STANDARDS OF REVIEW AS APPLIED TO ARBITRAL DECISIONS

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I. INTRODUCTION

This paper examines different standards of review which govern judicial review of an arbitral decision, or put another way, how a party goes about trying to either enforce, vacate or modify an arbitral award in court. This will entail, to some extent, a discussion of cases concerned with the threshold issue, that is, whether or not a court can compel arbitration in the first place, since both inquiries require a close examination of the arbitration clause. Finally, in analyzing the standard of review for vacating an award, the paper will discuss the scope of an arbitrator's power once arbitration has been established as the dispute resolution procedure which must be used.

As a preliminary matter, however, it seems worth flagging a common refrain. Arbitration is a creature of contract between parties, so parties can modify or change almost any rule described in this paper. The starting and finishing points of any arbitration analysis are the same point, the arbitration clause itself, in any given case. The clause controls the procedural and substantive law which will apply to the dispute, as well as the extent to which a party may appeal any arbitral decision beyond the narrow statutory grounds discussed below. So, a general caveat applies to almost any statement about the law of arbitration: only unless the clause does not say otherwise.

II. CONFIRMING, VACATING OR MODIFYING ARBITRAL AWARDS

The criteria a court relies on to confirm, vacate or modify an arbitrator's award[1] differ depending on the character of the arbitration itself: if the arbitration is between Texans and does not involve interstate commerce, the court looks to the Texas General Arbitration Act for its guidance; if the arbitration brushes up against the Commerce Clause, then the Federal Arbitration Act is the starting point; and if the arbitration is "international," which does not necessarily require that at least one party be foreign, then the reviewing court should break out its copy of the United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards (commonly referred to as the "New York Convention" after the city in which it was enacted). Each of these starting points invokes a slightly different set of rules and interpreting case law and, potentially, standard of review. This paper will not discuss confirming, vacating, modifying or enforcing international arbitral awards, though that is a fascinating topic worthy of examination.

On the last day of 2002, Texas Supreme Court Justice Nathan Hecht articulated his view of a court's proper role in reviewing an arbitrator's award:

> "Subjecting arbitration awards to judicial review adds expense and delay, thereby diminishing the benefits of arbitration as an efficient, economical system for resolving disputes. Accordingly, we have long held that 'an award of arbitrators upon matters submitted to them is given the same effect as a judgment of a court of last resort. All reasonable presumptions are indulged in favor of the award, and none against it.'"

CVN Group, Inc. v. Delgado, 95 S.W.3d 234, 238 (Tex. 2002), *quoting City of San Antonio v. McKenzie Constr. Co.*, 136 Tex. 315, 150 S.W.2d 989, 996 (Tex. 1941). Justice Hecht's view is in line with that of many commentators and most court opinions that opine as to the advisability of allowing courts to review arbitral decisions, and the case law bears out this inherent prejudice against judicial review of arbitral decisions.[2] In other words, if you are tasked with trying to avoid an arbitral award, you face an uphill battle.

[1]Throughout this paper, for reasons of convenience and consistency, I will refer to an "arbitrator's award" in the singular, despite the fact that many arbitrations are conducted by a panel of arbitrators, usually three. Obviously, whether a court reviews the findings of a single arbitrator or a panel, the rules are the same (although the makeup of the tribunal does become significant when courts review awards for bias or prejudice - more on this later).

[2]Justice Hecht's logic, of course, depends on his assumption that arbitration is in fact "an efficient, economical system for resolving disputes." In real life, it isn't, and not because pesky courts keep trying to review arbitral decisions. However, the State Bar has not asked me to climb on a soapbox and complain about arbitration, and people still pay me to serve as an arbitrator, so this paper will not focus on my views of the Myth of Efficient and Cheap Dispute Resolution through Arbitration. *See, however, Prescott v. Northlake Christian Sch.*, 369 F.3d 491 (5th Cir. 2004).

A. Vacating or Modifying Arbitral Awards Governed by the Texas General Arbitration Act

1. The Grounds for Vacating or Modifying an Award

The Texas General Arbitration Act ("TAA") sets forth several independent grounds under which a court must vacate an arbitral award:

> On application of a party, the court shall vacate an award if:
>
> (1) the award was obtained by corruption, fraud, or other undue means;
> (2) the rights of a party were prejudiced by:
>
> (A) evident partiality by an arbitrator appointed as a neutral arbitrator;
> (B) corruption in an arbitrator; or
> (C) misconduct or wilful misbehavior of an arbitrator;
>
> (3) the arbitrators:
>
> (A) exceeded their powers;
> (B) refused to postpone the hearing after a showing of sufficient cause for the postponement;
> (C) refused to hear evidence material to the controversy; or
> (D) conducted the hearing, contrary to Section 171.043, 171.044, 171.045, 171.046 or 171.047, in a manner that substantially prejudiced the rights of a party; or
>
> (4) there was no agreement to arbitrate, the issue was not adversely determined in a proceeding under Subchapter B, and the party did not participate in the arbitration hearing without raising the objection.

TEX. CIV. PRAC. & REM. CODE §171.088(a).

Also, in certain extreme cases, a court may vacate an arbitral award that violates public policy, though the Texas Supreme Court has been careful to note 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." *CVN Group*, 95 S.W.3d at 239.

The TAA also requires a court to modify an arbitral award in certain circumstances:

> On application, the court shall modify or correct an award if:
>
> (1) the award contains:
>
> (A) an evident miscalculation of numbers; or
> (B) an evident mistake in the description of a person, thing, or property referred to in the award;
>
> (2) the arbitrators have made an award with respect to a matter not submitted to them and the award may be corrected without affecting the merits of the decision made with respect to the issues that were submitted; or
> (3) the form of the award is imperfect in a manner not affecting the merits of the controversy.

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

2. Corruption, Fraud and Undue Means

Upon proper application by a party, a court must vacate an arbitral award obtained by corruption, fraud, or other undue means. TEX. CIV. PRAC. & REM. CODE §171.088(a)(1). A recent court of appeals opinion from El Paso provides an example. *Tri-Star Petroleum v. Tipperary* involved an appeal of a trial court's decision to vacate an arbitral award due to undue means and to refuse to order that a new arbitration take place. *Tri-Star Petroleum Co. v. Tipperary Corp.*, 107 S.W.3d 607, 614 (Tex. App. - El Paso 2003, pet. denied). The arbitration clause at issue was itself the product of a prior settlement agreement, and it required the parties to hire a neutral accounting firm to make certain calculations and factual determinations, which would be enforced as a binding arbitral award under the TAA. *Id.*, at 610-11.

The *Tri-Star* trial court refused to confirm the arbitral award based on its finding that Ernst & Young, the accounting firm hired, acted not as a neutral but as retained accountants on behalf of one of the parties. *Id.*, at 612. Ernst & Young, according to the trial court, refused to conduct a hearing, refused to communicate with the party that did not hire them, and otherwise consciously excluded one of the parties due to its own professional obligations to the party which hired it as its accountants. *Id.* While Ernst & Young's conduct may have been appropriate as a retained professional advisor to a client, it certainly did not allow for an open, impartial and efficient dispute resolution procedure.

In affirming the trial court's decision, under Section 171.088(a)(1), to vacate Ernst & Young's award, the Court of Appeals also specifically found that, post vacatur, a court is not required to order a new arbitration. *Id.*, at 614-16. Starting the arbitration process over after the prolonged disastrous first arbitration would have defeated the policy of arbitration as an efficient and inexpensive dispute resolution mechanism.[3] *Id.* Instead, the Court of Appeals found that Tri-Star Petroleum materially breached the arbitration clause of the settlement agreement, and therefore that the arbitration clause was revoked under Section 171.001(b) of the TAA. *Id.*, at 613-16. In so doing, the Court of Appeals explicitly found that the TAA's revocation analysis is not limited to formation defenses, such as lack of consideration, mistake and duress; arbitration agreements are not, according to the Court, more enforceable than other types of contracts. *Id.* Material breach of an arbitration agreement therefore, which presumably will take place whenever a party obtains an arbitral award through undue means, can revoke the arbitration agreement itself. Establishing undue means, therefore, can serve to not only vacate an award but also to eliminate arbitration altogether.

Rogers v. Maida, while not a vacatur case[4], is still helpful with respect to establishing corruption, fraud or undue means, as it provides an example of a Court of Appeals affirming a trial court's refusal to compel arbitration due to duress. *Rogers v. Maida*, 126 S.W.3d 643 (Tex. App. - Beaumont 2004, orig. proceeding[5]). *Rogers* is an employment case, whereby an employee of RLS Legal Solutions refused to sign an arbitration agreement, and her employer refused to pay her for services already rendered until she capitulated. *Id.*, at 645. Litigation eventually ensued, the employer moved to compel arbitration, and the trial court found that the arbitration agreement was a product of duress, since the employer did not have the legal right to refuse to pay its employee wages already earned. *Id.* This would be a classic case of a defect in the formation of an arbitration clause.

Rogers is also obviously distinguishable from the classic case of a contract of adhesion, whereby an employer refuses to continue to employ an employee unless the employee agrees to an arbitration clause. This latter situation is absolutely kosher in Texas, as the Texas Supreme Court has held as recently as April 15, 2005. *In re AdvancePCS Health L.P.*, 2005 WL 856961 (Tex. 2005) (Case No. 04-0182).

3. Evident Partiality, Willful Misconduct, Corruption

Upon proper application by a party, a court must vacate an award if the rights of a party to the arbitration were prejudiced by the evident partiality of a neutral arbitrator, by corruption in an arbitrator, or by misconduct or wilful misbehavior of an arbitrator. TEX. CIV. PRAC. & REM. CODE §171.088(a)(2).

The Texas Supreme Court issued its first opinion explaining the evident partiality standard within the context of the TAA in 1997. *Burlington Northern Railroad Co. v. TUCO, Inc.*, 960 S.W.2d 629, 633 (Tex. 1997). The *TUCO* court explains, however, that it bases its opinion on federal jurisprudence interpreting an identical provision in the Federal Arbitration Act. *Id.* The *TUCO* rule is as follows: "a neutral arbitrator selected by the parties or their representatives exhibits evident partiality under this provision if the arbitrator does not disclose facts which might, to an objective observer, create a reasonable impression of the arbitrator's partiality." *Id.*, at 630. The *TUCO* rule, therefore, only applies with respect to neutral arbitrators and in a situation where the parties or their representatives select the challenged arbitrator. The rule therefore applies to many, but not all, arbitrators.

In the *TUCO* case, each party selected a friendly arbitrator, and the friendly arbitrators selected the third, neutral arbitrator, whose partiality was challenged. *Id.*, at 630-31. After the panel made its decision, the friendly arbitrator for TUCO overheard the neutral arbitrator

[3]It also seems worth noting that this opinion has survived a Petition for Rehearing, a Petition for Review, a Petition for Writ of Mandamus, a Petition for Rehearing of the Denial of the Petition for Review, and a Petition for Rehearing for Denial of the Mandamus. The mediated settlement agreement in this case, which contained an arbitration provision to add efficiency to its implementation, was executed on May 2, 1996; the final (I think) appellate petition that could be filed in this matter seems to have been resolved on July 2, 2004. Efficiency in action.

[4]Many, if not most, arbitration cases involve the issue of arbitrability itself: whether or not a court must require parties to arbitrate rather than litigate their disputes. While this question is not the subject of this paper, the issues occasionally overlap, so some arbitrability cases are instructive here.

[5]Interlocutory appeal of trial court's decision, under TAA, not to compel arbitration. Interlocutory appeal is the proper procedural mechanism under the TAA to challenge such a ruling; under the Federal Arbitration Act one must challenge a decision not to compel arbitration via mandamus.

thank the friendly arbitrator for Burlington Northern for referring him a large piece of litigation work. *Id.* TUCO filed a suit, pursuant to Section 171.088(a)(2)'s predecessor, asking the court to vacate the award due to evident partiality.

The Texas Supreme Court, realizing that it was making new Texas law, provides a thorough history of the evident partiality standard as it applies to the FAA, which I will not recap in this paper, but which I do recommend to any party challenging an arbitral award, under either the TAA or the FAA, on the ground of evident partiality. The Court rules that, since arbitration is a creature of contract between parties, and since parties have an incentive to choose the most qualified and experienced arbitrators who would naturally be the most likely to have conflicts, it is critical that the arbitrators disclose potential conflicts as fully as is reasonable. *Id.*, at 635. This early and complete disclosure allows the parties, and not subsequent courts, to evaluate potential bias and decide whether or not to proceed. *Id.* The Court emphasizes that the evident partiality does not stem from the potential conflict, but from the fact of nondisclosure itself, "regardless of whether the undisclosed information necessarily establishes partiality or bias." *Id.*, at 636. Under *TUCO*, arbitrators are not required to disclose trivial relationships or connections, but they are required to disclose, for example, a familial or close social relationship, and "the conscientious arbitrator should err in favor of disclosure." *Id.*, at 637. Finally, in a footnote, the *TUCO* court notes that "a party who learns of a conflict before the arbitrator issues his or her decision must promptly object to avoid waiving the complaint." *Id.*, n.9.

In 2002, the Texas Supreme Court revisited the issue and added complexity to the analysis. *Mariner Fin. Group, Inc. v. Bossley*, 79 S.W.3d 30 (Tex. 2002). After restating the *TUCO* rule, the Court affirmed the court of appeals' decision to reverse a summary judgment confirming an award that had been challenged on evident partiality grounds. *Id.* In *Mariner*, about two months after an arbitral award had been issued, the Bossleys' expert witness realized that she had earlier testified against one of the arbitrators in a malpractice proceeding. *Mariner*, at 31-32. The Bossleys filed a proceeding to vacate the award, and Mariner, the prevailing party at arbitration, moved for summary judgment on the grounds that no legal basis existed to vacate the award. *Id.*, at 32.

Procedurally, Mariner's decision to move for summary judgment on this issue proved determinative. Ordinarily, the party challenging an award under 171.088(a) has the burden of proving evident partiality; in this case, however, since Mariner filed a "traditional" motion for summary judgment, to prevail Mariner had to establish, as a matter of law, that no issue of material fact existed with respect to the arbitrator's evident partiality. *Id.*; *see also* TEX. R. CIV. P. 166a(c). Under *TUCO*, the arbitrator had an affirmative obligation to disclose his previous relationship with the Bossleys' expert if he knew of it. *Id.* The summary judgment evidence, however, was "silent about whether [the arbitrator] remembered [the expert] or even knew of her." *Id.*, at 33. That being the case, the trial court should not have granted the motion for summary judgment.

In its analysis, the *Mariner* court emphasizes the fact-intensive inquiry that must take place with respect to evident partiality analysis. *Id.*, at 34. While some cases involve "common knowledge" of a potentially conflicting relationship which does not require additional formal disclosure, others absolutely require disclosure since only the arbitrator would know of the potential conflict. *Id.* While the *Mariner* court seems to suggest that its set of facts is somewhere in the middle, it cannot even make that assertion based on the record before it. What is clear, though, is that the duty to disclose is the arbitrator's, so the arbitrator's state of mind is the critical factual inquiry. While a party with knowledge of a conflict must object immediately lest it waive a potential challenge, a party is not required to conduct independent research to discover potential conflicts. *Id.*, at 34-35. "[T]he whole purpose of an arbitrator's duty to disclose is to avoid this very type of speculative presumption and let the parties to the arbitration make the call." *Id.*, at 35.

Finally, the Austin Court of Appeals recently applied the *TUCO* rule, reversed a trial court's decision to vacate an arbitral award on the basis of evident bias, and rendered judgment enforcing the arbitral award. *Kendall Builders, Inc. v. Chesson*, 149 S.W.3d 796 (Tex. App. - Austin 2004, pet. denied). *Kendall* involved an arbitration award issued against a homeowner in favor of a remodeling contractor. *Id.*, at 800. The homeowner was an employee of Vignette Corporation who had moved to Austin due to work obligations and had bought a house there in need of repair. *Id.*, at 801. During a break in the arbitration, the arbitrator complained to the homeowner about the price of Vignette stock. *Id.*

After the arbitrator issued an award in the contractor's favor, the homeowner mentioned the exchange about Vignette stock to his attorney, who promptly deposed the arbitrator and filed an application to vacate the award based on evident partiality. *Id.* The trial court vacated, but Court of Appeals reversed, finding that the homeowner waived his right to complain about

any alleged anti-Vignette bias when he did not object during the arbitration. *Id.*, at 804-805. The logical basis for disclosure is to allow the parties themselves to decide whether to complain about potential conflicts, says the Court, so parties can and often will "waive an otherwise valid objection to the partiality of the arbitrator despite knowledge of facts giving rise to such an objection." *Id.*, at 804. Again, parties in specialized cases will often hire expert arbitrators in the are who will therefore be will-known to the parties.

The *Kendall* court's analysis is in line with *TUCO*, and based on the factual record as presented in the opinion it is difficult, as an arbitrator and as an attorney who represents clients in arbitration, to believe that the price of Vignette stock had anything to do with the arbitrator's decision. However, it seems worth considering the burden the Court places on parties to arbitrations left alone in rooms with arbitrators. In order to preserve his complaint, the party here, during a pending arbitration, would have been required to make an objection to an off-hand remark in what is supposed to be a less-formal proceeding. On the other hand, had the remark evidenced serious and relevant bias, perhaps immediate objection would seem a more reasonable expectation.[6]

4. Did the Arbitrator Exceed His or Her Power, Refuse to Postpone a Hearing, or Refuse to Hear Material Evidence?

Upon proper application by a party, a court must vacate an award if the arbitrator exceeded his or her powers, refused to postpone the hearing after a showing of sufficient cause for the postponement, or refused to hear evidence material to the controversy. TEX. CIV. PRAC. & REM. CODE §171.088(a)(2).

Determining whether or not an arbitrator has exceed his or her power requires at the outset an examination of the arbitration clause itself: "the authority of an arbitrator derives from the arbitration agreement and is limited to a decision of the matters submitted therein." *Action Box Co., Inc. v. Panel Prints, Inc.*, 130 S.W.3d 249, 252 (Tex. App. - Houston [14th Dist.] 2004, no pet.) (*citing Gulf Oil Co. v. Guidry*, 160 Tex. 139, 327 S.W.2d 406, 408 (Tex. 1959). This means establishing that the arbitrator made rulings specifically outside the scope of the arbitration clause; it is not enough that the arbitrator decided matters within his or her purview wrongly or haphazardly. In the *Action Box* case, for example, the party seeking vacatur alleged that the "arbitrator exceeded his powers by misinterpreting the operative agreement and erroneously admitting parol evidence to construe it even though it was unambiguous." *Id.* The Court found that even if those allegations were proven, they would not amount to the arbitrator's exceeding his or her power, and so they cannot support vacatur. *Id.* Put another way, it is well within an arbitrator's power to decide an issue incorrectly.

What's more, when courts read arbitration clauses to determine whether an arbitrator's ruling was within the scope of his or her power, they read them broadly: "every presumption will be indulged to uphold the arbitrators' decision, and none is indulged against it." *J.J. Gregory Gourmet Services, Inc. v. Antone's Import Co.*, 927 S.W.2d 31, 36 (Tex. App. - Houston [1st Dist] 1995, no writ). The *J.J. Gregory* Court held that, in a case with a broad form arbitration clause (like the standard clauses promulgated by all the major arbitration providing organizations), an arbitrator has authority to decide any issue that the clause does not specifically take out of his scope. *Id.* In other words, the clause need not specifically give the arbitrator authority to act; it must simply not specifically prevent the arbitrator from acting. *See also Hisaw & Assocs. Gen. Contractors, Inc. v. Cornerstone Concrete Sys., Inc.*, 115 S.W.3d 16, 20 (Tex. App. - Fort Worth 2003, no pet.).

The San Antonio Court of Appeals, however, reversed a trial court's judgment confirming an arbitral award to the extent the trial court confirmed an improperly modified award. *Barsness v. Scott*, 126 S.W.3d 232, 241-42 (Tex. App. - San Antonio 2003, pet. denied). The Court ruled that since arbitral awards are treated "very deferentially" under Texas law, an arbitrator exceeds his or her powers by modifying his or her award absent a finding that statutory grounds for modification exist under the TAA. *Id.* In other words, once the arbitrator made his or her final decision, the merits of the arbitration were no longer before him or her, except as allowed by the narrow guidelines of Section 171.054(a) of the TAA. The trial court, therefore, was required to vacate the modification as it exceed the arbitrator's power.

At least one Texas Court of Appeals has analyzed a party's claim that an arbitrator's failure to postpone an arbitration required vacatur. *Hoggett v. Zimmerman, Axelrad, Meyer, Stern & Wise, P.C.*, 63 S.W.3d 807, 811 (Tex. App. - Houston [14th Dist.] 2001, no pet.). In that case, the Court applied analysis similar to that a court would use in the context of a trial court's refusal to

[6]The actual complained-of comment was the question of whether Vignette stock was "ever going to go up." *Kendall Builders*, 149 S.W.3d at 801.

grant a continuance in determining that the failure to postpone in the face of sufficient notice did not warrant vacatur. *Id*. *See also Crossmark, Inc. v. Hazar*, 124 S.W.3d 422, 432 (Tex. App. - Dallas 2004, pet. denied) (Court refused, with no analysis, to require vacatur when party did not ask for postponement until six days before arbitral hearing).

The end result of Texas law interpreting the TAA in this area is that, in most cases and in the "default" cases where a party uses a form or standard arbitration clause, there is no opportunity for meaningful appeal of an arbitral decision on the basis that the arbitrator was obviously wrong on the facts, the evidence, or the law.[7] Indeed, since the Supreme Court's opinion in *CVS Group v. Delgado*, courts treat any attempt to appeal an arbitration as an affront to jurisprudential efficiency. However, since arbitration is a creature of contract, it is possible for parties to build some sort of appeal, either in limited or full common-law form, into the clause, and this paper will touch on this idea later.

5. No Agreement to Arbitrate

Finally, the TAA allows a party to seek vacation of an arbitral award on the grounds that no agreement to arbitrate exists, the issue was not adversely determined under Subchapter B, and the party did not participate in the arbitration hearing without raising objection. TEX. CIV. PRAC. & REM. CODE §171.088(a)(4). Subchapter B is the subchapter of the TAA which controls disputes over whether or not a dispute is arbitrable that arise at the beginning of an arbitral proceeding. So, for 171.088(a)(4) to apply, a party would object to arbitration, the objection would be overruled at the outset, the party would participate in the arbitration under objection, and the party would move to vacate the award within ninety days of the award.

While this scenario is plausible, most disputes (and there are lots) as to a dispute's arbitrability occur at the outset. A court's refusal to compel arbitration under the TAA is an immediately appealable interlocutory order. TEX. CIV. PRAC. & REM. CODE §171.098. Therefore, numerous reported opinions exist concerning trial courts' refusals to compel arbitration. These opinions make up a critical body of Texas arbitration law, and they are beyond the scope of this paper. The arbitrability analysis, however, is similar to the vacatur analysis, in that the strongest argument one can make at either point in the process must be based in the language of the arbitration clause itself.

6. Public Policy as a Grounds for Vacating an Arbitral Award Under Texas Law

As has been noted above, Texas law allows a court to vacate a Texas arbitration award (i.e. one that does not fall under the auspices of the Federal Arbitration Act) if the award contravenes public policy. *CVN Group, Inc. v. Delgado*, 95 S.W.3d at 237-38. However, the Texas Supreme Court makes such a remedy quite difficult to obtain: "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." *Id.*, at 239. The example the Court uses comes from a 1936 case in which the Court refused to confirm an award which enforced a gambling debt. *Id.*, at 237. So, under *CVN Group* at least, it is clear than a party ought to be able to vacate an arbitration award which supports an illegal activity.

The *Action Box* Court is careful to note that arbitral errors of contract interpretation, even if clear, "do not begin to approach such a fundamental policy contravention." *Action Box*, 130 S.W.3d at 253. Similarly, the *Crossmark* Court makes it clear that the public policy ground for vacatur cannot be used to complain of arbitral errors in applying the law: "any alleged errors by the arbitrators in applying the substantive law are not subject to review in the courts." *Crossmark*, 124 S.W.3d at 435. "Because Crossmark's arguments at most raise issues as to the application of law, as opposed to presenting fundamental public policy arguments, the trial court could not have set aside the arbitrators' award." *Id.* In other words, just as it is within an arbitrator's power to be wrong so long as he or she is wrong on an issue properly before him or her, it is also no violation of the public policy of the State of Texas to make mistakes of contract construction or in the application of the law to the facts.

7. Modifying an Arbitral Award Due to Evident Miscalculations

Upon proper application by a party, a court must modify or correct an award if the award contains an evident miscalculation of numbers or an evident mistake in the description of a person, thing, or property referred to in the award. TEX. CIV. PRAC. & REM. CODE §171.091(a)(1).

In a 1994 opinion, the Houston Court of Appeals considered a challenge to an arbitral award that the

[7] TAA jurisprudence does not allow for the non-statutory ground of an arbitrator's manifest disregard of the law as a basis for vacating an award (more on this basis for vacatur below, in the section on Federal Arbitration Act jurisprudence). *Action Box*, 130 S.W.3d at 252.

challenging party claimed made errors of arithmetic on the arbitrators' part in assessing liquidated damages. *City of Baytown v. C.L. Winter, Inc.*, 886 S.W.2d 515, 519 (Tex. App. - Houston [1st Dist.] 1994, no writ). However, the *Baytown* court refused to modify the award in the absence of a transcription of the arbitration proceeding: "we do not know what evidence the arbiters considered in making their award, and the award on its face does not reflect a miscalculation." *Id.*, at 520. In other words, if you are arbitrating a case involving a lot of arithmetic, you may well want to have the proceedings recorded.

The *Crossmark* court refuses to modify an award on the basis of a claimed miscalculation when the party to the arbitration requesting the modification also requested, during the arbitration, that the arbitrators employ his methodology with respect to calculation. *Crossmark*, 124 S.W.3d at 436. Based on these facts, the Court found the arbitral math to be a concerted decision to not adopt a party's proposed calculation, as opposed to an error. *Id.* The miscalculation ground for modification of an award, therefore, clearly seems to apply only to legitimate errors in arithmetic, and not to arbitral decisions as to the proper measure of damages, even if those decisions may seem unusual or unfair (in *Crossmark*, for example, the arbitrators refused to discount an accelerated liquidated damages payment to present value of the funds, awarding instead in one lump sum all payments that were to be paid out over ten years originally - this may not in fact have been unusual or unfair, but even if it were it would not be grounds for modifying an award).

8. Practice Note on Standard of Review

More than one of the above-cited vacatur cases involves a party, after the final arbitral award, filing an action to vacate or confirm an award, and then moving for summary judgment, asking the court to vacate or confirm or specifically not to vacate. This is not necessary, and it in fact is not a great way to achieve either vacatur or confirmation of an award. The *Crossmark* Court explains the rule:

> The [Texas General Arbitration] Act provides that an application under the Act is heard in the same manner and on the same notice as a motion in a civil case. . . . Thus, applications to confirm or vacate an arbitration award should be decided as other motions in civil cases; on notice and an evidentiary hearing if necessary. Summary judgment motions are not required for the trial court to confirm, modify or vacate an arbitration award. However, if a party chooses to follow summary judgment procedure rather than the simple motion procedure authorized by the Act, it assumes the traditional burdens and requirements of summary judgment practice.

Crossmark, 124 S.W.3d at 430. While this may not normally be a dispositive difference, given that the remarkable judicial deference given to arbitral decisions makes the standard of review skewed in favor of the award in any case, it can be.

As discussed above, the *Mariner* Court was bound by summary judgment standard, as opposed to TAA standards, which shifted the burden of proof and proved to be dispositive. *Mariner*, 79 S.W.3d at 32.

B. Vacating or Modifying Arbitral Awards Governed by the Federal Arbitration Act

1. The Grounds for Vacating or Modifying an Award

The Federal Arbitration Act ("FAA") sets forth several independent grounds under which a court may vacate an arbitral award:

In any of the following cases the United States court in and for the district wherein the award was made may make an order vacating the award upon the application of any party to the arbitration --

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

9 U.S.C. §10(a).

The Fifth Circuit has accepted manifest disregard of the law as an additional, non-statutory basis by which a court may vacate an arbitral award. *Brabham v. A.G. Edwards & Sons, Inc.*, 376 F.3d 377, 381 (5th Cir. 2004) (discussing the history of the Circuit's jurisprudence on

this issue). The Fifth Circuit also "does recognize some circumstances in which a court may refuse to enforce an arbitration award that is contrary to public policy." *Prestige Ford v. Ford Dealer Computer Services, Inc.*, 324 F.3d 391, 396 (5th Cir. 2003). Both manifest disregard and public policy grounds for vacatur are, like most grounds for vacatur under either Texas or Federal law, construed quite narrowly.

The Fifth Circuit does not, however, accept arbitrariness and capriciousness as a nonstatutory ground for vacatur in FAA cases, though some federal circuits do.[8] *Brabham*, 376 F.3d at 382-85. "In the interest of establishing clear and deferential standards of review, however, we must avoid hashing the existing grounds for vacatur into analytical bits, only to see those bits take on a life of their own and inexorably overwhelm the deference accorded arbitration awards." *Id.*, at 385-86 (paraphrasing, by the Court's own admission, Goethe).

Finally, like the TAA, the FAA provides for modification of an erroneous award:

> In either of the following cases the United States court in and for the district wherein the award was made may make an order modifying or correcting the award upon the application of any party to the arbitration --
>
> (a) Where there was an evident miscalculation of figures or an evident material mistake in the description of any person, thing or property referred to in the award.
> (b) Where the arbitrators have awarded upon a matter not submitted to them, unless it is a matter not materially affecting the merits of the decision upon the matter submitted.
> (c) Where the award is imperfect in matter of form not affecting the merits of the controversy.
>
> The order may modify and correct the award, so as to effect the intent thereof and promote justice between the parties.

9 U.S.C. §11.

The general standard of review a court in the Fifth Circuit employs when considering a motion to vacate an award under either the FAA or one of the non-statutory grounds is well-established and severe: "We review de novo an order vacating an arbitration award. Our review of the award itself, however, is exceedingly deferential. We can permit vacatur of an arbitration award only on very narrow grounds." *Brabham*, 376 F.3d at 380 (citations omitted); *see also Prescott v. Northlake Christian School*, 369 F.3d 491 (5th Cir. 2004) ("the district court's review of an arbitration award, under the [FAA], is 'extraordinarily narrow'"). While courts describe the standard of review under the FAA as de novo, the review of the award itself (as theoretically opposed to the decision to vacate the award, but the two seem to always conflate) requires a much restricted version of de novo review, and "normal" do novo review of an award is in fact grounds for reversal of a vacatur. *Kergosien v. Ocean Energy, Inc.*, 390 F.3d 346, 357 (5th Cir. 2004).

2. Award Procured by Corruption, Fraud or Undue Means

Upon proper application by a party, a court may vacate an arbitral award procured by corruption, fraud, or other undue means. 9 U.S.C. §10(a)(1). The Fifth Circuit has interpreted this ground for vacatur "as requiring a nexus between the alleged fraud and the basis for the panel's decision." *Forsythe Int'l, S.A. v. Gibbs Oil Co. of Texas*, 915 F.2d 1017, 1022 (5th Cir. 1990). In other words, a party seeking vacatur must allege more than just fraud during the arbitration process; the allegation must link the alleged fraud to the arbitral award complained of. "The requisite nexus may exist where fraud prevents the panel from considering a significant issue to which it does not otherwise enjoy access." *Id.*

In the *Forsythe* case, the arbitral panel clearly considered a party's allegations of fraud when making its award. *Id.*, at 1022-23. According to the Fifth Circuit, "the panel effectively ruled that the asserted fraud was immaterial." *Id.* The Court reversed the trial court's vacatur of the arbitral award on the grounds of fraud or undue means. *Id.* at 1023. In other words, when fraud upon the panel is discovered and explored before the rendition of the final award, it will be quite difficult for a party to obtain a vacatur on those grounds.

[8] A caveat exists: arbitration awards arising from the terms of a collective bargaining agreement may be vacated if arbitrary and (or?) capricious in the Fifth Circuit. *Brabham*, 376 F.3d at 382. The arbitrary and capricious ground stems from Section 301 of the Labor-Management Relations Act, 29 U.S.C. §185, a statutory ground independent of the FAA, and thus not from Fifth Circuit common law, and so it does not apply to cases decided under the FAA. *Id.*

Interestingly, the Court also notes that the arbitral panel seemed a bit irritated that the parties spent so much time dwelling on the alleged fraud, which seemingly entailed deposition shenanigans (a former employee of a party was represented to be a current employee so the party could exert more control over his deposition). *Id.*, at n.7 ("the neutral arbitrator, however, expressed impatience with protracted diversion from the merits"). As the Court states, "submission of disputes to arbitration always risks an accumulation of procedural and evidentiary shortcuts that would properly frustrate counsel in a formal trial. . . . whatever indignation a reviewing court may experience in examining the record, it must resist the temptation to condemn imperfect proceedings without a sound statutory basis for doing so." *Id.*, at 1022.

A later district court opinion from the Southern District of Texas which the Fifth Circuit later adopted examined fraud and undue influence as grounds for vacating an arbitral award and offered a bit more explanation:

> Under the FAA a party who alleges that an arbitration award was procured through fraud or undue means must demonstrate that the improper behavior was (1) not discoverable by due diligence before or during the arbitration hearing, (2) materially related to an issue in arbitration, and (3) established by clear and convincing evidence. Although "fraud" and "undue means" are not defined in section 10(a) of the FAA, courts interpret the terms together. Fraud requires a showing of bad faith during the arbitration proceedings, such as bribery, undisclosed bias of an arbitrator, or willfully destroying or withholding evidence. Similarly, undue means connoted behavior that is 'immoral if not illegal' or otherwise in bad faith. Section 10(a)(1) also requires a nexus between the alleged fraud or undue means and the basis for the arbitrator's decision.

In the matter of the Arbitration Between Trans Chemical Ltd. and China Nat'l Machinery Import & Export Corp., 978 F.Supp.266 (S.D. Texas 1997), *aff'd* 161 F.3d 314 (5th Cir. 1998) (citations omitted).

3. Evident Partiality or Corruption in the Arbitrators

In its *TUCO* decision, the Texas Supreme Court creates TAA evident partiality jurisprudence, but the Court states from the outset that it is basing its holding on cases interpreting the FAA's identical provision. *TUCO*, 960 S.W.2d at 632. *TUCO*, therefore, while not controlling, is certainly helpful with respect to federal evident partiality analysis, particularly since vacatur cases employing FAA analysis are often heard in state courts rather than federal courts. The *TUCO* Court's holding is based on what it characterizes as "the seminal evident partiality case," the 1968 U.S. Supreme Court opinion in *Commonwealth Coatings*.

Commonwealth Coatings establishes the simple rule that it is the nondisclosure of a potential bias, rather than evidence of actual bias itself, which triggers a potential vacatur under the FAA. *Commonwealth Coatings Corp. v. Continental Casualty Co.*, 393 U.S. 145, 147-48, 89 S.Ct. 337, 338-39 (1968). "We can perceive of no way in which the effectiveness of the arbitration process will be hampered by the simple requirement that arbitrators disclose to the parties any dealings that might create an impression of possible bias." *Id.*, at 149, 339. Justice White's concurrence explains a bit more the policy rationale for the *Commonwealth Coatings* rule: "it is often because [arbitrators] are men of affairs, not apart from but of the marketplace, that they are effective in their adjudicatory function." *Id.*, at 150, 340 (J. White, concurring). Since arbitrators, unlike judges, function as part of the world in which they make decisions and are chosen because of their prominence in that world, potential conflicts may abound. The solution to this is frankness, so that the parties can decide from the outset whether or not they wish to proceed.

As a slight aside, the Supreme Court's analytical basis for its decision is germane to the overall thrust of this paper: "we should, if anything, be even more scrupulous to safeguard the impartiality of arbitrators than judges, since the former have completely free reign to decide the law as well as the facts and are not subject to appellate review." *Id.*, at 149, 339 There you have it.

A three-justice dissent in *Commonwealth Coatings* argues that vacatur for an arbitrator's undisclosed conflict is too harsh a result when all parties seem to agree that no actual bias or impartiality in the challenged arbitrator's ruling existed. *Id.*, at 152-55, 341-42. As the *TUCO* court explains, some federal circuits have declined to follow *Commonwealth Coatings* or have diluted its mandate. *TUCO*. 960 S.W.2d at 633-34 ("Although Justices White and Marshall joined fully in Justice Black's opinion for the Court, some lower federal courts have purported to see a conflict between the two writings. By treating Justice Black's opinion as a mere plurality, they have felt free to reject the suggestion that 'evident partiality' is met by an 'appearance of bias,' and to apply a much narrower standard.")

The Fifth Circuit, in *dicta*, suggested that it would adopt the Second Circuit's narrower standard of evident partiality analysis: "evident partiality means more than a mere appearance of bias." *Bernstein Seawell & Kove v. Bosarge*, 813 F.2d 726, 732 (5th Cir. 1987) (quoting *Florasynth, Inc. v. Pickholz*, 750 F.2d 171, 173 (2d Cir. 1984)). There has not been, to date, a definitive Fifth Circuit pronouncement on this issue.

A recent U.S. District Court opinion from the Northern District of Texas, however, does a thorough job of fully explaining the post-*Commonwealth Coatings* rift in evident partiality FAA jurisprudence and adopts the broader rule also adopted by the Texas Supreme Court in *TUCO*. *Positive Software Solutions, Inc. v. New Century Mortgage Corp.*, 337 F.Supp.2d 862, 878-887 (N.D. Texas 2004). The Court holds "that in nondisclosure cases, an arbitration award must be vacated where there is a reasonable impression of partiality." *Id.*, at 885. The Court refused to apply the Second Circuit cases adopting a heightened standard, explaining that their rule in large part developed from partiality cases in which the potential conflicts were in fact disclosed. *Id.*, at 883. This distinction seems to be critical: the analytical foundation for evident partiality rulings is the idea that parties ought to be able to choose whether or not to object to a potential conflict. Obviously the standard should be stricter in cases in which the potential conflict was disclosed, and the *Positive Software* Court maintains a clear distinction.

In nondisclosure cases, therefore, the Northern District clearly rejects the stricter evident partiality analysis which takes place in the Second Circuit and some other federal circuits. Finally, the rule in the Southern District of Texas is perhaps less clear, as a recent opinion (dealing with facts which would suggest a partially disclosed conflict as opposed to a fully undisclosed conflict) seems to employ something of a mixture of evident partiality tests. *Lummus Global Amazonas, S.A. v. Aguaytia Energy Del Peru, S.R. Ltda.*, 256 F.Supp.2d 594, 622-29 (S.D. Texas 2002).

4. Arbitrator Misconduct, Refusal to Postpone Hearing or Hear Material Evidence

Conveniently, the Fifth Circuit provided clear precedent on the kind of arbitrator misconduct which will support vacatur when it affirmed a district court vacatur of an award on the ground that "the arbitrator misled Exxon into believing that evidence was admitted, and then refused to consider that evidence." *Gulf Coast Indus. Workers Union v. Exxon Co., USA*, 70 F.3d 847, 848 (5th Cir. 1995).

In the *Gulf Coast* case, Exxon attempted to discharge a union worker for just cause when a substance found in her vehicle tested positive for marijuana, which would have violated Exxon's policy with respect to controlled substance misuse. *Id.*, at 848-49. At the arbitration, Exxon's attorney began to prove up the "DLR test"[9] which had identified the substance found as marijuana, but the arbitrator stopped him. *Id.* at 849. The Arbitrator specifically ruled that the test had been admitted into evidence and that arbitral time did not need to be spent establishing it as a business record. *Id.* The Court cites references to the arbitration record, which includes both a transcript of the proceedings and a stipulation between the parties as to the DLR tests's accuracy and reliability. *Id.*

In the end, however, the arbitrator ruled against Exxon on the basis that Exxon had not proven that the substance found was in fact marijuana, since the DLR test was inadmissible hearsay. *Id.* "The arbitrator then spent five pages of his decision in a diatribe on the unreliability of hearsay." *Id.* Relying on Section 10(a)(3) of the FAA, the Fifth Circuit found that the arbitrator in this case misled Exxon's attorney into not adequately proving up the DLR test, and therefore triggered vacatur under the FAA. *Id.*, at 850.

Of course, *Gulf Coast* must be considered within a larger context of great deference to arbitral awards. The general rule is that arbitrators are given significant leeway on evidentiary issues: "arbitrators are not bound to hear all of the evidence tendered by the parties; however, they must give each of the parties to the dispute an adequate opportunity to present its evidence and arguments." *Prestige Ford*, 324 F.3d at 395. In other words, it would seem that an arbitrator must pro-actively lure a party into evidentiary hot water for 10(a)(3) to apply. Given many arbitrators' willingness to simply admit all evidence, 10(a)(3) may, as a practical matter, be a rather rare ground for vacatur (one wonders if the *Gulf Coast* result would have differed had the arbitrator admitted the DLR test result into evidence but, perhaps even without cogent explanation, ruled against Exxon anyway - such a result would have been much more difficult for Exxon to overcome it would seem).

5. The Arbitrator Exceeded His or Her Powers

The Fifth Circuit has also recently explained in some detail the analysis that must take place when a party asks a court to vacate an arbitral award on the basis that the award exceeds the arbitrator's powers. *Kergosien v.*

[9]Dequenois Levine Reagent test.

Ocean Energy, Inc., 390 F.3d 346, 354-55 (5th Cir. 2004). The *Kergosien* case explains that an arbitrator's jurisdiction is defined by both the contract containing the arbitration clause and the parties' submissions, but that a failure to provide a reviewing court with a full record of an arbitration proceeding makes it exceedingly difficult for a court to find in favor of vacatur. *Id.*

> [I]n deciding whether the arbitrator exceeded his jurisdiction, 'any doubts concerning the scope of arbitral issues should be resolved in favor of arbitration.' . . . arbitration should not be denied 'unless it may be said with *positive assurance* that the arbitration clause is not susceptible of an interpretation that covers the asserted dispute.' We held that the decision as to whether or not an issue is arbitrable is for the arbitrator to decide 'if the subject matter of the dispute is arguably arbitrable,' and that courts have no business overruling an arbitrator 'because their interpretation of the contract is different from his.'

Id., at 355 (citations omitted, emphasis in original). This quoted passage leaves little room for doubt as to the limits of any argument that an arbitrator exceeded his or her power in issuing an arbitral award.

An earlier U.S. Supreme Court case explained the operation of this basic rule, when that Court found that, in a case within the parameters of the FAA (more on this below), an arbitration clause combined with the arbitration rules of the National Association of Securities Dealers allowed an arbitrator to award punitive damages in the case, even though 1) New York law specifically prohibited arbitral awards of punitive damages; and 2) the arbitration clause specified that New York substantive law applied to any disputes under the contract. *Mastrobuono v. Shearson Lehman Hutton, Inc.*, 514 U.S.52, 115 S.Ct. 1212 (1995). The FAA, the Court found, trumped New York law prohibiting arbitral punitive damages award, so if the arbitration clause allowed them, the FAA required their enforcement. *Id.*, at 58, 1216. The arbitration clause was silent on the issue, but silence in these cases is significant only to the extent it means that the clause did not specifically prohibit punitive damages. *Id.*, at 59, 1217. *see also Action Indus., Inc. v. United States Fidelity & Guaranty Co.*, 358 F.3d 337, 343 (5th Cir. 2004); *Bridas S.A.P.I.C. v. Government of Turkmenistan*, 345 F.3d 347, 365-66 (5th Cir. 2003).

A recent Fifth Circuit decision held that, even in the face of an arbitrator's obvious abandonment of an arbitration clause's scriptures, a court cannot award vacatur of the eventual award when a party does not formally and properly object to the arbitrator's deviation from the clause. *Brook v. Peak Int'l, Ltd.*, 294 F.3d 668 (5th Cir. 2002). The *Brook* case involved an arbitration administered by the American Arbitration Association ("AAA") pursuant to the AAA's rules and procedures. *Id.* at 670. According to the Court, "parties to an arbitration agreement may determine by contract the method for appointment of arbitrators," and an arbitrator exceeds his or her powers when he or she does not adhere to this contractually determined methodology. *Id.*, at 672. Within this context, the Court writes, "To state that the AAA failed to follow the simple selection procedure outlined in Brook's Employment Agreement is insufficient: the AAA flouted the prescribed procedures and ignored complaints from both sides about the irregular selection process. . . . Because arbitration is a creature of contract, the AAA's departure from the contractual selection process fundamentally contradicts its role in voluntary dispute resolution." *Id.*, at 673.

The Court, therefore, clearly finds that the arbitration award was issued in manner completely outside the scope of the parties' agreement to arbitrate, since the AAA wholly botched the arbitrator selection process. However, even in this blatant case, it does not matter. Even though the parties complained during the selection process, failing to object in formal writing or at the commencement of the arbitration hearing constituted waiver of their potential complaint. *Id.*, at 673-74. The Fifth Circuit, therefore, reversed the district court's decision to vacate the award. *Id.*

At this point it is worth mentioning again the most recent (April 15, 2005) Texas Supreme Court case on arbitration, *AdvancePCS*. That case, although it would fall under the scope of the FAA, did not involve a motion to vacate an award under the FAA and does not discuss FAA grounds for vacatur, but the clause itself at issue raises an interesting point. The clause used in *AdvancePCS* reads, in part:

> Any and all controversies in connection with or arising out of this Agreement will be exclusively settled by arbitration before a single arbitrator in accordance with the Rules of the American Arbitration Association. **The arbitrator must follow the rule of law, and may only award remedies provided in this Agreement.**

AdvancePCS, 2005 WL 856961, *1 (Tex. 2005) (emphasis added). The Texas Supreme Court has now

ordered the parties to arbitrate this dispute. The clause here would clearly allow a post-award vacatur under the FAA (Section 10(a)(4)) in the event that the arbitrator does not "follow the rule of law," since the contract which provides this arbitrator's power contains the limitation. While it is unclear exactly what this means, the unusual requirement that an arbitrator follow the rule of law may well, at least in this specific case, reign in the arbitrator's discretion under the default rule, which is exceedingly broad and may well encompass decisionmaking that cannot be claimed to be within the confines of the rule of law (see Section II(B)(6), below).

6. Manifest Disregard

As has been noted above, in the Fifth Circuit an arbitrator's manifest disregard for the law warrants vacating an arbitral award. *Brabham*, 376 F.3d at 381. The Court's opinion on a case involving the government of Turkmenistan provides the most thorough recent discussion of that standard for vacating an award. *Bridas*, 345 F.3d at 363-65.

> Manifest disregard clearly means more than error or misunderstanding with respect to the law. The error must have been obvious and capable of being readily and instantly perceived by the average person qualified to serve as arbitrator. Moreover, the term 'disregard' implies that the arbitrator appreciates the existence of a clearly governing principle but decides to ignore or pay no attention to it. . . . The governing law alleged to have been ignored by the arbitrators must be well defined, explicit, and clearly applicable.

Id., at 363 (*quoting Prestige Ford*, 324 F.3d at 395).

In the Fifth Circuit, courts apply a two-step inquiry into whether or not manifest disregard exists. First, if it is not manifest to the reviewing court that the arbitrators acted contrary to existing law, the award should be upheld. *Id.* Second, even if it is manifest that the arbitrator acted contrary to applicable law, the award should still be upheld unless "it would result in significant injustice, taking into account all the circumstances of the case, including the powers of arbitrators to judge norms appropriate to the relations between the parties." *Id.* Both analytical steps, of course, are to be undertaken under the specter of the "extraordinarily narrow" standard of review that applies to claims for vacatur under the FAA. *Id.*

In a recent Fifth Circuit case, the Court over-ruled a vacatur which had been based on manifest disregard when it found that "the district court improperly substituted its judgment for that of the arbitrator." *Kergosien*, 390 F.3d at 357. The Court explains that the breadth of an arbitrator's discretion with respect to the facts and the law allows an arbitrator to make rulings that are "erroneous," that reflect "serious error," and that involve "improvident, even silly factfinding." *Id.*, at 358 (*quoting Major League Baseball Players Ass'n v. Garvey*, 532 U.S. 504, 509, 121 S.Ct. 1724 (2001)).

7. Standard for Modifying an Award

As allowed by the TAA, the FAA allows a court to modify an arbitral award under certain circumstances, notably in the even of an "evident material miscalculation." 9 U.S.C. §11. The Fifth Circuit has recently explained this basis for modification: "an 'evident material miscalculation' occurs 'where the record before the arbitrator demonstrates an unambiguous and undisputed mistake of fact and the record demonstrates strong reliance on that mistake by the arbitrator in making his award.'" *Prestige Ford*, 324 F.3d at 396 (citations omitted).

C. Determining Whether the Taa or the Faa Applies

The reach of the FAA "extends to any contract effecting commerce, as far as the Commerce Clause of the United States Constitution will allow." *In re L & L Kempwood Associates, L.P.*, 9 S.W.3d 125, 127 (Tex. 1999) (citing *Allied-Bruce Terminix Co. v. Dobson*, 513 U.S. 265, 115 S.Ct. 834 (1995)). This means that the FAA can apply in a state court proceeding against only Texas litigants who never contemplated that their relationship would involve interstate commerce. *Feldman Interests, L.L.P. v. Settlement Capital Corp.*, 140 S.W.3d 879, 883-85 (Tex. App. - Houston [14th Dist.] 2004, orig. proceeding).

Parties are free, however, to choose whether the FAA or the TAA would apply to a potential arbitration clause if they do so explicitly; an arbitration clause in a contract between residents of different states which obviously and clearly contemplates interstate commerce may still fall within the TAA if the clause itself so states. *Action Industries*, 358 F.3d at 341. However, such a choice by parties must be explicit. *Id.; see also Ford v. NYLCare Health Plans of the Gulf Coast, Inc.*, 141 F.3d 243, 247 (5th Cir. 1998) (clause specifically referenced and invoked "Texas General Arbitration Act").

A choice of law provision, however, does not, by itself, evidence a clear intention of the parties to the arbitration clause to avoid the FAA's applicability. *Id.*, at 342; *Mastrobuono*, 514 U.S. at 62, 115 S.Ct.1212. In other words, a clause that clearly states "Texas law shall apply" but does not stipulate that the arbitration will be conducted pursuant to the Texas General Arbitration Act will be within the FAA if the contractual relationship touches upon interstate commerce.

III. SELF-HELP: MAKING UP YOUR OWN STANDARD OF REVIEW

None of this has to matter. It is perfectly allowable for parties, who draft arbitration clauses in the first place, to change the standard of review described above in the interest of allowing for a meaningful appeal, or for any other interest I suppose.

A 1995 Fifth Circuit case involved an arbitration clause which provided that "the arbitration decision shall be final and binding on both parties, except that errors of law shall be subject to appeal." *Gateway Tech., Inc. v. MCI Telecommunications Corp.*, 64 F.3d 993, 996 (5th Cir. 1995). According to the Court, "such a contractual modification is acceptable because, as the Supreme Court has emphasized, arbitration is a creature of contract." *Id.* The clause at issue in *Gateway* had the legal affect of changing the standard of review with respect to the arbitral award itself, such that it "allow[ed] for de novo review of issues of law embodied in the arbitral award." *Id.*, at 997.

The trial court in *Gateway* refused to conduct the bargained-for de novo review, but the Fifth Circuit did, apparently enjoying the opportunity, for once, to make fun of arbitrators. Specifically, the Court objected to the arbitrator's decision to award punitive damages:

> In an extremely confusing passage, the arbitrator found that punitive damages were justified 'in part for an additional reason not assigned by Claimant, but found by the Arbitrator: that Respondent's attempt to terminate Claimant for default was part of a deceptive scheme in wanton disregard of Respondent's obligations to Claimant.' Beyond this lone, opaque statement, the arbitration award is silent about its rationale for imposing punitive damages against MCI.

Id., at 998. The Court, conducting de novo review, vacates the arbitral award to the extent it awarded punitive damages. *Id.*, at 1001.

The Fifth Circuit examines a similar clause several years later but reaches a slightly different result. *Harris v. Parker College of Chiropractic*, 286 F.3d 790 (5th Cir. 2002). The *Harris* case reiterates that parties are free to change the standard of review and impose meaningful appeals of arbitral awards. *Id.*, at 793. The Court goes on to find, however, that the phrase "questions of law" is ambiguous, since it "could reasonably be interpreted to encompass solely 'pure' questions of law, or it could be read broadly, to encompass mixed questions of law and fact." *Id.*, at 793-94. The Court interprets the clause against the party who drafted it and adopts the narrower interpretation. *Id.*, at 794.

More recently, the Fifth Circuit revisited both of these cases. *Prescott*, 369 F.3d 491. *Prescott* was an employment case, involving a principal of a private school's claims under Title VII. *Id.*, at 493.

> When the school's relationship with Prescott deteriorated, however, Prescott filed suit. The district court ordered ADR. Mediation occurred, then arbitration; NCS appealed a highly adverse and somewhat dubious award back to the court; NCS appealed to this court; and we are forced to remand for further proceedings. So much for saving money and relationships through alternative dispute resolution. Perfect justice is not always found in this world.

Id. The *Prescott* arbitration clause required that any dispute be resolved in conformity with the biblical injunctions of 1 Corinthians 6:1-8, Matthew 5:23, 24 and Matthew 18:15-20[10]. *Id.* It also, via a properly executed hand-written addendum, provided that "No party waives appeal rights, if any, by signing this Agreement." *Id.*, 494.

The *Prescott* Court eventually remands the case to the trial court for an evidentiary hearing to determine what exactly the hand-written appeal provision means. *Id.*, at 498. The Court makes it clear, however, that even this unusual and uncertain addition to the arbitration clause must mean something, so the trial court was wrong to ignore it. *Id.*

[10]As an aside, the arbitrator found that the school violated Matthew, Chapter 18, which in turn superseded the contract language and provided Prescott a remedy not normally permitted under Louisiana law.

IV. CONCLUSION

In Texas, whether the TAA or the FAA applies, it is remarkably difficult to get a court to vacate an arbitral award; they are, for the most part, unappealable. Given the prevalence of mandatory arbitration in a seemingly unlimited variety of cases, this may well cause practitioners concern. To the extent that we as a judicial system embrace arbitration, we reject the concept of any meaningful review of a determinative decision. It is not alarmist to fear for the future of, among other things, continuing publicly available legal precedent on which we can rely in advising clients.

This is not, of course, irrevocable. Arbitration clauses can perfectly easily provide for some sort of appellate review (although as a practical matter consumer arbitration involves clauses, such as those in the credit card context, typically offered on a "take it or leave it" basis). Businesses can choose other dispute resolution mechanisms which, while potentially more efficient than a jury trial, still invoke the protections of a court system, such as bench trials.

None of this helps the lawyer who is given a dispute once it's already started, where the arbitration clause has already been agreed to. That lawyer has few options. If he or she fears that an appeal may eventually be desirable, he or she certainly needs to provide a record of the arbitration, but even that decision is a risk: the prevailing party in arbitration is almost certainly guaranteed victory in the event no record exists. Arbitral decisions are inherently more difficult to predict, since arbitrators do not really have to follow the law (put a less cynical way, there is no way to avoid an arbitrator's erroneous legal analysis). Finally, for the party or parties unhappy with an arbitral decision, the best advice may simply be to live with it and cut your client's losses with respect to attorneys' fees unless clear grounds for vacatur somehow exist. Good luck.