

# SMU Annual Texas Survey

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Volume 6

Article 2

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2020

## Arbitration

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### Recommended Citation

John Allen Chalk, *Arbitration*, 6 SMU ANN. TEX. SURV. 3 (2020)  
<https://scholar.smu.edu/smuatxs/vol6/iss1/2>

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# ARBITRATION

*John Allen Chalk, Sr.\**

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## I. INTRODUCTION

During the Survey period (December 1, 2018, through November 30, 2019), the U.S. Supreme Court, the U.S. Court of Appeals for the Fifth Circuit, and Texas state courts issued opinions affecting arbitration law. This article surveys these developments, including cases governed by the Federal Arbitration Act (FAA) and the Texas Arbitration Act (TAA). The article first discusses recent arbitration developments in the U.S. Supreme Court. Next, the article addresses court procedure for compelling arbitration and focuses on the legal standard and process that courts apply to rule on different motions intended to enforce arbitration agreements. The next section of the article addresses post-arbitration court challenges and confirmations, focusing on jurisdictional issues, standing issues, timing issues, and grounds for vacating or modifying an arbitrator’s decision.

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## II. ARBITRATION IN THE U.S. SUPREME COURT

During the Survey period, the U.S. Supreme Court addressed arbitration issues in three cases. First, the Court in *Henry Schein, Inc. v. Archer & White Sales, Inc.* followed *First Options of Chicago, Inc. v. Kaplan* regarding delegation of gateway issues.<sup>1</sup> In *First Options*, the Court held that parties may delegate the question of arbitrability to an arbitrator so long as the arbitration agreement does so by “‘clear and unmistakable’ evidence.”<sup>2</sup> Since that 1995 decision, however, some appellate courts had refused to enforce clear and unmistakable delegation clauses if the argument for arbitration was “wholly groundless.”<sup>3</sup> The Court in *Henry Schein* rejected the wholly groundless exception and held that courts may not override a clear and unmistakable delegation of gateway issues to an arbitrator.<sup>4</sup> In rejecting the wholly groundless exception, the Court reasoned that the exception was inconsistent with the FAA, which does not contain such an exception, and the Court’s precedent.<sup>5</sup>

Second, the U.S. Supreme Court in *New Prime Inc. v. Oliveira* addressed the scope of FAA coverage.<sup>6</sup> While the FAA usually governs arbitration provisions within employment-related contracts,<sup>7</sup> the FAA does not apply to “contracts of employment of . . . workers engaged in foreign or interstate commerce.”<sup>8</sup> The respondent in *New Prime*, a truck driver hired as an independent contractor of the petitioner trucking company, argued that he was exempted from the FAA as a transportation worker.<sup>9</sup> The Court agreed and held that the exception applies to transportation workers regardless of whether they are employees or independent contractors.<sup>10</sup> Additionally, the Court clarified that courts, not arbitrators, must determine whether an agreement is excluded from FAA coverage even when there is a gateway delegation clause.<sup>11</sup>

Finally, the U.S. Supreme Court in *Lamps Plus, Inc. v. Varela* addressed an obstacle to classwide arbitration—ambiguity in the arbitration agreement.<sup>12</sup> The Court held that courts may not compel classwide arbitration if the arbitration agreement is ambiguous as to whether the par-

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1. *Henry Schein, Inc. v. Archer & White Sales, Inc.*, 139 S. Ct. 524, 531 (2019); *First Options of Chi., Inc. v. Kaplan*, 514 U.S. 938, 943 (1995).

2. *First Options of Chi.*, 514 U.S. at 944 (quoting *AT&T Techs. v. Commc’ns Workers of Am.*, 475 U.S. 643, 649 (1986)).

3. *Henry Schein*, 139 S. Ct. at 529 (“Those courts have reasoned that the ‘wholly groundless’ exception enables courts to block frivolous attempts to transfer disputes from the court system to arbitration.”).

4. *Id.* at 531.

5. *Id.* at 528, 531.

6. *New Prime Inc. v. Oliveira*, 139 S. Ct. 532, 536 (2019).

7. *See generally* Federal Arbitration Act, 9 U.S.C. §§ 1–16 (2018).

8. *Id.* § 1 (commonly known as the transportation worker exception).

9. *New Prime*, 139 S. Ct. at 536.

10. *Id.* at 543–44.

11. *Id.* at 537.

12. *Lamps Plus, Inc. v. Varela*, 139 S. Ct. 1407, 1415 (2019) (quoting *Stolt-Nielsen S.A. v. AnimalFeeds Int’l Corp.*, 559 U.S. 662, 684 (2010)) (“We therefore face the question whether, consistent with the FAA, an ambiguous agreement can provide the necessary ‘contractual basis’ for compelling class arbitration.”).

ties agreed to arbitrate on a class basis.<sup>13</sup> In making this decision, the Court emphasized key differences between classwide and bilateral arbitration to show why the Court requires an unambiguous contractual basis to find that parties agreed to sacrifice the principal advantages of bilateral arbitration.<sup>14</sup>

### III. COMPELLING ARBITRATION

This section surveys cases where a party sought court assistance to bring another party to arbitration by filing a motion to compel.

#### A. DELEGATION OF GATEWAY ARBITRABILITY QUESTIONS

When considering a motion to compel arbitration, the court must first determine who decides questions of arbitrability: the court or the arbitrator. Long-standing U.S. Supreme Court jurisprudence notes that questions of arbitrability, as potentially dispositive “gateway” questions, are presumptively for the courts to decide.<sup>15</sup> As the Supreme Court stated, gateway arbitrability questions are “rather arcane,”<sup>16</sup> and cannot be presumed to have crossed the parties’ minds when negotiating the terms of the binding agreement to arbitrate without clear and unmistakable intent to send such questions to arbitration.<sup>17</sup> Therefore, courts should presume that the question of arbitrability remains with the court.<sup>18</sup> This presumption can be overcome with clear and unmistakable evidence of the parties’ intent to have the arbitrator determine arbitrability questions even when the trial court would ordinarily be the proper forum to hear such validity issues.<sup>19</sup>

If the party seeking to compel arbitration argues there is a clause delegating arbitrability questions to an arbitrator, the court must determine “whether the purported delegation clause is in fact a delegation clause.”<sup>20</sup> If the agreement to arbitrate includes a proper delegation clause and the opponent does not directly challenge the delegation clause itself, the court will compel arbitration; any questions about the validity of the en-

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13. *Id.* at 1419.

14. *Id.* at 1416.

15. *See Rent-A-Ctr., W., Inc. v. Jackson*, 561 U.S. 63, 68–69, 69 n.1 (2010).

16. *First Options of Chi., Inc. v. Kaplan*, 514 U.S. 938, 945 (1995).

17. *See, e.g., id.*; *AT&T Techs. v. Commc’ns Workers of Am.*, 475 U.S. 643, 649 (1986) (“[T]he question of arbitrability . . . is undeniably an issue for judicial determination. Unless the parties clearly and unmistakably provide otherwise, the question of whether the parties agreed to arbitrate is to be decided by the court, not the arbitrator.”).

18. This is different than the more common presumption in favor of arbitration when the scope of an arbitration clause is at issue. When a contract is ambiguous or silent on the parties’ intent to arbitrate an issue, the default presumptions are used to resolve ambiguities and inconsistencies in favor of arbitration. *See, e.g., Howsam v. Dean Witter Reynolds, Inc.*, 537 U.S. 79, 83 (2002).

19. *Ridge Nat. Res., L.L.C. v. Double Eagle Royalty, L.P.*, 564 S.W.3d 105, 119 (Tex. App.—El Paso 2018, no pet.).

20. *Edwards v. DoorDash, Inc.*, 888 F.3d 738, 743–44 (5th Cir. 2018) (citing *Kubala v. Supreme Prod. Servs., Inc.*, 830 F.3d 199, 202 (5th Cir. 2016)).

tire contract will be addressed by the arbitrator.<sup>21</sup>

*Archer & White Sales, Inc. v. Henry Schein, Inc.* gave the U.S. Court of Appeals for the Fifth Circuit a second opportunity on remand from the U.S. Supreme Court<sup>22</sup> to analyze the acknowledged delegation clause in the parties' arbitration agreement.<sup>23</sup> The appellate court disposed of the appeal with the same result as its first decision<sup>24</sup>—the district court's denial of a motion to compel arbitration was upheld—but for a different reason.<sup>25</sup> The arbitration agreement, agreed by the parties as valid, contained an exception or “carve-out” construed by the court to modify the “any dispute” scope language in the agreement.<sup>26</sup> The parties' exception also came before the adoption of “the arbitration rules of the American Arbitration Association.”<sup>27</sup> Plaintiff's claims included a request for injunctive relief and thereby the lawsuit qualified as “actions seeking injunctive relief” described in the exception or “carve-out.”<sup>28</sup> Therefore, there was no “clear and unmistakable” delegation of arbitrability to the arbitrator regarding the excepted actions.<sup>29</sup> The drafter of arbitration clauses governed by the FAA that adopt arbitral arbitration rules should review this second Fifth Circuit *Archer & White* opinion before including a “carve-out” in the arbitration agreement.

Another key delegation case decided in the Survey period is *20/20 Communications, Inc. v. Crawford*, where the U.S. Court of Appeals for the Fifth Circuit joined the Third, Fourth, Sixth, Seventh, Eighth, and Eleventh federal circuit courts of appeals<sup>30</sup> in deciding that “class arbitration” is a “gateway” or “arbitrability” question reserved by default to the court, not the arbitrator, “absent clear and unmistakable language in the arbitration clause to the contrary.”<sup>31</sup> The Fifth Circuit in this case decided the court, not the arbitrator, is authorized to decide the “gateway issue” of class arbitration.<sup>32</sup>

The Fifth Circuit's opinion in *Crawford* combined two separate cases from the U.S. District Court for the Northern District of Texas, Fort Worth Division, involving managers and other employees of *20/20 Communications, Inc.* who wanted to pursue class arbitration.<sup>33</sup> Both cases

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21. *Id.* at 744.

22. *Henry Schein, Inc. v. Archer & White Sales, Inc.*, 139 S. Ct. 524, 531 (2019).

23. *Archer & White Sales, Inc. v. Henry Schein, Inc.*, 935 F.3d 274, 276 (5th Cir. 2019).

24. *Archer & White Sales, Inc. v. Henry Schein, Inc.*, 878 F.3d 488, 498 (5th Cir. 2017), *vacated*, 139 S. Ct. 524 (2019).

25. *Archer & White*, 935 F.3d at 277–78.

26. *Id.* at 281–82.

27. *Id.* at 278.

28. *Id.* at 283.

29. *Id.* at 281–82.

30. *20/20 Commc'ns, Inc. v. Crawford*, 930 F.3d 715, 718–19 (5th Cir. 2019) (citations to all federal circuit courts of appeals); *see also* *Opalinski v. Robert Half Int'l, Inc.*, 761 F.3d 326, 329 (3d Cir. 2014).

31. *Crawford*, 930 F.3d at 718–19.

32. *Id.* at 717.

33. *Id.* at 717–18 (*Blevins* decision by Judge Means held that the parties' class arbitration bar foreclosed class arbitration; *Crawford* decision by Judge McBryde confirmed a clause construction award invalidating the class arbitration bar).

were initiated by the employer in the district court in an attempt to preserve the arbitration clause bar on class and collective claims in arbitration.<sup>34</sup>

At least seven times throughout the Fifth Circuit's *Crawford* opinion, the court refers to and uses the "clear and unmistakable" phrase<sup>35</sup> to describe the circumstance under which the arbitrator, not the court, would be empowered to decide whether the parties' arbitration agreement "clearly and unmistakably" delegated such power to the arbitrator and not the court.<sup>36</sup> The Fifth Circuit in this case made it abundantly clear that this delegation standard was not satisfied by various powers granted the arbitrator by the parties' arbitration agreement.<sup>37</sup> These arbitrator powers included: (1) the grant of power to the arbitrator to hear all "arbitrability" issues regarding "the formation or meaning of this Agreement"; (2) exclusive power to determine "all disputes and claims between" the parties; and (3) the power to administer the arbitration according to the applicable AAA employment arbitration rules.<sup>38</sup> None of these arbitrator powers, "standing alone," could overcome "clearly and unmistakably" the parties' agreed class arbitration bar.<sup>39</sup>

*Crawford* turned on the Fifth Circuit's construction of the parties' arbitration agreement and only incidentally did the court choose the opportunity to state that class arbitration is a "gateway" or "arbitrability" question for the court, not the arbitrator, unless there is a clear and unmistakable delegation of the class arbitration question to the arbitrator in the arbitration agreement.<sup>40</sup> The Fifth Circuit also made it clear that for "the gateway issue of class arbitration *presented here*," courts, not arbitrators, must decide "the gateway issue."<sup>41</sup> The practitioner should take away that there are "gateway issues" that are not arbitrability questions, and as *Crawford* demonstrates, there are "gateway issues of arbitrability" reserved for the court, one of which is class arbitration.

The Texas Supreme Court also addressed delegation issues in *RSL Funding, LLC v. Newsome*.<sup>42</sup> The trial court entered an order approving

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34. The arbitration clause authorized the arbitrator to "hear only individual claims" and prohibited arbitration "as a class or collective action . . . to the maximum extent permitted by law." *Id.* at 719–20.

35. *Id.* at 717–18, 720–21; *see also* *AT&T Techs. v. Commc'ns. Workers of Am.*, 475 U.S. 643, 649 (1986) (courts should not assume that parties agreed to arbitrate arbitrability unless there is "clear [ ] and unmistakabl[e]" evidence that they did so).

36. *Crawford*, 930 F.3d at 718 (citing *Henry Schein, Inc. v. Archer & White Sales, Inc.*, 139 S. Ct. 524, 530 (2019)).

37. *Id.* at 721 ("Because when we compare these provisions with the class arbitration bar at issue in this case, we conclude that none of them state with the requisite clear and unmistakable language that arbitrators, rather than courts, shall decide questions of class arbitrability.").

38. *Id.* at 720.

39. *Id.* at 721.

40. *Id.* at 718 ("a gateway issue"), 719 ("a threshold question of arbitrability" and "a foundational question of arbitrability"), 721 ("a gateway issue").

41. *Id.* at 717 (emphasis added).

42. 569 S.W.3d 116, 121 (Tex. 2018).

an agreement to transfer certain structured settlement payment rights.<sup>43</sup> Pursuant to the arbitration provision in the transfer agreement, RSL filed a motion to compel arbitration, which the trial court denied.<sup>44</sup> The Fifth Dallas Court of Appeals affirmed the denial of the motion to compel.<sup>45</sup> The supreme court, however, held that the “arbitrator, rather than [the] court, was required to decide arbitrability of dispute[s] involving the transfer of structured settlement payment rights, even though [the] legislature assigned approval of structured settlement transfers to the courts under [the] Structured Settlement Protection Act.”<sup>46</sup> The supreme court further held that “whether [the] transfer agreement was void on public policy grounds was required to be decided by [the] arbitrator.”<sup>47</sup>

#### B. EXISTENCE OF AGREEMENT TO ARBITRATE

In reviewing a motion to compel arbitration, courts in the Fifth Circuit first “determine whether the parties agreed to arbitrate the dispute at issue.”<sup>48</sup> In making this determination, courts consider “(1) whether there is a valid agreement to arbitrate between the parties; and (2) whether the dispute in question falls within the scope of that arbitration agreement.”<sup>49</sup> While it is well-settled that any doubts regarding scope should be resolved in favor of arbitration, the legal standard applicable to the existence of an agreement to arbitrate is not as clear.<sup>50</sup>

In *Jackson v. Royal Caribbean Cruises, Ltd.*, the U.S. District Court for the Northern District of Texas adopted the magistrate judge’s opinion denying Royal Caribbean’s motion to compel arbitration.<sup>51</sup> The magistrate judge’s opinion contains a long recitation of the facts related to this maritime contract dispute (involving multiple e-mails and related documents, as well as Jackson’s claim of an oral contract).<sup>52</sup> The magistrate judge’s opinion in *Jackson* surveys both Fifth Circuit and other federal circuit court cases and concludes that the “summary judgment standard” in Federal Rules of Civil Procedure Rule 56 is the appropriate standard to apply in deciding a motion to compel arbitration.<sup>53</sup> *Matos v. AT&T Corp.*<sup>54</sup> and *Hatch v. Jones*<sup>55</sup> follow and apply the same Rule 56 standard

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43. *Id.* at 119.

44. *Id.* at 120.

45. *Id.*

46. *Id.* at 116 (Westlaw summary).

47. *Id.* (Westlaw summary).

48. *Jackson v. Royal Caribbean Cruises, Ltd.*, 389 F. Supp. 3d 431, 443 (N.D. Tex. 2019) (noting that the Fifth Circuit had not clearly laid out what standard district courts should apply when ruling on motions to compel).

49. *Id.* (quoting *Safer v. Nelson Fin. Grp., Inc.*, 422 F.3d 289, 294 (5th Cir. 2005)).

50. *Id.*

51. *Id.* at 437.

52. *Id.* at 438–42.

53. *Id.* at 443–44.

54. No. 3:18-CU-02591-M-BK, 2019 WL 5191922, at \*3 (N.D. Tex. Sept. 9, 2019), adopted by 2019 WL 5191487 (N.D. Tex. Oct. 15, 2019) (applying the Federal Arbitration Act).

55. No. 4:18-CV-04146, 2019 WL 6137389, at \*5 n.11 (S.D. Tex. Oct. 30, 2019), adopted by 2019 WL 6135119 (S.D. Tex. Nov. 19, 2019) (applying the Federal Arbitration Act) (a

for motions to compel that was adopted in *Jackson v. Royal Caribbean*.

In a subsequent case, *Trammel v. AccentCare, Inc.*, the U.S. Court of Appeals for the Fifth Circuit similarly applied a summary judgment-like standard in reversing the lower court's decision to grant a motion to compel arbitration.<sup>56</sup> In *Trammel*, the Fifth Circuit decided that the plaintiff was entitled to a jury trial because she "created a genuine issue of material fact regarding whether an arbitration agreement was formed."<sup>57</sup>

The dispute in *Lloyd's Syndicate 457 v. FloaTEC, L.L.C.* involved a policy purchased from Lloyd's Syndicate to insure an oil platform co-owned and operated by Chevron.<sup>58</sup> Chevron also entered into a contract with FloaTEC for engineering work on the platform; this contract contained an arbitration provision. In court, Lloyd's Syndicate attempted to compel arbitration with FloaTEC based on FloaTEC's agreement to arbitrate with the insured. The insurer argued that since the engineering contract contained a broad delegation clause that required arbitration of all "gateway arbitrability issues," the question of whether the policy's subrogation waiver barred the insurer's claims should have been delegated to the arbitrator.<sup>59</sup> The U.S. Court of Appeals for the Fifth Circuit, however, affirmed the trial court's decision that because the insurer was not a party to the engineering contract, the insurer could not benefit from that contract's arbitration provision.<sup>60</sup> The Fifth Circuit explained that a district court's initial role is to "determine whether the parties entered into *any arbitration agreement at all*."<sup>61</sup> Here, as the Fifth Circuit confirmed, the parties did not enter into an agreement to arbitrate.<sup>62</sup>

In *Aerotek, Inc. v. Boyd*, the Fifth Dallas Court of Appeals, by a divided panel with Justice Bridges dissenting, affirmed a Dallas County District Court's order denying the appellants' motion to compel arbitration.<sup>63</sup> In its lengthy opinion discussing evidentiary hearing testimony, the court of appeals affirmed the trial court's denial of the motion to compel after the evidentiary hearing in which the parties agreed to the admission of affidavits (to be considered the same as live testimony) by three former employees of an employee staffing company claiming none of them knew of or signed electronically or in any other form respective arbitration agreements. The employer presented live testimony at the evidentiary hearing and did not object to the introduction of the employee

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question of fact regarding whether the parties orally agreed to arbitration was raised by the plaintiff's competing affidavit; the magistrate judge observed that "[u]nder the summary judgment-like standard applied by some courts in the Fifth Circuit, this would defeat the motion to compel arbitration.")

56. *Trammel v. AccentCare, Inc.*, 776 F. App'x 208, 211 (5th Cir. 2019) (per curiam).

57. *Id.* at 211 (citing 9 U.S.C. § 4).

58. *Lloyd's Syndicate 457 v. FloaTEC, L.L.C.*, 921 F.3d 508, 510 (5th Cir. 2019).

59. *Id.* at 513–14.

60. *Id.* at 514–15.

61. *Id.* at 514 (quoting *IQ Prods. Co. v. WD-40 Co.*, 871 F.3d 344, 348 (5th Cir. 2017) (emphasis in original)).

62. *Id.* at 515–16.

63. *Aerotek, Inc. v. Boyd*, No. 05-18-00579-CV, 2019 WL 4025040, at \*1 (Tex. App.—Dallas Aug. 27, 2019, pet. filed).



affidavits as “live testimony.”<sup>64</sup> The court of appeals applied “a no-evidence standard to the trial court’s factual determinations and a de novo standard to legal determinations” and described the evidentiary hearing as a “*Tipps* hearing.”<sup>65</sup> *Aerotek* concludes that the trial court’s decision on a motion to compel after an evidentiary hearing is reviewed by the appellate court for “legal sufficiency” and then explains four separate ways that “evidence [can be] legally insufficient” on review.<sup>66</sup>

Another issue as to whether an agreement to arbitrate exists are conditions precedent within a dispute resolution clause. For example, the express language of the arbitration clause at issue in *Carter v. ZB, National Association* conditioned the parties’ agreement to arbitrate on the occurrence of one of the following: (1) the applicable law not permitting a jury-trial waiver; or (2) a court ruling that a jury-trial waiver is not permitted.<sup>67</sup> In this case, the Fourteenth Houston Court of Appeals found that no agreement to arbitrate existed since neither of those conditions precedent were met.<sup>68</sup>

### C. SCOPE OF THE AGREEMENT

The scope of an agreement to arbitrate determines what claims are arbitrable.<sup>69</sup> Doubts regarding an arbitration agreement’s scope “should be resolved in favor of arbitration, whether the problem at hand is the construction of the contract language itself or an allegation of waiver, delay, or a like defense to arbitrability.”<sup>70</sup> After determining that a valid arbitration agreement exists, the analysis turns to whether the alleged dispute falls within the scope of the agreement.<sup>71</sup> Most arbitration agreements are written very broadly to cover “all disputes” or “all claims” relating to either the contract itself or possibly even to the relationship formed by the contract. These broad agreements often withstand judicial review both for validity and scope. Many cases during the Survey period include arguments about the scope of the arbitration agreement.

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64. *Id.* at \*4.

65. *Id.* at \*5 (quoting *Sidley Austin Brown & Wood, L.L.P. v. J.A. Green Dev. Corp.*, 327 S.W.3d 859, 863 (Tex. App.—Dallas 2010, no pet.)). Texas civil procedure, based on the Texas General Arbitration Act (TGAA), calls for a summary determination of motions to compel but if the “material facts necessary to determine” the existence of a valid arbitration agreement are controverted, “the trial court must conduct an evidentiary hearing to determine the disputed material facts.” *Id.* at \*15. *Tipps* is a case of first impression in which the Texas Supreme Court distinguished a “summary” versus an “evidentiary” hearing on a motion to compel arbitration under both the FAA and the TGAA. *Jack B. Anglin Co. v. Tipps*, 842 S.W.2d 266, 269 (Tex. 1992).

66. *Aerotek*, 2019 WL 4025040, at \*5.

67. *Carter v. ZB, Nat’l Ass’n*, 578 S.W.3d 613, 616 (Tex. App.—Houston [14th Dist.] 2019, no pet.).

68. *Id.* at 624.

69. *Ridge Nat. Res., L.L.C. v. Double Eagle Royalty, L.P.*, 564 S.W.3d 105, 120 (Tex. App.—El Paso 2018, no pet.); see also *Edwards v. DoorDash, Inc.*, 888 F.3d 738, 743 (5th Cir. 2018).

70. *Henry v. Cash Biz, LP*, 551 S.W.3d 111, 115 (Tex. 2018) (quoting *In re Serv. Corp. Int’l*, 85 S.W.3d 171, 174 (Tex. 2002)).

71. John Allen Chalk, Sr., *Arbitration*, 5 SMU ANN. TEX. SURV. 25, 33 (2019).

For example, in *Communications Workers of America, AFL-CIO v. Southwestern Bell Telephone Co.*, a labor union claimed an employer violated their collective bargaining agreement (CBA) by “lay[ing] off over seven hundred Union employees and contract[ing] out many . . . jobs.”<sup>72</sup> The U.S. District Court for the Western District of Texas found that the dispute “was covered by the CBA’s arbitration provision and the Union failed to exhaust the remedies provided by the CBA.”<sup>73</sup> Thus, “[t]he district court dismissed the Union’s complaint for lack of subject matter jurisdiction.”<sup>74</sup> The U.S. Court of Appeals for the Fifth Circuit affirmed this decision and held that the trial court was without subject matter jurisdiction because the labor union’s dispute with the employer was within the scope of the CBA’s arbitration provisions.<sup>75</sup>

The U.S. Court of Appeals for the Fifth Circuit reached a different conclusion, however, in *Papalote Creek II, L.L.C. v. Lower Colorado River Authority*.<sup>76</sup> In this case, a wind farm operator sued the Lower Colorado River Authority (LCRA) for allegedly breaching their power purchase agreement when it stopped purchasing power from Papalote. The issue in the case concerned whether there was a liability cap for LCRA if it stopped purchasing power. LCRA sought to compel arbitration of this issue. The parties’ purchase agreement contained an arbitration clause that required the parties to arbitrate “any dispute [that] arises with respect to either [p]arty’s performance.”<sup>77</sup> The Fifth Circuit found that the “arbitration clause clearly signified the parties’ intent to limit arbitration to performance-related disputes only,” so that “interpretation-related dispute[s] did not fall within the scope of the agreement’s arbitration clause.”<sup>78</sup> Accordingly, since the liability cap issue was rooted in contract interpretation, the Fifth Circuit held that the dispute fell outside the scope of the arbitration agreement and needed to be resolved in court.<sup>79</sup>

All doubts regarding the scope of an arbitration agreement should be resolved in favor of arbitration, especially when the arbitration clause is very broad.<sup>80</sup> This rule is emphasized in *Gray v. Ward*, where a withdrawing partner sued the general partner, claiming breach of contract, breach of fiduciary duty, wrongful discharge, and defamation.<sup>81</sup> The arbitration agreement applied to “‘all disputes and claims relating to’ (i) ‘this Agree-

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72. *Comm’n. Workers of Am., AFL-CIO v. Sw. Bell Tel. Co.*, 781 F. App’x 339, 340 (5th Cir. 2019) (per curiam).

73. *Id.*

74. *Id.*

75. *Id.* at 343–44.

76. 918 F.3d 450, 451–52 (5th Cir. 2019).

77. *Id.* at 451–52 (alteration in original).

78. *Id.* at 450 (Westlaw summary).

79. *Id.* at 457.

80. See *In re Kellogg Brown & Root, Inc.*, 166 S.W.3d 732, 737 (Tex. 2005) (orig. proceeding); *BDO Seidman, LLP v. J.A. Green Dev. Corp.*, 327 S.W.3d 852, 857 (Tex. App.—Dallas 2010, no pet.).

81. *Gray v. Ward*, No. 05-18-00266-CV, 2019 WL 3759466, at \*1 (Tex. App.—Dallas Aug. 9, 2019, no pet.) (mem. op.).

ment,’ (ii) ‘the rights and obligations of the parties hereto,’ and (iii) ‘any claims or causes of action relating to the performance of either party.’”<sup>82</sup> After the general partner filed a motion to compel arbitration, the district court compelled arbitration for the breach of contract and breach of fiduciary duty claims only.<sup>83</sup> The Fifth Dallas Court of Appeals found that the withdrawing partner’s defamation and wrongful termination claims were also within the scope of the limited partnership agreement’s arbitration clause.<sup>84</sup> Since the agreement contained broad language such as “all disputes” and “relating to,” the court resolved the dispute in favor of arbitration.<sup>85</sup>

This presumption in favor of arbitration can be seen in *Houston NFL Holding L.P. v. Ryans*, as well.<sup>86</sup> In that case, DeMarco Ryans, a former player in the National Football League (NFL) sued his former NFL team for premises liability, alleging that the team had failed to provide him with a reasonably safe field. The issue was whether the tort claim fell within the scope of an arbitration clause in the CBA. Since the applicable arbitration provision was titled “Non-Injury Grievance,” Ryans argued that his injury-related claim was not within the scope of the agreement. The First Houston Court of Appeals, however, rejected this argument and found that the “heading . . . entitled ‘Non-Injury Grievance’ did not indicate that [the] player’s negligent injury claim fell outside [the arbitration agreement’s] scope.”<sup>87</sup> This decision again relied on the broad language of the provision, which covered:

Any dispute . . . involving the interpretation of, application of, or compliance with, any provision of [the CBA], the NFL Player Contract, the Practice Squad Player Contract, or any applicable provision of the NFL Constitution and Bylaws or NFL Rules pertaining to the terms and conditions of employment of NFL players, will be resolved exclusively in accordance with the procedure set forth in this Article, except wherever another method of dispute resolution is set forth elsewhere in this Agreement.<sup>88</sup>

Accordingly, the court of appeals found that the CBA required arbitration of the player’s claims.<sup>89</sup>

*Rodriguez v. Texas Leaguer Brewing Co.*, on the other hand, illustrates how a party can overcome the policy of interpreting scope ambiguities in favor of arbitration.<sup>90</sup> In that case, members in a brewing limited liability company sued the company, alleging securities fraud and breach of an

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82. *Id.* at \*4.

83. *Id.* at \*14.

84. *Id.* at \*6.

85. *Id.* at \*3.

86. *Hous. NFL Holding L.P. v. Ryans*, 581 S.W.3d 900, 907 (Tex. App.—Houston [1st Dist.] 2019, pet. filed) (Westlaw summary).

87. *Id.* at 900.

88. *Id.* at 908 (alteration in original).

89. *Id.* at 911.

90. *Rodriguez v. Tex. Leaguer Brewing Co.*, 586 S.W.3d 423, 433 (Tex. App.—Houston [14th Dist.] 2019, pet. denied).

agreement to repay a loan made to the company. Since the company agreements required arbitration of any and all claims arising out of or relating to the agreement, the district court granted the company's motion to compel arbitration of all the members' claims.<sup>91</sup> The Fourteenth Houston Court of Appeals, however, held that while the "securities fraud claim was within [the] scope of [the] arbitration clause," the "members' claim that [the] company breached [the] loan agreement was not subject to [the] arbitration clause."<sup>92</sup> Since the alleged loan agreement was not mentioned in the membership agreement, the court found that the breach of contract claim did not relate to or arise out of the company agreements.<sup>93</sup> This case shows that some disputes can fall outside the scope of an arbitration clause, even if the clause is very broad and even though public policy favors arbitration.

#### D. BANKRUPTCY COURT'S RIGHT TO REFUSE

The U.S. Court of Appeals for the Fifth Circuit previously ruled in *In re National Gypsum Co.* that bankruptcy courts may decline to enforce arbitration clauses if the following requirements are met: (1) the proceeding must adjudicate statutory rights conferred by the Bankruptcy Code and not the debtor's pre-petition legal or equitable rights; and (2) requiring arbitration must conflict with the purposes of the Bankruptcy Code.<sup>94</sup> Thus, the Fifth Circuit has "held that bankruptcy courts need not enforce agreements to arbitrate whether a creditor's efforts to collect a debt violated a discharge order."<sup>95</sup>

During the Survey period, this ruling was questioned in light of the recent U.S. Supreme Court case, *Epic Systems Corp. v. Lewis*.<sup>96</sup> The U.S. Court of Appeals for the Fifth Circuit, in *In re Henry*, found that the test it established in *National Gypsum* was still good law notwithstanding *Epic Systems*.<sup>97</sup> The court emphasized that "*National Gypsum* looked to 'the purpose of the [Bankruptcy] Code, including the goal of centralized resolution of purely bankruptcy issues, the need to protect creditors and reorganizing debtors from piecemeal litigation, and the undisputed power of a bankruptcy court to enforce its own orders.'"<sup>98</sup> Ultimately, the court decided that the "type of statutory-purpose analysis" employed in *Na-*

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91. *Id.* at 426–27.

92. *Id.* at 423 (Westlaw summary).

93. *Id.* at 433.

94. *Nat'l Gypsum Co. v. NGC Settlement Tr. & Asbestos Claims Mgmt. Co. (In re Nat'l Gypsum Co.)*, 118 F.3d 1056, 1069 (5th Cir. 1997); *Gandy v. Gandy (In re Gandy)*, 299 F.3d 489, 495 (5th Cir. 2002) (citing *Nat'l Gypsum*, 118 F.3d at 1067).

95. *Henry v. Educ. Fin. Serv. (In re Henry)*, 944 F.3d 587, 591 (5th Cir. 2019) (per curiam) (quoting *Nat'l Gypsum*, 118 F.3d at 1071) ("A debtor's right to be free from collection efforts for discharged debts is a creature of the Bankruptcy Code. 11 U.S.C. § 524(a). An action to enforce such a right implicates an important bankruptcy policy, the ability of a bankruptcy court to enforce its own orders, such that requiring arbitration 'would be inconsistent with the Bankruptcy Code.'").

96. *Id.*; see also *Epic Sys. Corp. v. Lewis*, 138 S. Ct. 1612, 1624 (2018).

97. *In re Henry*, 944 F.3d at 592.

98. *Id.* (quoting *Nat'l Gypsum*, 118 F.3d at 1069).

*tional Gypsum* “remains a valid tool for determining whether a given statute displaces the FAA,” and is not affected by the Supreme Court ruling in *Epic Systems*.<sup>99</sup>

#### IV. CHALLENGING OR CONFIRMING AN ARBITRATOR’S DECISION

##### A. JURISDICTION

The U.S. Court of Appeals for the Fifth Circuit in *Adam Joseph Resources (M) Sdn. Brotherhood v. CNA Metals Ltd.*,<sup>100</sup> following an earlier Fifth Circuit decision,<sup>101</sup> held that 9 U.S.C. §§ 201–208 created federal court jurisdiction for a Houston, Texas law firm’s motion to intervene and its Federal Rules of Civil Procedure Rule 60(b)(6) motion for relief from a final judgment of the U.S. District Court for the Southern District of Texas.<sup>102</sup> Both law firm motions denied by the district court were the law firm’s attempt to remedy an undisclosed agreement reached between the law firm’s client and the losing arbitration party that cheated (the word used by the district court in its initial opinion) the movant law firm out of its earned contingency fee resulting from an international commercial arbitration award for the law firm’s client. The Fifth Circuit’s opinion provides helpful guidance regarding how U.S. federal court jurisdiction arises pursuant to 9 U.S.C. §§ 201–208.

In *Conn Appliances, Inc. v. Williams*, a creditor sought to “vacate [an] arbitration award in favor of [a] consumer on [Telephone Consumer Protection Act] claims . . . relating to calls from [the] creditor after [the] consumer missed payments under [a] retail installment contract.”<sup>103</sup> The consumer “moved to dismiss the Texas case for lack of personal jurisdiction” because he “did not have sufficient contacts within the state to give rise to jurisdiction.”<sup>104</sup> Though the consumer entered into a contract with a Texas entity, the consumer entered into that contract at a Tennessee store, the contract was governed by Tennessee law, and the arbitration was held in Tennessee.<sup>105</sup> Accordingly, the U.S. Court of Appeals for the Fifth Circuit held that “[the] creditor failed to establish [a] prima facie case of personal jurisdiction over [the] consumer.”<sup>106</sup>

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99. *Id.*

100. 919 F.3d 856, 859 (5th Cir. 2019).

101. *See generally* *Stemcor USA, Inc. v. CIA Siderurgica Do Para Cosipar*, 895 F.3d 375 (5th Cir. 2018) (opinion withdrawn and superseded on reh’g, 927 F.3d 906 (5th Cir. 2019)).

102. *Adam Joseph*, 919 F.3d at 869. The Fifth Circuit reversed the district court’s denials of the law firm’s motions and remanded the case to the district court for consideration of the law firm’s claims for recovery of its earned contingency fee. *Id.*

103. *Conn Appliances, Inc. v. Williams*, 936 F.3d 345, 345 (5th Cir. 2019) (per curiam) (Westlaw summary).

104. *Id.* at 347.

105. *Id.* at 348.

106. *Id.* at 345 (Westlaw summary).

### B. STANDING TO CHALLENGE

Another interesting problem posed during the Survey period was who has standing to challenge an arbitrator's award. The U.S. Court of Appeals for the Fifth Circuit addressed this issue in *Horner v. American Airlines, Inc.*<sup>107</sup> In this case, “pilots who had worked for [an acquired] airline [sued the] acquiring airline’s union under the Railway Labor Act . . . seeking to vacate and enjoin implementation of [an] arbitration award in favor of [the] acquiring airline.”<sup>108</sup> The arbitrator found that the “pilots’ job protections under [their] collective bargaining agreement had expired” and issued an arbitration award in favor of the airline.<sup>109</sup> The Fifth Circuit affirmed the district court’s decision and held that the “pilots lacked standing to challenge [the] arbitration award.”<sup>110</sup> Practitioners should be aware that “an individual grievant generally lacks standing to challenge the results of a binding arbitration process where a union has the sole authority to compel arbitration under a CBA formed pursuant to the RLA.”<sup>111</sup>

### C. WAIVER OF RIGHT TO CHALLENGE

A party’s right to challenge an arbitration award, although limited, can be waived.<sup>112</sup> The party challenging an award must be vigilant and timely with pre-award objections that preserve the alleged error for review.<sup>113</sup>

This waiver issue arose in two cases during the Survey period—*Light-Age v. Ashcroft-Smith*<sup>114</sup> and *In re Marriage of Piske*.<sup>115</sup> *Light-Age* involved a fee dispute between an attorney and his client, who refused to pay the allegedly excessive legal fees.<sup>116</sup> The parties agreed to resolve the fee dispute in arbitration.<sup>117</sup> According to the applicable arbitration rules, one panelist had to be a non-lawyer with no financial interest in the practice of law. After the arbitration hearing, the client learned that the selected non-lawyer panelist was a full-time payroll manager at a large law firm. The client sought to vacate the arbitration award in favor of the attorney on the grounds that the arbitration panel was improperly formed.<sup>118</sup> The U.S. Court of Appeals for the Fifth Circuit, however, found that the client had constructive knowledge that the non-lawyer panelist worked at a law firm before the hearing, because the client could

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107. 927 F.3d 340, 342 (5th Cir. 2019) (per curiam).

108. *Id.* at 340 (Westlaw summary).

109. *Id.*

110. *Id.*

111. *Id.* at 342.

112. See *Gateway Techs., Inc. v. MCI Telecomms. Corp.*, 64 F.3d 993, 998 (5th Cir. 1995), *abrogated on other grounds by* *Hall St. Assocs. v. Mattel, Inc.*, 552 U.S. 576, 591–92 (2008).

113. *Brook v. Peak Int’l, Ltd.*, 294 F.3d 668, 674 (5th Cir. 2002).

114. 922 F.3d 320, 321 (5th Cir. 2019) (per curiam).

115. 578 S.W.3d 624, 631–32 (Tex. App.—Houston [14th Dist.] 2019, no pet.).

116. *Light-Age*, 922 F.3d at 321.

117. *Id.* (under the Houston Bar Association’s fee-dispute program).

118. *Id.* at 321.

have found that information “simply by clicking on the link provided in [the panelist’s] email signature or running a brief internet search.”<sup>119</sup> So, it is important that parties conduct adequate due diligence regarding arbitrators prior to an arbitration hearing.

*In re Marriage of Piske*, on the other hand, illustrates how a party to an arbitration may not waive their right to challenge an arbitrator’s award if the full extent of the objectionable issue is unknown at the time of the hearing.<sup>120</sup> In this case, a divorcing husband and wife agreed to appoint Warren Cole to arbitrate their disputes.<sup>121</sup> “At the parties’ initial . . . conference with Cole, [Cole] represented that he did not have a material relationship” with either party or their respective legal counsel.<sup>122</sup> Several weeks passed after the final hearing and Cole had not yet issued his ruling, so the husband’s co-counsel sent Cole an email requesting that he issue his ruling. In the email, the husband’s attorney stated that she thought of Cole as a friend. Cole subsequently issued a ruling in the husband’s favor. The wife sought to vacate the award on the grounds of evident partiality. The husband argued that the ex-wife had waived her evident partiality claim by proceeding with the arbitration after the email in question.<sup>123</sup> The Fourteenth Houston Court of Appeals disagreed, finding that the email “did not disclose the later-discovered extent of [the attorney and Cole’s] personal and business connections.”<sup>124</sup>

#### D. GROUNDS FOR VACATUR

“There are no common-law grounds for vacating an arbitration award” under either the FAA or the TAA.<sup>125</sup> Instead, both statutes enumerate specific grounds to vacate an arbitration award.<sup>126</sup>

Under the FAA, an . . . award may be vacated . . . (1) “where the award was procured by corruption, fraud, or undue means”[;] (2) “where there was evidence of partiality or corruption” in any of the arbitrators; (3) where the arbitrators were guilty of misconduct or other misbehavior that prejudiced the rights of a party; or (4) where the arbitrators exceeded their powers or “so imperfectly executed

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119. *Id.* at 323.

120. *In re Marriage of Piske*, 578 S.W.3d at 631–32.

121. *Id.* at 626.

122. *Id.* at 627.

123. *Id.* at 631.

124. *Id.* (quoting *Tenaska Energy, Inc. v. Ponderosa Pine Energy, LLC*, 437 S.W.3d 518, 528 (Tex. 2014)) (“[The appellant] did not waive its evident partiality challenge by proceeding to arbitration based upon information it was unaware of at that time. To hold otherwise would put a premium on concealment in a context where the Supreme Court has long required full disclosure.”).

125. *Holmes Builders at Castle Hills, Ltd. v. Gordon*, No. 05-16-00887-CV, 2018 WL 1081635, at \*2 (Tex. App.—Dallas Feb. 28, 2018, no pet.) (mem. op.). The common-law claim of manifest disregard for the law is no longer a basis by which a court can vacate an arbitration award. *See also* 9 U.S.C. § 10 (2018); TEX. CIV. PRAC. & REM. CODE § 171.088; *Hoskins v. Hoskins*, 497 S.W.3d 490, 494 (Tex. 2016); *C Tekk Sols., Inc. v. Sricom, Inc.*, No. 05-17-00845-CV, 2018 WL 2072811, at \*2 (Tex. App.—Dallas May 1, 2018, no pet.) (mem. op.).

126. *Holmes Builders*, 2018 WL 1081635, at \*2.

them that a mutual, final, and definite award upon the subject matter submitted was not made.”<sup>127</sup>

The party seeking to vacate the award bears the burden of proof and must timely serve a notice of the motion to vacate the award.<sup>128</sup>

### 1. *Evident Partiality*

Under the TAA, a trial court shall vacate an arbitrator’s award if evident partiality of an arbitrator appointed as a neutral arbitrator prejudices the rights of a party.<sup>129</sup> The party seeking vacatur must show that the arbitrator failed to disclose facts “which might, to an objective observer, create a reasonable impression of the arbitrator’s partiality.”<sup>130</sup> However, an arbitrator is not obligated to disclose trivial relationships or connections.<sup>131</sup> Showing nondisclosure of non-trivial, material relationships and connections is enough to establish evident partiality, regardless of whether the nondisclosed information actually shows partiality or bias.<sup>132</sup>

*In re Marriage of Piske* is a good example of a successful vacatur based on evident partiality. In that case, a divorcing husband and wife agreed to resolve their disputes in arbitration.<sup>133</sup> After the final arbitration hearing, the husband’s co-counsel sent an email to the arbitrator asking if the arbitrator could issue his ruling soon since the deadline for the award had passed, reminding the arbitrator that the arbitrator and co-counsel were good friends. A few weeks later, the arbitrator issued his ruling in favor of the husband.<sup>134</sup> The wife later discovered that: (1) the husband’s attorney had been a guest at the arbitrator’s home three or four times for cookouts; (2) the attorney and the arbitrator spent a weekend “at a mutual friend’s ranch” together with “their respective significant others”; (3) the arbitrator has previously served in that capacity on another case of the attorney; and (4) the arbitrator “had mediated disputes for [the hus-

127. *Thiessen v. Fid. Bank*, No. 02-17-00321-CV, 2018 WL 599331, at \*14 n.1 (Tex. App.—Fort Worth Nov. 15, 2018, pet. denied) (mem. op.) (quoting 9 U.S.C. § 10).

128. *See Craig v. Sw. Secs., Inc.*, No. 05-16-01378-CV, 2017 WL 6503213, at \*3 (Tex. App.—Dallas Dec. 18, 2017, no pet.) (mem. op.) (appellant did not meet the three-month statute of limitations to file a motion to vacate the arbitration award in § 12 of the FAA); *see also Reitman v. Yandell*, No. 02-17-00245-CV, 2018 WL 1324775, at \*2 (Tex. App.—Fort Worth Mar. 15, 2018, no pet.) (per curiam) (mem. op.) (same); *Parker v. United-Bilt Homes, LLC*, No. 12-17-00054-CV, 2017 WL 6350021, at \*4 (Tex. App.—Tyler Dec. 13, 2017, pet. denied) (mem. op.) (the trial court was required to confirm the arbitration award “because [the homeowner] did not attempt to demonstrate grounds for vacating the arbitration award under either the FAA or the TAA”).

129. *Forest Oil Corp. v. El Rucio Land & Cattle Co.*, 518 S.W.3d 422, 431 (Tex. 2017).

130. *Tenaska Energy, Inc. v. Ponderosa Pine Energy, LLC*, 437 S.W.3d 518, 525 (Tex. 2014).

131. *Id.*

132. *Burlington N. R.R. v. TUCO Inc.*, 960 S.W.2d 629, 636 (Tex. 1997); *Builders First Source-S. Tex., LP v. Ortiz*, 515 S.W.3d 451, 458 (Tex. App.—Houston [14th Dist.] 2017, pet. denied).

133. *In re Marriage of Piske*, 578 S.W.3d 624, 626 (Tex. App.—Houston [14th Dist.] 2019, no pet.).

134. *Id.* at 627.



band’s attorney] on five-or-six occasions.”<sup>135</sup> Since the arbitrator failed to disclose these connections to the wife or her attorney, the Fourteenth Houston Court of Appeals vacated the arbitrator’s award for evident partiality.<sup>136</sup>

In *Xerox Commercial Solutions, LLC v. Segura*, however, the Eighth El Paso Court of Appeals reached a different outcome.<sup>137</sup> Segura sued Xerox, claiming employment discrimination on the basis of age. The arbitrator ruled in favor of Xerox, because he found that “the arbitration was not timely initiated.”<sup>138</sup> Segura sought to vacate the award on the basis of evident partiality, arguing that the arbitrator “[failed] to disclose prior dealings with Xerox.”<sup>139</sup> The only evidence that Segura presented to show prior dealings was that two Judicial Arbitration and Mediation Services (JAMS) arbitrators made a presentation of arbitration best practices to a group of Xerox attorneys. However, that presentation occurred after the arbitrator’s ruling and there was no evidence that the arbitrator was one of the presenters. Since Segura’s claim rested solely on the activity of the arbitrator’s employer (JAMS) and not on the actual bias of the arbitrator himself, the court of appeals found that there was no evident partiality.<sup>140</sup>

## 2. *Exceeded Powers*

The arbitrator’s authority is created by the parties’ arbitration agreement.<sup>141</sup> Some arbitration agreements give wide latitude to the arbitrator. Other arbitration agreements limit the arbitrator’s authority to specific decisions.<sup>142</sup> “Arbitrators exceed their powers when they decide matters not properly before them or where the resulting award is not rationally inferable from the parties’ agreement.”<sup>143</sup> The TAA restricts court review, stating: “[t]he fact that the relief granted by the arbitrators could not or would not be granted by a court of law or equity is not a ground for vacating or refusing to confirm the award.”<sup>144</sup> Therefore, because the courts give wide deference to arbitrators and the court only has limited

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135. *Id.* at 627–28.

136. *Id.* at 629–30.

137. *Xerox Commercial Sols., LLC v. Segura*, 579 S.W.3d 170, 179 (Tex. App.—El Paso 2019, no pet.).

138. *Id.* at 171–72.

139. *Id.* at 175.

140. *Id.* at 179–80.

141. *Constr. Fin. Servs. v. Douzart*, No. 09-16-00035-CV, 2018 WL 1096103, at \*4, \*5 (Tex. App.—Beaumont Feb. 28, 2018, pet. denied) (mem. op.) (Arbitrator fashioned an equitable remedy, an option not limited by the arbitration agreement. Thus, the arbitrator did not exceed his or her authority.).

142. *See Nafta Traders, Inc. v. Quinn*, 339 S.W.3d 84, 88 (Tex. 2011).

143. *Holmes Builders at Castle Hills, Ltd. v. Gordon*, No. 05-16-00887-CV, 2018 WL 1081635, at \*2, \*3 (Tex. App.—Dallas Feb. 28, 2018, no pet.) (mem. op.) (citing *Ancor Holdings, LLC v. Peterson, Goldman & Villani, Inc.*, 294 S.W.3d 818, 829 (Tex. App.—Dallas 2009, no pet.)) (The provisions “(a) All applicable Federal and State law . . . shall apply” and “(b) All applicable claims, causes of action, remedies and defenses that would be available in court shall apply” did not limit the power of the arbitrator.).

144. TEX. CIV. PRAC. & REM. CODE § 171.090.

ability to review the award, an argument for exceeded powers rarely leads to a vacated award.<sup>145</sup>

For example, the party moving for vacatur in *YPF S.A. v. Apache Overseas, Inc.* was not successful in arguing that the arbitrator exceeded his or her power by not issuing a “reasoned award.”<sup>146</sup> In that case, an independent accountant (KPMG) and arbitrator ruled that Apache, the seller of certain assets to YPF, owed YPF about \$10 million. The purchase agreement between the parties required the arbitrator to include “reasoning supporting [its] determination.”<sup>147</sup> Since the arbitrator did not include the “[exact] arithmetic computations” that supported its decision, Apache sought to vacate the award.<sup>148</sup> The U.S. Court of Appeals for the Fifth Circuit, however, found that the arbitrator issued a “reasoned award” by noting that “it based its analysis on the parties’ statements and accounting records, pointed to its finding on the accrual of liabilities, and explained what documentation it found relevant in evaluating the proper refund amount.”<sup>149</sup> Practitioners should note that the Fifth Circuit has not laid out an exact definition of a “reasoned award.”<sup>150</sup> Rather, the court has stated that a “‘reasoned award’ requires the arbitrators to submit ‘something short of findings and conclusions but more than a simple result.’”<sup>151</sup>

Conversely, *Southwest Airlines v. Local 555* provides a good example of how a party might prevail on exceeded powers grounds.<sup>152</sup> In this case, the U.S. Court of Appeals for the Fifth Circuit found that the arbitrator exceeded the scope of his authority by holding that a CBA between Southwest Airlines and one of its unions became effective on the date when it was signed, rather than when it was ratified.<sup>153</sup> The express terms of the CBA provided that it would “become effective upon ratification.”<sup>154</sup> Since the arbitrator ruled that the CBA became effective on the execution date even though the CBA did not have any language to that effect, the Fifth Circuit found that the arbitrator ignored the unambiguous terms of the CBA and, in doing so, exceeded the scope of his

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145. See, e.g., *Pasadera Builders, LP v. Hughes*, No. 04-17-00021-CV, 2017 WL 6345218, at \*4 (Tex. App.—San Antonio Dec. 13, 2017, pet. denied) (mem. op.) (The arbitration agreement did not “contain any language specifically foreclosing the panel from determining that neither party was a prevailing party” and “[s]ince the panel was not specifically foreclosed from making that finding, the panel did not act in direct contravention of the agreement or exceed its powers.”); *Miller v. Walker*, 582 S.W.3d 300, 308 (Tex. App.—Fort Worth 2018, no pet.) (holding that the award of attorney’s fees was within the arbitrator’s authority and the trial court erred in modifying the award to vacate the award of attorney’s fees).

146. *YPF S.A. v. Apache Overseas, Inc.*, 924 F.3d 815, 821 (5th Cir. 2019).

147. *Id.* at 820.

148. *Id.* at 819.

149. *Id.* at 821.

150. *Id.* at 820.

151. *Id.* (quoting *Sarofim v. Tr. Co. of the W.*, 440 F.3d 213, 215 n.1 (5th Cir. 2006)).

152. *Sw. Airlines Co. v. Local 555, Transp. Workers Union of Am.*, 912 F.3d 838, 846–47 (5th Cir. 2019).

153. *Id.* at 840.

154. *Id.*

authority.<sup>155</sup>

## V. CONCLUSION

Over the Survey period (December 1, 2018 through November 30, 2019), the U.S. Supreme Court, the U.S. Court of Appeals for the Fifth Circuit, and Texas state courts issued opinions discussed in this Survey that give practitioners information regarding arbitration clause drafting, arbitrability and gateway issues, enforcement of arbitration agreements, appellate review of awards, arbitrator conduct, arbitrator authority, and related jurisdictional issues.

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155. *Id.* at 846–47.