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## Alternative Dispute Resolution

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# ALTERNATIVE DISPUTE RESOLUTION

*Will Pryor\**

In this Survey year, there are relatively few developments in the *law* of ADR. Were this to be a survey of the developments in the *practice* of ADR, this article could be hundreds of pages long. This year, however, there are no reported appellate cases to summarize pertaining to mediation, only an update on a recent controversial legislative development. And in the field of arbitration, although controversy abounds, the most significant development involved a U.S. Supreme Court decision on the waiver of class action clauses in consumer and employment contracts. This article will address developments in mediation and arbitration during the Survey year.

## I. MEDIATION

The practice of mediation continues to grow at a seemingly exponential rate.<sup>1</sup> Fueled by jurisdictions where courts habitually order that every case on the docket be mediated before trial, as well as the insertion of non-binding mediation clauses in virtually every kind of contract used in our society, there appears to be no end in the growth.<sup>2</sup> The increase is also seen in the number of mediations taking place pre-suit, even where there is no pre-dispute mediation clause, because experienced players realize that if mediation is inevitable, why not give it a shot at the outset and possibly save everyone time and money?<sup>3</sup>

So the universe of mediation is ever expanding, but at the same time, satisfaction levels may be heading in a different direction.<sup>4</sup> The overall decrease in settlement rates; the lawyers' failure—perhaps burned out by too many mediations—to prepare the client or the mediator; the increasing request for a half day mediation when a full day commitment is needed; and the pervasive sight of many mediations where one or more participants are not physically present but participate by phone; these are all symptoms of a participant population that often does not take an upcoming mediation as seriously as it should, and certainly not as seriously

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1. See WILL PRYOR, A SHORT AND HAPPY GUIDE TO MEDIATION 2–3 (2014).

2. See *id.* at 126.

3. See, e.g., Mike Christiansen, *Five Compelling Reasons to Build a Presuit Mediation Clause into Your Business Contracts*, 84 FLA. B.J. 44, 44–45 (2010).

4. See PRYOR, *supra* note 1, at 127–29.

as it used to.<sup>5</sup>

Perhaps of greatest concern is the trend in Texas and across the country that favors skipping the joint session at the outset of the mediation.<sup>6</sup> Twenty years ago it was almost unthinkable that the process would omit its most important component, the joint session. Now the suggestion that the convening of the parties be dispensed with is a routine, daily occurrence.<sup>7</sup> What changed? Was it a statute, a judicial opinion, or the rules pertaining to the mediation process? No. The only change over the years has been the volume of experience, and advocates seem to have decided that joint sessions are either inefficient or unnecessary (“the lawyers know each other’s case inside and out”), or will be too emotional, polarizing, counterproductive, or too adversarial. Is it not revealing that these objections were not routinely raised twenty years ago?

In this Survey year, there is an unremarkable absence of appellate decisions involving mediation. As is often noted, this is as it should be. By its nature, the mediation process is informal, and court interaction should be unnecessary. To repeat from a prior survey:

Over the maturing course of experience with court-referred mediation, there have been a few issues subject to judicial comment and participation, most notably whether a “good faith” obligation is required of mediation participants, and the meaning and application of “confidentiality” and “privilege” in the ADR statute. But these issues were not addressed in appellate decisions or by the Texas legislature in [our survey year].<sup>8</sup>

But a brief, if inconclusive, follow up on changes to Rule 169 of the Texas Rule of Civil Procedure may be appropriate.<sup>9</sup> In 2013, the Texas Legislature enacted House Bill 274, which mandated that the Texas Supreme Court adopt rules that would lower the cost and expedite litigation of relatively modest cases.<sup>10</sup> In response, the supreme court adopted Rule 169, which removed judicial discretion to order the parties to mediation in circumstances where the parties agree to not mediate and the amount in controversy is less than \$100,000.00.<sup>11</sup> When the parties cannot agree to not mediate and a court orders mediation, the mediation is limited to one half day and the cost is limited to twice the amount of the filing fee.<sup>12</sup>

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5. *See generally id.* at 125–41 (Chapter 7, “What’s Wrong with the Process These Days and How Can We Fix It?” gives a more thorough discussion on the problem of mediation).

6. *See id.* at 129–34.

7. *See id.*

8. Will Pryor, *Alternative Dispute Resolution*, 61 SMU L. REV. 519, 520 (2008).

9. *See* Will Pryor, *Alternative Dispute Resolution*, 1 SMU ANN. TEX. SURV. 101, 116–17 (2014), <http://smulawreview.law.smu.edu/getattachment/Journals/TX-Survey/2015-Texas-Survey/Alternative-Dispute-Resolution.pdf> [<https://perma.cc/8TAY-W3G2>] (discussing the controversy surrounding the (then) proposed Rule 169).

10. *See* TEX. GOV’T CODE ANN. § 22.004 (West 2015).

11. *Id.* § 22.004 (a), (h).

12. TEX. R. CIV. P. 169(d)(4).

This change might strike a disinterested observer as unremarkable (why should two parties in a modest case who do not want to incur the time and expense of a mediation be required to mediate?). When it was proposed, however, the change created an uproar in the ADR community.<sup>13</sup> Neutral organizations reacted hysterically.<sup>14</sup> The controversy revealed one of the unintended consequences of the 1987 ADR Statute: A protective new constituency. The growth in the number of professional neutral persons and organizations had created a new constituency, professionals who perceived any invasion of their “turf”—their core business—as something to be fought, regardless of the merits of the possible improvement in our system of civil justice.<sup>15</sup>

Judge Frank Evans, the father of ADR in Texas, recently opined that there is no data or other objective factors to which we can turn to determine if changes to Rule 169 have made any discernible impact on our judicial system.<sup>16</sup> Unlike most others in the ADR community, Judge Evans calmly suggests that there is no reason not to examine and re-examine ways that dispute resolution in our state can be improved and made more affordable.<sup>17</sup>

This author believes that the Rule 169 ruckus was a crack in the dam after nearly three decades of “mediation, everywhere all the time” and the judicial use—occasional abuse and over-use—of mediation referrals to maintain docket control. In the future, participants will likely recognize that not every dispute should be mediated and acknowledge that mediation has, at times, evolved into another layer of delay and expense in certain litigated matters.

## II. ARBITRATION

Judicial interaction with arbitration occurs principally on two occasions: (1) at the outset, whether parties are compelled to arbitrate by a binding, valid arbitration clause, and (2) at the conclusion, whether an arbitration award should be enforced or set aside.<sup>18</sup> We will cover judicial decisions in these areas, as well as a few others where judicial scrutiny is less common.

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13. See generally Robert C. Rodriguez, *Texas Expands Loser Pays Rule*, AM. BAR ASS'N (Aug. 8, 2011), [https://apps.americanbar.org/litigation/litigationnews/top\\_stories/080811-texas-loser-pays—rule.html](https://apps.americanbar.org/litigation/litigationnews/top_stories/080811-texas-loser-pays—rule.html) [<https://perma.cc/U4NQ-8JUV>].

14. See Angela Morris, *Attention-Getting Loser-Pays Not the Star of H.B. 274*, TEX. LAW. (June 6, 2011), <https://advance.lexis.com/api/permalink/6616b4df-b76b-4b2b-ba80-8a9afd141e35/?context=1000516>.

15. See Pryor, *supra* note 9, at 116; see also PRYOR, *supra* note 1, at 127.

16. Frank Evans, *Redesigning ADR Protocols for Efficiency and Affordability*, ALTERNATIVE RESOLUTIONS, Winter 2015, at 10, 13.

17. *Id.* at 10.

18. See Will Pryor, *Alternative Dispute Resolution*, 64 SMU L. REV. 3, 6 (2011).

A. THE ARBITRATION CLAUSE WAS ENFORCEABLE BECAUSE . . .

It has become dogma in Texas that “arbitration is strongly favored.”<sup>19</sup> Truer words have never been spoken. In this Survey year we will briefly examine five appellate challenges to the enforceability of an arbitration clause. In all five cases the clause was enforced.

1. *Unconscionable?*

In *Royston, Rayzor, Vickery, & Williams, LLP v. Francisco “Frank” Lopez*, the Texas Supreme Court addressed the conscionability and enforceability of an arbitration provision in an attorney-client employment contract. Both the trial court and the court of appeals agreed that the arbitration clause was unconscionable and unenforceable, primarily because the clause required the client to arbitrate any claims it might have against the law firm. But the lower courts allowed the law firm to litigate its claims for fees and expenses against the client.<sup>20</sup>

The supreme court summarized two legal points of note: “Arbitration agreements may be either substantively or procedurally unconscionable, or both”<sup>21</sup> and “arbitration clauses in attorney-client employment contracts are not presumptively unconscionable.”<sup>22</sup> The supreme court went on to conclude that “although the provision was one-sided in the sense that it excepted any fee claims by [the firm] from its scope, excepting that one type of dispute does not make the agreement so grossly one-sided as to be unconscionable.”<sup>23</sup> Now apparently, that one-sidedness—even in an attorney-client contract—must be grossly one-sided to invalidate an arbitration clause.<sup>24</sup> This gives us an insight into how presumptively Texas appellate courts favor arbitration these days.

In *Venture Cotton Cooperative v. Freeman*,<sup>25</sup> the Eastland Court of Appeals, having been previously reversed by the Texas Supreme Court, reconsidered arguments that an arbitration clause was substantively unconscionable in an agreement between a cotton-marketing cooperative and twenty-eight cotton farmers. There were three challenges to finding substantive unconscionability: (1) whether the co-op’s rules provided a cost-prohibitive forum; (2) whether the co-op’s rules limited the farmers’ right to discovery; and (3) whether a conflict of interest existed between the co-op and the neutral service provider.<sup>26</sup>

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19. *Royston, Rayzor, Vickery & Williams, LLP v. Lopez*, 467 S.W.3d 494, 499 (Tex. 2015).

20. *Id.* at 497.

21. *Id.* at 499.

22. *Id.* at 500 (internal quotation marks omitted).

23. *Id.* at 502.

24. *See id.*

25. No. 11-11-00093-CV, 2015 WL 1967251 (Tex. App.—Eastland Apr. 30, 2015, no pet.); *see also* Pryor, *supra* note 1, at 114 (addressing the previous appellate court decision, *Venture Cotton Coop. v. Freeman*, 395 S.W.3d 272, 276 (Tex. App.—Eastland 2013), *rev’d*, 435 S.W.3d 222 (Tex. 2014)).

26. *Freeman*, 2015 WL 1967251, at \*3.

The court of appeals only tossed aside the first challenge after an extremely lengthy analysis and a conclusion that the co-op presented no evidence of costs that would prevent pursuit of a claim.<sup>27</sup> The second challenge was rather quickly dismissed: “[U]ntil an arbitrator actually denies Appellees’ requests for discovery, it is only speculative that Appellees’ right to discovery will be limited.”<sup>28</sup> Finally, the conflict of interest challenge (the manager of the co-op was also a board member of the industry association whose arbitration rules were adopted in the contract, and both shared the same legal counsel) was also dismissed.<sup>29</sup> “Until [the cotton farmers] are denied access to unbiased arbitrators, it would be a matter of pure speculation to find that there is a conflict of interest that will not be resolved.”<sup>30</sup> To put this in a different context, if an owner of a Big Tex Arbitration Company inserts a “Big Tex Arbitration Company” clause in the agreement, the court of appeals seems to suggest that “[w]hile it is possible that the arbitral forum will be biased . . . it is simply that—a mere possibility.”<sup>31</sup> If you think this curious reasoning (maybe there is a conflict, but the parties will probably work it out) suggests that perhaps the court of appeals could read the handwriting on the wall, and did not want to be reversed again by the supreme court, you are not alone.

## 2. Waiver?

Waiver has been a subject of numerous appellate court decisions in recent years. After the Texas Supreme Court’s landmark *Perry Homes v. Cull*<sup>32</sup> decision in 2008, appellate courts have addressed waiver in the “substantially invoked judicial process” context.

The Texas Supreme Court once again took up the waiver argument in *Richmont Holdings, Inc. v. Superior Recharge Systems, L.L.C.*<sup>33</sup> The Fort Worth Court of Appeals had determined that the filing of motions and pleadings in the trial court, requesting continuances, meeting with opposing counsel over a Rule 11 agreement, requesting discovery delays, and suffering sanctions from the trial court impliedly waived arbitration.<sup>34</sup> In its second reversal of the court of appeals, the Texas Supreme Court reiterated that there is a strong presumption against waiver, and that the court of appeals had misapplied the *Perry Homes v. Cull* test.<sup>35</sup> The test,

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27. *Id.* at \*3–5.

28. *Id.* at \*5.

29. *Id.* at \*6.

30. *Id.*

31. *See id.* at \*7.

32. 258 S.W.3d 580 (Tex. 2008); *see also* Will Pryor, *Alternative Dispute Resolution*, 62 SMU L. REV. 843, 845–47 (2009).

33. 455 S.W.3d 573 (Tex. 2014) (per curiam); *see also* Pryor, *supra* note 9, at 105–06 (addressing the appellate court decision, *Richmont Holdings, Inc. v. Superior Recharge Sys., L.L.C.*, 392 S.W. 3d 633 (Tex. 2013), *remanded to* 453 S.W.3d 443 (Tex. App.—Fort Worth 2013), *rev’d* 455 S.W.3d 573 (Tex. 2015)).

34. *Richmont Holding, Inc.*, 455 S.W.3d at 576.

35. *Id.* at 574–75.

when applied correctly, finds that waiver only occurs when one party “substantially invoke[s] the judicial process to the other party’s detriment or prejudice.”<sup>36</sup>

Reinforcing the strong presumption against waiver, we come to *Cedillo v. Immobilier Jeuness Etablissement*<sup>37</sup> from the Fourteenth Houston Court of Appeals. Here, the defendants—the parties pursuing arbitration—“filed a motion to transfer venue in September 2012.”<sup>38</sup> The court of appeals, however, noted that “filing a motion to transfer venue does not waive arbitration.”<sup>39</sup> Further, the court of appeals noted that twenty-eight months transpired between the filing of the lawsuit and the motion to compel arbitration.<sup>40</sup> During this period, little discovery had occurred, no depositions had been taken, no third-party discovery had occurred, and no motions to compel had been filed. The party seeking to compel arbitration argued that its counsel had only discovered the existence of the arbitration clause when they began producing documents. Rejecting that argument, the court of appeals reasoned that “[a]lthough this explanation may be implausible, ‘mere delay in moving to compel arbitration is not enough for waiver.’”<sup>41</sup>

To summarize, when trying to avoid arbitration on the grounds that the other side’s litigation conduct amounts to “substantially invoking judicial process” and constitutes waiver, good luck.

Waiver in this Survey year also leads to the discussion of a national legal and public policy debate concerning arbitration clauses in employment and consumer circumstances, and whether employees and consumers can legitimately waive their right to class action relief.<sup>42</sup> This skirmish has been ongoing at least since 2005 when a decision came down from the California Supreme Court, holding that class-arbitration waivers in consumer contracts amount to contracts of adhesion.<sup>43</sup> In 2011, the U.S. Supreme Court essentially reversed the California decision.<sup>44</sup>

The skirmish, however, continues. In *DirectTV v. Imburgia*, the U.S. Supreme Court, invoking pre-emption of the Federal Arbitration Act over state law, reasoned that a class action waiver was flawed by the expression of the “law of your state,” which necessarily invoked *invalid* Cal-

36. *Id.*

37. 476 S.W.3d 557 (Tex. App.—Houston [14th Dist.] 2015, pet. denied).

38. *Id.* at 571.

39. *Id.*

40. *Id.*

41. *Id.* (quoting *Richmont Holdings, Inc.*, 455 S.W.3d at 576).

42. See generally *Federal Agency Announces It Will Seek To Ban Class Waivers in Arbitration*, 33 ALTERNATIVES 155 (2015) (addressing a thorough summary and analysis of how the federal government, through the recently formed Consumer Financial Protection Bureau and the NLRB is going about trying to invalidate class waivers in consumer and employment arbitration agreements administratively, rather than legislatively or judicially); *Cutting Arbitration Classes: Facing Court Defeats on Workplace Waivers, the NLRB Refuses to Back Down*, 34 ALTERNATIVES 1 (2016) (same).

43. *Discover Bank v. Superior Court*, 36 Cal. 4th 148, 162–63 (2005), *abrogated by* *AT&T Mobility v. Concepcion*, 563 U.S. 333 (2011).

44. See *Concepcion*, 563 U.S. at 352.

ifornia law, meaning pre-emption applied.<sup>45</sup> Does this not seem overly complicated? This author could not agree more with John Allen Chalk of Fort Worth—publisher of *The Arbitration Newsletter* and an eminent authority on arbitration in the State of Texas—who reviewed this opinion and suggested, “[e]very word, phrase, clause, and sentence in a pre-dispute arbitration clause must be given thoughtful and considered attention, especially the clause’s unintended consequences.”<sup>46</sup>

### 3. Other Challenges Overruled

Although unconscionability and waiver may be the most common challenges, parties will attempt to avoid arbitration for a variety of other reasons. For example, *AVIC International USA, Inc. v. Tang Energy Group, Ltd.* presented a challenge to the method by which a *nine-member* arbitrator panel was chosen.<sup>47</sup> The U.S. District Court for the Northern District of Texas held that it lacked subject matter jurisdiction under the Federal Arbitration Act on the very narrow grounds that allow judicial intervention in panelist selection.<sup>48</sup> This author is curious whether the drafters of the arbitration provision calling for a nine-member panel truly thought that the appointment process would be seamless!

In *Brock Services, LLC v. Solis*, the Corpus Christi Court of Appeals reversed a trial court’s denial of a motion to compel arbitration.<sup>49</sup> At issue was the scope of the arbitration, often referred to as arbitrability. The court determined that a valid arbitration agreement existed and found a “clear and unmistakable” intent to submit questions of arbitrability to the arbitrator: “Parties show a ‘clear and unmistakable’ intent . . . by either (1) including a clause in the agreement that directs this function to the arbitrator or (2) incorporating rules in the agreement that empower the arbitrator to determine arbitrability.”<sup>50</sup> Consequently, in this employment dispute, the arbitrator was ultimately left to determine whether the departed employee’s claim for retaliation was subject to arbitration.<sup>51</sup>

Separability is a principle in arbitration law that holds that an arbitration clause is separable and survives even if the underlying contract is terminated or found invalid.<sup>52</sup> In the context of a brokerage agreement created when a bank customer opened an IRA, the Fort Worth Court of Appeals, in *BBVA Compass Investment Solutions, Inc. v. Brooks*, turned back several challenges to the arbitration clause, including the argument that the “contractual relationship between the parties ended once Appel-

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45. *DirectTV v. Imburgia*, 136 S. Ct. 463, 471 (2015).

46. John Allen Chalk, *Pre-emption or Consumer Protection?* *THE ARBITRATION NEWSLETTER*, Jan. 2016, at 1, 3.

47. No. 3:14-cv-2815-K, 2015 WL 477316, at \*2 (N.D. Tex. Feb. 5, 2015).

48. *Id.* at \*5.

49. *Brock Servs., LLC v. Solis*, No. 13-15-00204-CV, 2015 WL 5895083, at \*4 (Tex. App.—Corpus Christi Oct. 8, 2015, no pet.) (mem. op.).

50. *Id.*

51. *Id.*

52. *BBVA Compass Inv. Sols., Inc. v. Brooks*, 456 S.W.3d 711, 718 (Tex. App.—Fort Worth 2015, no pet.).



lants liquidated and closed the account.”<sup>53</sup> Also of interest is the court of appeals’s dismissal of the challenge that tort claims are typically not subject to arbitration of contractual disputes: “[A] court must determine if the tort claim ‘is so interwoven with the contract that it could not stand alone, or on the other hand, is completely independent of the contract that it could be maintained without reference to the contract.’”<sup>54</sup>

Now we consider the pre-emption doctrine in the context of a state law, the Texas Medical Liability Act (TMLA), and a legislative goal of regulating the arbitration of health care liability claims. In *Fredericksburg Care Company, L.P. v. Perez*, the Texas Supreme Court held that an arbitration agreement between a Texas nursing home health care provider and a patient was enforceable, regardless of whether the agreement complied with state law.<sup>55</sup> The provider argued that the TMLA was enacted to regulate the insurance business. If so, the federal McCarran-Ferguson Act,<sup>56</sup> which protects the regulation of insurance by states from pre-emption, would prevail over normal pre-emption of the Federal Arbitration Act (FAA).<sup>57</sup> The arbitration clause in the contract admittedly did not comply with the TMLA.<sup>58</sup> But the supreme court determined that because the state law did not sufficiently concern the business of regulating insurance, there was no shield from FAA pre-emption, and the arbitration clause was enforceable.<sup>59</sup>

## B. VACATURE OF AWARD

Having seen that appellate courts throughout Texas mean it when they say, “arbitration is highly favored,” let’s examine whether such supportive treatment exists at the back end of the process, when the losing party asks a court to set aside an arbitration award, often referred to as vacature.

For almost a century, a body of common law developed surrounding arbitration awards and their validity. Part of the basis for the increasing popularity of arbitration was the notion that even though arbitration is final and binding, there was always comfort that if something went wrong or if an arbitration panel went completely capricious, the courts could at least set an award aside if the result amounted to a “manifest disregard of the law” or similar standard. This reassuring safety net was taken away by the U.S. Supreme Court’s landmark 2008 decision, *Hall Street v. Mattel*, which ruled that the specific and narrow grounds listed in the FAA for vacating an arbitration award were exclusive.<sup>60</sup>

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53. *Id.* at 717.

54. *Id.* at 720.

55. *Fredericksburg Care Co., L.P. v. Perez*, 461 S.W.3d 513, 528 (Tex. 2015), *cert. denied*, *Perez v. Fredericksburg Care Co., LP*, 136 S. Ct. 798 (2016).

56. 15 U.S.C. §§ 1011–1015 (2012).

57. *Fredericksburg*, 461 S.W.3d at 517–18.

58. *Id.* at 516.

59. *Id.* at 528.

60. *Hall Street v. Mattel*, 552 U.S. 576, 578 (2008).

Since *Mattel*, appellate lawyers seeking vacature of an arbitration award have been casting a keen eye on the FAA's enumerated grounds, primarily focusing on the evident partiality and exceeded authority grounds. It is as if, in pending appeals all across the land, lawyers amended their briefs, "we're sorry; when we said 'manifestly disregarded the law,' what we really meant was 'exceeded authority!'" Let us first look at how courts in Texas treated claims of exceeded authority during the Survey year.

We start with the Fourteenth Houston Court of Appeals opinion, *D.R. Horton-Texas, Ltd. v. Bernhard*, where the court of appeals denied a petition for review by the Texas Supreme Court.<sup>61</sup> Here, the homebuyers' sales contract with the builder contained an arbitration clause; the clause provided that each party in arbitration would bear its own fees, costs and expenses.<sup>62</sup> The arbitrator eventually published an award in favor of the homebuyers, including a substantial amount of attorneys' fees that the arbitrator classified as economic damages under the Residential Construction Liability Act (RCLA).<sup>63</sup> The builder protested, arguing that the arbitrator exceeded his powers under the Texas Arbitration Act.<sup>64</sup> The court of appeals concluded that the proper inquiry is "not whether the arbitrator decided an issue *correctly*, but instead whether she had the authority to decide the issue *at all*."<sup>65</sup> Because RCLA authorizes an award of attorney's fees to a prevailing party, the arbitrator did not exceed his authority.<sup>66</sup>

To compare, in *City of Arlington v. Kovacs*, we have an award tossed by Fort Worth Court of Appeals because the arbitrator exceeded his authority.<sup>67</sup> Here, a city employee had been terminated for violating numerous personnel rules, but an arbitrator reinstated the employee. The award explicitly discussed evidence of facts developed after the employee's termination, facts neither known to the employer nor made part of the decision to terminate. The court of appeals held that "[b]y considering the post-termination evidence, the arbitrator improperly pursued an inquiry beyond the scope of the [employer's] charging instrument, thus departing from his authority as clearly and unambiguously confined by the same document."<sup>68</sup>

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61. *D.R. Horton-Texas, Ltd. v. Bernhard*, 423 S.W.3d 532 (Tex. App.—Houston [14th Dist.] 2014, pet. denied).

62. *Id.* at 533.

63. *Id.*; see TEX. PROP. CODE ANN. § 27.004(g)(6) (West 2014) (allowing a claimant to recover reasonable and necessary attorney's fees as economic damages).

64. *D.R. Horton-Texas, Ltd.*, 423 S.W.3d at 533.

65. *Id.* at 534 (quoting *LeFoumba v. Legend Classic Homes, Ltd.*, No. 14-08-00243-CV, 2009 Tex. App. LEXIS 773, at \*3 (Tex. App.—Houston [14th Dist.] Sept. 17, 2009, no pet.) (mem. op.)).

66. *Id.* at 535.

67. *City of Arlington v. Kovacs*, No. 02-14-00281-CV, 2015 WL 4776100, at \*6 (Tex. App.—Fort Worth Aug. 13, 2015, no pet.).

68. *Id.*

What if, after an award is published, the losing party stumbles across a possible conflict of interest of one of the arbitrators—a prior relationship with opposing counsel perhaps—that was undisclosed? Such evidence might be the basis for vacature of the award if it amounts to evident partiality. Are you as counsel entitled to discovery on this issue?

The answer is *yes* in *Rodas v. La Madeleine of Texas, Inc.*<sup>69</sup> The Dallas Court of Appeals addressed whether the trial court abused its discretion by denying a motion to compel discovery regarding evident partiality when a party presented facts indicating that the sole arbitrator failed to disclose two subsequent appointments by the law firm of opposing counsel during the pendency of the claimant's case.<sup>70</sup> In the post-*Mattel* legal playground of evident partiality, much of the attention has centered on disclosures—or the lack of disclosures—of conflicts of interest or circumstances giving rise to the appearance of a conflict by candidates for the arbitration panel. Even a seemingly “neutral arbitrator exhibits evident partiality if he does not disclose facts which might, to an objective observer, create a reasonable impression of the arbitrator's partiality.”<sup>71</sup> Here, the court of appeals granted the claimant's discovery request:

Because discovery is permissible if it is reasonably calculated to lead to the discovery of admissible evidence . . . and [the claimant's] requested discovery is directed at her evident partiality grounds for attempting to vacate the award, the proceedings described above (acknowledgement of subsequent arbitrator appointments) support allowing her to conduct her requested discovery.<sup>72</sup>

The final opinion reveals nothing but the unpredictability of judicial analysis. Arbitrators are tasked with preparing and publishing a final award.<sup>73</sup> Historically, the most popular and sensible form of such an award is referred to as a standard award.<sup>74</sup> The simple definition of a standard award is “short and sweet,” or perhaps, “the less said the better.”<sup>75</sup> In a standard award, an arbitrator essentially declares a winner and loser and sets forth the relief, if any, that one of the parties will enjoy.<sup>76</sup> Many observers view the standard award as the form that best represents the goals of efficiency and finality: long hallmarks of arbitration.<sup>77</sup>

Occasionally, the parties will request a form of award familiar to courts: “findings of fact and conclusions of law.”<sup>78</sup> A detailed findings of

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69. No. 05-14-00054-CV, 2015 WL 1611780, at \*1 (Tex. App.—Dallas Apr. 10, 2015, pet. denied) (mem. op.).

70. *Id.*

71. *Id.* at \*3 (quoting *Burlington N.R.R. v TUCO, Inc.*, 960 S.W.2d 629, 630, 636 (Tex. 1997)).

72. *Id.* at \*6.

73. See TEX. CIV. PRAC. & REM. CODE ANN. § 171.053 (West 2011).

74. See *SSP Holdings Ltd. P'ship v. Lopez*, 432 S.W.3d 487, 494 (Tex. App.—San Antonio 2014, no. pet.).

75. See *id.*; *Stage Stores Inc. v. Jon Gunnerson*, 477 S.W.3d 848, 857 (Tex. App.—Houston [1st Dist.] 2015, no. pet.).

76. See *Stage Stores*, 477 S.W.3d at 857.

77. *SSP Holdings*, 432 S.W.3d at 494.

78. See *Stage Stores*, 477 S.W.3d at 857.

fact award would presumably be more popular in a venue where an appeal is either reasonably anticipated or virtually certain. Arbitration is not that venue.

Often, however, the parties will agree to yet a third form of award, the reasoned award.<sup>79</sup> The parties requesting a reasoned award may have mixed desires. Although reasoned awards presumably will add time and expense to the process, the parties may feel that a dispute deserves the added attention. These parties ask, “how can we go through this entire process and not know how or why the arbitrator reached his or her decision?” A cynical observer might suggest another motive: Reasoned awards theoretically create more arguments and opportunities for vacature.

For whatever reasons, the parties in *Stage Stores, Inc. v. Jon Gunnerson* requested a reasoned award.<sup>80</sup> The arbitration agreement called for arbitration under the FAA, pursuant to the rules of the American Arbitration Association. In a scheduling order, the parties agreed to the reasoned award. In a four-page opinion, the arbitrator included a statement of jurisdiction, identification of the parties, a statement of the issues, a recitation of procedural facts, the arbitrator’s rulings, and the arbitrator’s damage award. The First Houston Court of Appeals found that “[t]his [was] clearly more than a standard award.”<sup>81</sup>

The appellant argued that the award was not a reasoned award because it discussed some, but not all, of its key defenses, and the court of appeals agreed,<sup>82</sup> acknowledging, “[w]e cannot fill in this gap for the arbitrator.”<sup>83</sup> The court of appeals remanded the matter to the trial court to further remand to the arbitrator.<sup>84</sup> And the court of appeals outlined the future procedural steps: “After the arbitrator issues a revised award accounting for this deficiency, the matter will return to the trial court for final determination of whether the award should be confirmed or vacated.”<sup>85</sup>

This author believes that this case was wrongly decided. In arbitration, enormous discretion is ordinarily extended to the arbitrator in fashioning whatever form of award the parties request. Here, the court of appeals found that “even if the arbitrator was not completely successful, the award largely conforms to the requirements for being a reasoned award.”<sup>86</sup> But, because the parties had not agreed on a more elaborate definition of a reasoned award, and because the arbitrator discussed some, but not all, of the issues in the case, the case was remanded to the

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79. *See id.* at 858–59; *SSP Holdings*, 432 S.W.3d at 494.

80. *See Stage Stores*, 477 S.W.3d at 853.

81. *Id.* at 859.

82. *Id.* at 860.

83. *Id.* at 863.

84. *Id.*

85. *Id.*

86. *Id.* at 859.

arbitrator for clarification.<sup>87</sup> Is the arbitrator's reaction to the remand not entirely predictable? Have any parties to an arbitration ever thought it necessary or appropriate to provide a definition to the expression *reasoned award*?

In reviewing this decision, the opinion of a well-recognized authority in Texas concluded as follows:

For advocates and practitioners, the lesson appears to be clear. To avoid this kind of confusion with awards, and thus avoid costly and time-consuming remands, define "reasoned award" at the outset so that the Arbitrator can thereafter clearly understand his or her obligation to comply with the parties' agreement.<sup>88</sup>

This author, however, disagrees. Any attempt to define reasoned award—a term that should need no definition—will only create more ambiguity. The term has been used in thousands of arbitration clauses for decades and has accordingly earned the right to stand alone.

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87. *Id.* at 863.

88. Lionel Schooler, *What is a Reasoned Award?* ALTERNATIVE RESOLUTIONS, Fall/Winter 2015–2016, at 9, 11.