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Alternative Dispute Resolution

Will Pryor

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ALTERNATIVE DISPUTE RESOLUTION

Will Pryor*

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LAST year was the first year in the distinguished sixty-year history of the annual Texas Survey edition of the SMU Law Review that the editors deemed appropriate the inclusion of a chapter on Alternative Dispute Resolution (ADR). In this, the second installment of such a “look back” at the developments in this area, we have a case to examine that is not only significant to practitioners across the state who have disputes that may be subject to arbitration,¹ but the decision itself was deemed worthy of headline and editorial treatment by the *Dallas Morning News*, the *Houston Chronicle*, and other leading newspapers across the state.² It is safe to speculate that such notoriety will not attend ADR developments in very many survey years to come. This Article addresses developments during the survey year in mediation and arbitration.

I. MEDIATION

Though mediation remains the most common “alternative” method of dispute resolution, it also remains an area in which there is little, if any,

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1. See *Perry Homes v. Cull*, 258 S.W.3d 580, 589 (Tex. 2008).

2. See, e.g., Wayne Slater, *Texas Supreme Court Overturns Mansfield Couple's Award Against Homebuilder*, DALLAS MORNING NEWS, May 3, 2008, at A1.

discussion by appellate courts in Texas. But again, this is as it should be. The beauty of mediation is its elegant simplicity. Mediation continues to gain favor, not because there are elaborate rules in place to provide it with structure, but precisely because there are hardly any rules which apply. Courts, as a consequence, have little to oversee, interpret, or regulate.

A. ENFORCING (MEDIATED) SETTLEMENT AGREEMENTS

Respect for the integrity of the mediation process, however, and the agreements that often result from it, is important to its ongoing credibility and effectiveness. If courts were in the practice of routinely finding reasons to set aside mediated settlement agreements, then, obviously, the reliance of courts, lawyers, and clients on mediation would be undermined. Fortunately, courts remain fairly stoic in their confirmation of mediated agreements.

This year's example is *In re Guardianship of DuLuna*, in which the Corpus Christi Court of Appeals reviewed a probate court's refusal to approve a settlement achieved in a mediation on behalf of an incapacitated minor child.³ After eight hours of mediation involving the parents and one of the child's health care providers, a compromise settlement was achieved. Both parties joined in a motion filed with a probate court for the review and approval of the settlement as required by the Probate Code.⁴ In the face of recommendations by all parties to the agreement, as well as a favorable recommendation by the court-appointed guardian ad litem, the probate court denied the request. Citing the Texas Civil Practice & Remedies Code ("It is the policy of this state to encourage the peaceable resolution of disputes"),⁵ the court concluded that it is apparent "that the probate court's judgment was arbitrary and unreasonable."⁶ The court noted that the record was absent any indication that the agreement was achieved by collusion or anything other than "arms length" negotiation, specifically "adding that the parties were well informed, represented competently, and reached an agreement only after eight hours of mediation."⁷ While there is no reason to conclude that the fact that the settlement had been achieved through a mediation process was outcome determinative, there is every reason to believe that the court's opinion reflects a view that the mediation lent credibility and validity to the outcome.

The circumstances were quite different in *Brooks v. Brooks*, where a party to a mediated settlement agreement in a divorce proceeding stipulated in writing through counsel one year after the agreement that

3. Nos. 13-06-541-CV & 13-06-687-CV, 2008 WL 1747581, at *1 (Tex. App.—Corpus Christi Apr. 17, 2008, no pet.).

4. *Id.* at *2.

5. TEX. CIV. PRAC. & REM. CODE ANN. § 154.002 (Vernon 2005).

6. *In re DeLuna*, 2008 WL 1747581, at *7.

7. *Id.* at *4.

“[p]ursuant to our conversation today it is agreed that the mediated settlement agreement dated May 20, 2004 is void and this matter will be mediated again at a time mutually agreed upon by the parties and attorneys.”⁸ After the case eventually went to trial, new counsel for the husband filed a motion for new trial, arguing that there was no basis to not enforce the previous, valid mediated settlement agreement. The trial court and the appellate court disagreed. In a decision that admittedly has little to do with the provisions of the Texas Alternative Dispute Resolution Procedures Act or the Texas Family Code, the court relied on the contract doctrine of quasi-estoppel, which “precludes a party from asserting, to another’s disadvantage, a right inconsistent with a position previously taken.”⁹

Gary’s position at trial was clearly inconsistent with his later position in his motion for new trial that the [mediated settlement agreement (MSA)] was enforceable and that judgment should have been rendered in accordance with the MSA. Gary admitted that he agreed to remediate and that he knew he would have to go to trial if the second mediation failed.¹⁰

For the moment at least, it appears that the courts will require something akin to the unique and unequivocal revocation by Gary of a mediated settlement agreement before they will agree to set one aside.

II. ARBITRATION

“We have said on many occasions that a party waives an arbitration clause by substantially invoking the judicial process to the other party’s detriment or prejudice. . . . To date, we have never found such a waiver”¹¹

The appellate decisions from last year continue to reflect the current climate of acceptance and acquiescence by courts in arbitration-related matters. But, with one decision, the Texas Supreme Court hinted at a slightly more engaged review of arbitration clauses in the future, and in doing so touched off a proverbial firestorm of controversy.

A. WAIVER OF ARBITRATION CLAUSE BY SUBSTANTIALLY INVOKING JUDICIAL PROCESS

The last several decades have witnessed a steady crescendo of judicial approval of arbitration clauses and arbitration awards in Texas and all over the United States. So, in that context, the Texas Supreme Court granted that request by a Houston-area homebuilder to set aside an \$800,000.00 arbitration award in favor of a homebuying couple.¹² The analysis itself is unremarkable; as the court points out, “[s]ince 1846,

8. 257 S.W.3d 418, 420 (Tex. App.—Fort Worth 2008, pet. denied).

9. *Id.* at 423.

10. *Id.* at 424.

11. *Perry Homes v. Cull*, 258 S.W.3d 580, 589-90 (Tex. 2008).

12. *Id.* at 585.

Texas law has provided that parties to a dispute may choose to arbitrate rather than litigate. But that choice cannot be abused; a party cannot substantially invoke the litigation process and then switch to arbitration on the eve of trial.”¹³ Several other cases in the survey year also adopted the well-honed analysis of “whether a party has substantially invoked the judicial process to an opponent’s detriment,” constituting a waiver of the arbitration agreement.¹⁴

But the irony in *Cull* is that it was a homebuilder, one of the classes of litigants in the past few decades which have been at the forefront of the movement to compel consumers to arbitrate rather than litigate, that was making the waiver argument and seeking to set aside an arbitration award.

Putting aside the irony of the posture of the homebuilder in arguing waiver and the court’s acknowledgement that “[t]o date, we have never found such a waiver,”¹⁵ the reason for the widespread media scrutiny is best-addressed in a footnote.¹⁶ In *Cull*, the homebuyers filed suit and then vigorously resisted the efforts by the warranty company (but not the homebuilder) to compel arbitration.¹⁷ No ruling by the court was forthcoming. Extensive discovery ensued. Only four days before trial the homebuyers moved to compel arbitration. A reluctant trial judge granted the request, finding that the homebuilder had not shown any prejudice

13. *Id.* at 584.

14. *In re Fleetwood Homes of Tex., L.P.*, 257 S.W.3d 692, 694-95 (Tex. 2008); *In re Citigroup Global Mkts., Inc.*, 258 S.W.3d 623, 626 (Tex. 2008); see also *In re Castro*, 246 S.W.3d 756, 761 (Tex. App.—Eastland 2008, no pet.); *In re H&R Block Fin. Advisors, Inc.*, 262 S.W.3d 896, 898 (Tex. App.—Houston [14th Dist.] 2008, no pet.); *Wee Tots Pediatrics, P.A. v. Morohunfola*, 268 S.W.3d 784, 792 (Tex. App.—Fort Worth 2008, no pet.); *In re Bath Junkie Franchise, Inc.*, 246 S.W.3d 356, 360 (Tex. App.—Beaumont 2008, no pet.).

15. *Id.* at 590.

16. All nine justices of the Texas Supreme Court who participated in the decision were recipients of political campaign contributions from Bob Perry, the owner of Perry Homes, “the state’s most prolific campaign contributor Since 2000, Mr. Perry and his family have contributed more than \$263,000 to members of the court both directly and through a political action committee. About \$166,000 went to the four judges who ruled in favor of the Culls; \$97,500 went to the five who ruled for Mr. Perry.” Slater, *supra* note 2. Many bloggers and editorial writers across the state viewed the decision as an example of “justice for sale.” See, e.g., Editorial, *Donors Shouldn’t Tip Scales of Justice*, AUSTIN AM. STATESMAN, May 6, 2008, available at http://www.statesman.com/blogs/content/shared-gen/blogs/austin/editorial/entries/2008/05/06/donors_shouldnt_tip_scales_of.html; *Renegade Texas Supreme Court?*, HOUSTON CHRON., May 2, 2008, available at http://blogs.chron.com/legal/trade/2008/05/texas_supreme_court_upside_down.html (quoting Alex Winslow, Executive Director of Texas Watch: “The Texas Supreme Court issued a controversial and long-awaited decision in a case involving mega-homebuilder and campaign moneymen Bob Perry today. In *Perry Homes v. Cull*, the Court sided with Perry in a dispute over shoddy construction, vacating a pro-consumer \$800,000 arbitrator decision. . . . After years of forcing consumers into a lopsided binding arbitration process, the Court today carved out a special decision for the man who gives the Court more campaign cash than any other individual in the state. Since 2000, Mr. Perry and his family have poured over \$135,000 into the justices’ campaign coffers. HillCo PAC, which is largely controlled by Perry, has thrown in for another \$172,000. This decision is little more than a bail out for a major political moneymen, and is the latest in a long line of pro-defendant rulings by our state’s highest court.”).

17. *Perry Homes*, 258 S.W.3d at 585.

from the delayed request, but observing, “I really have a problem with people who have competent counsel who wait 14 months and after all this much effort in the courthouse has taken place, to come in and say that they have not waived that arbitration. That arbitration clause was there when the lawsuit was filed.”¹⁸

In applying a “totality of the circumstances” test, the Texas Supreme Court concluded that “[u]nquestionably, the Culls substantially invoked the litigation process.”¹⁹ Then the court set aside the trial court’s determination that prejudice had not been shown because the homebuilder had not shown that the extensive discovery by the parties and the expenses incurred would have been different in arbitration. “[S]uch manipulation of litigation for one party’s advantage and another party’s detriment is precisely the kind of inherent unfairness that constitutes prejudice under federal and state law.”²⁰

Proving that it could apply a similar test to the waiver argument without inviting political hoopla, the Texas Supreme Court subsequently determined that where a mobile home builder filed its answer to a lawsuit in October of 2005, but did not move to compel arbitration until July 2006, no waiver occurred.²¹ The dealer bringing the claim against the manufacturer argued that express waiver had occurred through “several emails from Fleetwood’s counsel regarding a proposed trial setting.”²² The court was dismissive of the argument but allowed that “the question here is whether Fleetwood *impliedly* waived arbitration by failing to pursue its arbitration demand for eight months while discussing a trial setting and allowing limited discovery.”²³ Reviewing the limited discovery engaged in by the parties, the court noted that “[t]aken together, these actions are not enough to overcome the presumption against waiver.”²⁴

Similar reasoning was applied in *In re Citigroup Global Markets, Inc.* where seven months of effort by a party to remove a state court action to various federal courts, before finally filing an answer in state court with a contemporaneous motion to compel arbitration, did not amount to an express or implied waiver.²⁵

Several appellate court decisions also held that arbitration was not waived. First, “a summary judgment motion, filed in the alternative to an arbitration demand,” did not, by itself, amount to the substantial invocation of the judicial process.²⁶ Likewise, “nineteen interrogatories, sixteen requests for admissions, . . . thirty-nine requests for production, . . . [and] a partial motion for summary judgment,” all before seeking arbitration,

18. *Id.*

19. *Id.* at 595.

20. *Id.* at 597.

21. *In re Fleetwood Homes of Tex., L.P.*, 257 S.W.3d 692, 693-94 (Tex. 2008).

22. *Id.* at 694.

23. *Id.*

24. *Id.* at 695.

25. 258 S.W.3d 623, 626 (Tex. 2008).

26. *In re H&R Block Fin. Advisors, Inc.*, 262 S.W.3d 896, 901 (Tex. App.—Houston [14th Dist.] 2008, no pet.).

did not constitute waiver because these activities were not solely focused on a party's arbitrable claims.²⁷ Fourteen months of delay before requesting arbitration, propounding discovery, and participating in depositions and mediation, may or may not have amounted to "substantially invoking" the judicial process, but the determination was not necessary in light of the resisting party's failure to "carry its burden of showing that it was prejudiced by these actions."²⁸

Having determined that arbitration agreements can be, but seldom are, waived by parties who initially engage in litigation, we move on to cases which highlight other grounds for avoiding arbitration, such as when an arbitration clause is unconscionable, or deemed illusory, and when a non-signatory to the arbitration agreement can be required, or allowed, to be a party to the arbitration.

B. UNCONSCIONABILITY

Employers have joined the growing list of parties pursuing the arbitration arena in recent years and courts everywhere have long expressed a willingness to support the right of employers and employees to litigate "any and all" claims arising out of the employment relationship.²⁹

But, courts are mindful of the potential for "overreaching" by employers who seek to achieve too much of an advantage in the process of resolving disputes with employees. Such was the case in *In re Poly-America, L.P.* where the Texas Supreme Court considered a company's standard employment agreement, which had the following arbitration requirements: all claims had to be asserted within one year of the event creating the issue, all fees (mediation, arbitration, court reporter, etc.) would be evenly split by the parties, with a cap on the employee's share, discovery would be specifically limited, certain financial information would not be discoverable, and all aspects of the process would be deemed confidential.³⁰ Most importantly, the employment agreement stripped the arbitrator of authority to award punitive, exemplary, or liquidated damages.³¹

By impairing or eliminating the employee's statutory rights under the Texas Workers' Compensation Act, the agreement went too far. "An arbitration agreement covering statutory claims is valid so long as the arbitration agreement does not waive the substantive rights and remedies the statute affords and the arbitration procedures are fair, such that the em-

27. *Wee Tots Pediatrics, P.A. v. Morohunfolu*, 268 S.W.3d 784, 792 (Tex. App.—Fort Worth 2008, no pet.).

28. *In re Bath Junkie Franchise, Inc.*, 246 S.W.3d 356, 368 (Tex. App.—Beaumont 2008, no pet.). Though rare, opinions like *Perry Homes* that result in a determination that the arbitration clause has been waived by participating in litigation, with a satisfactory showing of detriment to the other party, do occur. See *In re Castro*, 246 S.W.3d 756, 759 (Tex. App.—Eastland 2008, no pet.) ("substantial invocation" included waiting for three years before filing a motion to compel arbitration on the day of trial).

29. See *In re AdvancePCS Health L.P.*, 172 S.W.3d 603, 608 (Tex. 2005).

30. 262 S.W.3d 337, 344 (Tex. 2008).

31. *Id.*

ployee may ‘effectively vindicate his statutory rights.’”³² Pointing out that the Workers’ Compensation Act allows for recovery of punitive damages and reinstatement in circumstances in which employers acted with actual malice in discharging an employee, the court reasoned:

Permitting an employer to contractually absolve itself of this statutory remedy would undermine the deterrent purpose of the Workers’ Compensation Act’s anti-retaliation provisions. In creating the Texas Workers’ Compensation Act, the legislature carefully balanced competing interests—of employees subject to the risk of injury, employers, and insurance carriers—in an attempt to design a viable compensation system, all within constitutional limitations. Were we to endorse Poly-America’s position and permit enforcement of these remedy imitations, a subscribing employer could avoid the Act’s penalties by conditioning employment upon waiver of the very provisions designed to protect employees who have been the subject of wrongful retaliation.³³

The court went on to address the appropriateness of the other provisions. Acknowledging that “[c]ourts across the country have universally condemned the use of fee-splitting agreements in employment contracts that have the effect of deterring potential litigants from vindicating their statutory rights,”³⁴ the court nonetheless determined that Mr. Luna had failed to provide sufficient evidence of prejudice.³⁵ Practitioners should note the opportunity, and the obligation, to submit evidence of prejudice in these circumstances, evidence that intuitively should not be hard to come by. The court addressed the arguments concerning the discovery limitations, the prohibition on a “just cause inquiry,” and the one-year limitation on filing claims, dismissively.³⁶ Utilizing a severability clause in the arbitration agreement, the court invalidated as unconscionable the provision prohibiting the award of punitive damages or reinstatement of employment, and ordered that the claim be arbitrated.³⁷

Aside from the issue of vindicating statutory rights, the findings of the court in *Lawson v. Archer* track those of *Poly-America*. In *Lawson*, homebuyers challenged four features of an arbitration agreement entered into as part of their contract with a home inspector they retained prior to purchase.³⁸ The home buyers alleged that the panel of arbitrators would

32. *Id.* at 349 (quoting *In re Halliburton*, 80 S.W.3d 566, 572 (Tex. 2002)). Justice Brister, in his dissent, takes issue with the majority’s reliance on *In re Halliburton*, claiming that the quoted phrase “appears only in a parenthetical describing an opinion by an intermediate appellate court in Michigan, an opinion we neither approved nor adopted.” *Id.* at 363 (Brister, J., dissenting). Regardless of Justice Brister’s characterization of whether the “vindication of the employee’s statutory rights” had been the law in Texas, it indisputably is now.

33. *Id.* at 352.

34. *Id.* at 355.

35. *Id.* at 356.

36. *Id.* at 358-60.

37. *Id.* at 360-61.

38. *Lawson v. Archer*, 267 S.W.3d 376, 383 (Tex. App.—Houston [14th Dist.] 2008, no pet.).

not be neutral, that the prevailing party would be entitled to all costs and expenses of the arbitration, that damages were limited to the amount of the contract inspection fee, and that the limitations period was limited to one year.³⁹ For the most part, these challenges were dismissed on evidentiary grounds or on the basis that these terms pertained to the contract generally and not specifically to the arbitration clause.⁴⁰

Elsewhere, an appellate court overruled a trial court's conclusion that an arbitration clause was "procedurally unconscionable and unenforceable because it was not [shown to have been] signed by [one of the parties], was buried in fine print," and it was not shown to have even been given to the non-signing party.⁴¹ However, in *Security Service Federal Credit Union v. Sanders*, the court agreed that the arbitration agreement was substantively unconscionable because it sought to prohibit the opportunity to recover attorney's fees and costs of plaintiffs, rights protected by the Texas Deceptive Trade Practices-Consumer Protection Act.⁴² As in *Poly America*, the court concluded that the finding of a substantively unconscionable provision did not render the arbitration clause void when the offending provision could be severed and ordered the parties to arbitrate.⁴³

C. ILLUSORY?

An arbitration clause may not violate a court's sense of what is unconscionable, but if the contract itself is illusory, the agreement may be unenforceable.

Amway, the well-known multi-national seller of household products, sells its products through a network of distributors, who in turn recruit new distributors, creating a multi-level series of distribution agreements.⁴⁴ In 1998, Amway amended its contracts regarding arbitration, confirming the new rules "as [they are] amended and published from time to time in official Amway literature."⁴⁵ The United States Fifth Circuit Court of Appeals, applying Texas law in *Morrison v. Amway Corp.*, took issue with Amway's "unilateral right" to amend the arrangement at-will and found Amway's arbitration arrangement in its distribution agreement illusory and unenforceable:

There is nothing in any of the relevant documents which precludes amendment to the arbitration program—made under Amway's unilateral authority to amend its Rules of Conduct—from eliminating the entire arbitration program or its applicability to certain claims or disputes so that once notice of such an amendment was published mandatory arbitration would no longer be available even as to dis-

39. *Id.*

40. *Id.* at 383-85.

41. 264 S.W.3d 292, 301 (Tex. App.—San Antonio 2008, no pet.).

42. *Id.* at 297-300.

43. *Id.* at 300.

44. See *Morrison v. Amway Corp.*, 517 F.3d 248, 250 (5th Cir. 2008).

45. *Id.* at 250-51.

putes which had arisen and of which Amway had notice prior to the publication.⁴⁶

D. CAN NON-SIGNATORIES BE INCLUDED IN AN ARBITRATION PROCEEDING?

Occasionally, one or more parties to an arbitration clause desire to compel the inclusion of a third party who, though involved in the transaction or event giving rise to the dispute, is technically a non-signatory to the arbitration agreement. Conversely, occasions arise where the non-signatory party seeks to participate in an arbitration where they are not wanted by a signatory. We have both circumstances to examine.

In *In re Trammell*, the arbitration clause at issue was contained in a contract between Larsen, a general contractor, and C&K Concrete, a labor and materials subcontractor.⁴⁷ When litigation ensued between the parties and Larsen counterclaimed against Trammell, President and owner of C&K Concrete, individually, on the theory that C&K's forfeiture of its corporate charter exposed Trammell to individual liability, Trammell sought to lump these claims into the others being arbitrated because "although 'C&K Concrete may have waived arbitration, Trammell has not.'"⁴⁸ The Dallas Court of Appeals found that "a corporate relationship is generally not enough to bind a nonsignatory to an arbitration agreement,"⁴⁹ and concluded that the claims for individual liability arose from provisions of the Texas Tax Code instead of from the contract.⁵⁰ The court affirmed the trial court's denial of Trammell's motion to compel arbitration.⁵¹

In *In re Jindal Saw Ltd.*, the widow and children of a workplace accident victim sought to sue the decedent's employer for wrongful death and survival action remedies.⁵² The employer, seeking to enforce an arbitration agreement in its benefit plan, moved to compel arbitration of "any and all" claims arising out of the accident.⁵³ The employer argued that the employee was bound by his agreement to arbitrate claims and that the "derivative nature" of the survival action and wrongful death claims bound the widow and children.⁵⁴ Despite the fact that the widow and children did not sign the arbitration agreement, the employer argued that they "stood in the shoes" of their husband and father. The court stated that "[a]lthough there is no Texas precedent that has determined whether the pre-death arbitration agreement between an employee and his non-subscribing employer binds the employee's statutory wrongful death ben-

46. *Id.* at 257.

47. 246 S.W.3d 815, 818 (Tex. App.—Dallas 2008, no pet.).

48. *Id.* at 819.

49. *Id.* at 820.

50. *Id.* at 825.

51. *Id.* at 827.

52. 264 S.W.3d 755, 759-60 (Tex. App.—Houston [1st Dist.] 2008), *rev'd*, No. 08-0805, 2009 WL 490082 (Tex. Feb. 27, 2009).

53. *Id.* at 760.

54. *Id.*

eficiaries, the century-old general rule remains, that a decedent's pre-death contracts bind his wrongful death beneficiaries."⁵⁵ However, the court distinguished some claims:

A non-signatory wife, asserting in her individual capacity personal statutory claims for damages such as her own mental anguish and loss of consortium, earnings, companionship, society, and inheritance, lacks the type of privity contemplated for the contracting parties to bind her to a contract that she did not sign in her individual capacity. Simply put, a surviving wife may be an heir, within the meaning of an arbitration agreement that she did not sign individually, to her late husband's claims; she cannot be an heir to her own claims.⁵⁶

Distinguishing the survival claims from those brought by the widow on the decedent's behalf as if he was still alive, as "wholly derivative," the trial court was found to have abused its discretion in refusing to compel arbitration of the survival action.⁵⁷

However, the Texas Supreme Court overruled this distinction between wrongful death and survival claims.⁵⁸ Based on its decision in *In re Labatt*,⁵⁹ the court held that the arbitration agreement also applied to the wrongful death claims because "under Texas law the wrongful death cause of action is entirely derivative of the decedent's rights." Therefore, because the deceased would have been bound to arbitrate if he had sued immediately before his death, his beneficiaries must also arbitrate.

E. ARE ARBITRATION PROCEEDINGS CONFIDENTIAL?

Two opinions which confirmed the confidentiality of underlying arbitration proceedings inadvertently bring attention to a feature of arbitration proceedings which may surprise many practitioners. This author believes that there is a common presumption that arbitration proceedings in general, and arbitration awards in particular, are presumptively confidential. Many arbitrations are conducted under very generic agreements to arbitrate pursuant to the Federal Arbitration Act, the Texas Arbitration Act, or the Commercial Arbitration Rules of the American Arbitration Association. These statutes and published rules do not have any provision whatsoever preserving the confidentiality of any aspect of the proceedings. For the proceedings or the award to be confidential, a specific provision may be required in the parties' agreement.

In *ITT Educational Services, Inc. v. Arce*, a textbook example of an enforceable confidentiality agreement was presented.⁶⁰ The arbitration provision expressly adopted the AAA's Commercial Arbitration Rules,

55. *Id.* at 762 (internal quotations omitted).

56. *Id.* at 763 (quoting *In re Keepa*, 178 S.W.3d 279, 296 (Tex. App.—Houston [1st Dist.] 2005, orig. proceeding)).

57. *Id.* at 765-67.

58. *In re Jindal Saw Ltd.*, No. 08-0805, 2009 WL 490082, at *1 (Tex. Feb. 27, 2009).

59. 279 S.W.3d 640 (Tex. 2009).

60. 533 F.3d 342, 345 (5th Cir. 2008).

as modified: "(g) All aspects of the arbitration proceeding, and any ruling, decision or award by the arbitrator, will be strictly confidential."⁶¹ The Fifth Circuit Court of Appeals affirmed the trial court's injunction against disclosure of the arbitration award by one of the parties to the proceedings.⁶²

An intriguing analysis of confidentiality is presented in *Knapp v. Wilson N. Jones Memorial Hospital*, where in a subsequent lawsuit, a hospital's terminated financial officer sought discovery of testimony from an arbitration proceeding between the hospital and an accounting firm, a proceeding to which the former officer was not a party.⁶³ Although the court cited the ADR statute at length, the decision to confirm the denial of the discovery seems to have been influenced by the Rules for Non-Administered Arbitration of the CPR Institute for Dispute Resolution, which had a clear provision preserving the confidentiality of any information or material exchanged during discovery or the hearing.⁶⁴

F. CONFIRMING (OR OVERTURNING) ARBITRATION AWARDS

It has always been a daunting task to persuade a court to vacate an arbitration award on the grounds that the panel incorrectly applied the law or incorrectly interpreted the facts.⁶⁵ The Federal Arbitration Act (F.A.A.) sets out a very narrow set of grounds, primarily referring to instances in which "the award was procured by corruption, fraud, or undue means."⁶⁶ But over the years, perhaps out of a concern that public confidence in arbitration suggested at least a minimal amount of judicial scrutiny, various "non-statutory" grounds for vacatur of awards evolved, especially where the parties contracted for expanded judicial review. "Manifest disregard of the law" became a well-recognized basis for vacatur and awards found to be violative of public policy also were set aside.⁶⁷ But federal courts of appeal were eventually divided, some finding the narrow grounds of the F.A.A. to be exclusive and others concluding that

61. *Id.*

62. *Id.* at 349.

63. 281 S.W.3d 163, 165-66 (Tex. App.—Dallas 2009, no pet.).

64. *Id.* at 172-74. The opinion is interesting because, in a section labeled "Applicable Law," the confidentiality provisions of Chapter 154 of the ADR statute are elaborately set out and discussed. *See id.* at 172-74. But, heretofore, the ADR statute has been deemed to apply to the ADR procedures described in the statute, which include *nonbinding* arbitration. *See, e.g.,* TEX. CIV. PRAC. & REM. CODE ANN. §§ 154.027, 154.073 (Vernon 2005). Although the statute explains that an arbitration proceeding can be made binding by a stipulation of the parties, the author is confident that the confidentiality provisions in the statute were not intended to cover all binding arbitration proceedings in the state of Texas; rather, confidentiality would only apply to an arbitration conducted pursuant to a judicial referral under the ADR statute, with a stipulation of the parties that the process will be binding. *Id.*

65. *See* JAY FOLBERG, DWIGHT GOLANN, LISA KLOPPENBERG, & THOMAS J. STIPANOWICH, *RESOLVING DISPUTES: THEORY PRACTICE AND LAW* 523 (2005). "[I]t is not surprising that few arbitration awards are challenged in court. Of those challenges, very few succeed." *Id.*

66. 9 U.S.C. § 10(a) (2006).

67. *See* FOLBERG ET AL., *supra* note 65, at 498, 525-26, 536-37.

non-statutory grounds were acceptable, especially where judicial review had been written into the arbitration agreement.⁶⁸

In *Hall Street Associates, L.L.C. v. Mattel, Inc.*, the United States Supreme Court came down on the side of minimizing the scrutiny which courts can give to arbitration awards, even in instances in which the parties contracted for such scrutiny: "Instead of fighting the text, it makes more sense to see the three provisions, §§ 9-11, as substantiating a national policy favoring arbitration with just the limited review needed to maintain arbitration's essential virtue of resolving disputes straight-away."⁶⁹ *Hall Street* may leave the door open for arbitrating parties to contractually create an arbitration appeal process, so long as it does not include a judicial mechanism, but it is clear that the opinion signals a view that courts are not to scrutinize awards for anything, essentially, other than "corruption, fraud, or undue means."⁷⁰

Hall Street's rationale was quickly adopted by the Dallas Court of Appeals and found to apply to proceedings under the Texas General Arbitration Act (TAA). In *Quinn v. NAFTA Traders*, the claimant received an arbitration award, which included recovery of her attorney's fees.⁷¹ When moving to confirm the award, the claimant sought additional attorney's fees from the trial court. Both the trial court and the Dallas Court of Appeals denied her request.⁷² "The award is conclusive on the parties as to all matters of fact and law," noted the court, finding that the TAA has grounds for modification and vacation of awards that are extremely narrow, with no express authority for expanded judicial review.⁷³

68. See 128 S. Ct. 1396, 1403 n.5 (2008) (illustrating a breakdown of the federal circuits, two of which had clearly opined that parties may not contract for such expanded judicial review, and four of which held the opposite view).

69. *Id.* at 1405.

70. See, e.g., 9 U.S.C. § 10(a)(1) (2006).

71. *Quinn v. NAFTA Traders, Inc.*, 257 S.W.3d 795, 797 (Tex. App.—Dallas 2008, pet. granted).

72. *Id.* at 797-98.

73. *Id.* at 798.