 S.W.3d 711, 722-23 (Tex. App.—Fort Worth 2015, no pet.) (language within the arbitration clause encompassing "all controversies... concerning... the performance of breach of the agreement" sufficient to cover all subsequent conduct of the parties and require arbitration of the same).

<sup>180.</sup> See *In re Dallas Peterbilt, Ltd., L.L.P.*, 196 S.W.3d 161, 163 (Tex. 2006) (arbitration clause in employment contract included race-discrimination claim); *In re Dillard Dept. Stores*, 186 S.W.3d 514, 515 (Tex. 2006) (arbitration clause in employment contract included defamation claim); *Merrill Lynch, Perce, Fennder & Smith, Inc. v. Wilson*, 805 S.W.2d 38, 39 (Tex. App.—El Paso 1991, no writ) (arbitration agreement encompassed tort claim); *BBVA Compass Inv. Sols., Inc. v. Brooks*, 456 S.W.3d 711, 722 (Tex. App.—Fort Worth 2015, no pet.) (all claims, even those not based on the contract at issue, are within the scope of the arbitration provision).

**PRACTICE POINTER:**

Although courts must resolve any doubt in favor of arbitration,<sup>181</sup> they may not stretch an agreement beyond the scope intended by the parties.<sup>182</sup>

**1-5 DEFENSES TO ENFORCEMENT  
OF ARBITRATION AGREEMENT**

If the party seeking to compel arbitration proves that a valid arbitration agreement exists, the burden shifts to the party resisting arbitration to assert an affirmative defense to enforcement.<sup>183</sup> It is important to note that although the FAA preempts state law that conflicts with the Act’s stated objectives, state law remains that declares an arbitration agreement unenforceable on “such grounds as exist in law or in equity for the revocation of any contract.”<sup>184</sup> Thus, classic and “generally applicable contract defenses,” such as fraud, unconscionability, duress, or illusory agreement may still serve under some circumstances to invalidate an agreement to arbitrate.<sup>185</sup>

**1-5:1 No Agreement**

The party resisting arbitration may argue that an agreement to arbitrate never existed. To do this, the party must raise a contract-formation defense, which triggers the issue of whether an agreement to arbitrate ever existed, and thus must be decided

<sup>181.</sup> *In re D. Wilson Construction Co.*, 196 S.W.3d 774, 782 (Tex. 2006); see *Osornia v. AmerinMex Motor & Controls, Inc.*, 367 S.W.3d 707, 712–14 (Tex. App.—Houston [14th Dist.] 2012, no pet.) (“Any doubts as to whether a claim falls within the scope of the arbitration clause must be resolved in favor of arbitration”).

<sup>182.</sup> *Jacobs v. Jacobs*, 2013 WL 3968462, Tex. App.—Houston [14th Dist.] Aug. 1, 2013) (claim expressly excluded by the arbitration agreement fell outside scope of agreement); *Osornia v. AmeriMex Motor & Controls, Inc.*, 367 S.W.3d 707, 712 (Tex. App.—Houston [14th Dist.] 2012, no pet.) (assigned tort claims based on conduct allegedly occurring before settlement agreement was signed did not “arise out of” the settlement agreement); *Coffman v. Provost \* Umphrey Law Firm, L.L.P.*, 161 F. Supp. 2d 720, 724–30 (E.D. Tex. 2001) (breach of prior partnership agreements that allegedly occurred before any arbitration clause was in effect did not fall within scope of arbitration clause that applied to all claims “arising under” subsequent partnership agreements).

<sup>183.</sup> *Ellis v. Schlimmer*, 337 S.W.3d 860, 861–62 (Tex. 2011).

<sup>184.</sup> *Venture Cotton Coop. v. Freeman*, 435 S.W.3d 222, 227 (Tex. 2008).

<sup>185.</sup> *AT & T Mobility LLC v. Concepcion*, 131 S. Ct. 1740, 1746 (2011).

by the court.<sup>186</sup> Under these circumstances, the strong public policy favoring arbitration agreements does not apply because the court is required to determine the threshold issue of whether an arbitration agreement exists in the first place.<sup>187</sup>

### 1-5:2 Invalid Agreement

The party resisting arbitration may argue that the agreement to arbitrate is invalid. While arbitrators decide validity defenses related to the contract as a whole,<sup>188</sup> the court must resolve validity defenses relating to the arbitration agreement itself.<sup>189</sup> A validity defense relates to the arbitration agreement when it focuses specifically on the arbitration clause as opposed to other contractual provisions.<sup>190</sup> Texas law recognizes several defenses that challenge the validity of an arbitration agreement.

#### 1-5:2.1 Fraud

The party resisting arbitration may argue that the arbitration agreement was induced or procured by fraud.<sup>191</sup> To establish fraud in the inducement in the formation of an arbitration agreement, the plaintiff must prove that a material representation was made and that it was false.<sup>192</sup> Failure to read an arbitration clause because it was on the back of a single-sheet contract is not enough to show fraud.<sup>193</sup>

<sup>186.</sup> *In re Morgan Stanley & Co.*, 293 S.W.3d 182, 189 (Tex. 2009).

<sup>187.</sup> *In re Morgan Stanley & Co.*, 293 S.W.3d 182, 185 (Tex. 2009) (“[T]he presumption favoring arbitration arises only after the party seeking to compel arbitration proves that a valid arbitration agreement exists.”).

<sup>188.</sup> *In re Labatt Food Serv.*, 279 S.W.3d 640, 648 (Tex. 2009) (finding that arbitrator must determine illegality of a contractual provision because it “challenge[d] the validity of the contract as a whole”).

<sup>189.</sup> *Nitro-Lift Techs., L.L.C., v. Howard*, 133 S. Ct. 500, 503 (2012); *Perry Homes v. Cull*, 258 S.W.3d 580, 589 (Tex. 2008); *but see HIS Acquisition No. 131, Inc. v. Iturralde*, 387 S.W.3d 785 (Tex. App.—El Paso 2012, no pet.) (finding that arbitrator determines validity defenses to arbitration agreement if agreement clearly and unmistakably provides that issues of validity or enforceability are subject to arbitration).

<sup>190.</sup> *In re RLS Legal Solutions, L.L.C.*, 221 S.W.3d 629, 630 (Tex. 2007).

<sup>191.</sup> *Forest Oil Corp. v. McAllen*, 268 S.W.3d 51, 56 (Tex. 2008); *In Interest of K.D.*, 471 S.W.3d 147, 161 (Tex. App.—Texarkana 2015, no pet.) (holding in the case of family law mediated settlement agreement that “[Texas law] does not require the enforcement of [a mediated settlement agreement] that is illegal in nature or procured by fraud, duress, coercion, or other dishonest means.”).

<sup>192.</sup> *See In re Oakwood Mobile Homes, Inc.*, 987 S.W.2d 571, 574 (Tex. 1999) (*per curiam*).

<sup>193.</sup> *In re United States Home Corp.*, 236 S.W.3d 761, 764 (Tex. 2007).

**1-5:2.2 Unconscionability**

The party resisting arbitration may argue that the arbitration agreement was unconscionable at the time it was made.<sup>194</sup> While the courts will generally presume that unambiguous contracts should be enforced as written,<sup>195</sup> a court will find an agreement unconscionable if it is grossly one-sided.<sup>196</sup> Texas law recognizes two forms of unconscionability: substantive and procedural.<sup>197</sup>

**1-5:2.2a Substantive Unconscionability**

Substantive unconscionability refers to the fairness of the contract itself.<sup>198</sup> In determining whether an arbitration agreement is substantively unconscionable, courts consider whether, in light of the parties' backgrounds, the agreement is so one-sided that it is unconscionable under the circumstances at the time the parties signed the contract.<sup>199</sup> For example, the Texas Supreme Court has found that an agreement eliminating key remedies under the Workers' Compensation Act's anti-retaliation provisions was substantively unconscionable,<sup>200</sup> while an agreement allowing the prevailing party to recover attorney's fees and limiting discovery for both parties was not.<sup>201</sup> In 2014, the Texas Supreme Court held that an agreement containing an arbitration clause expressly providing for attorney's fees for one party but not the other party is **not** unconscionable per-se standing alone, though it may be relevant to a "broader inquiry into contractual oppression or an imbalance in bargaining power."<sup>202</sup>

<sup>194</sup> Tex. Civ. Prac. & Rem. Code § 171.022; *Venture Cotton Coop. v. Freeman*, 435 S.W.3d 222, 227 (Tex. 2014) ("But if the circumstances would render any contract unconscionable under Texas law, they are appropriate to invalidate the agreement to arbitrate as well.").

<sup>195</sup> *Venture Cotton Coop. v. Freeman*, 435 S.W.3d 222, 228 (Tex. 2014).

<sup>196</sup> *In re First Merit Bank, N.A.*, 52 S.W.3d 749, 747 (Tex. 2001).

<sup>197</sup> *LDF Constr., Inc. v. Texas Friends of Chabad Lubavitch, Inc.*, 459 S.W.3d 720, 731 (Tex. App.—Houston [14th Dist.] 2015, no pet.) ("Procedural unconscionability refers to the circumstances surrounding the adoption of the arbitration provision – the bargaining process – whereas substantive unconscionability refers to the fairness of the arbitration provision itself.").

<sup>198</sup> *In re Halliburton Co.*, 80 S.W.3d 566, 571 (Tex. 2002).

<sup>199</sup> *In re Olshan Found. Repair Co., LLC*, 328 S.W.3d 883, 892 (Tex. 2010).

<sup>200</sup> *In re Poly-Am., L.P.*, 262 S.W.3d 337, 348–49 (Tex. 2008).

<sup>201</sup> *In re Fleetwood Homes*, 257 S.W.3d 692, 695 (Tex. 2008); see also *In re Palm Harbor Homes, Inc.*, 195 S.W.3d 672, 678 (Tex. 2006) (finding against substantive unconscionability where the agreement bound only one party to arbitration).

<sup>202</sup> *Venture Cotton Coop. v. Freeman*, 435 S.W.3d 222, 231 (Tex. 2014).

An arbitration agreement may also be substantively unconscionable if it imposes excessive costs that effectively deprive a party from asserting their rights in an arbitration proceeding.<sup>203</sup> The party contesting arbitration due to excessive costs bears the burden of proving the likelihood of incurring prohibitively expensive costs.<sup>204</sup> In determining whether the costs of arbitration are excessive enough to render the agreement unconscionable, courts will consider the following factors: (1) the party's ability to pay the arbitration fees and costs; (2) the actual amount of the fees compared to the amount of the underlying claim; (3) the expected cost differential between arbitration and litigation; and (4) whether that cost differential is so substantial that it would deter a party from bringing a claim.<sup>205</sup> The mere risk that a party may incur excessive costs is not enough to render an arbitration agreement substantively unconscionable.<sup>206</sup> Parties must, at a minimum, provide evidence of the likely cost of their particular arbitration, through invoices, expert testimony, reliable cost estimates, or other comparable evidence.<sup>207</sup>

### 1-5:2.2b Procedural Unconscionability

Procedural unconscionability refers to the circumstances surrounding the arbitration agreement's adoption and execution.<sup>208</sup> Courts repeatedly have held that unequal bargaining power will not rise to the level required to establish procedural unconscionability.<sup>209</sup>

<sup>203.</sup> *In re Olshan Found. Repair Co., LLC*, 328 S.W.3d 883, 893 (Tex. 2010) (“[A]n arbitration agreement may render a contract unconscionable if the existence of large arbitration costs could preclude a litigant . . . from effectively vindicating [his or her] rights in the arbitral forum.”) (internal citations and quotations omitted); see *In re Poly-Am., L.P.*, 262 S.W.3d 337, 348–49 (Tex. 2008).

<sup>204.</sup> *In re Odyssey Healthcare, Inc.*, 310 S.W.3d 419, 422 (Tex. 2010) (*per curiam*).

<sup>205.</sup> *In re Olshan Found. Repair Co., LLC*, 328 S.W.3d 883, 893–94 (Tex. 2010).

<sup>206.</sup> *In re Olshan Found. Repair Co., LLC*, 328 S.W.3d 883, 895 (Tex. 2010).

<sup>207.</sup> *In re Olshan Found. Repair Co., LLC*, 328 S.W.3d 883, 895 (Tex. 2010); see *Tex. Echo Land & Cattle v. Gen. Steel Domestic Sales*, 2013 Tex. App. LEXIS 7486, 2013 WL 3064513, Tex. App.—Fort Worth, June 20, 2013, no pet.) (costs not excessive where agreement assigned responsibility for all arbitration costs to the party initiating arbitration and the party alleging excessive costs did not initiate arbitration); see also *BBVA Compass Inv. Sols., Inc. v. Brooks*, 456 S.W.3d 711, 723–24 (Tex. App.—Fort Worth 2015, no pet.) (holding that plaintiff had failed to provide specific evidence to compare litigation costs to arbitration costs to show excessive arbitration fees).

<sup>208.</sup> *In re Palm Harbor Homes, Inc.*, 195 S.W.3d 672, 677 (Tex. 2006).

<sup>209.</sup> *In re Halliburton Co.*, 80 S.W.3d 566, 572 (Tex. 2002); *In re AdvancePCS Health L.P.*, 172 S.W.3d 603, 608 (Tex. 2005); see also *In re Rangel*, 45 S.W.3d 783, 786 (Tex. App.—Waco

Instead, procedural unconscionability will invalidate an agreement only when a party was incapable of understanding the agreement.<sup>210</sup> This high standard reflects the Texas Supreme Court’s concern about “setting the bar for holding arbitration clauses unconscionable too low.”<sup>211</sup>

**1-5:2.3 Illusory Agreement**

The party resisting arbitration may argue that the arbitration clause is illusory.<sup>212</sup> An arbitration agreement is illusory when one party has the unilateral and unrestricted right to amend or terminate the arbitration agreement to avoid its promise to arbitrate.<sup>213</sup> For example, in a 2003 case, an agreement was held to be illusory because it gave the employer the ability to change, modify, delete, or amend the arbitration agreement “with or without prior notification to employees.”<sup>214</sup> In a 2014 case, a Texas appellate court found an agreement illusory because it was signed and subsequently objected to while the signing party was still a minor, and the agreement thus void.<sup>215</sup>

However, retaining power to terminate an agreement, by itself, may not make an agreement illusory. Many Texas courts have adopted the test articulated in *Lizalde v. Vista Quality Markets*, indicating that retaining termination power does not make an

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2001, original proceeding) (holding that agreement was not unconscionable even though one of the parties had never attended school, was 75, hard of hearing, and had difficulty reading).

<sup>210.</sup> *Prevot v. Phillips Petroleum Co.*, 133 F. Supp. 2d 937, 940-41 (S.D. Tex. 2001) (finding procedural unconscionability where the party did not speak English and the agreement was neither translated nor explained to the party); *In re Turner Bros. Trucking Co.*, 8 S.W. 3d 370 (Tex. App.—Texarkana 1999, orig. proceeding [mand. denied]) (finding procedural unconscionability where one of the parties was functionally illiterate, nobody explained the agreement to him, and the person who gave him the agreement to sign did not understand the agreement); *but see also BBCA Compass Inv. Sols., Inc. v. Brooks*, 456 S.W.3d 711, 725 (Tex. App.—Fort Worth 2015, no pet.) (“Subsequent events do not retroactively make an agreement procedurally unconscionable.”).

<sup>211.</sup> *In re Olshan Found. Repair Co., LLC*, 328 S.W.3d 883, 892 (Tex. 2010); *see also G.T. Leach Builders, LLC v. Sapphire V.P., LP*, 458 S.W.3d 502, 522-23 (Tex. 2015) (in claim for procedural unconscionability, it was held that courts must defer to an arbitrator’s decision as to whether or not a contractual deadline affects the right to arbitrate).

<sup>212.</sup> *In re 24R, Inc.*, 324 S.W.3d 564, 567 (Tex. 2010).

<sup>213.</sup> *J.M. Davidson, Inc. v. Webster*, 128 S.W.3d 223, 230 n.2 (Tex. 2003).

<sup>214.</sup> *In re C&H News Co.*, 133 S.W.3d 642, 646 (Tex. App.—Corpus Christ 2003, orig. proceeding).

<sup>215.</sup> *Pak Foods Houston, LLC v. Garcia*, 433 S.W.3d 171, 177 (Tex. App.—Houston [14th Dist.] 2014, pet. dism’d).

agreement illusory so long as that power “1) extends only to prospective claims, 2) applies equally to both the employer’s and employee’s claims, and 3) so long as advance notice to the employee is required before termination is effective.”<sup>216</sup>

### 1-5:3 Claim Outside Agreement’s Scope

The party resisting arbitration may argue that the claim lies outside the agreement’s scope.<sup>217</sup> Because public policy strongly favors arbitration,<sup>218</sup> any doubt regarding whether the claim falls within the agreement’s scope must be resolved in favor of arbitration.<sup>219</sup>

### 1-5:4 Waiver

The party resisting arbitration may argue that the party seeking arbitration waived its right to arbitrate, either expressly or impliedly.<sup>220</sup> Express waiver exists when a party expressly indicates its desire to resolve the case in a judicial forum.<sup>221</sup> To establish implied waiver, the party contesting arbitration bears the burden of showing that the other party substantially invoked the litigation process to the contesting party’s detriment or prejudice.<sup>222</sup> Given

<sup>216</sup>. *Lizalde v. Vista Quality Markets*, 746 F.3d 222, 227 (5th Cir. 2014) (arbitration clause was enforceable because the employer’s power to terminate arbitration agreement was properly constrained by termination provisions within the arbitration agreement and benefit plan); see also *Nelson v. Watch House Intern., L.L.C.*, 815 F.3d 190, 195 (5th Cir. 2016) (reviewing both 5th circuit and Texas case law, the court concludes that *Lizalde* was the controlling test in holding that employer retaining unilateral power to modify the employment contract made the arbitration agreement unconscionable).

<sup>217</sup>. For a further discussion of the scope of agreement, see § 1-4:2.

<sup>218</sup>. See, e.g., *Southland Corp. v. Keating*, 465 U.S. 1, 10 (1984); *East Texas Salt Water Disposal Co., Inc. v. Werline*, 307 S.W.3d 267, 270 (Tex. 2010).

<sup>219</sup>. *In re Bank One*, 216 S.W.3d 825-26 (Tex. 2007); see *In re Houston Progressive Radiology Assocs., PLLC*, 474 S.W.3d 435, 447-48 (Tex. App.—Houston [1st Dist.] 2015, no pet.) (“[under a broad arbitration clause] a claim is not subject to arbitration only if the facts alleged in support of the claim stand alone, are completely independent of the contract, and the claim could be maintained without reference to the contract.”).

<sup>220</sup>. Waiver is defined as the “intentional relinquishment of a known right or intentional conduct inconsistent with claiming that right.” *Jernigan v. Langley*, 111 S.W.3d 153, 156 (Tex. 2003). Every analysis begins with a strong presumption against the waiver of a contractual right to arbitrate. See, e.g., *In re Bank One*, 216 S.W.3d 825, 826 (Tex. 2007).

<sup>221</sup>. *Interconex, Inc. v. Ugarov*, 224 S.W.3d 523, 533 (Tex. App.—Houston [1st Dist.] 2007, no pet.); but see *Venture Cotton Coop. v. Freeman*, 435 S.W.3d 230 (Tex. 2014) (a waiver under another state statute if contrary to public policy may still be invalid).

<sup>222</sup>. *G.T. Leach Builders, LLC v. Sapphire V.P., LP*, 458 S.W.3d 502, 511-12 (Tex. 2015); *Perry Homes v. Cull*, 258 S.W.3d 580, 585 (Tex. 2008).

the strong presumption against waiver of arbitration, this hurdle is a high one.<sup>223</sup>

**1-5:4.1 Substantial Invocation of Judicial Process**

In determining whether the party substantially invoked the judicial process, courts apply a totality-of-the-circumstances test.<sup>224</sup> The test considers factors such as: (1) whether the party seeking arbitration was the plaintiff (who chose to file in court) or the defendant (who simply responded),<sup>225</sup> (2) when the party seeking arbitration knew of the arbitration clause and how long that party delayed before seeking arbitration,<sup>226</sup> (3) how much discovery has been conducted,<sup>227</sup> (4) who initiated the discovery,<sup>228</sup> (5) whether the discovery related to the merits rather than arbitrability or standing,<sup>229</sup> (6) how much of the discovery would be useful in arbitration,<sup>230</sup> and (7) whether the party seeking arbitration sought judgment on the merits.<sup>231</sup>

The Texas Supreme Court has applied this test to conclude that a party does not substantially invoke the judicial process simply by: filing suit,<sup>232</sup> moving to dismiss a claim for lack of standing,<sup>233</sup> moving to set aside a default judgment and requesting a new trial,<sup>234</sup> opposing a trial setting and seeking to move the litigation to federal court,<sup>235</sup> moving to strike an intervention and opposing

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<sup>223</sup> *G.T. Leach Builders, LLC v. Sapphire V.P., LP*, 458 S.W.3d 502, 511-12 (Tex. 2015); *Perry Homes v. Cull*, 258 S.W.3d 580, 590 (Tex. 2008).

<sup>224</sup> *Perry Homes v. Cull*, 258 S.W.3d 580, 592 (Tex. 2008).

<sup>225</sup> *Perry Homes v. Cull*, 258 S.W.3d 580, 591-92 (Tex. 2008).

<sup>226</sup> *EZ Pawn Corp. v. Mancias*, 934 S.W.2d 87, 88-89 (Tex. 1996).

<sup>227</sup> *In re Vesta Ins. Grp.*, 192 S.W.3d 750, 763 (Tex. 2006).

<sup>228</sup> *In re Vesta Ins. Grp.*, 192 S.W.3d 750, 763 (Tex. 2006).

<sup>229</sup> *In re Vesta Ins. Grp.*, 192 S.W.3d 750, 763 (Tex. 2006).

<sup>230</sup> *In re Bruce Terminix Co.*, 988 S.W.2d 702, 704 (Tex. 1998).

<sup>231</sup> *In re Bruce Terminix Co.*, 988 S.W.2d 702, 704 (Tex. 1998).

<sup>232</sup> *Perry Homes v. Cull*, 258 S.W.3d 580, 590 (Tex. 2008) (citing *In re D. Wilson Constr. Co.*, 196 S.W.3d 774, 783 (Tex. 2006)).

<sup>233</sup> *Perry Homes v. Cull*, 258 S.W.3d 580, 590 (Tex. 2008) (citing *In re Vesta Ins. Grp.*, 192 S.W.3d 750, 764 (Tex. 2006)).

<sup>234</sup> *Perry Homes v. Cull*, 258 S.W.3d 580, 590 (Tex. 2008) (citing *In re Bank One*, 216 S.W.3d 825, 827 (Tex. 2007)).

<sup>235</sup> *Perry Homes v. Cull*, 258 S.W.3d 580, 590 (Tex. 2008) (citing *In re Service Corp. Int'l*, 355 S.W.3d 655, 659 (Tex. 2011) (*per curiam*)).

discovery;<sup>236</sup> sending 18 interrogatories and 19 requests for production;<sup>237</sup> requesting an initial round of discovery, noticing, but not taking, a single deposition and agreeing to a trial resetting;<sup>238</sup> participating in pretrial discovery and filing a counterclaim but never seeking disposition of it the case on the merits;<sup>239</sup> or seeking initial discovery, taking four depositions, and moving for dismissal based on standing.<sup>240</sup> In fact, only once has the Texas Supreme Court held that a party waived arbitration by substantially invoking the judicial process.<sup>241</sup>

### 1-5:4.2 Prejudice

The concept of prejudice is critical in a court’s determination of waiver. “Prejudice” refers to the inherent unfairness in terms of delay, expense, or damage to a party’s legal position that occurs when the opposing party forces litigation of an issue and later seeks to arbitrate that same issue.<sup>242</sup> In other words, Texas courts do not condone litigation “brinkmanship,” and will not allow parties who have hedged their bets by strategically keeping arbitration agreements in the back pockets as a “failsafe,” to deploy on the eve of trial to prejudice the other party.<sup>243</sup> Prejudice requires more than mere delay in seeking arbitration.<sup>244</sup>

<sup>236</sup>. *Perry Homes v. Cull*, 258 S.W.3d 580, 590 (Tex. 2008) (citing *Prudential Sec., Inc. v. Marshall*, 909 S.W. 896, 898–99 (Tex. 1995)).

<sup>237</sup>. *Perry Homes v. Cull*, 258 S.W.3d 580, 590 (Tex. 2008) (citing *In re Bruce Terminix Co.*, 988 S.W.2d 702, 704 (Tex. 1998)).

<sup>238</sup>. *Perry Homes v. Cull*, 258 S.W.3d 580, 590 (Tex. 2008) (citing *EZ Pawn Corp. v. Mancias*, 934 S.W.2d 87, 90 (Tex. 1996)).

<sup>239</sup>. *G.T. Leach Builders, LLC v. Sapphire V.P., LP*, 458 S.W.3d 502, 513 (Tex. 2015); see also *Morgan v. Bronze Queen Mgt. Co., LLC*, 474 S.W.3d 701, 708–09 (Tex. App. Houston [14th Dist.] 2014, no. pet.) (“We conclude that filing a counterclaim in arbitration and withdrawing it before the claim is submitted to the arbitrator for decision does not constitute waiver.”).

<sup>240</sup>. *Perry Homes v. Cull*, 258 S.W.3d 580, 590 (Tex. 2008) (citing *In re Vesta Ins. Grp.*, 192 S.W.3d 750, 763 (Tex. 2006)).

<sup>241</sup>. *Perry Homes v. Cull*, 258 S.W.3d 580, 589–90 (Tex. 2008) (finding substantial invocation of judicial process where the party objected to arbitration, conducted extensive discovery, and then moved to compel arbitration just before trial).

<sup>242</sup>. *Perry Homes v. Cull*, 258 S.W.3d 580, 597 (Tex. 2008).

<sup>243</sup>. *El Paso Healthcare Sys., Ltd. v. Green*, 485 S.W.3d 227, 233–34 (Tex. App.—El Paso 2016, pet. filed) (denying party’s movement to compel arbitration raised shortly before trial after over nineteen months of discovery and litigation).

<sup>244</sup>. *In re Vesta Ins. Grp.*, 192 S.W.3d 759, 763 (Tex. 2006); *Richmont Holdings, Inc. v. Superior Recharge Sys., L.L.C.*, 2013 Tex. App. LEXIS 10689, 2013 WL 4517220 (Tex. App.—Fort Worth Aug. 22, 2013) (finding prejudice); *CropMark Direct, LLC v. Urbanczyk*,

## 1-6 PRE-ARBITRATION LITIGATION IN TRIAL AND APPELLATE COURTS

### 1-6:1 Where to File

Texas federal district courts can hear a motion to compel and order the parties to arbitrate in the forum identified in the agreement, even if the forum is outside the circuit.<sup>245</sup>

### 1-6:2 Interlocutory Appeal Available for Denial of Motion to Compel Arbitration

Section 51.016 of the Texas Civil Practice and Remedies Code permits the interlocutory appeal of an order denying a motion to compel arbitration under the Federal Arbitration Act.<sup>246</sup> Similarly, the FAA states that “[a]n appeal may be taken from . . . an order . . . denying an application . . . to compel arbitration.”<sup>247</sup>

### 1-6:3 Standard of Review of Trial Court’s Denial of Motion to Compel Arbitration

The trial court’s order denying a motion to compel arbitration generally is reviewed under an abuse of discretion standard.<sup>248</sup> A trial court’s determination regarding the validity of an arbitration agreement is subject to de novo review.<sup>249</sup> A party seeking to compel arbitration must establish the existence of a valid arbitration agreement and show the claims raised in the suit

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377 S.W.3d 761, 764–66 (Tex. App.—Amarillo 2012, pet. denied) (finding prejudice where party requested a jury trial, delayed seeking arbitration, participated in discovery relating to the merits rather than whether the claims were subject to arbitration, and benefitted from discovery mechanisms not available in arbitration).

<sup>245</sup> *Dupuy-Busching Gen. Agency, Inc. v. Ambassador Ins. Co.*, 524 F.2d 1275, 1277–78 (5th Cir. 1975).

<sup>246</sup> Tex. Civ. Prac. Code Ann. § 51.016; *In re Weekley Homes, L.P.*, 336 S.W.3d 413, 418 (Tex. App.—Dallas 2011, pet. denied).

<sup>247</sup> 9 U.S.C. § 16(a)(1)(c); *see also Sidley Austin Brown & Wood, LLP v. J.A. Green Dev. Corp.*, 327 S.W.3d 859, 861 (Tex. App.—Dallas 2010, no pet.) (considering an interlocutory appeal from a trial court’s denial of a motion to compel arbitration under the FAA). Under the FAA, “the general, congressionally mandated rule [is] that anti-arbitration decisions are immediately appealable under 16(a)(1).” *May v. Higbee Co.*, 372 F.3d 757, 762–763 (5th Cir. 2004). “[T]he question whether the parties have entered into a binding agreement to arbitrate is one of the enquires we undertake in an interlocutory appeal of the denial of a motion to compel arbitration.” *May v. Higbee Co.*, 372 F.3d 757, 762 (5th Cir. 2004).

<sup>248</sup> *Sidley Austin Brown & Wood, LLP v. J.A. Green Dev. Corp.*, 327 S.W.3d 859, 862–63 (Tex. App.—Dallas 2010, no pet.).

<sup>249</sup> *J.M. Davidson, Inc. v. Webster*, 128 S.W.3d 223, 227 (Tex. 2003).

fall within the scope of the agreement.<sup>250</sup> The presumption in favor of arbitration arises only after a valid arbitration agreement is proven to exist.<sup>251</sup>

When a party denies he is bound by an arbitration agreement, the trial court determines whether a valid agreement to arbitrate exists between the parties, and may decide this on the basis of affidavits, pleadings, discovery, and stipulations, and may conduct an evidentiary hearing to resolve material facts necessary to determine the issue.<sup>252</sup> Absent express language to the contrary, it is the trial court's role to decide whether the dispute in question is subject to a valid agreement to arbitrate.<sup>253</sup>

#### 1-6:4 Review by Mandamus

Because an order denying a motion to compel arbitration is immediately appealable under both the TAA and the FAA, mandamus is typically unavailable to review these orders.<sup>254</sup> Similarly, an order granting a motion to compel arbitration is generally not reviewable by mandamus.<sup>255</sup> If an order compelling arbitration disposes of all remaining parties and claims, then it is final and subject to ordinary appeal rather than mandamus.<sup>256</sup>

<sup>250.</sup> *In re Oakwood Mobile Homes, Inc.*, 987 S.W.2d 571, 573 (Tex. 1999) (citing *Cantella & Co. v. Goodwin*, 924 S.W.2d 943 (Tex.1996)).

<sup>251.</sup> *J.M. Davidson, Inc. v. Webster*, 128 S.W.3d 223, 227 (Tex. 2003).

<sup>252.</sup> Tex. Civ. Prac. & Rem. Code § 171.021; *Jack B. Anglin Co., Inc. v. Tipps*, 842 S.W.2d 266, 269 (Tex. 1992).

<sup>253.</sup> See *AT&T Technologies, Inc. v. Comm. Workers of America*, 475 U.S. 643, 647–51 (1986); see also *Moses H. Cone Memorial Hospital v. Mercury Construction Corp.*, 460 U.S. 1, 22 (1983) (recognizing FAA Sections 3 & 4 “call for an expeditious and summary hearing, with only restricted inquiry into factual issues”); Tex. Civ. Prac. & Rem. Code § 171.021(b) (requiring court to “summarily determine” existence of agreement to arbitrate if disputed). In the case of *In re MH Partnership, Ltd.*, 7 S.W.3d 918 (Tex. App.—Houston [1st Dist.] 1999, no pet.), the court granted mandamus relief on the basis of this statute against a trial court ruling deferring consideration of a motion to compel arbitration until the completion of full-blown discovery in the case. *In re MH Partnership, Ltd.*, 7 S.W.3d 918, 922 (Tex. App.—Houston [1st Dist.] 1999, no pet.); see also *Jack B. Anglin Co. v. Tipps*, 842 S.W.2d 266, 269 (Tex. 1992) (allowing trial court to summarily decide whether to compel arbitration on the basis of affidavits, pleadings, discovery, and stipulations unless material facts are controverted).

<sup>254.</sup> Tex. Civ. Prac. & Rem. Code § 171.098 (TAA); Tex. Civ. Prac. & Rem. Code § 51.016 (FAA); 9 U.S.C. § 16 (FAA). Before 2009, orders denying arbitration under the FAA were reviewable by mandamus. See *In re Bruce Terminix Co.*, 988 S.W.2d 702, 703–04 (Tex. 1998) (using mandamus review to set aside order denying motion to compel arbitration).

<sup>255.</sup> *In re Gulf Exploration, LLC*, 289 S.W.3d 836, 842–43 (Tex. 2009).

<sup>256.</sup> *Childers v. Advanced Found. Repair, L.P.*, 193 S.W.3d 897–98 (Tex. 2006) (reversing court of appeals decision that it lacked jurisdiction over appeal because order was interlocutory).

Unlike a dismissal, however, a stay constitutes postponement of proceedings and therefore lacks finality.<sup>257</sup> Therefore, a court's decision to stay a case pending arbitration cannot be reviewed by appeal until the court renders a final judgment.<sup>258</sup> An exception to the rule recognizes that mandamus review of an order staying a case for arbitration could be available if a party satisfies a "particularly heavy" burden to show "clearly and indisputably" that the trial court lacked the discretion to stay the proceedings pending arbitration.<sup>259</sup>

**PRACTICE POINTER:**

Although the courts say that there are those rare occasions when an order compelling arbitration and staying the case can be reviewed by way of mandamus or interlocutory appeal, in practice, interlocutory appellate remedies are only available for orders that deny arbitration. The one-sidedness of these rights has been determined to be the intention of both the federal and state legislatures.

## 1-7 THE ARBITRATION

The arbitration agreement sets out the administrative rules that govern the arbitration proceedings. The agreement usually incorporates rules promulgated by an organization that provides arbitration administration services,<sup>260</sup> the most common of which is the American Arbitration Association (AAA). While the AAA authors several sets of rules,<sup>261</sup> the most common is the AAA's Commercial Arbitration Rules and Mediation Procedures. As such, any discussion in this chapter relating to administrative rules will be referring to the AAA's Commercial Arbitration Rules and Mediation Procedures.<sup>262</sup> Arbitration agreements which do not

<sup>257</sup> *Apache Bohai Corp., LDC v. Texaco China, B.V.*, 330 F.3d 307, 309 (5th Cir. 2003).

<sup>258</sup> *In re Palacios*, 221 S.W.3d 564, 565–66 (Tex. 2006).

<sup>259</sup> *In re Palacios*, 221 S.W.3d 564, 565 (Tex. 2006).

<sup>260</sup> Examples of these organizations include the American Arbitration Association, the Financial Industry Regulatory Authority, the National Arbitration Forum, and the International Chamber of Commerce.

<sup>261</sup> The AAA offers multiple sets of administrative rules with each tailored to a specific area of law, such as construction, employment, labor or commercial litigation. See generally [www.adr.org](http://www.adr.org).

<sup>262</sup> To incorporate the AAA's commercial rules into a contract, the parties should include the following arbitration clause in the contract: "Any controversy or claim arising out of or

specify AAA rules may employ many different variations of the rules discussed herein.

### 1-7:1 The Arbitrator

The Arbitrator is charged with the responsibility of awarding costs and sanctions, resolving discovery disputes and issuing the final award. Given the arbitrator's wide discretion, this step of the arbitration process cannot be overlooked.

#### 1-7:1.1 Number of Arbitrators

If the agreement is silent as to the number of arbitrators, then one arbitrator will decide the dispute unless the AAA decides otherwise.<sup>263</sup> A party may request three arbitrators in the Demand or Answer, but the AAA only considers such a request a factor in deciding the number of arbitrators to appoint to the dispute.<sup>264</sup> If the parties cannot agree upon the number of arbitrators and a claim or counterclaim involves at least \$1,000,000, then three arbitrators must decide the case.<sup>265</sup>

#### 1-7:1.2 Selection of Arbitrators

##### **PRACTICE POINTER:**

Like most aspects of arbitration, the agreement dictates the method for selecting the arbitrators. If the parties' agreement names an arbitrator, then that designation must be followed.<sup>266</sup>

*relating to this contract, or the breach thereof, shall be settled by arbitration administered by the American Arbitration Association under its Commercial Arbitration Rules, and judgment on the award rendered by the arbitrator(s) may be entered in any court having jurisdiction thereof.*" AAA Commercial Arbitration Rules and Mediation Procedures (amended and effective Oct. 1, 2013), (Fee Schedule Amended and Effective July 1, 2016), available at <https://adr.org/sites/default/files/Commercial%20Rules.pdf>.

<sup>263.</sup> R-16 AAA Commercial Arbitration Rules and Mediation Procedures (amended and effective Oct. 1, 2013), (Fee Schedule Amended and Effective July 1, 2016), available at <https://adr.org/sites/default/files/Commercial%20Rules.pdf>.

<sup>264.</sup> R-16 AAA Commercial Arbitration Rules and Mediation Procedures (amended and effective Oct. 1, 2013), (Fee Schedule Amended and Effective July 1, 2016), available at <https://adr.org/sites/default/files/Commercial%20Rules.pdf>.

<sup>265.</sup> L-2 (a), AAA Commercial Arbitration Rules and Mediation Procedures (amended and effective Oct. 1, 2013), (Fee Schedule Amended and Effective July 1, 2016), available at <https://adr.org/sites/default/files/Commercial%20Rules.pdf>.

<sup>266.</sup> R-13 (a), AAA Commercial Arbitration Rules and Mediation Procedures (amended and effective Oct. 1, 2013), (Fee Schedule Amended and Effective July 1, 2016), available at <https://adr.org/sites/default/files/Commercial%20Rules.pdf>.

But when the arbitration agreement is silent as to the method of appointment, then the AAA sends both parties an identical list of 10 people chosen from a National Roster.<sup>267</sup> If the parties cannot agree upon an arbitrator listed, then the AAA gives 14 days to each party to strike objectionable names, list the remaining names in order of preference, and return the list to the AAA.<sup>268</sup> The AAA then invites only those arbitrators who have been approved on both lists according to the designated order of mutual preference.<sup>269</sup> If this process fails, then the AAA is authorized to appoint arbitrators from the National Roster without distributing additional lists.<sup>270</sup>

### 1-7:1.3 Judicial Involvement in Selection Process

Courts generally are discouraged from interfering with the arbitrator selection method agreed upon by the parties in the arbitration agreement.<sup>271</sup> However, the TAA and the FAA authorize the court to step in and appoint an arbitrator in certain limited situations.

Under the TAA, the court, on application of a party, must appoint an arbitrator if: (1) the agreement does not specify a method of appointment, (2) the agreed method fails or cannot be followed, or (3) an appointed arbitrator fails or is unable to act and a successor has not been appointed.<sup>272</sup> Under the FAA, the court is authorized to appoint an arbitrator if: (1) the agreement does

<sup>267</sup>. R-12 (a), AAA Commercial Arbitration Rules and Mediation Procedures (amended and effective Oct. 1, 2013), (Fee Schedule Amended and Effective July 1, 2016), available at [https://adr.org/sites/default/files/CommercialRules\\_Web.pdf](https://adr.org/sites/default/files/CommercialRules_Web.pdf).

<sup>268</sup>. R-12 (b), AAA Commercial Arbitration Rules and Mediation Procedures (amended and effective Oct. 1, 2013), (Fee Schedule Amended and Effective July 1, 2016), available at [https://adr.org/sites/default/files/CommercialRules\\_Web.pdf](https://adr.org/sites/default/files/CommercialRules_Web.pdf).

<sup>269</sup>. R-12 (b), AAA Commercial Arbitration Rules and Mediation Procedures (amended and effective Oct. 1, 2013), (Fee Schedule Amended and Effective July 1, 2016), available at [https://adr.org/sites/default/files/CommercialRules\\_Web.pdf](https://adr.org/sites/default/files/CommercialRules_Web.pdf).

<sup>270</sup>. R-12 (b), AAA Commercial Arbitration Rules and Mediation Procedures (amended and effective Oct. 1, 2013), (Fee Schedule Amended and Effective July 1, 2016), available at [https://adr.org/sites/default/files/CommercialRules\\_Web.pdf](https://adr.org/sites/default/files/CommercialRules_Web.pdf).

<sup>271</sup>. *In re La. Pac. Corp.*, 972 S.W.2d 63, 65 (Tex. 1998) (“[O]ne of the central purposes of the FAA has been to allow the parties to select their own arbitration panel if they choose to do so.”); *In re Service Corp. Int’l*, 355 S.W.3d 655, 659 (Tex. 2011) (*per curiam*) (holding that, ordinarily, the court does not have authority to override the parties’ selection of an arbitrator); *but see In re Phelps Dodge Magnet Wire Co.*, 225 S.W.3d 599 (Tex. App.—El Paso 2005, orig. proceeding) (invalidating arbitration agreement giving one party sole control of arbitrator selection process).

<sup>272</sup>. Tex. Civ. Prac. & Rem. Code § 171.041.

not specify a method of appointment, (2) a party “fail[s] to avail” itself of an agreed-upon method, or (3) a “lapse” in the naming of an arbitrator occurs.<sup>273</sup> A court should invoke its authority under the FAA to appoint an arbitrator only when some “mechanical breakdown in the arbitrator selection process” occurs or when a party’s refusal to comply with the process delays arbitration indefinitely.<sup>274</sup> Any alleged lapse must be measured from the time the parties reach an impasse under the selection process provided in the agreement.<sup>275</sup> A trial court’s decision concerning the selection of an arbitrator is not subject to interlocutory appeal, but may be reviewable by mandamus.<sup>276</sup>

#### **PRACTICE POINTER:**

When selecting arbitrators for arbitration panels, the process will be impacted not only by the legal qualifications, professional backgrounds and philosophic orientation of the arbitrators, but also by the personalities involved. Learn about the arbitrators before making selections.

#### **1-7:1.4 Disqualification of Arbitrator**

Arbitrators have a duty to disclose any fact that might, to an objective observer, create a reasonable impression of the arbitrator’s partiality; otherwise, evident partiality exists as a matter of law and the arbitrator is subject to disqualification.<sup>277</sup> Evident

<sup>273</sup>. 9 U.S.C. § 5; *but see Ranzy v. Extra Cash of Texas, Inc.*, No. H-09-3334, 2010 WL 936471 (S.D. Tex. 2010), *aff’d*, 393 Fed. Appx. 174 (5th Cir. 2010) (FAA did not permit the court to appoint an arbitrator because the arbitration clause’s requirements—specifically naming the National Arbitration Forum (NAF) as the sole arbitrator, stating all disputes would be resolved using the NAF Code, and requiring claims to be filed at any NAF office—directly related to the NAF, which no longer provided commercial arbitration services).

<sup>274</sup>. *In re La. Pac. Corp.*, 972 S.W.2d 63, 64–65 (Tex. 1998).

<sup>275</sup>. *In re Serv. Corp. Int’l*, 355 S.W.3d 655, 660 (Tex. 2011) (*per curiam*) (one-month delay following the impasse is insufficient as a matter of law to constitute “lapse” under the FAA); *Pacific Reins. Mgmt. Corp. v. Ohio Reins. Corp.*, 814 F.2d 1324, 1329 (9th Cir. 1987) (five-month delay after impasse constituted sufficient “lapse” of time under the FAA).

<sup>276</sup>. *In re Serv. Corp. Int’l*, 355 S.W.3d 655, 658 (Tex. 2011) (*per curiam*) (granting mandamus relief to vacate trial court order appointing arbitrator).

<sup>277</sup>. *Burlington N. R.R. v. TUCO*, 960 S.W.2d 629 (Tex. 1997) (holding that non-disclosure of arbitrator’s referral to represent co-arbitrator’s law firm in federal lawsuit was evident partiality); *Mariner Fin. Group v. Bossley*, 79 S.W.3d 30, 33 (Tex. 2002) (finding no evident partiality because a fact issue existed as to whether arbitrator knew of the prior

partiality may exist without actual bias—that is, it comes from the “*nondisclosure itself*.”<sup>278</sup> The duty to disclose also exists throughout the duration of the arbitration. Notwithstanding the general rule, parties may agree in writing that the arbitrator is not required to be impartial or independent.<sup>279</sup> In these situations, the arbitrator is not subject to disqualification based on evident partiality because the duty to disclose does not apply to arbitrators not intended to be neutral.<sup>280</sup> The court is obligated to vacate an arbitration award if a party shows evident partiality by an arbitrator intended to be neutral.<sup>281</sup>

### **PRACTICE POINTER:**

The disclosure requirement applies not only during the arbitrator selection process, but also throughout the entire arbitral proceeding. As a result, the arbitrator must reveal any new circumstances that arise during the course of the proceeding that may create a reasonable impression of the arbitrator’s partiality or bias to an objective observer.<sup>282</sup> This standard represents the minimum disclosure rules that must apply in the arbitral setting. Thus, if the parties choose to hold their arbitration to a higher standard, they may contract to do so.<sup>283</sup>

adverse relationship with one of the parties’ expert witnesses); *Forest Oil Corp. v. El Rucio Land & Cattle Co., Inc.*, 446 S.W.3d 58, 80-81 (Tex. App.—Houston [1st Dist.] 2014, pet. denied) (The parties’ consideration of the mediator in prior litigation that mediator was unaware of could not have influenced the mediator’s impartiality); *Karlseng v. Cooke*, 346 S.W.3d 85, 94 (Tex. App.—Dallas 2011, no pet.) (holding that non-disclosure of arbitrator’s direct, personal, professional, social, and business relationship with plaintiff’s attorney was evident partiality); *J.D. Edwards World Solutions Co. v. Estes, Inc.*, 91 S.W.3d 836, 840 (Tex. App.—Fort Worth 2002, pet. denied) (finding that non-disclosure of arbitrator’s ongoing representation of defendant was evident partiality).

<sup>278.</sup> *Burlington N. R.R. v. TUCO*, 960 S.W.2d 636 (Tex. 1997) (citing *Commonwealth Coatings Corp. v. Continental Cas. Co.*, 393 U.S. 145, 147 (1968) (finding evident partiality based on arbitrator’s failure to disclose conflict despite no evidence of actual bias)).

<sup>279.</sup> R-18(b), AAA Commercial Arbitration Rules and Mediation Procedures (amended and effective Oct. 1, 2013), available at <https://adr.org/sites/default/files/Commercial%20Rules.pdf>.

<sup>280.</sup> See Tex. Civ. Prac. & Rem. Code § 171.041; *Burlington N. R.R. v. TUCO*, 960 S.W.2d 636–37 (Tex. 1997).

<sup>281.</sup> Tex. Civ. Prac. & Rem. Code § 171.088(a)(2)(A).

<sup>282.</sup> *Burlington N. R.R. v. TUCO*, 960 S.W.2d 636 (Tex. 1997).

<sup>283.</sup> *Mariner Fin. Group v. Bossley*, 79 S.W.3d 30, 35 (Tex. 2002) (parties agreed to incorporate stricter standard of evident partiality, “which provides not only that arbitrators should disclose relationships that ‘might reasonably create an appearance of partiality or bias,’ but also that they should make a ‘reasonable effort’ to inform themselves of such relationships.”).

While some jurisdictions impose a duty on the parties to investigate the arbitrator's potential bias, the Texas Supreme Court's position on the duty remains unclear.<sup>284</sup> In *Mariner Financial Group v. Bossley*, the concurring justices declined to support the imposition of a duty upon the parties to investigate the arbitrator; yet, they found that an arbitrator's failure to disclose information she believed the parties already knew would not create "a reasonable impression" of the arbitrator's partiality.<sup>285</sup> Subsequently, in *Tanaska Energy, Inc. v. Ponderosa Pine Energy, LLC*, the Texas Supreme Court once again sat to decide whether or not to vacate an award handed down by an allegedly partial arbitrator.<sup>286</sup> The court held that the arbitrator's failure to disclose the extent of his relationship with two lawyers representing one party in the arbitration might yield a reasonable impression of the arbitrator's partiality to an objective observer.<sup>287</sup> The *Tanaska* court also ruled that the parties did not waive a challenge to the arbitrator's partiality as the waiver clause "was conditioned on a full disclosure that did not occur."<sup>288</sup>

In light of this lack of clarity, a prudent practitioner should conduct an evaluation of any neutral arbitrator's background before arbitration, as it enables the party to consider and evaluate any biases that are public knowledge or readily known and defuses any argument that the party waived objections to connections, relationships, or financial dealings that are so well known as to be common knowledge.

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<sup>284.</sup> *Mariner Fin. Group v. Bossley*, 79 S.W.3d 30, 35 (Tex. 2002) (observing that the Court did not decide whether the challenging party had a duty to discover the basis of the arbitrator's alleged partiality).

<sup>285.</sup> *Mariner Fin. Group v. Bossley*, 79 S.W.3d 30, 35–36 (Tex. 2002) (Owen, J., concurring) ("An arbitration award should not be vacated for 'evident partiality' based solely on a failure to disclose if the party seeking to vacate the award could reasonably have been expected to know the undisclosed facts.").

<sup>286.</sup> *Tanaska Energy, Inc. v. Ponderosa Pine Energy, LLC*, 437 S.W.3d 518, 519 (Tex. 2014).

<sup>287.</sup> *Tanaska Energy, Inc. v. Ponderosa Pine Energy, LLC*, 437 S.W.3d 518, 529 (Tex. 2014) ("[The arbitrator's] failure to disclose the extent of his relationship with [a party] and the two lawyers who represented it... might yield a reasonable impression of the arbitrator's partiality to an objective observer. Thus, [the arbitrator] had a duty to disclose the additional information, and his failure to do so constitutes evident partiality.").

<sup>288.</sup> *Tanaska Energy, Inc. v. Ponderosa Pine Energy, LLC*, 437 S.W.3d 518, 529 (Tex. 2014).

## 1-7:2 Discovery

Nothing in the FAA or the TAA precludes discovery in the arbitration process. But limitations to discovery in arbitration should be expected.<sup>289</sup>

### 1-7:2.1 Permissible Discovery

The AAA Commercial Arbitration Rules and Mediation Procedures authorize the arbitrator to resolve any dispute concerning the exchange of information.<sup>290</sup> Under Rule 21, the arbitrator is authorized, at the request of any party or at the arbitrator's discretion, to direct: (1) the production of documents and other information, and (2) the identification of any witnesses to be called.<sup>291</sup> Although the rule does not expressly mention the availability of depositions, some arbitrators interpret the language "other information" to include depositions. But the rules governing large, complex cases, which the AAA defines as any case in which the claim or counterclaim of any party is at least \$500,000 exclusive of claimed interest, arbitration fees and costs, expressly give the arbitrator broad authority to order and control the exchange of information—including depositions.<sup>292</sup>

### 1-7:2.2 Judicial Involvement in Arbitral Discovery

While the TAA authorizes a party to apply for a court order requiring an adverse party or any witness to comply *with* an arbitrator's order made during arbitration,<sup>293</sup> it does not permit courts to order discovery in arbitration *without* an arbitral order

<sup>289</sup>. *Gilmer v. Interstate Johnson Lane Corp.*, 500 U.S. 20, 31 (1991) (arbitration agreement reflects the parties' decision to "trade [] the procedures . . . of the courtroom for the simplicity, informality, and expedition of arbitration"). See *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614, 628 (1985).

<sup>290</sup>. R. 21, AAA Commercial Arbitration Rules and Mediation Procedures (amended and effective Oct. 1, 2013), (Fee Schedule Amended and Effective July 1, 2016), available at [https://adr.org/sites/default/files/CommercialRules\\_Web.pdf](https://adr.org/sites/default/files/CommercialRules_Web.pdf).

<sup>291</sup>. R-21 (a)(i)-(ii) AAA Commercial Arbitration Rules and Mediation Procedures (amended and effective Oct. 1, 2013), (Fee Schedule Amended and Effective July 1, 2016), available at [https://adr.org/sites/default/files/CommercialRules\\_Web.pdf](https://adr.org/sites/default/files/CommercialRules_Web.pdf).

<sup>292</sup>. R-21, AAA Commercial Arbitration Rules and Mediation Procedures (amended and effective Oct. 1, 2013), (Fee Schedule Amended and Effective July 1, 2016), available at [https://adr.org/sites/default/files/CommercialRules\\_Web.pdf](https://adr.org/sites/default/files/CommercialRules_Web.pdf).

<sup>293</sup>. Tex. Civ. Prac. & Rem. Code § 171.088(a)(4).

compelling the same.<sup>294</sup> Accordingly, no mechanism exists to request immediate relief from an arbitrator’s denial of a motion to compel. The only option, available under both the TAA and the FAA, is to ask a court to vacate the award *after* it has been issued on the basis that the arbitrator refused to hear evidence material to the dispute.<sup>295</sup> But, proving the materiality of evidence that a party has not been allowed to discover is nearly impossible. Combined with the courts’ overwhelming reluctance to vacate an arbitration award, a denial of a motion to compel has virtually no remedy.

### 1-7:3 Decision to Request a Transcript of Proceedings

The party contesting an arbitration award bears the burden of producing evidence to support the statutory or common law basis asserted to vacate, modify or clarify an award. Specifically, the contesting party must “bring forth a sufficient record to establish any basis, including constitutional grounds that would warrant vacating the award.”<sup>296</sup>

Therefore, parties should consider retaining a court reporter to transcribe the proceedings, as it will preserve error for review. Without a record of the arbitral proceedings, the court will not disturb the arbitrator’s decision.<sup>297</sup>

#### **PRACTICE POINTER:**

A record is also helpful throughout the arbitration to read back testimony, quote during arguments or to assist the arbitrator in reviewing the evidence before rendering an award. Even if an appeal is not contemplated, if the size of the dispute supports the expenditure, have a record made. Many times, the parties will share the cost, especially if they have decided to make a daily copy of the transcript.

<sup>294</sup> See *Transwestern Pipeline Co. v. Blackburn*, 831 S.W.2d 72, 78 (Tex. App.—Amarillo 1992, orig. proceeding) (discussing that discovery is allowed only at the discretion of the arbitrator).

<sup>295</sup> Tex. Civ. Prac. & Rem. Code § 171.088(a)(3)(c); 9 U.S.C. § 10(a)(3).

<sup>296</sup> *In re C.A.K.*, 155 S.W.3d 554, 560 (Tex. App.—San Antonio 2004, pet. denied).

<sup>297</sup> *GJR Mgmt. Holdings, L.P. v. Jack Raus, Ltd.*, 126 S.W.3d 257, 263 (Tex. App.—San Antonio 2003, pet. denied) (“Because we have no record, we have no way of judging whether the misconduct in fact occurred and, if it occurred, whether it deprived [plaintiff] of a fair hearing.”); *Jamison & Harris v. Nat’l Loan Investors*, 939 S.W.2d 735, 738 (Tex. App.—Houston [14th Dist.] 1997, writ denied) (motion to vacate award based on arbitrator’s alleged refusal to consider material evidence was dismissed after complaining party failed to present a record of what evidence was offered and refused).

### 1-7:4 Award, Costs and Sanctions

The arbitrator's award must be in writing and signed by each arbitrator joining the award.<sup>298</sup> The arbitrator is not required to render a reasoned award unless the parties agree for a reasoned award before the arbitrator is appointed or the arbitrator determines that a reasoned award is appropriate.<sup>299</sup> Upon a party's request, the arbitrator may order sanctions for a party's failure to comply with an arbitrator's order.<sup>300</sup>

If the arbitrator enters a sanction (1) limiting any party's participation in the arbitration or (2) resulting in an adverse determination of an issue, then the arbitrator must explain that order in writing and require the submission of evidence and legal argument before making an award.<sup>301</sup> With regard to a party that is subject to a sanctions request, the arbitrator must give that party the opportunity to respond before making any determination regarding the sanctions request.<sup>302</sup> In no event may the arbitrator enter a default award as a sanction.<sup>303</sup>

## 1-8 CONFIRMING AN ARBITRATION AWARD

If the prevailing party in an arbitral proceeding wishes to reduce the award to a judgment, the process is known as "confirming an arbitration award." While an arbitration award is treated the same as the judgment of a court of last resort and all reasonable presumptions are indulged to uphold the arbitrators' decisions, and no hostile presumption is indulged against those rulings, the

<sup>298</sup>. Tex. Civ. Prac. & Rem. Code § 171.053(a).

<sup>299</sup>. R-46(b), AAA Commercial Arbitration Rules and Mediation Procedures (amended and effective Oct. 1, 2013), (Fee Schedule Amended and Effective July 1, 2016), *available at* [https://adr.org/sites/default/files/CommercialRules\\_Web.pdf](https://adr.org/sites/default/files/CommercialRules_Web.pdf).

<sup>300</sup>. R-58(a), AAA Commercial Arbitration Rules and Mediation Procedures (amended and effective Oct. 1, 2013), (Fee Schedule Amended and Effective July 1, 2016), *available at* [https://adr.org/sites/default/files/CommercialRules\\_Web.pdf](https://adr.org/sites/default/files/CommercialRules_Web.pdf).

<sup>301</sup>. R-58(a), AAA Commercial Arbitration Rules and Mediation Procedures (amended and effective Oct. 1, 2013), (Fee Schedule Amended and Effective July 1, 2016), *available at* [https://adr.org/sites/default/files/CommercialRules\\_Web.pdf](https://adr.org/sites/default/files/CommercialRules_Web.pdf).

<sup>302</sup>. R-58(b), AAA Commercial Arbitration Rules and Mediation Procedures (amended and effective Oct. 1, 2013), (Fee Schedule Amended and Effective July 1, 2016), *available at* [https://adr.org/sites/default/files/CommercialRules\\_Web.pdf](https://adr.org/sites/default/files/CommercialRules_Web.pdf).

<sup>303</sup>. R-58(a), AAA Commercial Arbitration Rules and Mediation Procedures (amended and effective Oct. 1, 2013), (Fee Schedule Amended and Effective July 1, 2016), *available at* [https://adr.org/sites/default/files/CommercialRules\\_Web.pdf](https://adr.org/sites/default/files/CommercialRules_Web.pdf).

trial court will have to enter an order confirming the award to have the effect of a judgment.<sup>304</sup>

**PRACTICE POINTER:**

An arbitration award is presumed valid and entitled to great deference, in part because of the importance of resolving disputes quickly.<sup>305</sup> When reviewing an arbitration award, the court may not substitute its view of the facts for that of the arbitrator's, merely because the court would have reached a different decision.<sup>306</sup>

Any party to an arbitration may confirm an award made in a Texas arbitration proceeding.<sup>307</sup> Once confirmed and entered by the trial court, the award has the same force and effect as any other judgment.<sup>308</sup>

The FAA is far more specific as it relates to confirming an arbitration award than is the TAA. Thus, a party should comply with the FAA's more specific procedural requirements when attempting to confirm an arbitration award, particularly when the TAA does not have a corresponding procedural requirement.

## 1-8:1 How to Confirm Award

Requests to confirm an arbitration award are considered motions, not independent suits for relief.<sup>309</sup>

### 1-8:1.1 Must Show Agreement Contemplated Judgment

Before filing a motion to confirm an arbitration award, the parties must affirmatively show that they have provided in their

<sup>304</sup> *CVN Group, Inc. v. Delgado*, 95 S.W.3d 234, 238 (Tex. 2002).

<sup>305</sup> *Crossmark, Inc. v. Hazar*, 124 S.W.3d 422, 429 (Tex. App.—Dallas 2004, pet. denied).

<sup>306</sup> *CVN Group, Inc. v. Delgado*, 95 S.W.3d 234, 238 (Tex. 2002).

<sup>307</sup> 9 U.S.C. § 9.

<sup>308</sup> 9 U.S.C. § 13; *CVN Group, Inc. v. Delgado*, 95 S.W.3d 234, 239 (Tex. 2002) (“An award of arbitrators upon matters submitted to them is given the same effect as the judgment of a court of last resort. All reasonable presumptions are indulged in favor of the award, and none against it.”, quoting *City of San Antonio v. McKenzie Constr. Co.*, 136 Tex. 315, 150 S.W.2d 989, 996 (1941)).

<sup>309</sup> 9 U.S.C. § 6; *IFC Interconsult, AG v. Safeguard Int'l Partners*, 438 F.3d 298, 308 (3d Cir. 2006) (“IFC’s application to the District Court for confirmation of the arbitration award was a motion, not a pleading. The FAA requires that “[a]ny application to the court hereunder shall be made and heard in the manner provided by law for the making and hearing of motions.”) (citing 9 U.S.C. § 6).

arbitration agreement that a judgment will be entered on the award.<sup>310</sup>

### 1-8:1.2 Arbitral Award Must be Final

Under the FAA, confirmation of an arbitration award requires the award to be “mutual, final, and definite.”<sup>311</sup> An award is generally deemed final when it evidences the arbitrator’s intent to resolve all claims submitted for arbitration.<sup>312</sup> Notwithstanding the general rule, finality is not required when:

- (1) the issues of liability and damages are bifurcated in the arbitration proceeding;<sup>313</sup>
- (2) the arbitrator orders interim security or temporary equitable relief;<sup>314</sup> or
- (3) the interim award finally disposes of a separate and independent claim.<sup>315</sup>

### 1-8:1.3 Attachments

The FAA has specific requirements for a motion to confirm, while the TAA does not. When seeking to confirm an arbitration award under the FAA, a party must attach the following documents:

- (1) The arbitration agreement;<sup>316</sup>
- (2) Any selection or appointment of an additional arbitrator or umpire;<sup>317</sup>
- (3) Any written extension of the time to make the award;<sup>318</sup>

<sup>310</sup>. 9 U.S.C. § 9; *see also Varley v. Tarrytown Assoc., Inc.*, 477 F.2d 208, 210 (2d Cir. 1973) (refusing to enter judgment because parties’ agreement had no explicit language that a judgment could be entered by the court upon entry of an arbitral award).

<sup>311</sup>. 9 U.S.C. § 10(a)(4).

<sup>312</sup>. *Fradella v. Petricca*, 183 F.3d 17, 19 (1st Cir. 1999); *Michaels v. Mariforum Shipping S.A.*, 624 F.2d 411, 413 (2d Cir. 1980).

<sup>313</sup>. *See, e.g., Hart Surgical, Inc. Ultracision, Inc.*, 244 F.3d 231, 236 (1st Cir. 2001).

<sup>314</sup>. *See, e.g., Yasuda Fire & Marine Insurance Co. of Eur. v. Cont’l Cas. Co.*, 37 F.3d 345, 348 (7th Cir. 1994).

<sup>315</sup>. *See, e.g., Zeiler v. Deitsch*, 500 F.3d 157, 168 (2d Cir. 2007).

<sup>316</sup>. 9 U.S.C. § 13(a).

<sup>317</sup>. 9 U.S.C. § 13(a).

<sup>318</sup>. 9 U.S.C. § 13(a).

- (4) The arbitration award;<sup>319</sup> and
- (5) Each notice, affidavit, or other paper used in an application to confirm, modify, or correct the award, and a copy of each court order ruling on the request.<sup>320</sup>

#### 1-8:1.4 Ruling on Motion When No Response Filed

When a party files a motion to confirm an arbitration award in the proper form, the court must confirm the award unless there is a response seeking to vacate, modify, or correct the award.<sup>321</sup>

#### 1-8:2 Where to File Motion

##### **PRACTICE POINTER:**

Neither the FAA nor the TAA establish jurisdiction for a court to confirm an arbitration award. Thus, practitioners must rely on general subject-matter jurisdiction and venue provisions to determine where to file a motion to confirm.

In federal court, a motion to confirm an arbitration award may be brought in a district court with an independent ground for subject-matter jurisdiction, which requires a federal question or diversity of citizenship among the parties.<sup>322</sup> In addition, venue must be proper, requiring that the motion to confirm an arbitration award be brought in the district specified in the agreement, in the district where the award was made, or in any proper district under the general venue statute.<sup>323</sup>

In Texas state court, the parties may agree what specific court may hear disputes in “major transactions with an aggregate value

<sup>319</sup> 9 U.S.C. § 13(b).

<sup>320</sup> 9 U.S.C. § 13(c).

<sup>321</sup> 9 U.S.C. § 9; Tex. Civ. Prac. & Rem. Code § 171.087; *see also* 9 U.S.C. § 10 (listing grounds and procedure for vacating arbitration awards in federal court); 9 U.S.C. § 11 (listing grounds and procedure for modifying or correcting arbitration award in federal court).

<sup>322</sup> *Moses H. Cone Mem'l Hosp. v. Mercury Constr. Corp.*, 460 U.S. 1, 25 n.32 (1983).

<sup>323</sup> 9 U.S.C. § 9; 28 U.S.C. § 1391. The federal Act's venue provisions are permissive—not mandatory. *Cortez Byrd Chips, Inc. v. Bill Harbert Constr. Co.*, 529 U.S. 193, 203-04 (2000).

of more than \$1,000,000.”<sup>324</sup> Otherwise, unless a mandatory venue provision applies,<sup>325</sup> a motion to confirm an arbitration award must be brought:

- (1) In the county where all or a substantial part of the events giving rise to the claim occurred;<sup>326</sup>

<sup>324</sup>. The parties may agree to venue in a “major transaction.” Tex. Civ. Prac. & Rem. Code § 15.020. Except for major transactions, the parties cannot contractually agree before suit to a venue contrary to the venue statute. See *In re Texas Ass’n of Sch. Bds., Inc.*, 169 S.W.3d 653, 655 (Tex. 2005) (orig. proceeding) (holding school district’s suit against risk management pool and its servicing contractor did not involve a “major transaction” within meaning of mandatory venue provision because the “aggregate stated value” was the annual premium payment of approximately \$41,000, not the coverage limits of \$17,000,000).

<sup>325</sup>. Chapter 15 of the Civil Practices and Remedies Code lists the mandatory venues provisions, which requires that suits be brought in certain counties for certain types of cases. See Tex. Civ. Prac. & Rem. Code § 15.011 (mandating that suit involving a land dispute be brought in county where all or part of the land is located); Tex. Civ. Prac. & Rem. Code § 15.0115(a) (mandating that suit between landlord and tenant be brought in county where all or part of real property is located); Tex. Civ. Prac. & Rem. Code § 15.012 (mandating that an action to stay a proceeding be brought in county where suit is pending); Tex. Civ. Prac. & Rem. Code § 15.013 (mandating that an action to stop the execution of a judgment based on the invalidity of the judgment or the writ of execution be brought in county where judgment was rendered); Tex. Civ. Prac. & Rem. Code § 15.014 (mandating that suit against head of a state department must be filed in Travis County); Tex. Civ. Prac. & Rem. Code § 15.015 (mandating that suit against a county must be brought in that county); Tex. Civ. Prac. & Rem. Code § 15.015(a) (mandating that suit against a political subdivision located in a county with a population of 100,000 or less must be brought in the county where the political subdivision is located); Tex. Civ. Prac. & Rem. Code § 15.017 (mandating that a suit for libel, slander or invasion of privacy must be brought in the county where the plaintiff resided when the action accrued, in the county where any of the defendants resided when suit was filed, or in the county that is the domicile of any corporate defendant); Tex. Civ. Prac. & Rem. Code §§ 15.018(b), (c) (mandating that suit under the Federal Employers’ Liability Act or Jones Act be brought in the county where all or a substantial part of the events or omissions giving rise to the claim occurred, in the county where the defendant’s principal place of business in Texas is located, or in the county where the plaintiff resided when the cause of action accrued); Tex. Civ. Prac. & Rem. Code § 15.019(a) (mandating that suit brought by an inmate that accrued during incarceration be brought in county where prison facility is located); Tex. Civ. Prac. & Rem. Code § 101.102(a) (mandating that suit under the Texas Tort Claims Act be brought in county where all or part of the cause of action arises); Tex. Civ. Prac. & Rem. Code § 65.023(a) (mandating that injunction suit against Texas resident be brought in county where defendant is domiciled); Tex. R. Disc. P. 3.03 (mandating that disciplinary suit against attorney be brought in county of the attorney’s principle place of business, in county of the attorney’s residence or in county where the misconduct occurred in whole or part); Tex. Prop. Code § 21.013(a) (mandating that condemnation suit be brought in county where owner resides, if any of land is located there; otherwise, suit must be brought where all or part of the property is located); Tex. Prop. Code § 115.002(b) (mandating that trust suit be brought in county where trustee resided or in county where trust was administered); Tex. Prop. Code § 21.013(c) (mandating that trust suit against corporate trustee be brought in county where principal place of business is located); Tex. Ins. Code § 1952.110 (mandating that suit against insurance company for coverage be brought in county where policyholder or beneficiary resided at time of accident or in county where accident occurred involving uninsured or underinsured motorist).

<sup>326</sup>. Tex. Civ. Prac. & Rem. Code § 15.002(a)(1).

- (2) In the county of the defendant's residence when the cause of action accrued, if the defendant is a natural person;<sup>327</sup>
- (3) In the county of the defendant's principal office in Texas, if the defendant is not a natural person;<sup>328</sup>  
or
- (4) In the county where the plaintiff resided when the cause of action accrued, if none of the other provisions apply.<sup>329</sup>

### 1-8:3 Procedural Deadlines

#### 1-8:3.1 State Courts

##### **PRACTICE POINTER:**

Under the TAA, there is no specific deadline to confirm an arbitration award. The deadlines address when motions to vacate, modify or correct must be filed.<sup>330</sup> Once this deadline passes, it is virtually impossible for a losing party to challenge an arbitration award under the TAA.<sup>331</sup>

<sup>327</sup> Tex. Civ. Prac. & Rem. Code § 15.002(a)(2).

<sup>328</sup> Tex. Civ. Prac. & Rem. Code § 15.002(a)(3).

<sup>329</sup> Tex. Civ. Prac. & Rem. Code § 15.002(a)(4).

<sup>330</sup> Tex. Civ. Prac. & Rem. Code § 171.088(b) (requiring that motions to modify or correct be filed within 90 days after award is delivered to party); Tex. Civ. Prac. & Rem. Code § 171.091(b) (same); *but see Louisiana Nat. Gas Pipeline, Inc. v. Bludworth Bond Shipyard, Inc.*, 875 S.W.2d 458, 462 (Tex. App.—Houston [1st Dist.] 1994, writ denied) (recognizing that when ground for vacatur is corruption of the process the deadline is 90 days after the party learned or should have learned of the basis for the motion) (citing Tex. Civ. Prac. & Rem. Code § 171.088(b)).

<sup>331</sup> *Sverdrup Corp v. WHC Constructors, Inc.*, 989 F.2d 148, 156 (4th Cir. 1993). The only possible basis for vacating an arbitration award after the 3-month deadline under the FAA or the 90-day deadline under the TAA is when the losing party alleges that a corruption of the process occurred, which extends the deadline to 90 days after the losing party learned or should have learned of the basis for the motion; *see Louisiana Nat. Gas Pipeline, Inc. v. Bludworth Bond Shipyard, Inc.*, 875 S.W.2d 458, 462 (Tex. App.—Houston [1st Dist.] 1994, writ denied).

**PRACTICE POINTER:**

Because there is no time limit on confirmation of awards in state court, parties seeking to confirm awards typically wait until after all deadlines for challenge to the award have passed before seeking confirmation. Unless there is some urgent reason to proceed with confirmation, this is the best strategy.

**1-8:3.2 Federal Courts**

Any party to the arbitration may apply for an order confirming the award within one year after the award is rendered.<sup>332</sup> Although this has been categorized as imposing a one-year statute of limitations on the filing of a motion to confirm an arbitration award,<sup>333</sup> some courts have held a common law action on the award may be available after the expiration of the one-year statutory period,<sup>334</sup> and the question may be whether a state court would hold that the one-year period is permissive.<sup>335</sup> Also, under some

<sup>332</sup> 9 U.S.C. § 9.

<sup>333</sup> See, e.g., *Photopaint Tech., L.L.C. v. Smartlens Corp.*, 335 F.3d 152, 158 (2d Cir. 2003) (“[W]e read the word ‘may’ in section 9 as permissive, but only within the scope of the preceding adverbial phrase: “[a]t any time within one year after the award is made. We therefore hold that section 9 of the FAA imposes a one-year statute of limitations on the filing of a motion to confirm an arbitration award under the FAA.”) (citing 9 U.S.C. § 9).

<sup>334</sup> See, e.g., *Kentucky River Mills v. Jackson*, 206 F.2d 111, 120 (6th Cir. 1953) (“Enforcement of the award in this case is not barred by the one-year limitation contained in Section 9 of the Act, which provides for the summary remedy of confirmation of the award by the court.”) (citing 9 U.S.C. § 9).

<sup>335</sup> Section 9 of the FAA provides, in pertinent part that: “If the parties in their agreement have agreed that a judgment of the court shall be entered upon the award made pursuant to the arbitration, and shall specify the court, then at any time within one year after the award is made any party to the arbitration *may* apply to the court so specified for an order confirming the award, and thereupon the court must grant such an order [confirming the award] unless the award is vacated, modified, or corrected as prescribed in section 10 and 11 of this title.” 9 U.S.C. § 9 (emphasis added). The use of the word “may” in section 9 has led a number of courts to conclude that the one-year time limitation is permissive. See, e.g., *Sverdrup Corp., WHC Constructors, Inc.*, 989 F.2d 148, 151–56 (4th Cir. 1993) (“The use of the word ‘may,’ as opposed to mandatory language, has been deemed to have been of critical importance in determining the permissive nature of § 9.”) (citing 9 U.S.C. § 9); *Val-U Const. Co. v. Rosebud Sioux Tribe*, 146 F.3d 573, 581 (8th Cir. 1998) (“We hold that § 9 is a permissive statute and does not require that a party file for confirmation within one year. If Congress intended for the one year period to be a statute of limitations, then it could have used the word ‘must’ or ‘shall’ in place of ‘may’ in the language of the statute. Thus, Val-U may seek confirmation of its award more than one year after the award was issued.”) (citing 9 U.S.C. § 9); but see *Photopaint Tech., L.L.C. v. Smartlens Corp.*, 335 F.3d 152, 158 (2d Cir. 2003) (“[W]e read the word ‘may’ in section 9 as permissive, but only within the scope of the preceding adverbial phrase: “[a]t any time within one year after the award is made.”) (citing 9 U.S.C. § 9).

circumstances, the untimeliness of an application to confirm an award may be waived.<sup>336</sup>

A motion to confirm an award need not be postponed for a three-month period to allow an opposing party to file a motion to vacate, modify, or correct the award.<sup>337</sup> In fact, the failure to move to vacate makes a challenge to confirmation after 90 days virtually impossible and encourages the parties to treat an award as binding.<sup>338</sup> A suit properly characterized as proceeding to confirm, rather than modify, an award is timely under the one-year provision.<sup>339</sup>

## 1-8:4 Scope of Review

### 1-8:4.1 Standard of Judicial Review

The trial court's review of an arbitrator's award is extremely narrow.<sup>340</sup>

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<sup>336.</sup> *Maidman v. O'Brien*, 473 F. Supp 25, 27 (S.D.N.Y. 1979) (recognizing an objection to arbitration award on the merits acts as a waiver to the untimeliness of the motion to confirm award).

<sup>337.</sup> *The Harbridge*, 57 F.2d 672-73 (2d Cir. 1932) (“The motion to confirm the award was not premature. Section 9 provides that ‘at any time within one year after the award is made’ any party to the arbitration may apply to the court for an order of confirmation. Section 12 requires that notice of a motion to vacate an award must be served within three months after the award is filed or delivered, but there is nothing in such requirement to suggest that the winning party must refrain during that period from exercising the privilege conferred by section 9 to move ‘at any time’ within the year.”).

<sup>338.</sup> *Sverdrup Corp. v. WHC Constructors, Inc.*, 989 F.2d 148, 156 (4th Cir. 1993).

<sup>339.</sup> *RGA Reinsurance Co. v. Ulico Cas. Co.*, 355 F.3d 1136, 1139 (8th Cir. 2004) (“Arbitration modification and arbitration confirmation are different specie of action and different limitation periods apply. If an arbitration award is inconsistent or serious doubt exists as to its meaning, the district court may vacate, modify, or correct the award pursuant to the Federal Arbitration Act. However, proceedings to vacate, modify, or remand an arbitration award must be initiated promptly within three months of the arbitration ruling. If an award is unambiguous but needs clarification, then a district court has jurisdiction to conduct a confirmation proceeding. A party seeking confirmation of an arbitration must file a petition to confirm within one year after the award.”) (citations omitted).

<sup>340.</sup> *Bain Cotton Co. v. Chesnutt Cotton Co.*, No 12-11138, 2013 WL 3144953, at \*1 (5th Cir. June 24, 2013) (“This appeal presents a quintessential example of a principal distinction between arbitration and litigation, especially in the scope of review. Had this discovery dispute arisen in and been ruled on by the district court, it is not unlikely that the denial of Bain's pleas would have led to reversal; however, under the “strong federal policy favoring arbitration, judicial review of an arbitration award is extremely narrow.”); *CVN Group, Inc. v. Delgado*, 95 S.W.3d 234, 239 (Tex. 2002) (“We agree that an arbitration award cannot be set aside on public policy grounds except in an extraordinary case in which the award clearly violates carefully articulated, fundamental policy.”).

**PRACTICE POINTER:**

Even when the arbitration award is vacated or deemed unenforceable, the appropriate remedy is a remand for further arbitration proceedings, not a judicial determination of what should be awarded.<sup>341</sup>

**1-8:4.2 Review Defined by Contract**

The FAA and the TAA differ regarding the extent to which the parties may contractually limit or expand the scope and the standard of review. In *Hall Street Associates LLC v. Mattel Inc.*, the United States Supreme Court held that grounds for vacating and modifying an arbitration award under the FAA are exclusive and cannot be supplemented by contract.<sup>342</sup> The Court's opinion in *Hall Street*, however, is limited to the FAA, and does not exclude review based on authority outside the federal statute, such as enforcement under state arbitration statutes or common law.<sup>343</sup>

The Texas Supreme Court held that parties can agree to expanded judicial review under the TAA.<sup>344</sup> In *Nafta Traders, Inc. v. Quinn*, the parties agreed to arbitration but limited what the arbitrator could do. The agreement stated that the arbitrator did not have “authority (1) to render a decision which contains a reversible error of state or federal law, or (2) to apply a cause of action or remedy not expressly provided for under existing state or federal law.”<sup>345</sup> The losing party sought to vacate the award under the TAA based on the arbitrator's alleged legal error.<sup>346</sup>

<sup>341.</sup> *Major League Baseball Players Ass'n v. Garvey*, 532 U.S. 504, 511 (2001) (“[E]stablished law ordinarily precludes a court from resolving the merits of the parties' dispute on the basis of its own factual determinations, no matter how erroneous the arbitrator's decision. Even when the arbitrator's award may properly be vacated, the appropriate remedy is to remand the case for further arbitration proceedings. The Court of Appeals usurped the arbitrator's role by resolving the dispute and barring further proceedings, a result at odds with this governing law.”) (citations omitted).

<sup>342.</sup> *Hall Street Associates LLC v. Mattel Inc.*, 552 U.S. 576, 584–89 (2008).

<sup>343.</sup> *Hall Street Associates LLC v. Mattel Inc.*, 552 U.S. 576, 584–89 (2008).

<sup>344.</sup> *Nafta Traders, Inc. v. Quinn*, 339 S.W.3d 84, 91 (Tex. 2011).

<sup>345.</sup> *Nafta Traders, Inc. v. Quinn*, 339 S.W.3d 84, 91 (Tex. 2011).

<sup>346.</sup> *Nafta Traders, Inc. v. Quinn*, 339 S.W.3d 84, 91 (Tex. 2011). The United States Supreme Court held in *Hall Street Assocs., L.L.C. v. Mattel, Inc.*, 552 U.S. 576, 578 (2008), that the grounds for vacating or modifying an arbitration award under the FAA are exclusive and cannot be enlarged by contractual agreement. The Texas Supreme Court held that the

The Texas Supreme Court agreed, holding that the arbitrator was limited by the agreement's terms.<sup>347</sup> The court reasoned:

We find nothing in the TAA at odds with this policy. On the contrary, the purpose of the TAA is to facilitate arbitration agreements, which have been enforceable in Texas by Constitution or statute since at least 1845. Specifically, the TAA contains no policy against parties' agreeing to limit the authority of an arbitrator to that of a judge, but rather, an express provision requiring *vacatur* when arbitrators have exceeded [their] powers.<sup>348</sup>

Though parties may agree to allow for a judge to review the arbitrator's factual findings and legal conclusions, a reviewing court must have a sufficient record of the arbitral proceedings and complaints must have been preserved, all as if the award were a court judgment on appeal.<sup>349</sup>

## 1-9 CHALLENGING AN ARBITRATION AWARD

### **PRACTICE POINTER:**

Any party to an arbitration may challenge an award made in a Texas arbitration proceeding.<sup>350</sup> But the grounds are limited, because when Congress enacted the FAA, it meant to end judicial hostility to arbitration

FAA does not preempt enforcement of an agreement for expanded judicial review of an arbitration award enforceable under the Texas Arbitration Act. The TAA permits parties to agree to expanded judicial review of arbitration awards. *Nafta Traders, Inc. v. Quinn*, 339 S.W.3d 84, 91 (Tex. 2011).

<sup>347</sup>. *Nafta Traders, Inc. v. Quinn*, 339 S.W.3d 84, 91 (Tex. 2011).

<sup>348</sup>. *Nafta Traders, Inc. v. Quinn*, 339 S.W.3d 84, 96 (Tex. 2011).

<sup>349</sup>. *Nafta Traders, Inc. v. Quinn*, 339 S.W.3d 84, 101-02 (Tex. 2011) (citing Tex. R. App. P. 33, 34). Thus, if parties want to limit an arbitrator's power, the parties must provide for a record of all the arbitration proceedings, raise all arguments and defenses to the arbitrator, properly present objections to the arbitration and preserve those objections. See *Quinn v. Nafta Traders, Inc.*, 360 S.W.3d 713, 716 (Tex. App.—Dallas 2012, pet. denied) (finding on remand that losing party had waived arguments under Rules 33 and 34 of the Texas Rules of Appellate Procedure).

<sup>350</sup>. 9 U.S.C. § 10, 11; Tex. Civ. Prac. & Rem. Code §§ 171.088, 171.091.

agreements.<sup>351</sup> Lawmakers wanted to prevent courts from intervening in private disputes before or during the arbitration.<sup>352</sup>

However, they gave little thought to post-arbitration disputes where a losing party refuses to comply with an award or seeks to overturn the arbitrator's ruling in court.<sup>353</sup> The 1924 Senate Report states that "courts are bound to accept and enforce the award of the arbitrators unless there is in it a defect so inherently vicious that, as a matter of common morality, it ought not to be enforced."<sup>354</sup> An award should be vacated "only when corruption, partiality, fraud, or misconduct are present or when the arbitrators exceeded or imperfectly executed their powers or were influenced by other undue means—cases in which enforcement would obviously be unjust."<sup>355</sup> The Senate concluded that "[t]here is no authority and no opportunity for the court, in connection with the award, to inject its own ideas of what the award should have been."<sup>356</sup>

<sup>351</sup>. *Baravati v. Josephthal, Lyon & Ross, Inc.*, 28 F.3d 704, 706 (7th Cir. 1994) ("Judicial review of arbitration awards is tightly limited; perhaps it ought not to be called 'review' at all."). The Senate Report said that the bill would abolish the judicial reluctance to enforce arbitration agreements. S. Rep. No. 68–536, at 2–3 (1924). During Senate debate on the FAA, Senator Thomas J. Walsh, explained: "In short, the bill provides for the abolition of the rule that agreements for arbitration will not be specifically enforced." Remarks of Senator Walsh, 66 Cong. Rec. 984 (1924).

<sup>352</sup>. Joint Hearings before the Subcommittees of the Committees on the Judiciary, 68th Cong. 1st Sess, on S. 1005 and H.R. 646, at 6 (1924). Julius Henry Cohen, General Counsel of the New York State Chamber of Commerce said, "The difficulty is that men do enter into these such (arbitration) agreements and then afterwards repudiate the agreement . . . You go in and watch the expression of the face of your arbitrator and you have a 'hunch' that he is against you, and you withdraw and say, 'I do not believe in arbitration anymore,'" Joint Hearings before the Subcommittees of the Committees on the Judiciary, 68th Cong. 1st Sess, on S. 1005 and H.R. 646, at 6 (1924).

<sup>353</sup>. H.R. Rep. No. 68–96, at 2 ("The award may then be entered as a judgment, subject to attack by the other party for fraud and corruption and similar undue influence, or for palpable error in form.")

<sup>354</sup>. S. Rep. No. 68–536, at 4 ("The courts are bound to accept and enforce the award of the arbitrators unless there is in it a defect so inherently vicious that, as a matter of common morality, it ought not to be enforced. This exists only when corruption, partiality, fraud or misconduct are present or when the arbitrators exceeded or imperfectly executed their powers or were influenced by other undue means—cases in which enforcement would obviously be unjust. There is no authority and no opportunity for the court, in connection with the award, to inject its own ideas of what the award should have been.")

<sup>355</sup>. S. Rep. No. 68–536, at 4.

<sup>356</sup>. S. Rep. No. 68–536, at 4.

**1-9:1 Procedural Hurdles to Challenging Award****1-9:1.1 Determining Finality of Award**

Because confirmation of an arbitration award requires the award to be “mutual, final, and definite, this is a potential ground for challenging an award.”<sup>357</sup> An award generally is deemed final when it evidences the arbitrator’s intent to resolve all claims submitted for arbitration.<sup>358</sup> Notwithstanding the general rule, finality is not required when:

- (1) the issues of liability and damages are bifurcated in the arbitration proceeding;<sup>359</sup>
- (2) the arbitrator orders interim security or temporary equitable relief;<sup>360</sup> or
- (3) the interim award finally disposes of a separate and independent claim.<sup>361</sup>

**1-9:1.2 Where to File Challenge****PRACTICE POINTER:**

Neither the FAA nor the TAA establish jurisdiction for a court to challenge an arbitration award. Thus, practitioners must rely on general subject-matter jurisdiction and venue provisions to determine where to file a motion to modify, correct or vacate an arbitration award.

In federal court, a motion to modify, correct or vacate an arbitration award may be brought in a district court with an independent ground for subject-matter jurisdiction, which requires a federal question or diversity of citizenship among the parties.<sup>362</sup> In addition, venue must be proper, requiring that the motion to confirm (or challenge) an arbitration award be brought in the

<sup>357</sup> 9 U.S.C. § 10(a)(4).

<sup>358</sup> *Fradella v. Petricca*, 183 F.3d 17, 19 (1st Cir. 1999); *Michaels v. Mariforum Shipping S.A.*, 624 F.2d 411, 413 (2d Cir. 1980).

<sup>359</sup> *See, e.g., Hart Surgical, Inc. Ultracision, Inc.*, 244 F.3d 231, 236 (1st Cir. 2001).

<sup>360</sup> *See, e.g., Yasuda Fire & Marine Insurance Co. of Eur. v. Cont’l Cas. Co.*, 37 F.3d 345, 348 (7th Cir. 1994).

<sup>361</sup> *See, e.g., Zeiler v. Deutsch*, 500 F.3d 157, 168 (2d Cir. 2007).

<sup>362</sup> *Moses H. Cone Mem’l Hosp. v. Mercury Constr. Corp.*, 460 U.S. 1, 25 n.32 (1983).

district specified in the agreement, in the district where the award was made, or in any proper district under the general venue statute.<sup>363</sup>

As mentioned earlier in this chapter, in Texas state court, the parties may agree what court may hear disputes in “major transactions with an aggregate value of more than \$1,000,000.”<sup>364</sup> Otherwise, unless a mandatory venue provision applies,<sup>365</sup> a motion to modify, correct or vacate an arbitration award must be brought:

<sup>363.</sup> 9 U.S.C. § 9; 28 U.S.C. § 1391. The federal Act’s venue provisions are permissive—not mandatory. *Cortez Byrd Chips, Inc. v. Bill Harbert Constr. Co.*, 529 U.S. 193, 203-04 (2000).

<sup>364.</sup> The parties may agree to venue in a “major transaction.” Tex. Civ. Prac. & Rem. Code § 15.020. Except for major transactions, the parties cannot contractually agree before suit to a venue contrary to the venue statute. *See* Tex. Civ. Prac. & Rem. Code § 15.020(a) (defining “major transaction” as one with an aggregate value of more than \$1,000,000).

<sup>365.</sup> Chapter 15 of the Civil Practices and Remedies Code lists the mandatory venue provisions, which require that suit be brought in certain counties for certain types of cases. *See* Tex. Civ. Prac. & Rem. Code § 15.011 (mandating that suit involving a land dispute be brought in county where all or part of the land is located); Tex. Civ. Prac. & Rem. Code § 15.0115(a) (mandating that suit between landlord and tenant be brought in county where all or part of real property is located); Tex. Civ. Prac. & Rem. Code § 15.012 (mandating that an action to stay a proceeding be brought in county where suit is pending); Tex. Civ. Prac. & Rem. Code § 15.013 (mandating that an action to stop the execution of a judgment based on the invalidity of the judgment or the writ of execution be brought in county where judgment was rendered); Tex. Civ. Prac. & Rem. Code § 15.014 (mandating that suit against head of a state department must be filed in Travis County); Tex. Civ. Prac. & Rem. Code § 15.015 (mandating that suit against a county must be brought in that county); Tex. Civ. Prac. & Rem. Code § 15.015(a) (mandating that suit against a political subdivision located in a county with a population of 100,000 or less must be brought in the county where the political subdivision is located); Tex. Civ. Prac. & Rem. Code § 15.017 (mandating that a suit for libel, slander or invasion of privacy must be brought in the county where the plaintiff resided when the action accrued, in the county where any of the defendants resided when suit was filed, or in the county that is the domicile of any corporate defendant); Tex. Civ. Prac. & Rem. Code §§ 15.018(b), (c) (mandating that suit under the Federal Employers’ Liability Act or Jones Act be brought in the county where all or a substantial part of the events or omissions giving rise to the claim occurred, in the county where the defendant’s principal place of business in Texas is located, or in the county where the plaintiff resided when the cause of action accrued); Tex. Civ. Prac. & Rem. Code § 15.019(a) (mandating that suit brought by an inmate that accrued during incarceration be brought in county where prison facility is located); Tex. Civ. Prac. & Rem. Code § 101.102(a) (mandating that suit under the Texas Tort Claims Act be brought in county where all or part of the cause of action arises); Tex. Civ. Prac. & Rem. Code § 65.023(a) (mandating that injunction suit against Texas resident be brought in county where defendant is domiciled); Tex. R. Disc. P. 3.03 (mandating that disciplinary suit against attorney be brought in county of the attorney’s principal place of business, in county of the attorney’s residence or in county where the misconduct occurred in whole or part); Tex. Prop. Code § 21.013(a) (mandating that condemnation suit be brought in county where owner resides, if any of land is located there; otherwise, suit must be brought where all or part of the property is located); Tex. Prop. Code § 115.002(b) (mandating that trust suit be brought in county where trustee resided or in county where trust was administered); Tex. Prop. Code § 21.013(c) (mandating that trust suit against corporate trustee be brought in county where principal place of business is located); Tex. Ins. Code § 1952.110 (mandating that suit against insurance company for coverage be brought in county where policyholder or beneficiary resided at time of accident or in county where accident occurred involving uninsured or underinsured motorist).

- (1) In the county where all or a substantial part of the events giving rise to the claim occurred;<sup>366</sup>
- (2) In the county of the defendant's residence when the cause of action accrued, if the defendant is a natural person;<sup>367</sup>
- (3) In the county of the defendant's principal office in Texas, if the defendant is not a natural person;<sup>368</sup>  
or
- (4) In the county where the plaintiff resided when the cause of action accrued, if none of the other provisions applies.<sup>369</sup>

### 1-9:1.3 Procedural Deadlines

#### 1-9:1.3a State Courts

The deadline to serve notice of a motion to modify, correct or vacate an arbitration award under the TAA is 90 days after the award is filed or delivered.<sup>370</sup> If the ground for *vacatur* is corruption of the process, the deadline is 90 days after the party learned or should have learned of the basis for the motion.<sup>371</sup>

#### 1-9:1.3b Federal Courts

The deadline to serve notice of a motion to modify, correct or vacate an arbitration award under the FAA is three months after the award is filed or delivered.<sup>372</sup>

<sup>366</sup> Tex. Civ. Prac. & Rem. Code § 15.002(a)(1).

<sup>367</sup> Tex. Civ. Prac. & Rem. Code § 15.002(a)(2).

<sup>368</sup> Tex. Civ. Prac. & Rem. Code § 15.002(a)(3).

<sup>369</sup> Tex. Civ. Prac. & Rem. Code § 15.002(a)(4).

<sup>370</sup> Tex. Civ. Prac. & Rem. Code §§ 171.088(b), 171.091(b).

<sup>371</sup> Tex. Civ. Prac. & Rem. Code § 171.088(b); *Louisiana Nat. Gas Pipeline, Inc. v. Bludworth Bond Shipyard, Inc.*, 875 S.W.2d 458, 462 (Tex. App.—Houston [1st Dist.] 1994, writ denied) (finding motion to vacate untimely where losing party failed to allege corruption of the process).

<sup>372</sup> 9 U.S.C. § 12.

## 1-9:2 Scope of Review

Arbitration is intended to allow parties to obtain a speedy and inexpensive final disposition of disputed matters.<sup>373</sup> An appellate state court reviews de novo a trial court's confirmation of an arbitration award based on the entire record.<sup>374</sup> Similar to the decision whether the award should be confirmed, the decision "[w]hether an arbitration agreement is enforceable is subject to de novo review."<sup>375</sup> All reasonable presumptions are indulged to uphold the arbitrators' decisions, and no hostile presumption is indulged against those rulings.<sup>376</sup>

### PRACTICE POINTER:

As pointed out earlier in this chapter, an arbitration award is presumed valid and entitled to great deference, in part because of the importance of resolving disputes quickly.<sup>377</sup> When reviewing an arbitration award, the appellate court, just like the trial court, may not substitute its view of the facts for that of the arbitrator's merely because the court would have reached a different decision.<sup>378</sup>

Judicial review of arbitration awards adds expense and delay and thereby diminishes the benefits of arbitration as an efficient, economical system for resolving disputes.<sup>379</sup>

Accordingly, appellate review of any arbitration award is "extraordinarily narrow."<sup>380</sup> Review is so limited that an appellate

<sup>373</sup>. See *Porter & Clements, LLP v. Stone*, 935 S.W.2d 217, 221 (Tex. App.—Houston [1st Dist.] 1996, no pet.).

<sup>374</sup>. *Myer v. America Life, Inc.*, 232 S.W.3d 401, 407 (Tex. App.—Dallas 2007, no pet); *Tanox, Inc. v. Akin, Gump, Strauss, Hauer & Feld, LLP*, 105 S.W.3d 244, 250 (Tex. App.—Houston [14th Dist.] 2003, pet. denied).

<sup>375</sup>. *In re Labatt Food Serv., L.P.*, 279 S.W.3d 640, 643 (Tex. 2009); *Petroleum Analyzer Co. LP v. Olstowski*, No. 01–09–00076–CV, 2010 WL 724589, at \*6 (Tex. App.—Houston [1st Dist.] March 4, 2010, no pet.).

<sup>376</sup>. *CVN Group, Inc. v. Delgado*, 95 S.W.3d 234, 238 (Tex. 2002).

<sup>377</sup>. *Myer v. America Life, Inc.*, 232 S.W.3d 401, 407 (Tex. App.—Dallas 2007, no pet); *Crossmark, Inc. v. Hazar*, 124 S.W.3d 422, 429 (Tex. App.—Dallas 2004, pet. denied).

<sup>378</sup>. *Bailey & Williams v. David Westfall*, 727 S.W.2d 86, 90 (Tex. App.—Dallas 1987, writ ref'd n.r.e.); see also *CVN Group, Inc. v. Delgado*, 95 S.W.3d 234, 238 (Tex. 2002).

<sup>379</sup>. *CVN Group, Inc. v. Delgado*, 95 S.W.3d 234, 238 (Tex. 2002); *Crossmark, Inc. v. Hazar*, 124 S.W.3d 422, 429 (Tex. App.—Dallas 2004, pet. denied).

<sup>380</sup>. *Myer v. America Life, Inc.*, 232 S.W.3d 401, 408 (Tex. App.—Dallas 2007, no pet); see also *Statewide Remodeling, Inc. v. Williams*, 244 S.W.3d 564, 568 (Tex. App.—Dallas 2008,

court may not vacate an award even if it is based upon a mistake in law or fact.<sup>381</sup> Because so much deference is given to arbitration awards, judicial scrutiny focuses on the integrity of the process, not the propriety of the result.<sup>382</sup> Therefore, courts are not free to change arbitral results—even when they disagree about the result.

### 1-9:2.1 Standard Judicial Review

It bears repeating that the trial court’s review of an arbitrator’s award is extremely narrow.<sup>383</sup> Even when the arbitration award is vacated or deemed unenforceable, the appropriate remedy is a remand for further arbitration proceedings, not a judicial determination of what should be awarded.<sup>384</sup>

### 1-9:2.2 Review Defined by Contract

As discussed fully above, the Texas Supreme Court held that parties can agree through contract to expanded judicial review under the TAA.<sup>385</sup> In *Nafta Traders, Inc. v. Quinn*, the parties agreed to arbitration, but limited what the arbitrator could do. The agreement stated that the arbitrator did not have “authority (1) to render a decision which contains a reversible error of state or federal law, or (2) to apply a cause of action or remedy not

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no pet.); *Tanox, Inc. v. Akin, Gump, Strauss, Hauer & Feld, LLP*, 105 S.W.3d 244, 250 (Tex. App.—Houston [14th Dist.] 2003, pet. denied).

<sup>381.</sup> *Crossmark, Inc. v. Hazar*, 124 S.W.3d 422, 429 (Tex. App.—Dallas 2004, pet. denied) (citing *Anzilotti v. Gene D. Ligin, Inc.*, 899 S.W.2d 264, 266 (Tex. App.—Houston [14th Dist.] 1995, no writ)).

<sup>382.</sup> *TUCO, Inc. v. Burlington N. R.R. Co.*, 912 S.W.2d 311, 315 (Tex. App.—Amarillo 1995), *modified on other grounds*, 960 S.W.2d 629 (Tex. 1997).

<sup>383.</sup> *Bain Cotton Co. v. Chesnutt Cotton Co.*, No 12-11138, 2013 WL 3144953, at \*1 (5th Cir. June 24, 2013) (“This appeal presents a quintessential example of a principal distinction between arbitration and litigation, especially in the scope of review. Had this discovery dispute arisen in and been ruled on by the district court, it is not unlikely that the denial of Bain’s pleas would have led to reversal; however, under the ‘strong federal policy favoring arbitration, judicial review of an arbitration award is extremely narrow.’”); *CVN Group, Inc. v. Delgado*, 95 S.W.3d 234, 239 (Tex. 2002) (“We agree that an arbitration award cannot be set aside on public policy grounds except in an extraordinary case in which the award clearly violates carefully articulated, fundamental policy.”).

<sup>384.</sup> *Major League Baseball Players Ass’n v. Garvey*, 532 U.S. 504, 511 (2001) (“[E]stablished law ordinarily precludes a court from resolving the merits of the parties’ dispute on the basis of its own factual determinations, no matter how erroneous the arbitrator’s decision. Even when the arbitrator’s award may properly be vacated, the appropriate remedy is to remand the case for further arbitration proceedings. The Court of Appeals usurped the arbitrator’s role by resolving the dispute and barring further proceedings, a result at odds with this governing law.”) (citations omitted).

<sup>385.</sup> *Nafta Traders, Inc. v. Quinn*, 339 S.W.3d 84, 91 (Tex. 2011).

expressly provided for under existing state or federal law.”<sup>386</sup> The losing party sought to vacate the award under the TAA based on the arbitrator’s alleged legal error.<sup>387</sup> The Texas Supreme Court agreed, holding that the arbitrator was limited by the agreement’s terms.<sup>388</sup>

### 1-9:3 Remedies

#### **PRACTICE POINTER:**

The only available remedies for a party challenging an arbitration award are modification or correction of the award<sup>389</sup> and vacatur of the award.<sup>390</sup>

#### 1-9:3.1 Modification of Award

Though similar, the FAA and TAA have specific grounds for modifying or correcting an arbitration award.

##### 1-9:3.1a FAA

Section 11 of the FAA provides the exclusive grounds for modifying an arbitration award, which include:

- (1) When there was an evident material miscalculation of figures or an evident material mistake in the description of any person, thing, or property referred to in the award;<sup>391</sup>

<sup>386</sup>. *Nafta Traders, Inc. v. Quinn*, 339 S.W.3d 84, 91 (Tex. 2011).

<sup>387</sup>. *Nafta Traders, Inc. v. Quinn*, 339 S.W.3d 84, 91 (Tex. 2011) (“The United States Supreme Court held in *Hall Street Assocs., L.L.C. v. Mattel, Inc.*, 552 U.S. 576, 578 (2008), that the grounds for vacating or modifying an arbitration award under the FAA are exclusive and cannot be enlarged by contractual agreement. The Texas Supreme Court held that the FAA does not preempt enforcement of an agreement for expanded judicial review of an arbitration award enforceable under the Texas Arbitration Act. The TAA permits parties to agree to expanded judicial review of arbitration awards.”).

<sup>388</sup>. *Nafta Traders, Inc. v. Quinn*, 339 S.W.3d 84, 91 (Tex. 2011).

<sup>389</sup>. Tex. Civ. Prac. & Rem. Code Ann. § 171.091; § 1-12:3.1.

<sup>390</sup>. Tex. Civ. Prac. & Rem. Code Ann. § 171.089; § 1-12:3.2.

<sup>391</sup>. 9 U.S.C. § 11(a); see also *Apex Plumbing Supply, Inc., U.S. Supply Co.*, 142 F.3d 188, 193 (4th Cir. 1998) (holding modification of arbitration award was not warranted for evident partiality where arbitrator included old inventory in inventory valuation as miscalculation was evident in that it did not appear on the face of arbitration award); *Eljer Mfg., Inc. v. Kowin Dev. Corp.*, 14 F.3d 1250, 1254 (7th Cir. 1994) (finding double recovery could be modified); *Fellus v. Serne, Agee & Leach, Inc.*, 783 F. Supp. 2d 612, 622 (S.D.N.Y.

- (2) When the award was based on a matter not submitted to the arbitral panel,<sup>392</sup> or
- (3) Where the form of the award is imperfect and the imperfection does not affect the merits of the controversy.<sup>393</sup>

### 1-9:3.1b TAA

A party may file a motion to modify or correct an arbitration award on the following grounds:<sup>394</sup>

- (1) When the award contains an evident miscalculation of numbers or a mistake in the description of any person, thing, or property referred to in the award;<sup>395</sup>

2011) (refusing to modify arbitration award because award did not explain arbitrators' rationale in reaching decision or reference any numbers other than the total damages awarded).

<sup>392.</sup> 9 U.S.C. § 11(b); *see also Executone Information Sys., Inc. v. Davis*, 26 F.3d 1314, 1323 (5th Cir. 1994) (finding that matter was properly submitted to arbitrator where district court ordered parties to submit all issues to arbitrator for final resolution, including an issue regarding distributor's alleged loss of contracts due to deficiencies in manufacturer's equipment).

<sup>393.</sup> 9 U.S.C. § 11(c); *see also Atlantic Aviation, Inc. v. EBM Group, Inc.*, 11 F.3d 1276, 1284 (5th Cir. 1994) (holding modification appropriate where failure of arbitration panel to award balance remaining under contract to refurbish aircraft was, in essence, clerical error which could be corrected without disturbing merits of decision); *Lummus Global Amazonas, S.A. v. Aguaytia Energy del Peru, S.R. LTDA*, 256 F. Supp. 2d 594, 634–36 (S.D. Tex. 2002) (“Aguaytia’s argument that the modification it seeks would not change the award in a manner that affects the merits of the disputed issues between the parties is supported by the lack of dispute over the items and amounts of credits and payments in the stipulation. However, the defect in the award that the parties assert is not merely one of form; it is a \$5.2 million net sum, composed of a number of specific payment and credit items. The modification would not effectuate the panel’s intent in issuing the award. The panel was clear that it did not intend to include the stipulated amounts in the award. The panel was clear that it lacked sufficient information to determine the relationship between the stipulated items and the items resolved in the award.”).

<sup>394.</sup> *See Patten v. Johnson*, 429 S.W.3d 767, 779–80 (Tex. App.—Dallas 2014, pet. denied) (“absent a statutory ground to vacate or modify an arbitration award, a reviewing court lacks jurisdiction to review other complaints about the arbitration.”).

<sup>395.</sup> Tex. Civ. Prac. & Rem. Code § 171.091(a)(1). A miscalculation is a mistake. *Crossmark, Inc. v. Hazar*, 124 S.W.2d 422, 436 (Tex. App.—Dallas 2004, pet. denied) (“Crossmark failed to show the arbitrators made any miscalculation or mistake in calculating the award. Rather, the record indicates the arbitrators rejected Crossmark’s arguments for a discount based on the language of the non-competition agreements. The arbitrators’ rejection of Crossmark’s argument for a discount to present value was not inadvertence or an error caused by oversight; thus it was not an ‘evident miscalculation of numbers.’”); *but see Callahan & Assocs. v. Orangefield Indep. Sch. Dist.*, 92 S.W.3d 841, 844 (Tex. 2002) (holding decision not to award damages is not grounds for a motion to modify or correct).

- (2) When the award resolves a matter not submitted to the arbitral panel,<sup>396</sup> and
- (3) When the award contains an error in the form of the award on a matter not affecting the merits of the controversy.<sup>397</sup>

### 1-9:3.2 Vacatur of Award

Though similar, the FAA and TAA have specific statutory grounds for vacating an arbitration award. In addition, separate grounds exist under federal and state law to vacate an arbitration award.

#### 1-9:3.2a FAA Statutory Grounds

Section 10(a) of the FAA provides four grounds for vacating an arbitration award:

- (1) Where the award was procured by corruption, fraud, or undue means,<sup>398</sup>
- (2) Where there was evident partiality or corruption among the arbitrators;<sup>399</sup>
- (3) Where the arbitrators are guilty of misconduct in refusing to postpone the hearing, upon sufficient

<sup>396</sup>. Tex. Civ. Prac. & Rem. Code §§ 171.091(a)(2). The arbitral panel may only resolve what is presented to it. *Baker Hughes Oilfield Operations, Inc. v. Hennig Prod. Co.*, 164 S.W.3d 438, 443 (Tex. App.—Houston [14th Dist.] 2005, no pet.); *D.R. Horton-Texas, Ltd. v. Bernhard*, 423 S.W.3d 532, 536 (Tex. App.—Houston [14th Dist.] 2014, pet. denied) (holding that the reviewing court’s role is to determine whether the arbitrator had any authority to decide the issue at all under the terms of the agreement, not to determine if the arbitrator correctly applied the law).

<sup>397</sup>. Tex. Civ. Prac. & Rem. Code §§ 171.091(a)(3).

<sup>398</sup>. 9 U.S.C. § 10(a)(1). A party seeking to vacate an arbitration award on this basis must establish a causal connection between the improper conduct and the arbitration award. *Delta Mine Holdings Co. v. AFC Coal Props. Inc.*, 280 F.3d 815, 822 (8th Cir. 2001).

<sup>399</sup>. 9 U.S.C. § 10(a)(2). Because an arbitrator must disclose any dealings that might create an impression of possible bias, the arbitrator’s non-disclosure of certain facts can lead to a finding of evident partiality. *Commonwealth Coatings Corp. v. Continental Cas. Co.*, 393 U.S. 145, 149–50 (1968). But circuit courts cannot agree on the necessary standard of proof. *Compare Positive Software Solutions, Inc. v. New Century Mortg. Corp.*, 476 F.3d 278, 283 (5th Cir. 2007) (holding an arbitrator displays evident partiality when the undisclosed facts would create a reasonable impression of the arbitrator’s partiality) with *University Commons-Urbana, Ltd., Universal Constructors, Inc.*, 304 F.3d 1331, 1339 (11th Cir. 2002) (“[F]or an award to be vacated, the arbitrator must not have disclosed enough information for a reasonable person to realize that a potential conflict existed.”). A party seeking to vacate an award for evident partiality must have raised the objection to the arbitration panel first, or the objection is waived. *Delta Mine Holdings Co. v. AFC Coal Props.*, 280 F.3d 815, 821 (8th Cir. 2001).

cause shown, or refusing to hear evidence pertinent and material to the controversy or of any other behavior by which the rights of any party have been prejudiced;<sup>400</sup> and

- (4) Where the arbitrators exceeded their powers, or so imperfectly executed them that a mutual, final, and definitive award upon the subject matter submitted was not made.<sup>401</sup>

### 1-9:3.2b Judicially Created Exceptions to the Enforcement of Arbitration Awards Under the FAA

Though *Hall Street* has explained that the statutory exceptions are the sole basis for vacating an arbitration award under the FAA, other grounds may be available when the common law or a different statutory scheme authorizes the arbitration award.<sup>402</sup>

#### **PRACTICE POINTER:**

For example, federal courts have refused to enforce arbitrations awards in the following circumstances:

- (1) Where the award was against public policy;<sup>403</sup>
- (2) Where the party was denied a fair hearing;<sup>404</sup> or

<sup>400.</sup> 9 U.S.C. § 10(a)(3). A party seeking to vacate an arbitration award on this basis must establish a causal connection between the improper conduct and the arbitration award. *Delta Mine Holdings Co. v. AFC Coal Props.*, 280 F.3d 815, 822 (8th Cir. 2001).

<sup>401.</sup> 9 U.S.C. § 10(a)(4). A party seeking to vacate an arbitration award on this basis must establish a causal connection between the improper conduct and the arbitration award. *Delta Mine Holdings Co. v. AFC Coal Props. Inc.*, 280 F.3d 815, 822 (8th Cir. 2001).

<sup>402.</sup> *Hall Street Assocs., L.L.C. v. Mattel, Inc.*, 552 U.S. 576, 578 (2008); *BG Group, PLC v. Republic of Argentina*, 134 S. Ct. 1198, 1202 (2014).

<sup>403.</sup> *Stroehmann Bakeries, Inc. v. Local 776, Int'l Bhd. Of Teamsters*, 969 F.2d 1436, 1441–42 (3d Cir. 1992) (“[T]here are exceptional situations in which courts do review the merits of labor arbitration awards. One such situation is based on the general principle that courts may not enforce contracts which are contrary to public policy . . . [A]n award which fully reinstates an employee accused of sexual harassment without a determination that the harassment did not occur violates public policy. Therefore, Arbitrator Sands construed the Agreement between the parties in a manner that conflicts with the well-defined and dominant public policy concerning sexual harassment in the workplace and its prevention.”).

<sup>404.</sup> *United Mine Workers v. Marrowbone Dev. Co.*, 232 F.3d 383, 389 (3d Cir. 1992) (“Vacatur is appropriate . . . when the exclusion of relevant evidence ‘so affects the rights of a party that it may be said that he was deprived of a fair hearing.’ . . . Here, the arbitrator told the Union to meet with Marrowbone, gather information, negotiate further, and, if the dispute was still not resolved, present evidence and argument at a March 26 arbitration hearing. Yet the arbitrator issued his award without ever holding that hearing or affording

- (3) Where the arbitration panel engages in a manifest disregard of the law.<sup>405</sup>

### 1-9:3.2c TAA Statutory Grounds

The TAA provides five specific grounds for vacating an arbitration award:<sup>406</sup>

- (1) The award was procured by corruption, fraud or other undue means;<sup>407</sup>
- (2) There was evident partiality, misconduct or willful misbehavior by an arbitrator prejudicing a party's rights;<sup>408</sup>

the Union the opportunity to present the evidence it had been prepared to offer at the abbreviated February hearing. Notably, the arbitrator did not cancel the scheduled hearing because he found the Union's evidence 'cumulative,' 'irrelevant,' or 'immaterial'; nor does the record suggest that this evidence was, in fact, cumulative or anything less than highly material and relevant . . . . Therefore, despite our usual deference, we cannot sanction the decision of an arbitrator who failed to provide a signatory to the arbitration agreement a full and fair hearing.”)

<sup>405.</sup> *Ramos-Santiago v. United Parcel Serv.*, 524 F.3d 120, 124 (1st Cir. 2008) (“This Court has recognized a very limited exception under which we may vacate an arbitration award when there is evidence that the arbitrator acted in “manifest disregard of the law. To establish such an exception, the challenger must show that the arbitration award complained of is: (1) unfounded in reason and fact; (2) based on reasoning so palpably faulty that no judge, or group of judges, could ever conceivably have made such a ruling; or (3) mistakenly based on a crucial assumption that is concededly a non-fact. To succeed, there must be “some showing in the record, other than the result obtained, that the arbitrator knew the law and expressly disregarded it.”) (citations omitted). In reaffirming this basis for vacating an arbitration award, the First Circuit Court of Appeals “acknowledged the Supreme Court’s recent holding in *Hall Street Assocs., L.L.C. v. Mattel, Inc.*, that manifest disregard of the law is not a valid ground for vacating or modifying an arbitral award in cases brought under the FAA.” But the First Circuit Court of Appeals recognized that when the case is not an FAA case, *Hall Street Assocs., L.L.C. v. Mattel, Inc.*, 552 U.S. 576, 578 (2008) may not control.

<sup>406.</sup> See *Hoskins v. Hoskins*, 15-0046, 2016 WL 2993929, at \*7 (Tex. May 20, 2016) (“The TAA’s plain language confirms that, in proceedings governed by that statute, section 171.088 excludes the exclusive grounds for vacatur of an arbitration award.”).

<sup>407.</sup> Tex. Civ. Prac. & Rem. Code § 171.088(a)(1).

<sup>408.</sup> Tex. Civ. Prac. & Rem. Code § 171.088(a)(2)(A). A neutral arbitrator must disclose all known dealings that may create impression of possible bias. *Burlington N. R.R. v. TUCO, Inc.*, 960 S.W.2d 629, 636 (Tex. 1997) (finding evident partiality without any showing of actual bias where arbitrator failed to disclose referral of lawsuit to co-arbitrator’s law firm); *Mariner Fin. Group v. Bossley*, 79 S.W.3d 30, 33 (Tex. 2002) (finding no evident partiality because a fact issue existed as to whether arbitrator knew of the prior adverse relationship with one of the parties’ expert witnesses); *Karlseng v. Cooke*, 346 S.W.3d 85, 94 (Tex. App.—Dallas 2011, no pet.) (holding that non-disclosure of arbitrator’s direct, personal, professional, social, and business relationship with plaintiff’s attorney was evident partiality); *J.D. Edwards World Solutions Co. v. Estes, Inc.*, 91 S.W.3d 836, 840 (Tex.

- (3) The arbitrators exceeded their powers;<sup>409</sup>
- (4) The arbitrators refused to postpone the hearing upon sufficient cause being shown, or refused to hear material evidence or otherwise conducted the hearing contrary to the provisions of the Act so as to substantially prejudice a party's rights;<sup>410</sup> and
- (5) There was no arbitration agreement, the court did not previously compel or stay arbitration, and the party did not participate in the arbitration hearing without objection.<sup>411</sup>

### 1-9:3.2d Common Law Grounds Under Texas law

In addition to the TAA, Texas still recognizes common law arbitration.<sup>412</sup> “Statutory arbitration and common law arbitration exist side-by-side in Texas, and a dispute not arbitrable under the Texas statute can nevertheless be arbitrated under common law rules.”<sup>413</sup> Common law arbitration requires no specific form<sup>414</sup> and can come into play in Texas when parties either specifically reference it in their agreement to arbitrate or if their agreement falls outside the ambit of the TAA.<sup>415</sup> “Thus,

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App.—Fort Worth 2002, pet. denied) (finding that non-disclosure of arbitrator's ongoing representation of defendant was evident partiality). But a motion to vacate is the sole remedy to challenge an arbitrator's evident partiality. *Blue Cross Blue Shield v. Juneau*, 114 S.W.3d 126, 135-36 (Tex. App.—Austin 2003, no pet.) (holding losing party could not sue arbitrator for failing to disclose bias). And a party waives the right to vacate the judge for evident partiality if the party does not object to known facts showing partiality before the arbitrator makes the award. *Burlington N. R.R. v. TUCO, Inc.*, 960 S.W.2d 629, 637 n.9 (Tex. 1997).

<sup>409</sup>. Tex. Civ. Prac. & Rem. Code § 171.088(a)(3)(A).

<sup>410</sup>. Tex. Civ. Prac. & Rem. Code § 171.088(a)(3).

<sup>411</sup>. Tex. Civ. Prac. & Rem. Code §§ 171.088(a)(4).

<sup>412</sup>. See *Blue Cross Blue Shield of Texas v. Juneau*, 114 S.W.3d 126, 134 n.5 (Tex. App.—Austin 2003, no pet.) (“Two coexisting schemes govern arbitration in Texas: common law and the Texas Arbitration Act . . . [T]he legislature did not intend for the act to supplant common-law arbitration.”) (citations omitted).

<sup>413</sup>. *Monday v. Cox*, 881 S.W.2d 381, 385 n.1 (Tex. App.—San Antonio 1994, writ denied).

<sup>414</sup>. In fact, at least in 1848, common law agreements to arbitrate could be verbal. See *Owens v. Withee*, 3 Tex. 161, 166 (1848) (“At common law, the agreement to arbitrate might be verbally, by parol, or by an obligation under seal.”).

<sup>415</sup>. *Owens v. Withee*, 3 Tex. 161, 166 (1848) (finding that because the proceedings did not conform to the statute, legality must be derived from another source, such as the common law). For example, certain claims fall outside the scope of the statute, like personal injury claims. Tex. Civ. Prac. & Rem. Code Ann. § 171.002(a)(3).

a dual system of arbitration [exists] in Texas, and the statutory method has been viewed as cumulative of the common law.”<sup>416</sup> In 2016, the Texas Supreme Court addressed whether or not common law arbitration defenses, such as manifest disregard, are applicable within an arbitration governed by the TAA.<sup>417</sup> Noting the “quagmire” surrounding the FAA’s inclusion (or non-inclusion) of common law defenses causing more confusion than clarity,<sup>418</sup> the Texas Supreme Court explicitly stated that:

“The TAA’s plain language confirms that, in proceedings governed by that statute, section 171.088 provides the exclusive grounds for vacatur of an arbitration award. Because manifest disregard is not included in section 171.088, and because the parties did not agree to limit the arbitrator’s authority so as to authorize vacatur on that basis, Leonard’s attempt to vacate the award on the basis of manifest disregard must fail.”<sup>419</sup>

In other words, the *Hoskins* majority seems to have unequivocally stated that the TAA’s listed provisions provide the sole grounds for modifying or vacating an award made under the TAA, expressly excluding the classic common law grounds.<sup>420</sup> In so holding, however, the Texas Supreme Court made a point to recognize the existence of Texas’ “duel system” of arbitration, noting that the defense of manifest disregard is still available under contracts not governed by the TAA.<sup>421</sup>

<sup>416</sup> *L.H. Lacy Co. v. City of Lubbock*, 559 S.W.2d 348, 351 (Tex. 1977).

<sup>417</sup> *Hoskins v. Hoskins*, No. 15-0046, 2016 WL 2993929, at \*1 (Tex. May 20, 2016) (note: opinion not yet released for full publication and thus subject to change).

<sup>418</sup> *Hoskins v. Hoskins*, No. 15-0046, 2016 WL 2993929, at \*8 (Tex. May 20, 2016) (listing the several sets of conflicting cases regarding this particular issue among the several Federal District Courts).

<sup>419</sup> *Hoskins v. Hoskins*, No. 15-0046, 2016 WL 2993929, at \*7 (Tex. May 20, 2016).

<sup>420</sup> *Hoskins v. Hoskins*, No. 15-0046, 2016 WL 2993929, at \*7 (Tex. May 20, 2016).

<sup>421</sup> *Hoskins v. Hoskins*, No. 15-0046, 2016 WL 2993929, at \*5 (Tex. May 20, 2016) (recognizing Texas’ duel system and explaining that in “contracts not governed by the Act, this court’s function is to judge the validity of arbitration agreements under such common law rules as may be relevant).