CORRECTING ERRORS: IMPERFECT AWARDS IN TEXAS ARBITRATION

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I. INTRODUCTION

Since its earliest constitutions, Texas has recognized and accepted the concept of arbitration. Both the Texas Constitution in 1845[1] and its

[1] TEX. CONST. of 1845, art. VII, § 15 ("It shall be the duty of the Legislature to pass such laws

successor in 1869[2] required the legislature to pass laws facilitating arbitration, which was called a method of trial. The Texas Supreme Court recognized arbitration in 1856 as "a mode of trial guaranteed by the Constitution and regulated by statute . . . as effectual to settle finally and conclusively the rights of parties as any other mode of trial known to the law."[3]

Arbitration was always intended to be an efficient and speedy method to conclusively resolve conflicts between parties.[4] As such, arbitration, as an alternative to trial, should result in a final award resolving and ending disputes. Texas law intends for the arbitration proceedings to stand on their own without a need for court involvement, aside from the confirmation of the end result.

However, just as procedures exist to correct errors in trial, the Texas General Arbitration Act and Texas common law provide procedures to correct errors in arbitration. Because arbitration is favored, and because the courts do not want to chill the use and trust of the Texas arbitration system, courts "review arbitration awards very deferentially; [and] indulge every reasonable presumption in favor of the award and none against it."[5] The

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as may be necessary and proper, to decide differences by arbitration, when the parties shall elect that method of trial.").

[2] TEX. CONST. of 1869, art. XII, § 11 (using language identical to its 1845 counterpart).

[3] CVN Group, Inc. v. Delgado, 95 S.W.3d 234, 240 (Tex. 2002) (quoting Forshey v. G.H. & H. R.R. Co., 16 Tex. 516, 539 (1856)).

[4] The Texas Supreme Court has described arbitration as:

> [A] contractual proceeding by which the parties to a controversy or dispute, in order to obtain a speedy and inexpensive final disposition of matters involved voluntarily select arbitrators or judges of their own choice, and by consent submit the controversy to such tribunal for determination in substitution for the tribunals provided by the ordinary processes of the law.

Jack B. Anglin Co. v. Tipps, 842 S.W.2d 266, 268 (Tex. 1992) (citation omitted); *see also* Porter & Clements, L.L.P. v. Stone, 935 S.W.2d 217, 221 (Tex. App.—Houston [1st Dist.] 1996, no writ) ("In Texas, 'arbitration' is generally a contractual proceeding by which the parties to a controversy, in order to obtain a speedy and inexpensive *final disposition* of the disputed matter, select arbitrators or judges of their own choice, and by consent, submit the controversy to these arbitrators *for determination.*").

[5] Barsness v. Scott, 126 S.W.3d 232, 241 (Tex. App.—San Antonio 2003, pet. denied); *see also CVN Group, Inc.*, 95 S.W.3d at 238; IPCO-G. & C. Joint Venture v. A.B. Chance Co., 65 S.W.3d 252, 256 (Tex. App.—Houston [1st Dist.] 2001, pet. denied); Anzilotti v. Gene D. Liggin, Inc., 899 S.W.2d 264, 266 (Tex. App.—Houston [14th Dist.] 1995, no writ); Riha v. Smulcer, 843 S.W.2d 289, 293–94 (Tex. App.—Houston [14th Dist.] 1992, writ denied); Bailey

arbitration award serves as the judgment of a court of last resort, and consequently, a trial court reviewing the award "may not substitute its judgment for that of the arbitrators merely because it would have reached a different result."[6] "Nor may a reviewing court set aside an arbitration award for a mere mistake of fact or law."[7] The courts give great deference to arbitration awards "lest disappointed litigants seek to overturn every unfavorable arbitration award in court."[8] Judicial review of an arbitration award "adds expense and delay, thereby diminishing the benefits of arbitration as an efficient, economical system for resolving disputes."[9]

In keeping with the public policy favoring the conclusiveness of arbitration, courts may only set aside arbitration awards under limited circumstances.[10] Most recently the Houston Court of Appeals found that reviewing and changing the confirmation of an arbitration award should only occur in the presence of "exceptional cases."[11] Still, the Texas General Arbitration Act and the common law present a number of ways to correct errors in arbitration awards. More often than not, parties use these procedures to challenge the underlying reasoning for the award; however, the deference granted to arbitration proceedings protects the system from such collateral attacks. As a result, a party seeking to challenge the outcome of an arbitration proceeding faces a steep uphill battle.

& Williams v. Westfall, 727 S.W.2d 86, 90 (Tex. App.—Dallas 1987, writ ref'd n.r.e.).

[6] Baker Hughes Oilfield Operations, Inc. v. Hennig Prod. Co., 164 S.W.3d 438, 442 (Tex. App.—Houston [14th Dist.] 2005, no pet.); *see also* Crossmark, Inc. v. Hazar, 124 S.W.3d 422, 429 (Tex. App.—Dallas 2004, pet. denied); Koch v. Koch, 27 S.W.3d 93, 96 (Tex. App.—San Antonio 2000, no pet.); Jamison & Harris v. Nat'l Loan Investors, 939 S.W.2d 735, 737 (Tex. App.—Houston [14th Dist.] 1997, writ denied); J.J. Gregory Gourmet Servs., Inc. v. Antone's Imp. Co., 927 S.W.2d 31, 33 (Tex. App.—Houston [1st Dist.] 1995, no writ); City of Baytown v. C.L. Winter, Inc., 886 S.W.2d 515, 518 (Tex. App.—Houston [1st Dist.] 1994, writ denied); *Riha*, 843 S.W.2d at 293–94 (citing *Bailey & Williams*, 727 S.W.2d at 90).

[7] *Baker Hughes Oilfield Operations, Inc.*, 164 S.W.3d at 442; *see also In re* C.A.K., 155 S.W.3d 554, 560 (Tex. App.—San Antonio 2004, pet. denied); *Jamison*, 939 S.W.2d at 737; *J.J. Gregory Gourmet Servs., Inc.*, 927 S.W.2d at 33; *Anzilotti*, 899 S.W.2d at 266.

[8] *Crossmark, Inc.*, 124 S.W.3d at 429 (quoting Daniewicz v. Thermo Instrument Sys., Inc., 992 S.W.2d 713, 716 (Tex. App.—Austin 1999, pet. denied)).

[9] *Id.* (quoting *CVN Group, Inc.*, 95 S.W.3d at 238).

[10] Porter & Clements, L.L.P. v. Stone, 935 S.W.2d 217, 221 (Tex. App.—Houston [1st Dist.] 1996, no writ).

[11] *See* Universal Computer Sys., Inc. v. Dealer Solutions, L.L.C., 183 S.W.3d 741, 744 (Tex. App.—Houston [1st Dist.] 2005, pet. filed).

II. THE TEXAS ARBITRATION SYSTEM

A. Statutory Review Under the Texas General Arbitration Act

Arbitration may be conducted under the common law[12] or pursuant to the Texas General Arbitration Act.[13] "Statutory arbitration is merely cumulative of the common law."[14] To set aside an arbitration award, the complaining party must allege either a statutory or common law ground to vacate, modify or correct an award.[15] General complaints arising from the procedure used in the arbitration, the weight or sufficiency of the evidence, or the effects of controlling case law fall outside the purview of the trial court's jurisdiction. "In the absence of a statutory or common law ground to vacate or modify an arbitration award, a reviewing court lacks jurisdiction to review other complaints, including the sufficiency of the evidence to support the award."[16]

The Texas General Arbitration Act authorizes a court to vacate an award if:

> (1) the award was obtained by corruption, fraud, or other undue means;
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> (2) the rights of a party were prejudiced by: (A) evident partiality by an arbitrator appointed as a neutral arbitrator; (B) corruption in an arbitrator; or (C) misconduct or willful misbehavior of an arbitrator;
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> (3) the arbitrators: (A) exceeded their powers; (B) refused to postpone the hearing after a showing of sufficient cause for the postponement; (C) refused to hear evidence material

[12] Riha v. Smulcer, 843 S.W.2d 289, 292 (Tex. App.—Houston [14th Dist.] 1992, writ denied).

[13] TEX. CIV. PRAC. & REM. CODE ANN. §§ 171.001–.098 (Vernon 2005).

[14] Anzilotti v. Gene D. Liggin, Inc., 899 S.W.2d 264, 266 (Tex. App.—Houston [14th Dist.] 1995, no writ); *see Riha*, 843 S.W.2d at 292 (citing House Grain Co. v. Obst, 659 S.W.2d 903, 905 (Tex. App.—Corpus Christi 1983, writ ref'd n.r.e.)).

[15] *Anzilotti*, 899 S.W.2d at 266 (citing Powell v. Gulf Coast Carriers, Inc., 872 S.W.2d 22, 24 (Tex. App.—Houston [14th Dist.] 1994, no writ)).

[16] IPCO-G. & C. Joint Venture v. A.B. Chance, Co., 65 S.W.3d 252, 256 (Tex. App.—Houston [1st Dist.] 2001, pet. denied); *see also* Jamison & Harris v. Nat'l Loan Investors, 939 S.W.2d 735, 737 (Tex. App.—Houston [14th Dist.] 1997, writ denied); J.J. Gregory Gourmet Servs., Inc. v. Antone's Imp. Co., 927 S.W.2d 31, 33 (Tex. App.—Houston [1st Dist.] 1995, no writ).

> to the controversy; or (D) conducted the hearing, contrary to [the Texas General Arbitration Act's provisions for the hearing], in a manner that substantially prejudiced the rights of a party; or
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> (4) there was no agreement to arbitrate, the issue was not adversely determined in a proceeding [to compel or stay arbitration], and the party did not participate in the arbitration hearing without raising the objection.[17]

The Texas General Arbitration Act authorizes a court to modify or correct errors in an award when:

> (1) the award contains: (A) an evident miscalculation of numbers; or (B) an evident mistake in the description of a person, thing, or property referred to in the award;
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> (2) the arbitrators have made an award with respect to a matter not submitted to them and the award may be corrected without affecting the merits of the decision made with respect to the issues that were submitted; or
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> (3) the form of the award is imperfect in a manner not affecting the merits of the controversy.[18]

B. Common Law Grounds for Review

Under the common law, courts generally recognize that an arbitration award may be set aside "only if the decision is tainted with fraud, misconduct, or gross mistake as would imply bad faith and failure to exercise honest judgment."[19] While the courts do not favor common law

[17] TEX. CIV. PRAC. & REM. CODE ANN. § 171.088 (Vernon 2005). The Texas Family Code also allows an arbitration award to be vacated if an award in a suit affecting the parent-child relationship is not in the best interests of a child. TEX. FAM. CODE ANN. § 153.0071(b) (Vernon 2002).

[18] TEX. CIV. PRAC. & REM. CODE ANN. § 171.091.

[19] Universal Computer Sys., Inc. v. Dealer Solutions, L.L.C., 183 S.W.3d 741, 752 (Tex. App.—Houston [1st Dist.] 2005, pet. filed) (quoting *IPCO-G. & C. Joint Venture*, 65 S.W.3d at 256); *see also* Callahan & Assocs. v. Orangefield Indep. Sch. Dist., 92 S.W.3d 841, 844 (Tex. 2002) (citing Teleometrics Int'l., Inc. v. Hall, 922 S.W.2d 189, 193 (Tex. App.—Houston [1st Dist.] 1995, writ denied)); L.H. Lacy Co. v. City of Lubbock, 559 S.W.2d 348, 352 (Tex. 1977); Baker Hughes Oilfield Operations, Inc. v. Hennig Prod. Co., 164 S.W.3d 438, 446 (Tex. App.—

grounds for vacating, modifying, or correcting arbitration awards, the Texas Supreme Court left open the decision of whether a party may rely upon a common law standard to vacate or modify an award when the Texas General Arbitration Act governs the arbitration proceeding.[20]

Under the common law, parties most frequently assert that the arbitrators committed a gross mistake of law or fact. This common law standard does not exist within the Act, and consequently courts have been loathe to review awards challenged on this basis:

> We note, however, that the Texas Supreme Court recently declined an invitation to hold that a party governed by the Texas General Arbitration Act is limited to the statutory grounds for vacatur and cannot rely upon the common law "gross mistake" standard. After observing that "[n]either party disputes that the [Texas General Arbitration] Act governs the contract[,]" and "[t]he statutory grounds allowing a court to vacate . . . an award are limited to those the Act expressly identifies[,]" the Texas Supreme Court "assume[d] without deciding that [petitioner] may rely on the gross mistake standard under the common law to attack the arbitrator's award[.]" Thus, like the Texas Supreme Court, we assume without deciding that UCS may rely on the common law gross mistake standard in this case in seeking to set aside the trial court's confirmation of the arbitrators' decision.[21]

Several decisions note that parties seeking confirmation of the award argued that the Texas General Arbitration Act preempted common law grounds for challenging an award. Thus far, no court has determined the validity of this preemption argument. Because the Texas Supreme Court left the question of preemption open for decision, a party seeking to challenge an award should consider raising common law grounds as well as statutory grounds in the motion.

Houston [14th Dist.] 2005, no pet.); *Anzilotti*, 899 S.W.2d at 266 (quoting Carpenter v. N. River Ins. Co., 436 S.W.2d 549, 551 (Tex. Civ. App.—Houston [14th Dist.] 1968, writ ref'd n.r.e)); Monday v. Cox, 881 S.W.2d 381, 385 n.1 (Tex. App.—San Antonio 1994, writ denied) (citations omitted).

[20] *See Callahan & Assocs.*, 92 S.W.3d at 844.

[21] *Universal Computer Sys., Inc.*, 183 S.W.3d at 751–52 (internal citations omitted) (quoting *Callahan & Assocs*., 92 S.W.3d at 844).

III. THE ARBITRATORS' POWER TO MODIFY OR CORRECT AN AWARD IN TEXAS

At the conclusion of an arbitration proceeding, the arbitrator or arbitrators should render a written award signed by each arbitrator who joins in the award.[22] Delivery of the award to the parties initiates the timetable for seeking review.[23] While a procedure akin to a motion for new trial does not exist, the parties may, under limited circumstances, request that the arbitrators modify or clarify the award.[24]

A. Seeking Modification or Clarification Directly from the Arbitrators

Before seeking review in the trial courts, a party may request that an arbitrator or an arbitration panel either modify or clarify the award.[25] The request must be made within twenty days of the delivery of the award to the party.[26] A request made outside of this time limit will not confer any ability upon the arbiters to modify or clarify the award.[27] The second, and less frequently used, procedure for modifying an award involves the arbitrators submitting a corrected or modified award to a court considering the original award for purposes of confirming, vacating, ordering a rehearing, or modifying the arbitrators' original decision.[28]

The arbitration statute grants arbitrators and a reviewing court the same powers for modifying or correcting mistakes in an original decision.[29] Section 171.054 of the Act incorporates section 171.091, which defines the circumstances in which an award can be modified or corrected.[30] Namely, an award may be modified if (1) the award contains either an evident miscalculation of numbers, or an evident mistake in the description of a person, property, or thing referred to in the award; (2) the arbitrators made

[22] TEX. CIV. PRAC. & REM. CODE ANN. § 171.053(a) (Vernon 2005).

[23] *Id.* § 171.088(b).

[24] *Id.* § 171.054.

[25] *Id.*

[26] *Id.* § 171.054(c).

[27] Teleometrics Int'l., Inc. v. Hall, 922 S.W.2d 189, 192 (Tex. App.—Houston [1st Dist.] 1995, writ denied).

[28] TEX. CIV. PRAC. & REM. CODE ANN. § 171.054(b)(2).

[29] *Id.* § 171.054 (a)(1) ("(a) The arbitrators may modify or correct an award: (1) on the grounds stated in Section 171.091.").

[30] *Id.*

an award with respect to issues not submitted to them and the award may be modified without affecting the merits of the decision as to the properly submitted issues; or (3) the form of the award is imperfect in a manner not affecting the merits of the controversy.[31]

Interestingly, the arbitrators possess an additional power to "clarify the award" upon the proper and timely application of a party.[32] This clarification power has been largely overlooked by parties and arbitrators alike with regard to correcting an arbitration award, and the scope of the arbitrators' ability to clarify an award remains largely untested and undefined.

B. The Scope of the Arbitrators' Authority

Just as the courts must grant deference to the arbitration award, so too must the arbitrators. Once the award has been rendered, the arbitrators possess limited and narrow authority to change it. Substantive changes clearly fall outside the scope of the arbitrators' modification or clarification powers.

In *Barsness v. Scott*, the arbitration panel issued an original award declaring neither party to be the prevailing party, but later modified the award upon the application of Scott.[33] The modified award changed the original declaration as to the victor by declaring Scott to be the prevailing party, awarded Scott nominal damages of one dollar, and granted Scott more than three hundred and fifty thousand dollars in attorneys' fees.[34] Upon review, the San Antonio Court of Appeals determined that the arbitrators had exceeded their power to either clarify or modify the original award.[35]

"An arbitrator may clarify an award when the original award is ambiguous and requires further explanation."[36] The *Barsness* decision further explains: "[I]n order for the modified award to come within the narrow confines of the arbitrator's clarification authority, the original award must be subject to more than one reasonable interpretation and the modified

[31] *Id.* § 171.091(a).

[32] *See id.* § 171.054(a)(2).

[33] 126 S.W.3d 232, 236–37 (Tex. App.—San Antonio 2003, pet. denied).

[34] *Id.* at 237.

[35] *Id*. at 241.

[36] *Id.* at 240 (citing Daniewicz v. Thermo Instrument Sys., Inc., 992 S.W.2d 713, 717 (Tex. App.—Austin 1999, pet. denied)).

award must be consistent with the original award."[37] Reviewing the arbitrators' actions in *Barsness*, the appellate court found that the original award clearly decided that neither party prevailed and consequently was not subject to multiple interpretations.[38] Additionally, the modified award added relief inconsistent to the original award, which comprised a "substantive modification of the original award" rather than a clarification of the award.[39] Consequently the appellate court found that the arbitrators' actions did not fall within the clarification power allowed by section 171.054(a)(2).[40]

The appellate court similarly concluded that the Texas General Arbitration Act allows modification of an award only when the arbitration panel's changes will result in "inconsequential changes to an award, which otherwise do not affect the merits of the controversy or the merits of the panel's original decision."[41] Consequently the appellate court found that the Texas General Arbitration Act did not support or allow the arbitration panel's decision to award nominal damages and attorneys' fees after previously determining neither party to be the prevailing party.[42]

The Austin Court of Appeals addressed the scope of the arbitrators' authority to clarify an award after its delivery. In *Daniewicz v. Thermo Instrument Systems, Inc.*, the arbitration panel issued a second award clarifying that the original award not only applied to the past breaches and therefore past damages, but also encompassed the future damages that would be incurred as a result of the breach of contract at issue.[43] On appeal, the parties disputed whether the arbitrators possessed the power to make such a clarification of their original award.[44] The Austin Court of Appeals agreed that the arbitrators had properly clarified the original award in light of the dispute between the parties concerning the original award's scope and interpretation:

> The existence of this suit implies that some clarification may have been necessary, and the arbitration panel issued a

[37] *Id.* (citing *Daniewicz*, 992 S.W.2d at 717).

[38] *Id.*

[39] *Id.*

[40] *Id.*

[41] *Id.* at 241.

[42] *Id.*

[43] 992 S.W.2d 713, 717 (Tex. App.—Austin 1999, pet. denied).

[44] *Id.*

> self-styled "clarification" order which was not clearly inconsistent with its original award. The panel clarified that the original award covered the CannonBear Group's past and future damages for Thermo's failure to use its best efforts. Nothing in the record gives us reason to believe that the panel in fact modified the original award and disguised it as a clarification. We hold that the clarification order merely restated the intention of the original award and was not an impermissible modification.[45]

Both *Barsness* and *Daniewicz* incorporate the concept that any change made to an award, whether pursuant to a request for modification or a request for clarification, must remain consistent with the terms of the original award. Adding or changing relief exceeds the arbitrators' authority, but defining the intended scope of the award as written might be permissible. Thus, a party unsure of the intent of the arbitrators' award should quickly invoke this provision, because a trial court possesses no authority to interpret the award or define its scope.

A party should note that initiating a request for the arbitrators to modify or clarify an award does not toll or abate the time periods to seek review of the award or the proceedings in the trial court. Consequently, a party must remain cognizant of the elapsed time since delivery of the award so that it may properly seek relief in the trial court if the arbitrators do not swiftly take action to review their decision.

IV. INVOKING THE JURISDICTION OF THE TRIAL COURT

A party may seek to confirm, vacate, modify or correct an award in the trial court.[46] While the process should follow the general practice for motions in the court, some procedural considerations exist.[47]

A. Which Trial Court Possesses Jurisdiction?

The Texas General Arbitration Act does not define the court that may consider the motions affecting the award, and therefore the Act has not been

[45] *Id.*

[46] TEX. CIV. PRAC. & REM. CODE ANN. § 171.087 (Vernon 2005).

[47] *Id.* § 171.093.

found to necessarily favor the district courts or preclude the jurisdiction of the county courts.[48]

Several potential venues exist for a trial court's review of an arbitration award. A party may file a motion to confirm, vacate, modify, or correct an arbitration award in (1) the county where the adverse party resides or has a place of business, or (2) in any county, if the adverse party does not possess a residence or place of business in the state.[49] If the parties' arbitration agreement names a certain county where the arbitration is to proceed, then the application to confirm, vacate, or modify the award must be filed in that county.[50] If a hearing has been held before the arbitrators, then the application must be filed in the county where that hearing occurred.[51] Finally, if another proceeding has been initiated that relates to the arbitration of an issue being decided under an arbitration agreement, then the application must be filed in the court in which that action was filed.[52]

Depending on the circumstances giving rise to the arbitration, a party may have to return to the original court of jurisdiction, or it may possess a clean slate upon which to work. In the latter case, the parties can initiate proceedings with either a motion to confirm or a motion to vacate, modify, or correct the award. Consequently, both parties may engage in a race to the courthouse to file their respective motions in order to set venue, because "[t]he filing with the clerk of the court of an application for an order under this chapter, including a judgment or decree, invokes the jurisdiction of the court."[53]

Reviewing the locations for filing an application to confirm, vacate, or modify an arbitration award, the Houston Court of Appeals determined that a "proceeding . . . relating to arbitration of an issue subject to arbitration" meant an action in which an issue has been raised concerning (1) whether any of the underlying claims are subject to arbitration, (2) whether an arbitration proceeding pertaining to those issues should be compelled or stayed, or (3) whether the resulting award of the arbitration of those issues should be confirmed, vacated, modified, or otherwise reviewed by a court.[54]

[48] Hoggett v. Zimmerman, Axelrad, Meyer, Stern & Wise, P.C., 63 S.W.3d 807, 809–10 (Tex. App.—Houston [14th Dist.] 2001, no pet.).

[49] TEX. CIV. PRAC. & REM. CODE ANN. § 171.096(a)(1)–(2).

[50] *Id.* § 171.096(b).

[51] *Id.* § 171.096(c).

[52] *Id.* § 171.096(d).

[53] *Id.* § 171.082(a).

[54] Hoggett v. Zimmerman, Axelrad, Meyer, Stern & Wise, P.C., 63 S.W.3d 807, 810 (Tex.

In its decision, the court determined that a law firm seeking to confirm an arbitration award arising out of a fee dispute with its client did not need to file the application to confirm the award in the district court where the client's lawsuit was being litigated.[55] It also noted that because no issues pertaining to the fee dispute made the subject of the arbitration had been raised in the client's litigation in district court, the county court where the law firm sought to confirm the award did not lack jurisdiction over the determination of the validity of the award.[56]

B. Simple Motion Practice or Summary Judgment?

In order to invoke the court's jurisdiction to either confirm, vacate or modify an award, a party need only file a motion in the trial court.[57] The Texas General Arbitration Act contemplates the use of a motion to confirm, motion to vacate, or motion to modify the award for this purpose.[58] If the court confirms the award, then it shall enter judgment following its confirmation decision.[59] If the court modifies or corrects the award, then the court shall make the limited changes it deems necessary, and enter judgment consistent with the modified or corrected award.[60] The court will also render judgment if it denies a motion to modify or correct an award.[61] If the court denies a motion to vacate, then the court shall enter judgment confirming the award.[62] Only if the court vacates the award will a final judgment not be issued. In that instance, the court will return the parties to arbitration.[63]

The court may consider the motions with or without an evidentiary hearing depending upon the types of challenges raised to the confirmation of the award. The Dallas Court of Appeals explained, "[A]pplications to confirm or vacate an arbitration award should be decided as other motions in civil cases; on notice and an evidentiary hearing if necessary. Summary

App.—Houston [14th Dist.] 2001, no pet.).

[55] *Id.* at 809–10.

[56] *Id.* at 810.

[57] TEX. CIV. PRAC. & REM. CODE ANN. § 171.082(a) (Vernon 2005).

[58] *See id.* § 171.087.

[59] *Id.* § 171.092(a).

[60] *Id.*

[61] *Id.* § 171.091(c).

[62] *Id.* § 171.088(c).

[63] *Id.* § 171.089.

judgment motions are not required for the trial court to confirm, modify, or vacate an arbitration award."[64]

Because the Texas General Arbitration Act allows a party to file a motion that directly seeks to confirm, vacate, or modify an award rendered in arbitration, a challenging party need not, and probably should not, file a motion for summary judgment. If a party seeking confirmation does file a motion for summary judgment, then that party bears the burden of providing evidence supporting its entitlement to summary judgment.[65] This burden includes providing evidence demonstrating that the challenging party's reasons for seeking to vacate, modify, or clarify the award do not create a fact issue precluding summary judgment.[66]

In *Mariner Financial Group, Inc. v. Bossley*, the parties arbitrated disputes concerning losses from the investment of the Bossleys' retirement account.[67] The arbitrator rendered an award in favor of Mariner Financial Group, and the Bossleys later moved to vacate the award based upon claims of the arbitrator's evident partiality.[68] Mariner Financial Group opposed the motion by filing a motion for summary judgment to confirm the arbitrator's decision.[69] Both the court of appeals and the Texas Supreme Court found that summary judgment should not have been granted because Mariner Financial Group "failed to establish as a matter of law that the arbitrator was not evidently partial."[70] By filing a motion for summary judgment, the court found that Mariner Financial Group undertook the burden "to establish that [the arbitrator] was not evidently partial as a matter of law."[71] The Texas Supreme Court explained that "[a]lthough the Bossleys bear the ultimate burden of proving the arbitrator's partiality, on summary judgment

[64] Crossmark, Inc. v. Hazar, 124 S.W.3d 422, 430 (Tex. App.—Dallas 2004, pet. denied).

[65] *Id.*

[66] *See* Mariner Fin. Group, Inc. v. Bossley, 79 S.W.3d 30, 35 (Tex. 2002). The Dallas Court of Appeals followed the same reasoning, stating that:

> Like the proponent of the arbitration award in *Mariner Financial Group, Inc.*, the Hazars assumed the summary judgment burden of negating the grounds alleged by Crossmark for vacating or modifying the award, even though Crossmark would have the ultimate burden at trial of proving those grounds in order to prevail.

Crossmark, Inc., 124 S.W.3d at 431.

[67] *Mariner Fin. Group, Inc.*, 79 S.W.3d at 31.

[68] *Id.* at 31–32.

[69] *Id.* at 31.

[70] *Id.*

[71] *Id.* at 32.

Mariner and Moore assumed the burden to prove that no fact issue exists. Because they did not meet this burden, we affirm the court of appeals' judgment."[72]

While the courts have not defined the standard or burden that would have applied to a motion to confirm the arbitration award, the Texas Supreme Court's decision made it clear that upon filing a motion for summary judgment the moving party will shoulder the evidentiary burdens associated with such a motion.[73] Consequently, a party seeking to confirm an award through a motion for summary judgment may bear the burden to demonstrate that the opposing party's arguments do not create a fact issue requiring further proceedings. Rather than assuming this burden, a party should avail itself of the motion practice established by the Texas General Arbitration Act.

C. A Record Helps Preserve Errors

In the trial courts, trial attorneys instinctively know that in order to preserve error they must possess a record of the proceedings. Along these same lines, a party must consider what record will be available for review following an arbitration. An arbitration proceeding may or may not employ the use of a court reporter to record counsel's statements, witness testimony, evidentiary rulings, and the admission of evidence. Because the positions asserted by a party may impact any later review of the award, a party must consider obtaining a record not only of the portion of the proceeding where the arbitrators received evidence, but also of counsel's arguments at the conclusion of the proceeding. This remains true for hearings that take place prior to or following the arbitration proceeding.

The party challenging an arbitration award will bear the ultimate burden of providing evidence to support the statutory or common law basis asserted to vacate, modify, or clarify an award. This means that "[a] party seeking to vacate an arbitration award has the burden to bring forth a sufficient record to establish any basis, including constitutional grounds, that would warrant vacating the award."[74]

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[72] *Id.* at 35.

[73] *See generally id*.

[74] *In re* C.A.K., 155 S.W.3d 554, 564 (Tex. App.—San Antonio 2004, pet. denied); *see also* GJR Mgmt. Holdings, L.P. v. Jack Raus, Ltd., 126 S.W.3d 257, 263 (Tex. App.—San Antonio 2003, pet. denied); Anzilotti v. Gene D. Liggin, Inc., 899 S.W.2d 264, 267 (Tex. App.—Houston [14th Dist.] 1995, no writ).

In one instance, a court noted that if a motion to vacate an arbitration award is based on a claim that the arbitrator refused to hear material evidence, the complaining party must present a record of what evidence was offered and refused.[75] A reviewing court must otherwise presume that the evidence submitted to the arbitrator was sufficient to support the award.[76]

The record of the arbitrators' actions could become important during a review of an award challenged upon misconduct grounds. In *GJR Management Holdings, L.P. v. Jack Raus, Ltd*., GJR alleged that the arbitrator's misconduct in surfing the Internet and examining witnesses based upon information found, failing to make the information used in his examinations available to the parties to review, and inattention during the proceedings due to his use of his computer to send and respond to email, constituted grounds to vacate the award.[77] However, the parties possessed no record of the arbitration proceeding or of the hearing on GJR's motion to vacate.[78] Consequently, the court said, "Because we have no record, we have no way of judging whether the misconduct in fact occurred and, if it occurred, whether it deprived GJR of a fair hearing."[79]

Common law arguments must also be supported by a record of the proceedings.[80] In *Anzilotti*, the arbitration proceeding was not recorded and the appellate court noted that there was "no statement of facts available for us to review."[81] In the absence of a record, the deference shown to arbitration awards presumes a lack of error.[82] "Without a record, we are to presume that adequate evidence was presented to support the arbitrator's award."[83] The court also noted that the lack of a record precluded a determination of whether the arbitrator had committed a gross mistake in reaching his conclusion.[84] Consequently, the court held that "[t]he record before this court does not include any evidence of the arbitrator's 'gross

[75] Jamison & Harris v. Nat'l Loan Investors, 939 S.W.2d 735, 737 (Tex. App.—Houston [14th Dist.] 1997, writ denied).

[76] *Id.*

[77] 126 S.W.3d at 263.

[78] *Id*.

[79] *Id.*

[80] Anzilotti v. Gene D. Liggin, Inc., 899 S.W.2d 264, 267 (Tex. App.—Houston [14th Dist.] 1995, no writ).

[81] *Id.*

[82] *Id*.

[83] *Id.*

[84] *See id*.

mistake.'"[85] This court reached the same result in *GJR Management Holdings, L.P.*[86] Additionally, GJR argued that the arbitrator committed a gross mistake in determining the amount of damages to award and in failing to award GJR attorneys' fees.[87] In the absence of a record, the appellate court possessed no ability to determine whether the arbitrator's decision rose to the level of "bad faith or failure to exercise honest judgment," and consequently found no error in the trial court's refusal to vacate the arbitration award.[88]

Even requests to modify or correct evident miscalculations may need a record in order to support the basis asserted for changing the award.[89] In *City of Baytown v. C.L. Winter, Inc.*, the city argued that the award should be modified because the arbitrators miscalculated the liquidated damages awarded under the contract.[90] The appellate court noted that the city had not presented a full record of the proceedings for review, and the portion of the testimony presented did not apply to the calculation of damages.[91] Consequently, the court determined that the award did not demonstrate a miscalculation on its face, and without evidence, the court would presume adequate evidence existed to support the award.[92]

In light of these holdings, a party should consider whether or not it will want to retain a court reporter to transcribe the proceedings if a record will not otherwise be created or preserved.[93] If possible, a party believing that error has or will continue to occur in a proceeding where a court reporter is not present should immediately retain a court reporter to attend and transcribe any further proceedings.

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[85] *Id.*

[86] GJR Mgmt. Holdings, L.P. v. Jack Raus, Ltd., 126 S.W.3d 257, 264 (Tex. App.—San Antonio 2003, pet. denied).

[87] *Id.* at 263.

[88] *Id.* at 263–64.

[89] City of Baytown v. C.L. Winter, Inc., 886 S.W.2d 515, 519–20 (Tex. App.—Houston [1st Dist.] 1994, writ denied).

[90] *Id.* at 519.

[91] *Id*. at 520.

[92] *Id.*

[93] In the decision of *In re C.A.K.*, the court noted that no transcript of the arbitration proceedings existed. 155 S.W.3d 554, 564 (Tex. App.—San Antonio 2004, pet. denied). As a consequence of the lack of a transcript, no evidence of the alleged partiality of the arbitrator existed. *Id.*

Before the proceedings, or at least before the arbitrators render a decision, a party should confirm the arbitrator's or arbitration panel's intentions concerning whether factual findings will be rendered to support an award, as well as the form of those factual findings, if any. With regard to damages, the trial courts may not hypothesize as to the arbitrators' intent, the arbitrators may later decline to clarify their decisions, and the record may not contain any direct evidence of an evident miscalculation. Consequently, in addition to requesting fact findings, a party should request that the arbitrators provide the means and method for calculating any damage awards in the decision so that an evident miscalculation may be appropriately addressed and corrected if it should occur.

Of course, fact findings and damage calculations will not support a challenge to the award that arises from matters outside of the arbitration decision, such as whether there was evident partiality or misconduct of the arbitrators. If the basis for challenging the arbitration award relies upon the evident partiality or bias of the arbitrator, a party might even seek to depose the arbitrator on this limited issue in order to create a record of the relationship or conflict giving rise to the basis for review.[94] However, a party should recognize that the arbitrator possesses, or should possess, immunity from liability and consequently immunity from discovery concerning his thought processes leading to the decision.[95]

[94] *See* Blue Cross Blue Shield of Tex. v. Juneau, 114 S.W.3d 126, 129 (Tex. App.—Austin 2003, no pet.) (noting that one of the arbitrators appointed by the American Arbitration Association was subsequently deposed on the issue of his prior relationship with an attorney working at the prevailing company).

[95] *See id.* at 128–35. In *Juneau*, the Austin Court of Appeals upheld the arbitrator's plea to the jurisdiction and the trial court's dismissal of the lawsuit filed against the arbitrator. *Id.* at 128. The court found that while Texas had not officially recognized the doctrine of "arbitral immunity," the doctrine "is essential to the maintenance of arbitration by contractual agreement as a viable alternative to the judicial process for the settlement of controversies" and consequently applied the doctrine to the matter before it. *Id.* at 133. The court further justified its ruling by holding that a non-prevailing party could not mount a collateral attack on an arbitration award by filing suit against an arbitrator. *Id*. Rather, a non-prevailing party may only assert one of the statutory or common law reasons to vacate an award, and if unsuccessful, may not use any other means to challenge the award. *Id.* at 134–35. Ultimately, the Austin Court of Appeals found that the Texas General Arbitration Act supplied the "exclusive remedy" to challenge an award, and consequently a party may not assert claims directly against the arbitrator for his role in rendering the award. *See id.* at 135.

As a last resort, a party can (and probably should) attempt to create a record of the arbitration using affidavits of the parties and witnesses involved.[96]

V. VACATUR OF THE ARBITRATION AWARD

The Texas General Arbitration Act "is written in such a way as to ensure that an arbitration award is set aside only in limited circumstances."[97] The Act provides the exclusive remedy for contesting an arbitration award when the Act governs the arbitration agreement.[98]

Upon the application of a party, a court "shall confirm the award" of the arbitrators, unless "grounds are offered for vacating, modifying, or correcting an award."[99] The party may combine a request to vacate an award with an alternative request to modify or correct an award, and vice versa.[100] The trial court or reviewing court "lacks jurisdiction to review complaints that do not assert statutory, common law, or public policy grounds to vacate or modify the award."[101] As noted above, the grounds for challenging an award "are not the same issues as the issues on the merits involved in the underlying arbitration proceeding."[102]

Because arbitrators may fashion relief to resolve the issues submitted for their determination, arbitration may result in a broader range of

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[96] *See, e.g.*, Crossmark, Inc. v. Hazar, 124 S.W.3d 422, 428 (Tex. App.—Dallas 2004, pet. denied).

> The summary judgment record includes affidavits from lawyers involved in the arbitration testifying as to what occurred during the arbitration process, and attaching some of the documents filed in the arbitration proceeding. . . . We note the summary judgment record does not include a transcription of the arbitration proceedings or a complete record of the documents that were filed in the arbitration.

Id.

[97] Women's Reg'l Healthcare, P.A. v. FemPartners of N. Tex., Inc., 175 S.W.3d 365, 367 (Tex. App.—Houston [1st Dist.] 2005, no pet.) (citing Monday v. Cox, 881 S.W.2d 381, 384 (Tex. App.—San Antonio 1994, writ denied)).

[98] Yazdchi v. Am. Arbitration Ass'n, No. 01-04-00149-CV, 2005 WL 375288, at *4 (Tex. App.—Houston [1st Dist.] Feb. 17, 2005, no pet. h.) (unreported mem. op.); *Juneau*, 114 S.W.3d at 136.

[99] TEX. CIV. PRAC. & REM. CODE ANN. § 171.087 (Vernon 2005).

[100] *Id.* § 171.091(d).

[101] Baker Hughes Oilfield Operations, Inc. v. Hennig Prod. Co., 164 S.W.3d 438, 442 (Tex. App.—Houston [14th Dist.] 2005, no pet.) (citing *Crossmark, Inc*., 124 S.W.3d at 429).

[102] *Crossmark, Inc.*, 124 S.W.3d at 433.

remedies than available in a court. The mere fact that the relief granted by the arbitrators "could not or would not be granted by a court" is "not a ground for vacating or refusing to confirm an award."[103]

A. Calculating the Time to File the Motion to Vacate

A party who seeks to vacate an award must apply to the court no later than the ninetieth day after the arbitrators deliver a copy of the award to the applicant.[104] When a party believes that an award has resulted from corruption, fraud, or other undue means, the party must apply to vacate the award within ninety days "after the date the grounds for the application are known or should have been known."[105] The ninety-day period within the Texas General Arbitration Act serves as "a limitations period after which a party no longer has a right to petition a court to vacate an arbitration award."[106]

Despite the Act's language, a challenging party may not in reality be given the full ninety days to file a motion to vacate. If the prevailing party files a motion to confirm the arbitration award inside of ninety days of the delivery of the award, the opposing party must file an objection to the confirmation of the award that, at the very least, identifies the statutory or common law reasons for vacating the award before the court hears the motion for confirmation.[107] Otherwise, any later filed motion to vacate or to modify the award will be considered untimely and therefore waived.[108]

In *Hamm v. Millennium Income Fund*, the prevailing party, Millennium, filed a motion to confirm the arbitration award within four days of receiving

[103] TEX. CIV. PRAC. & REM. CODE ANN. § 171.090 (Vernon 2005).

[104] *Id.* § 171.088(b).

[105] *See id.*

[106] Teleometrics Int'l, Inc. v. Hall, 922 S.W.2d 189, 192 (Tex. App.—Houston [1st Dist.] 1995, writ denied); *see* Kline v. O'Quinn, 874 S.W.2d 776, 784 (Tex. App.—Houston [14th Dist.] 1994, writ denied) (holding that failure to challenge the attorneys' fees provision in an award within ninety days constitutes a waiver of the argument).

[107] *See* Hamm v. Millenium Income Fund, L.L.C., 178 S.W.3d 256, 264–65 (Tex. App.—Houston [1st Dist.] 2005, pet. denied).

[108] *Id.* at 264–66; GJR Mgmt. Holdings, L.P. v. Jack Raus, Ltd., 126 S.W.3d 257, 260 (Tex. App.—San Antonio 2003, pet. denied) ("Because, however, GJR filed this motion *after* the trial court had already entered judgment, it was too late to vacate the award."); City of Baytown v. C.L. Winter, Inc., 886 S.W.2d 515, 521 (Tex. App.—Houston [1st Dist.] 1994, writ denied) (noting that appellant failed to show how a hearing to confirm the award twenty-five days after the award was delivered caused any harm).

the award.[109] The court gave notice that the hearing on the motion would be held seven days later.[110] The Hamm parties filed an unverified motion for continuance advising the court that they planned to file a motion to vacate and a motion to modify the award and that they were requesting up to ninety days in which to file their motion.[111] The motion for continuance did not provide the reasons or statutory basis for the motion to vacate or motion to modify, and the trial court both denied the motion for continuance and confirmed the arbitration award at the hearing seven days later.[112] The Hamm parties later filed a motion to vacate the award which was considered and denied by the trial court.[113] However, on appeal, the Houston Court of Appeals found the motion to vacate to be untimely because it had been asserted after the award had been confirmed and a final judgment rendered.[114] "A motion to vacate, to modify, or to correct an arbitration award must be raised or considered before or simultaneously with a motion to confirm the award."[115]

In its decision, the Houston Court of Appeals found that the statutory language in the Texas General Arbitration Act requiring a trial court to confirm an award unless grounds are offered to vacate or modify the award established a due order of pleading.[116] Namely, the court determined that the statute contemplates that "any motions to vacate, to modify, or to correct the award must be pending before the court for its consideration, or must already have been ruled on, at the time that the court considers the motion to confirm."[117] Because the confirmation of an award constitutes a final judgment,[118] the appellate court noted that allowing a party a full ninety days to challenge an award could create unique exceptions to the modification and amendment of judgments, and might extend the trial court's plenary power to consider post-judgment motions beyond the thirty-day period allowed by the Texas Rules of Civil Procedure.[119] Additionally,

[109] 178 S.W.3d at 258–59.

[110] *Id*. at 259.

[111] *Id*.

[112] *Id.*

[113] *Id*. at 259–60.

[114] *Id*. at 269.

[115] *Id*.

[116] *Id.* at 262.

[117] *Id.*

[118] TEX. CIV. PRAC. & REM. CODE ANN. § 171.092(a) (Vernon 2005).

[119] *Hamm*, 178 S.W.3d at 264; *see* TEX. R. CIV. P. 329(d).

the Houston Court of Appeals considered a motion to vacate or modify an award analogous to an affirmative defense, and determined that "[a]n affirmative defense that is not pleaded or proved and on which findings are not obtained is waived and cannot be preserved by raising the affirmative defense for the first time in a motion for new trial."[120] These considerations led the Houston Court of Appeals to determine that "one must assert a motion to vacate, to modify, or to correct an arbitration award when a motion to confirm is filed, regardless of whether the Texas General Arbitration Act's ninety-day period to challenge the award has expired."[121]

Additionally, the court instructed:

> [A] party that moves to vacate, to modify, or to correct an arbitration award, and adduces evidence in support, only *after* the award has been confirmed and final judgment rendered has waived that challenge—or, at least, a trial court does not abuse its discretion if it overrules such a post-judgment motion.[122]

The Hamm parties did not request or obtain a record of the court's decision to deny the motion for continuance.[123] While the appellate court ultimately allowed the Hamm parties to assert and argue that the denial of the motion constituted error, the failure to provide the appellate court with a record of this hearing limited the ability of the court to determine that any error had occurred.[124] "We have no reporter's record from the September 5 confirmation hearing, and nothing in our record indicates what the parties and court might have discussed concerning the continuance motion at that hearing."[125] Additionally, the lack of a record failed to preserve any arguments that counsel for the Hamm parties may have made against the confirmation of the award, including any objections to the award.[126] One cannot guess whether a record of the substance of any such objections would have altered the outcome of the decision; however, at the least, the Hamm parties might have possessed a basis to argue that they had timely

[120] *Hamm*, 178 S.W.3d at 268.
[121] *Id.* at 266.
[122] *Id.* at 268.
[123] *Id.* at 259.
[124] *See id.*
[125] *Id.*
[126] *See id.* at 270–71.

lodged a motion to vacate, modify, or correct the award, albeit in oral form, prior to the trial court's confirmation of the award.

Consequently, a party facing an immediate motion and hearing to confirm an award should obtain a record of the hearing in order to preserve any error that may result, as well as to preserve any oral objections made to the award that have not been fully briefed and filed with the court. Of course, the better practice would be to file the objections to the award in addition to a record of the arbitration proceeding that is as complete as possible prior to any ruling on the motion to confirm, even if the objections cannot be fully briefed due to the timing of the hearing. This also illustrates, of course, that though a challenging party would normally possess ninety days post-award in which to file an appropriate motion, a prevailing party is best served by seeking to quickly confirm an award following an arbitration.

B. Vacating Awards Obtained Through Corruption, Fraud, or Undue Means

On the application of a party, an arbitration award shall be vacated if "the award was obtained by corruption, fraud, or other undue means[.]"[127] While "other undue means" could be used as a catchall for various attempts to attack an arbitration award, a paucity of cases exist concerning this provision of the Texas General Arbitration Act.

In *IPCO-G. & C. Joint Venture v. A.B. Chance Co.*, the challenging party asserted that the award should be vacated in part due to the arbitrator's ex parte independent investigation of evidence material to the award.[128] Classifying this argument as undue means under the statute, the Houston Court of Appeals struggled to define the standard that would help determine when undue means justified vacating an award.[129] Looking at the common law standards for setting aside arbitrations, the court decided that to justify setting aside the award, the acts constituting undue means must "so affect the rights of a party as to deprive it of a fair hearing."[130]

The *IPCO* decision arose from a dispute between IPCO-G. & C. Joint Venture (IPCO) and A.B. Chance Co. (Chance) concerning whether two anchors manufactured by Chance and used in the construction of an

[127] TEX. CIV. PRAC. & REM. CODE ANN. § 171.088(a)(1) (Vernon 2005).

[128] 65 S.W.3d 252, 255 (Tex. App.—Houston [1st Dist.] 2001, pet. denied).

[129] *See id*. at 257–58.

[130] *Id.* at 258.

underwater pipeline in Thailand were defective, resulting in their failure and damage to the pipeline constructed by IPCO.[131] After the conclusion of the arbitration, but prior to issuing the award, the arbitrator called counsel for IPCO in an ex parte telephone conversation to clarify certain points.[132] One such point concerned whether any other anchors existed and whether they had ever failed.[133] Counsel for IPCO apparently said that other anchors might exist, but no evidence had been introduced in the arbitration concerning them.[134] The arbitrator rendered the award in favor of Chance, reasoning in part that IPCO had not met its burden of proof to show that the anchors were defective and that other anchors used on the pipeline had not failed.[135]

The court agreed with IPCO that the ex parte communication by the arbitrator was improper, but after reviewing the record found no evidence that the communication "so affected IPCO's rights as to deprive it of a fair hearing."[136] Consequently, the court determined that the contact did not constitute undue means such as to justify vacating the arbitration award.[137]

C. Challenging Awards Based upon the Misconduct of the Arbitrator: Evident Partiality, Corruption, or Misbehavior

One of the statutory grounds for vacating an arbitration award that seems to have been a fertile source of appeals is "evident partiality by an arbitrator appointed as a neutral arbitrator."[138] The Texas General Arbitration Act provides that a court "shall vacate an award if . . . the rights of a party were prejudiced by evident partiality by an arbitrator appointed as a neutral arbitrator."[139] However, an arbitration award alone cannot establish the evident partiality of an arbitrator.[140]

[131] *Id.* at 255.
[132] *Id*. at 256–57.
[133] *Id*. at 257.
[134] *Id*.
[135] *Id.*
[136] *Id.* at 258.
[137] *Id*.
[138] TEX. CIV. PRAC. & REM. CODE ANN. § 171.088(a)(2)(A) (Vernon 2005).
[139] *Id.* § 171.088(a).
[140] *In re* C.A.K., 155 S.W.3d 554, 564 (Tex. App.—San Antonio 2004, pet. denied).

1. The Standard: A Neutral Arbitrator Must Avoid the Reasonable Impression of Partiality

In 1968, the United States Supreme Court rendered its decision in *Commonwealth Coatings Corp. v. Continental Casualty Co.*, a decision that would direct and influence the lower courts' decisions concerning the evident partiality of an arbitrator, including the courts of Texas.[141] In 1997, when Texas faced the issue of determining the standard that would apply to neutral arbitrators, Chief Justice Phillips summarized the importance of the *Commonwealth Coatings Corp.* decision:

> Justice Black, in delivering the Court's opinion, concluded that the "evident partiality" standard reflects Congress' efforts to ensure that arbitration be impartial. While recognizing that arbitrators are not expected to sever their ties with the business world, the Court concluded that it must be scrupulous in safeguarding the impartiality of arbitrators, because they have "completely free reign to decide the law as well as the facts and are not subject to appellate review." To achieve this goal, the Court imposed "the simple requirement that arbitrators disclose to the parties any dealings that might create an impression of possible bias." Although the Court noted that there was no evidence of actual bias in the case before it, the arbitrator's failure to disclose his business relationship with the prime contractor constituted evident partiality justifying vacation of the award.[142]

Justice White concurred in *Commonwealth Coatings Corp.*, but noted that the Court did not intend to subject arbitrators to the same "standards of judicial decorum" as judges.[143]

Drawing from *Commonwealth Coatings Corp.*, Chief Justice Phillips rendered the Texas Supreme Court decision on evident partiality in *TUCO*.[144] In that decision, the Texas Supreme Court established the standard for determining whether evident partiality requires the vacatur of

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[141] 393 U.S. 145, 150 (1968).

[142] Burlington N. R.R. Co. v. TUCO, Inc., 960 S.W.2d 629, 633 (Tex. 1997) (internal citations omitted) (summarizing and quoting *Commonwealth Coatings Corp*., 393 U.S. at 147–49).

[143] *Commonwealth Coatings Corp.*, 393 U.S. at 147–49 (White, J., concurring).

[144] *Id*.; *see TUCO*, 960 S.W.2d at 633.

an arbitration award.[145] The court held that "a neutral arbitrator selected by the parties or their representatives exhibits evident partiality under this provision if the arbitrator does not disclose facts which might, to an objective observer, create a reasonable impression of the arbitrator's partiality."[146] The court emphasized that "evident partiality is established from the *nondisclosure itself*, regardless of whether the nondisclosed information necessarily establishes partiality or bias."[147] The court intended this standard to preserve the parties' right to decide for themselves, after full disclosure, whether an arbitrator's partiality might be affected by a disclosed relationship.[148]

The Texas Supreme Court did not mandate a per se rule of disqualification when an arbitrator possesses some prior dealings, relationship, or connection with the parties.[149] Rather, the court allowed parties the right to use their own judgment to "balance the competing interest of avoiding a risk of partiality with the interest in obtaining the arbitrator's expertise or other benefits of proceeding before the arbitrator."[150] In other words, if the party has been informed of the arbitrator's connections or relationships to the parties and witnesses in the case, and that party decides to assert no objection, then the party has accepted the risk of the arbitrator's partiality.[151] But when the arbitrator

[145] *See TUCO*, 960 S.W.2d at 630.

[146] *Id*. The Texas Supreme Court noted that this standard sits in harmony with Canon II of the Code of Ethics for Arbitrators in Commercial Disputes which outlines the types of relationships that must be disclosed to arbitrating parties. *Id.* at 636. The court also recognized that both the American Bar Association and the American Arbitration Association had jointly adopted this Code of Ethics. *Id*.

[147] *Id.* at 636. In *TUCO*, the neutral arbitrator accepted the referral of a lawsuit from the law firm of one of the non-neutral arbitrators on the panel. *Id*. at 630. The neutral arbitrator did not disclose the referral to either of the parties. *Id*. at 631. The Texas Supreme Court found that the failure to disclose this information required the arbitration award to be vacated, even though the court specifically found that there had been no evidence produced of any actual bias or impartiality. *Id.* at 639. The mere appearance of impartiality created the need to vacate the award. *Id*.

[148] *See id.*

[149] *See* Kendall Builders, Inc. v. Chesson, 149 S.W.3d 796, 804 (Tex. App.—Austin 2004, pet. denied).

[150] *Id*. (citing *TUCO*, 960 S.W.2d at 635).

[151] In his concurrence to *Commonwealth Coatings Corp.*, Justice White "reasoned that an arbitrator should not be disqualified because of a business relationship with a party, if the parties are aware of the relationship and are willing to accept any risk of conflict." *TUCO*, 960 S.W.2d at 633 (citing Commonwealth Coatings Corp. v. Cont'l Cas. Co., 393 U.S. 145, 150 (1968) (White,

fails to make this disclosure, it robs the parties of their right to choose, and creates the appearance of partiality even in the absence of actual bias. Thus, the disclosure rule set forth by the Texas Supreme Court attempts to balance the "competing goals of expertise and impartiality."[152] By placing a duty of disclosure on the arbitrator and a duty to object upon the parties to the arbitration, the rule also aims to remove the courts from evaluating every arbitrator for any potential bias when a dissatisfied party challenges the award.[153]

2. The Materiality of the Non-Disclosed Conflict Matters

Under *TUCO*, the arbitrator should disclose all information that might "reasonably affect his impartiality," including financial and business relationships, familial relationships, and close social relationships.[154] "While a neutral arbitrator need not disclose relationships or connections that are trivial, the conscientious arbitrator should err in favor of disclosure."[155]

However, some non-disclosures may not invalidate an award. In fashioning the rule, the Texas Supreme Court determined that the "consequences for nondisclosure are directly tied to the materiality of the unrevealed information."[156] This allows reviewing courts to evaluate each alleged instance of evident partiality based upon the unique facts and circumstances before it.[157] As an example, the Texas Supreme Court in *Mariner Financial Group, Inc. v. Bossley* refused to vacate an arbitration

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J. concurring)).

[152] *Id.* at 635.

[153] *Id.*

[154] *See id.* at 637.

[155] *Id.*

[156] Mariner Fin. Group, Inc. v. Bossley, 79 S.W.3d 30, 32 (Tex. 2002) (citing *TUCO*, 960 S.W.2d at 637).

[157] In *Mariner Financial Group*, the Texas Supreme Court recognized the fact intensive nature of each instance where a party alleges the arbitrator demonstrated evident partiality.

> As the Eleventh Circuit Court of Appeals has observed: "the 'evident partiality' question necessarily entails a fact intensive inquiry. This is one area of the law which is highly dependent on the unique factual settings of each particular case. The black letter rules of law are sparse and analogous case law is difficult to locate."

Id. at 34 (quoting Lifecare Int'l, Inc. v. CD Med., Inc., 68 F.3d 429, 435 (11th Cir. 1995), *modified*, 85 F.3d 519 (11th Cir. 1996)).

award due to the arbitrator's non-disclosure that an expert witness used by the Bossleys in the arbitration had also served as an expert witness against the arbitrator in a prior legal malpractice action.[158] Noting that the expert witness did not recall the prior matter until two months after the arbitration, the Texas Supreme Court explained the record before it did not demonstrate that the prior adverse relationship was necessarily material:

> The summary judgment record here, however, is silent about whether [the arbitrator] remembered [the expert witness] or ever knew of her. Without some evidence of this, we cannot determine whether the undisclosed relationship is material to the issue of evident partiality. Clearly, the relationship could not have influenced [the arbitrator's] partiality if, in fact, he was unaware of it during the arbitration. Thus, the state of [the arbitrator's] knowledge about [the expert witness] is a fact issue material to determining his partiality.[159]

But the Houston First Court of Appeals found that a neutral arbitrator's failure to disclose his former representation of one of the parties six years before the arbitration was a basis for "debate between reasonable observers . . . on the issue of whether the nondisclosed facts 'might' create a reasonable impression of partiality."[160] The court noted that the challenging party only bore the burden to demonstrate the fact of non-disclosure, not that the undisclosed relationship created actual bias in the mediator: "UTI was required merely to present the trial court with evidence of facts which might create a reasonable impression of partiality by Hawbaker. UTI was not required to prove Hawbaker was actually biased or prejudiced in favor of TCB."[161] This was enough to support the trial court's order vacating the arbitration award.[162]

[158] *See id*. at 32–35.

[159] *Id.* at 33.

[160] Tex. Commerce Bank, N.A. v. Universal Technical Inst. of Tex., Inc., 985 S.W.2d 678, 681 (Tex. App.—Houston [1st Dist.] 1999, pet. dism'd w.o.j.).

[161] *Id.* (citing *TUCO*, 960 S.W.2d at 636).

[162] *See id.*

3. Disclosure Does Not Apply to the Non-Neutral Advocate

The Texas Supreme Court's standard for evident partiality of a neutral arbitrator does not apply to non-neutral arbitrators chosen by the parties.[163] In *TUCO*, the arbitration panel consisted of three arbitrators.[164] Each party chose one arbitrator, and those arbitrators and the parties then chose a third, neutral arbitrator.[165] The court noted that the Texas General Arbitration Act specifically applies the lack of evident partiality only to the arbitrator appointed as a "neutral arbitrator."[166]

The Texas Supreme Court classified non-neutral arbitrators chosen by the parties as advocates though it did not go so far as to find the non-neutral arbitrators to be the agents of the parties.[167] "As one court has recognized, 'An arbitrator appointed by a party is a partisan only one step removed from the controversy . . . .'"[168] Recognizing that the role of the non-neutral arbitrator likely meant that the parties would choose arbitrators with whom they possessed close ties, the court declined to require any disclosures by the arbitrator known to be serving as a party advocate.[169]

Because the court considers the non-neutral arbitrator an advocate for the party's position, a neutral arbitrator's financial or business dealings with a non-neutral arbitrator may cause a conflict that should be disclosed. In *TUCO*, the neutral arbitrator accepted the referral of a case from the law firm where one of the non-neutral arbitrators worked.[170] The law firm of the non-neutral arbitrator was not a party to the arbitration, and the law firm was not representing a party to the arbitration.[171] Nonetheless, the court concluded that the referral from the non-neutral arbitrator's law firm to the neutral arbitrator could create the appearance of partiality, and consequently the neutral arbitrator's failure to disclose the referral violated the evident

[163] *See TUCO*, 960 S.W.2d at 636–37.

[164] *Id*. at 630.

[165] *Id.* at 630 & n.2 (noting that this procedure is commonly used and that the Texas General Arbitration Act appeared to implicitly recognize the use of non-neutral arbitrators along with neutral arbitrators on a panel because of the Act's use of the term "appointed as a neutral" with regards to the evident partiality rules).

[166] *Id*. at 637; *see* TEX. CIV. PRAC. & REM. CODE ANN. § 171.088(a)(2)(A) (Vernon 2005).

[167] *See TUCO*, 960 S.W.2d at 639.

[168] *Id.* at 638 (quoting Lozano v. Md. Cas. Co., 850 F.2d 1470, 1472 (11th Cir. 1988)).

[169] *Id*. at 636–37.

[170] *Id* at 630.

[171] *Id.*

partiality rules for the arbitration process.[172] While the court specifically found that no evidence of any actual partiality or actual bias existed on the part of the neutral arbitrator, the non-disclosure created the appearance of partiality, which required the award to be vacated.[173] The court vacated the award, remanded the case to the trial court, and instructed the trial court to refer the case for further arbitration.[174]

4. The Standard for Appointed Arbitrators

In *TUCO*, the court refused to consider whether the same duty of disclosure would apply to an arbitrator that was not chosen by the parties.[175] The court noted that when the parties do not play a role in the choice of the arbitrator, "the issue becomes whether the conflict is so severe as to indicate that partiality or bias played a role in the arbitrator's decision."[176] The court did not review whether such an appointed arbitrator still possessed disclosure requirements to the parties.

The court's later decision in *Mariner Financial Group, Inc. v. Bossley* did not make this same distinction between party-chosen and third-party-appointed arbitrators.[177] In that decision, the National Association of Securities Dealers (NASD) chose the three neutral arbitrators and appointed one as chair for the proceedings.[178] The court utilized the *TUCO* standard throughout its analysis of the allegations of the evident partiality of the arbitrators, and thereby apparently extended the standard to all neutral arbitrators.[179]

Directly addressing the standards applicable to appointed arbitrators after the *TUCO* and *Mariner Financial Group* decisions, the Houston Court of Appeals determined that the *TUCO* standard should apply to all neutral arbitrators whether chosen through a process in which the parties possess some input, or blindly appointed for them.[180]

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[172] *Id.* at 639.

[173] *Id.*

[174] *Id.* at 639–40.

[175] *Id.* at 637.

[176] *Id.* at 636.

[177] 79 S.W.3d 30, 31 (Tex. 2002).

[178] *Id.*

[179] *Id.* at 32–35.

[180] Houston Vill. Builders, Inc. v. Falbaum, 105 S.W.3d 28, 32 (Tex. App.—Houston [14th Dist.] 2003, pet. denied) ("Because the Arbitrator was selected to serve as a neutral arbitrator, we

5. Changing the Rules: The Arbitration Agreement May Set Higher Standards

If the parties want to hold their dispute resolution process to a higher standard, they may contract to do so. The evident partiality standard adopted by the Texas Supreme Court only established the minimum disclosure rules imposed upon an arbitrator. For instance, in *Mariner Financial Group*, the arbitration agreement incorporated the NASD Code, "which provides not only that arbitrators should disclose relationships that 'might reasonably create an appearance of partiality or bias,' but also that they should make a 'reasonable effort' to inform themselves of such relationships."[181]

6. Disclosure Is a Continuing Duty

The court's disclosure requirement continues throughout the proceedings and requires the arbitrator to reveal any new circumstances or events that might "to an objective observer, create a reasonable impression of the arbitrator's partiality."[182] In *TUCO*, the court held that "the neutral arbitrator's failure to disclose his acceptance, during the course of the arbitration proceedings, of a substantial referral from the law firm of a non-neutral co-arbitrator established evident partiality as a matter of law."[183] "[W]e hold that a party who could have vetoed the arbitrator at the time of selection may disqualify the arbitrator during the course of the proceedings based on a new conflict which might reasonably affect the arbitrator's impartiality."[184]

In reaching its decision, the court noted that the parties had selected the neutral arbitrator in part because of assurances he gave in a retention letter.[185] This practice not only serves as evidence of the parties' attempt to discover the arbitrator's bias if any future undisclosed conflict arises, but it

conclude he was under a duty to disclose facts within his knowledge that might, to an objective observer, create a reasonable impression of his partiality.").

[181] *Mariner Fin. Group*, 79 S.W.3d at 35 (citing NASD Code of Arbitration Procedure § 10312(a)–(b)).

[182] Burlington N. R.R. v. TUCO, Inc., 960 S.W.2d 629, 636 (Tex. 1997).

[183] *Id.* at 630.

[184] *Id.* at 637.

[185] *Id.* at 637 n.8 ("[The arbitrator] knew of no condition 'that would in any way detract from [his] ability to render a truly impartial decision.'").

serves to remind the arbitrator of his duties to disclose any circumstances that might give rise to the appearance of partiality.

Any party facing arbitration in Texas should send a letter inquiring whether the arbitrators know of any circumstance that might give rise to the appearance of impartiality and requesting continued disclosure throughout the proceedings. Given the scope of opinions regarding the appearance of partiality, the party should consider including the identity of all parties, counsel, and key witnesses to the arbitration even if not previously requested by the arbitrators. This letter may protect the party against waiver arguments, may protect the arbitrators by advising them of the state of the parties' knowledge and the parties' expectations concerning disclosure, and serves as some evidence if the award is later challenged on evident partiality grounds.

7. Waiver of the Conflict

A party waives any objection based upon the evident partiality of the arbitrator if the party obtains knowledge of facts putting it on notice of a reasonable possibility of partiality but proceeds with the arbitration.[186] The Houston Court of Appeals explained:

> A party who does not object to the selection of the arbitrator or to any alleged bias on the part of the arbitrator at the time of the hearing waives the right to complain. A party may not sit idly by during an arbitration procedure and then collaterally attack that procedure on grounds not raised before the arbitrator when the result turns out to be adverse.[187]

A party must promptly assert any objection when its basis comes to light. "Of course, a party who learns of a conflict before the arbitrator issues his or her decision must promptly object [in order] to avoid waiving the complaint."[188] Waiver only occurs when the party knows of the facts or

[186] Kendall Builders, Inc. v. Chesson, 149 S.W.3d 796, 806 (Tex. App.—Austin 2004, pet. denied).

[187] Bossley v. Mariner Fin. Group, Inc., 11 S.W.3d 349, 351–52 (Tex. App.—Houston [1st Dist.] 2000), *aff'd*, 79 S.W.3d 30 (Tex. 2002) (internal citation omitted).

[188] *TUCO*, 960 S.W.2d at 637 n.9.

circumstances of the prior relationship giving rise to the claim of evident partiality.[189]

In *Kendall Builders, Inc. v. Chesson*, the court found waiver of the alleged evident partiality of the arbitrator based upon the arbitrator's conversational disclosure during a break in the proceedings that he had lost an undisclosed amount of money investing in the business where Chesson's husband worked.[190] Rather than objecting to the continuation of the proceedings, Chesson waited almost a month for the arbitrator to issue the award.[191] "Having elected to proceed with arbitration in the face of their knowledge of the arbitrator's losses in Vignette stock, appellees cannot now complain of the outcome."[192]

8. The Duty to Investigate the Arbitrator

In order to salvage an award in the face of an arbitrator's non-disclosure of relationships or conflicts, the prevailing party often attempts to ascribe a "duty to discover" the conflict or a duty to perform "a reasonable investigation" of potential conflicts to the challenging party.[193] If successful, the prevailing party could presumably argue that the challenging party waived any error despite the arbitrator's actions.

In *Mariner Financial Group,* the concurring justices evaluated whether the arbitrator's non-disclosure created the reasonable impression of partiality from the arbitrator's perspective.[194] In doing so, the concurring justices attempted to determine "whether the arbitrator could reasonably believe that the losing party already knew the facts that were not disclosed."[195] While the concurring justices disavow an attempt to impose a duty to investigate the arbitrator upon a party, they would find that a "reasonable impression" of the arbitrator's partiality would not be created when an arbitrator failed to disclose information she believed the parties

[189] *Mariner Fin. Group, Inc.*, 79 S.W.3d at 33 ("We therefore agree with the court of appeals that the Bossleys could not waive an objection that is based on a prior adverse relationship between [the arbitrator] and [the expert witness] that they knew nothing about.").

[190] 149 S.W.3d at 801.

[191] *Id*. at 801, 804–05.

[192] *Id.* at 806.

[193] *See Mariner Fin. Group*, 79 S.W.3d at 33.

[194] *Id.* at 36 (Owen, J., concurring) ("An analysis of evident partiality in cases such as this should focus on what the arbitrator could reasonably have believed the losing party knew.").

[195] *Id.* at 40.

already possessed.[196] Responding to these arguments, the majority opinion noted that the purpose of placing the disclosure duty on an arbitrator, rather than creating a duty for the party to discover information about the arbitrator, was to avoid the speculative presumption concerning the parties' knowledge and their choice to accept any relationships or prior dealings that might cause the appearance of partiality.[197] "Thus, there is no justification for the concurrence to shift the burden of disclosure from the arbitrator to a party."[198]

The Texas Supreme Court's position on a party's duty to discover the arbitrator's potential bias remains unclear. Notwithstanding its disagreement with the concurrence's attempt to excuse an arbitrator's non-disclosure based upon knowledge the parties reasonably should have known, the court declined to allow its decision to become the rule.[199] Specifically, the court noted that it was not deciding whether the challenging party possessed any duty to discover the basis of the arbitrator's alleged partiality.[200]

While reciting the apparent rule that no duty exists, the appellate courts remain cognizant that the Texas Supreme Court did not conclusively negate the duty. In *Houston Village Builders, Inc. v. Falbaum*, the prevailing party asserted that the arbitrator's non-disclosure had been waived because the arbitrator had disclosed enough information to allow the Falbaums to discover the arbitrator's attorney-client relationship with the trade association in which Houston Village Builders was a substantial member.[201] The appellate court first noted that the Texas courts have not imposed a duty to investigate the financial, social, and business relationships of the arbitrator to the parties involved in an arbitration.[202] Additionally, the court noted that waiver constitutes an affirmative defense which must be pleaded and proved, and that "Village Builders failed to establish that a reasonable investigation would have led the Falbaums to discover the Arbitrator's ongoing attorney-client relationship with the GHBA."[203]

[196] *Id.* at 40–42.

[197] *Id.* at 35 (majority opinion).

[198] *Id.*

[199] *Id.* at 33.

[200] *Id.*

[201] 105 S.W.3d 28, 35 (Tex. App.—Houston [14th Dist.] 2003, pet. denied).

[202] *Id.*

[203] *Id.*

Consequently a party should undertake a general review of the background of any neutral arbitrator so that biases that are public knowledge or readily known may be overtly evaluated prior to the arbitration. This will avoid any argument that the party waived objections to connections, relationships, or financial dealings that are so well known as to be common knowledge.

D. Vacating an Award When the Arbitrators Exceed Their Powers

The Texas General Arbitration Act allows a party to vacate an award that exceeds the scope of the arbitrators' authority.[204] The arbitrators' power derives from the arbitration agreement,[205] and a challenger considering an attack based on a claim that the arbitrators exceeded their authority should be forewarned that arbitrators have broad authority to decide any issues submitted to them, unless the arbitration agreement expressly limits that authority.[206] The scope of the arbitrators' authority includes both the matters expressly submitted to the arbitrators and those necessary by implication.[207] However, "when arbitrators attempt to determine matters not submitted to their determination, as to such matters the award is void."[208] The challenging party bears the burden to establish facts showing the arbitrators exceeded their powers.[209]

Rendering decisions on procedural issues does not exceed the arbitrators' scope of authority, even if the procedure does not follow the

[204] TEX. CIV. PRAC. & REM. CODE ANN. § 171.088(a)(3)(A) (Vernon 2005).

[205] *See id.* § 171.041(c) ("An arbitrator appointed under Subsection (b) has the powers of an arbitrator named in the agreement to arbitrate."); *see also* City of Baytown v. C.L. Winter, Inc., 886 S.W.2d 515, 518 (Tex. App.—Houston [1st Dist.] 1994, writ denied) (finding that arbiters "did not exceed their authority" in light of broad arbitration clause).

[206] Baker Hughes Oilfield Operations, Inc. v. Hennig Prod. Co., 164 S.W.3d 438, 443 (Tex. App.—Houston [14th Dist.] 2005, no pet.); Kline v. O'Quinn, 874 S.W.2d 776, 782 (Tex. App.—Houston [14th Dist.] 1994, writ denied) (finding that an agreement to arbitrate "a dispute that arises among the parties" encompassed all claims, including one for punitive damages); *see also City of Baytown*, 886 S.W.2d at 518 (finding that an agreement to arbitrate "all questions of dispute" arising under a contract gave the arbitrators authority to render an award based on changed conditions).

[207] *Baker Hughes Oilfield Operations*, 164 S.W.3d at 444.

[208] Gulf Oil Corp. v. Guidry, 160 Tex. 139, 327 S.W.2d 406, 408 (1959); *see also City of Baytown*, 886 S.W.2d at 518 ("An award that goes beyond the matters submitted for arbitration is void to that extent.").

[209] *In re* C.A.K., 155 S.W.3d 554, 564 (Tex. App.—San Antonio 2004, pet. denied).

Texas Rules of Civil Procedure.[210] For instance, in *Action Box Co. v. Panel Prints, Inc.*, Action Box sought to vacate an award arguing that the arbitrator exceeded his authority during the arbitration by misinterpreting the arbitration agreement and erroneously allowing parol evidence to construe it.[211] The court summarily rejected this argument explaining:

> Action Box does not contend that the arbitrator decided an issue that was outside the scope of the agreement, but merely that he decided an issue within the scope of that agreement incorrectly. Because this would not amount to exceeding his powers (even if true), Action Box's first issue affords no basis for relief and is overruled.[212]

If a broad arbitration provision exists, the arbitrators will not exceed their authority by determining an issue not specifically enumerated or included in the parties' specification of issues or pleadings. In *Baker Hughes Oilfield Operations, Inc. v. Hennig Production Co.*, the Houston Court of Appeals found that the parties had entered into a broad arbitration agreement that extended to any controversies between them:

> Here, Baker Hughes' field service order contained the agreement to arbitrate, stating the parties would arbitrate "any controversy or claim arising out of or relating to the Agreement or to [Baker Hughes'] services, equipment, or products provided to Customer." This is, by its plain language, a broad arbitration provision and subsumes *any* controversy or claim arising out of or relating to Baker Hughes' services.[213]

The court concluded that the claims covered included both causes of action asserted in contract and those asserted in tort.[214]

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[210] *Kline*, 874 S.W.2d at 783; *see also* Crossmark, Inc. v. Hazar, 124 S.W.3d 422, 434 (Tex. App.—Dallas 2004, pet. denied) ("As we have already noted, absent a specific agreement the rules of civil procedure and joinder of claims and parties do not apply in arbitration."); *City of Baytown*, 886 S.W.2d at 519 (finding that arbitrators possessed the authority to determine the timeliness of the demand for arbitration).

[211] 130 S.W.3d 249, 252 (Tex. App.—Houston [14th Dist.] 2004, no pet.).

[212] *Id.*

[213] 164 S.W.3d 438, 443 (Tex. App.—Houston [14th Dist.] 2005, no pet.).

[214] *Id.* at 444 n.5.

Similarly, the Austin Court of Appeals found that an arbitration panel possessed the authority to determine and fashion a remedy borne from the breach of contract presented to it in the arbitration.[215] The court noted that if an issue has properly been submitted to the arbitrators for resolution, then "arbitrators have traditionally enjoyed broad leeway to fashion remedies."[216] The court explained:

> In the present case, the CannonBear Group asked the arbitration panel to find a breach of contract, which the panel found. The CannonBear Group also asked for damages commensurate with that breach, which the panel awarded. Unlike *Guidry*, the arbitration panel in this case did not attempt to determine matters not submitted for its determination; the panel here clearly had the authority to fashion a remedy for the breach of the contractual requirement that Thermo use its "best efforts."[217]

In this same vein, the Houston Court of Appeals in *J.J. Gregory Gourmet Services, Inc. v. Antone's Import Co.* upheld the arbitrators' authority to award injunctive relief in a dispute arising from alleged breaches of a franchise agreement though neither party specifically requested this result or relief.[218] "In light of the broad arbitration clause in the agreement—and in the absence of any language specifically prohibiting the arbiters from granting injunctive relief—we conclude that the arbiters did not exceed their authority in awarding such relief."[219]

Notwithstanding these decisions, a court possesses a duty to vacate an award where, as in the matter of *Barsness v. Scott*[220], the arbitrators decide a matter not properly before them.[221] In *Barsness*, the court did not fault the

[215] Daniewicz v. Thermo Instrument Sys., Inc., 992 S.W.2d 713, 718 (Tex. App.—Austin 1999, pet. denied).

[216] *Id.*

[217] *Id.* (referring to Gulf Oil Corp. v. Guidry, 160 Tex. 139, 327 S.W.2d 406, 408 (1959)).

[218] 927 S.W.2d 31, 36 (Tex. App.—Houston [1st Dist.] 1995, no writ).

[219] *Id.*

[220] 126 S.W.3d 232, 241 (Tex. App.—San Antonio 2003, pet. denied). *Barsness* is discussed *supra* Part III.B.

[221] *See id.*; *Guidry*, 160 Tex. 139, 327 S.W.2d at 408. In *Guidry*, the Texas Supreme Court reviewed an arbitration award that reinstated an employee after termination following a fight at the work site and imposed punishments or penalties upon the employee. *Id.* at 407. The Texas Supreme Court found that the only issue submitted to the arbitrators had been whether cause existed to terminate the employee. *Id.* at 408. Because the award contained additional provisions

scope of the arbitrators' original award, but rather found that they possessed no authority to modify or clarify an award in order to add substantive relief that had previously been denied.[222] "When the panel subsequently modified its original award, when none of the requirements for modification under sections 171.054 and 171.091 were present, the panel exceeded its authority. The trial court was therefore required under section 171.088 to vacate the arbitration panel's modified award." [223]

E. Challenging an Award Based upon the Arbitrators' Refusal to Postpone a Hearing or Manner of Conducting the Hearing

In order to postpone a hearing, the movant must show "sufficient cause" to continue the arbitration.[224] The courts have not defined this standard and it is not a common basis upon which to challenge an award.

The decision of *Crossmark, Inc. v. Hazar* arose out of Crossmark's agreement to purchase a consumer products brokerage company, Action Brokerage, Inc., owned by the Hazars.[225] As part of the deal, but in separate agreements, Crossmark entered covenants not to compete with the Hazars in exchange for the payment of $600,000 over a ten year period.[226] After the initiation of an arbitration to decide a dispute between Crossmark and the Hazars concerning the payments owed as consideration for these covenants not to compete, Crossmark sought to add Action Brokerage, Inc. as a necessary party to the arbitration.[227] The arbitrators disagreed with Crossmark's characterization of Action Brokerage as a necessary party because the company was not a party to the separate covenant not to compete agreements.[228] Nonetheless, the arbitrators agreed to consider consolidating the two arbitration proceedings if Crossmark instituted a

relating to penalties imposed upon the employee after reinstatement, the court found that the arbitrators had exceeded their authority and vacated the award. *Id.*

[222] *Barsness*, 126 S.W.3d at 241. The original award declared neither party to be the prevailing party. *Id.* at 236. After an application to modify this determination, the arbitration panel declared Scott to be the prevailing party, awarded Scott one dollar in nominal damages, and granted Scott more than three hundred fifty thousand dollars in attorneys' fees. *Id.* at 236–37.

[223] *Id.* at 241–42.

[224] *See* TEX. CIV. PRAC. & REM. CODE ANN. § 171.088(a)(3)(B) (Vernon 2005); Crossmark, Inc. v. Hazar, 124 S.W.3d 422, 432 (Tex. App.—Dallas 2004, pet. denied).

[225] 124 S.W.3d at 427.

[226] *Id.*

[227] *Id.* at 432.

[228] *Id.*

separate arbitration against Action Brokerage.[229] Crossmark waited until six days prior to the scheduled arbitration with the Hazars and then sought to initiate the arbitration against Action Brokerage and to postpone the arbitration with the Hazars.[230] The arbitrators heard this motion on the first day of the arbitration with the Hazars and denied it.[231] Upon review, both the trial court and the appellate court determined that these facts did not show sufficient cause to warrant the postponement of the arbitration or to vacate the subsequent award.[232]

The *Hoggett* decision arose out of a fee dispute between Mr. Hoggett and his counsel.[233] At the time for the arbitration proceeding, counsel for Hoggett appeared but stated that Mr. Hoggett could not be present because he was "under a deadline to complete discovery" in the underlying lawsuit.[234] Consequently, Hoggett's counsel requested that the arbitrators postpone the hearing due to the fact that Mr. Hoggett could not attend the hearing and had not been able to consult with his counsel in preparation for the hearing.[235] The arbitrators refused the request and proceeded with the arbitration, rendering an award in favor of the law firm, which the trial court confirmed.[236] On appeal, the Houston Court of Appeals noted that the grounds to postpone an arbitration should be similar to the grounds to postpone a trial.[237] "That a party to a lawsuit has other business engagements is generally not a ground for which a trial court will grant a continuance."[238] The court explained:

> Instead, a request for postponement due to the absence of a party at trial must also show such things as: the diligence used to arrange for the presence of the party, that the conflicting business engagements could not be rescheduled, that the nature of the business engagements was such as to

[229] *Id.*

[230] *Id.*

[231] *Id.*

[232] *Id.*

[233] Hoggett v. Zimmerman, Axelrad, Meyer, Stern & Wise, P.C., 63 S.W.3d 807, 809 (Tex. App.—Houston [14th Dist.] 2001, no pet.).

[234] *Id.* at 811.

[235] *Id.*

[236] *Id.* at 809, 811.

[237] *Id.* at 811.

[238] *Id.* (citing Echols v. Brewer, 524 S.W.2d 731, 733–34 (Tex. Civ. App.—Houston [14th Dist.] 1975, no writ)).

> require the personal presence of the party, and that they could not be represented at the conflicting engagement by someone else.[239]

Because Hoggett possessed sufficient notice of the hearing, the court found that his failure to arrange his affairs to accommodate preparation for and attendance at the arbitration hearing did not require postponement of the proceeding.[240]

F. Seeking Vacatur When the Arbitrators Refused to Hear Evidence Material to the Controversy

The Texas General Arbitration Act authorizes a trial court to vacate an award if the arbitrators "refused to hear evidence material to the controversy."[241] In *IPCO-G. & C. Joint Venture v A.B. Chance Co.*, IPCO asserted that the award should be vacated because the arbitrator refused to consider additional evidence after the arbitration award had been rendered.[242] During the arbitration, IPCO did not assert that any evidence it desired to present had been refused.[243] After rendering an initial award, the arbitrator gave IPCO an additional hearing and a chance to present additional evidence supporting its motion to modify the arbitration award.[244] Once the arbitrator overruled this motion, IPCO attempted to introduce additional affidavits of counsel and experts.[245] The arbitrator refused and the trial court upheld this refusal.[246] On appeal, the Houston Court of Appeals found that the parties' agreement granted the arbitrator "broad discretion in determining whether evidence was relevant and material to the dispute and in accepting or rejecting such evidence."[247] On the record before it, the appellate court agreed with the trial court that the arbitrator's decision not to allow further evidence to be submitted was insufficient cause to vacate the award.[248]

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[239] *Id.*

[240] *Id.*

[241] TEX. CIV. PRAC. & REM. CODE ANN. § 171.088(a)(3)(c) (Vernon 2005).

[242] 65 S.W.3d 252, 259 (Tex. App.—Houston [1st Dist.] 2001, pet. denied**)**.

[243] *Id.*

[244] *Id.* at 259–60.

[245] *Id.* at 260.

[246] *Id.*

[247] *Id.*

[248] *Id.*

G. Vacating an Award Because There Was Not a Proper Agreement to Arbitrate

To avoid an arbitration award based on a claim that the underlying arbitration agreement was fraudulently induced, the challenging party must show that the fraudulent inducement specifically concerned the agreement to arbitrate rather than the underlying agreement as a whole.[249] A court should not consider claims of fraud relating to the underlying agreement, because such claims are to be determined by the arbitrators.[250]

The same rule applies to arguments that the underlying contract is void or illegal. In *Women's Regional Healthcare, P.A. v. FemPartners of North Texas, Inc.*, the court found that the Texas General Arbitration Act (section 171.088) was not properly invoked by raising the illegality of the contract prior to the arbitration without alleging that no agreement existed to arbitrate, alleging that the arbitration provision was invalid under contract principals, or objecting to the arbitration proceeding on the ground of the lack of an agreement:

> An objection to the validity of a contract containing an agreement to arbitrate as a whole does not satisfy the statute. Rather, if the parties' dispute arises from a contract containing an arbitration clause, a challenge to the contract as a whole—as opposed to a challenge specific to the arbitration clause itself—must be resolved by the arbitrators.[251]

[249] Holk v. Biard, 920 S.W.2d 803, 807 (Tex. App.—Texarkana 1996, no writ); *see also In re* Educ. Mgmt. Corp., 14 S.W.3d 418, 425 (Tex. App.—Houston [14th Dist.] 2000, no pet.) ("Fraud in the inducement of an arbitration provision is a matter for the trial court whereas fraud in the inducement of an entire agreement is a matter for the arbitrator."); Gerwell v. Moran, 10 S.W.3d 28, 33 (Tex. App.—San Antonio 1999, no pet.) (finding that the fraudulent inducement must go to the agreement to arbitrate itself and not to the underlying contract).

[250] *Holk*, 920 S.W.2d at 807.

[251] 175 S.W.3d 365, 368 (Tex. App.—Houston [1st Dist.] 2005, no pet.); *see also In re* David's Supermarkets, Inc., 43 S.W.3d 94, 98 n.7 (Tex. App.—Waco 2001, no pet.) (noting that the arbitrator must resolve a challenge to a contract as a whole).

VI. MODIFYING OR CORRECTING AN AWARD

A trial court may modify an award in limited circumstances as defined by the Texas General Arbitration Act.[252] A court may not, on its own motion, modify or correct an award:

> Courts are not free to simply change an arbitrator's award. "An arbitration award has the same effect as the judgment of a court of last resort, and a trial judge reviewing the award may not substitute his or her judgment for the arbiters' merely because he would have reached a different decision."[253]

A party must apply to modify or correct an award within ninety days of the receipt of a copy of the award.[254] If the application is granted, the court shall modify or correct the award and confirm the corrected award.[255] If denied, the court shall confirm the arbitrators' original award.[256]

As in a motion to vacate, a party should file a motion to modify or correct an award before the court hears and decides a motion to confirm the award. Though the Houston Court of Appeals in *Hamm v. Millennium Income Fund, L.L.C.* evaluated the timing of a motion to vacate the award,[257] the same rule applies to a motion to modify or correct an award. The Houston Court of Appeals' determination that the Texas General Arbitration Act created a due order of pleadings also dictates that a party should file a motion to modify or correct an award before the court decides a motion to confirm the award.[258]

Following an arbitration, the party seeking to modify or correct an award bears "the burden in the trial court of bringing forth the complete

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[252] Cooper v. Bushong, 10 S.W.3d 20, 26 (Tex. App.—Austin 1999, pet. denied).

[253] *Id.* (internal citations omitted) (citing Babcock & Wilcox Co. v. PMAC, Ltd., 863 S.W.2d 225, 229 (Tex. App.—Houston [14th Dist.] 1993, writ denied)); Island on Lake Travis, Ltd. v. Hayman Co. Gen. Contractors, 834 S.W.2d 529, 534 (Tex. App.—Austin 1992, writ granted w.r.m.) (quoting Bailey & Williams v. Westfall, 727 S.W.2d 86, 90 (Tex. App.—Dallas 1987, writ ref'd n.r.e.)).

[254] *See* TEX. CIV. PRAC. & REM. CODE ANN. § 171.091(b) (Vernon 2005).

[255] *Id.* § 171.091(c).

[256] *Id.*

[257] 178 S.W.3d 256, 262–63 (Tex. App.—Houston [1st Dist.] 2005, pet. filed).

[258] *Id.* at 262.

record to establish its basis for vacating or modifying the award."[259] A trial court does not err in confirming an award if no record is presented.[260]

A. Awards Containing an Evident Miscalculation of Numbers or an Evident Mistake in the Description of a Person, Property, or Thing

Courts may correct miscalculations and erroneous descriptions that appear on the face of the award and result from inadvertent error. The court may not correct any error that requires a determination of the arbitrators' intent. An "evident miscalculation" must be shown "clearly, concisely, and conclusively" in the record.[261] The Dallas Court of Appeals explained: "'Miscalculation implies inadvertence or an error caused by oversight.' If the amount of the award can be rationally inferred from the facts submitted to the arbitrator, there is no evident miscalculation."[262]

In *Vernon E. Faulconer, Inc. v. HFI Ltd. Partnership*, the Tyler Court of Appeals set forth the standard for awards containing an evident miscalculation of numbers:

> A court may not overturn an award based upon "evident miscalculation of figures" unless the mistake is clear, concise and conclusive from the record. "Miscalculation" implies inadvertence or an error caused by oversight. If the amount of the award is rationally inferable from the facts before the arbitrator, there is no evident miscalculation of figures. Furthermore, if the amount of the award falls within the range established by the testimony, we should not disturb the award on that basis. A claimant's dissatisfaction with the amount of an award will not support a judicial modification of that award.[263]

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[259] C.D. Henderson, Inc. v. Yates Concrete, Inc., No. 05-04-00376-CV, 2005 WL 1120004, at *2 (Tex. App.—Dallas May 12, 2005, no pet.) (unreported mem. op.).

[260] *Id.*

[261] *See id.* at *3.

[262] *Id.* (quoting Crossmark, Inc. v. Hazar, 124 S.W.3d 422, 436 (Tex. App.—Dallas 2004, pet. denied)) (internal citations and quotation marks omitted).

[263] 970 S.W.2d 36, 40 (Tex. App.—Tyler 1998, no pet.) (citing City of Baytown v. C.L. Winter, Inc., 886 S.W.2d 515, 519 (Tex. App.—Houston [1st Dist.] 1994, writ denied); Babcock & Wilcox Co. v. PMAC, Ltd., 863 S.W.2d 225, 235 (Tex. App.—Houston [14th Dist.] 1993, writ

An "evident miscalculation of numbers" does not "allow a reviewing court to modify or correct an award based on an arbitrator's 'evident mistake' in failing to award damages."[264] *Callahan & Associates v. Orangefield Independent School District* (OISD) involved a dispute concerning the design and construction of asphalt driveways for the school district.[265] During the arbitration, OISD presented evidence as to the cost to replace the asphalt driveway with a concrete driveway, but failed to present any evidence as to the cost to repair the driveway.[266] The arbitrator found Callahan at fault for the design of the driveway, but failed to award damages to OISD due to the fact that OISD presented no evidence as to the cost to repair the asphalt driveway.[267] The trial court confirmed the award while the appellate court reversed and remanded the award on this issue, finding that the arbitrator made an evident mistake in failing to award OISD damages.[268] The Texas Supreme Court addressed the issues and gave a strict construction to the terms of the Texas General Arbitration Act. The court found that the Act permits an arbitration award to be modified when it contains an "evident miscalculation of figures" or an "evident mistake in the description of a person, thing, or property referred to in the award" but found no support within the Act for correcting, supplementing, or changing an award, or lack thereof, made by an arbitrator.[269] "Because an arbitrator's mere failure to award damages is not a ground under the Act or the common law for modifying or correcting an award, we hold that the court of appeals erred in reversing, in part, the trial court's summary judgment confirming the arbitration award."[270]

Similarly, in *Barsness v. Scott*, Scott sought to prove an indemnity claim of one million dollars against Barsness as part of his claimed damages.[271]

denied); Riha v. Smulcer, 843 S.W.2d 289, 293 (Tex. App.—Houston [14th Dist.] 1992, writ denied)).

[264] Callahan & Assocs. v. Orangefield Indep. Sch. Dist., 92 S.W.3d 841, 844 (Tex. 2002) (per curiam); *see also* Barsness v. Scott, 126 S.W.3d 232, 239 n.1 (Tex. App.—San Antonio 2003, pet. denied) (citing *Callahan*, 92 S.W.3d at 844, in explaining that the trial court exceeded its authority when it added an indemnity award to its judgment that the arbitration panel had excluded).

[265] *Callahan*, 92 S.W.3d at 842.

[266] *Id.*

[267] *Id.*

[268] *Id.* at 843.

[269] *Id.* at 844.

[270] *Id.*

[271] 126 S.W.3d 232, 236 (Tex. App.—San Antonio 2003, pet. denied).

The arbitration panel mentioned the claim in the factual findings of its original award and also in a modified award, but did not enter any decree granting Scott's indemnity claim.[272] Upon review in the trial court, the judge confirmed the modified award but added a section to the judgment allowing Scott's indemnity claim.[273] The San Antonio Court of Appeals found that the Texas General Arbitration Act defined the instances when the arbitrators' award could be modified or corrected, and held that "none of the aforementioned grounds support the trial court's decision to include a one million dollar indemnity award in its judgment because the trial court included relief the arbitration panel implicitly denied Scott."[274] Further, the appellate court ruled that "[b]ecause the panel's decisions reflect no intention of awarding Scott one million dollars as an indemnity award, the trial court exceeded its authority by adding the indemnity award to its judgment."[275]

In *Crossmark, Inc. v. Hazar*, the court also disagreed with the challenging party's contention that the arbitrators' method of determining damages and failure to allow certain offsets constituted an evident miscalculation of numbers.[276] The court held:

> Crossmark failed to show the arbitrators made any miscalculation or mistake in calculating the award. Rather, the record indicates the arbitrators rejected Crossmark's argument for a discount based on the language of the non-competition agreements. The arbitrators' rejection of Crossmark's arguments for a discount to present value was not inadvertence or an error caused by oversight; thus it was not an "evident miscalculation of numbers."[277]

The court in *Riha v. Smulcer* reached the same result, noting that "[t]he arbitrator's failure to specify how he applied the credits in calculating the award is not an 'evident miscalculation of figures' and it is not evident from

[272] *Id.* at 236–37.

[273] *Id.* at 237.

[274] *Id.* at 238.

[275] *Id.* at 239.

[276] 124 S.W.3d 422, 436 (Tex. App.—Dallas 2004, pet. denied).

[277] *Id.* (citing Riha v. Smulcer, 843 S.W.2d 289, 293 (Tex. App.—Houston [14th Dist.] 1992, writ denied)).

the record the arbitrator miscalculated any of the figures he had before him."[278]

In *Cooper v. Bushong*, the trial court on its own motion reduced the arbitrator's child support award from $35,000 to $30,000, but otherwise affirmed the award.[279] The Austin Court of Appeals found that "[b]ecause no grounds exist for modifying or correcting the arbitrator's award, we conclude that the district court was precluded from interfering with the arbitrator's jurisdiction and impermissibly modified the arbitrator's decision."[280]

Based upon these decisions, the lack of an award by an arbitration panel equates to denial of the requested relief. A trial court may not modify the award to reflect its belief or supposition as to the arbitrators' intentions. Any effort by the trial court to add or to remove relief exceeds the trial court's modification powers.

B. Decisions Containing Awards Not Submitted to the Arbitrators for Decision

The Texas General Arbitration Act allows a trial court to modify an award, as opposed to vacating an entire award, if the "arbitrators have made an award with respect to a matter not submitted to them and the award may be corrected without affecting the merits of the decision made with respect to issues that were submitted."[281]

The courts generally use the deference granted arbitrators' decisions as a means to avoid changing a portion of the award, and no court has modified particular issues or relief within an award based upon a finding that the particular matter had not been submitted to the arbitrators. The party challenging an award on this basis generally seeks to vacate the entire award based upon the argument that the arbitrators "exceeded their powers" rather than attempting to find limited relief on a single issue.[282]

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[278] 843 S.W.2d at 293.

[279] 10 S.W.3d 20, 26 (Tex. App.—Austin 1999, pet. denied).

[280] *Id.*

[281] TEX. CIV. PRAC. & REM. CODE ANN. § 171.091(a)(2) (Vernon 2005). *Compare to id.* § 171.088 (Vernon 2005) (allowing a court to vacate an award when the arbitrators exceed their powers).

[282] *See* Kline v. O'Quinn, 874 S.W.2d 776, 781 (Tex. App.—Houston [14th Dist.] 1994, writ denied).

In *Kline v. O'Quinn*, the trial court believed that the parties' arbitration agreement did not allow an award of punitive damages, and the court confirmed the award after using its modification powers to strike the arbitrator's decision to award punitive damages to Kline.[283] Upon review, the appellate court determined that the parties' broad agreement to arbitrate "a dispute that arises among the parties" included both contract and tort claims without limitation as to the damages that could be awarded.[284] The appellate court determined that the award should not have been modified to remove punitive damages.[285]

C. Awards That Are "Imperfect" in a Manner Not Affecting the Merits of the Controversy

The Texas General Arbitration Act allows a trial court to modify or correct the "form" of an award when the correction will not affect the "merits of the controversy."[286] However, the trial court may not speculate as to the intent of the arbitrators.[287]

In *Baker Hughes Oilfield Operations v. Hennig Production Co.*, the arbitrators awarded Hennig prejudgment interest, but failed to include the date that the interest calculation started.[288] The trial court exercised its modification power and inserted the date that Baker Hughes filed for arbitration as the date from which the accrual of pre-judgment interest would be calculated.[289] On appeal, Baker Hughes argued that the trial judge had erroneously decided a substantive legal issue while Hennig argued that the inclusion of the date did not impact the merits of the controversy, but only corrected an award that was imperfect in its form.[290] On review, the appellate court determined that the arbitrators had awarded prejudgment interest but failed to include a date enabling its calculation.[291] Consequently, the appellate court distinguished other opinions where a trial

[283] *Id*.

[284] *Id.* at 782.

[285] *Id.* at 784.

[286] *See* TEX. CIV. PRAC. & REM. CODE ANN. § 171.091(a)(3) (Vernon 2005).

[287] Baker Hughes Oilfield Operations v. Hennig Prod. Co., 164 S.W.3d 438, 447 (Tex. App.—Houston [14th Dist.] 2005, no pet.).

[288] *Id.* at 446.

[289] *Id.*

[290] *Id.*

[291] *Id.* at 447.

court had modified either the rate of prejudgment interest or the award of prejudgment interest and held that:

> [T]he trial court's judgment merely effectuates the arbitrators' award of interest and is therefore permitted under Section 171.091, which directs the court to modify the form of an otherwise imperfect award.
>
> As evidenced by the award, the arbitrators intended to award prejudgment interest. Thus, the trial court did not resort to speculation regarding the arbitrators' intent, but only corrected the form of an imperfect award to effectuate that intent.[292]

VII. ARGUMENTS OF LAST RESORT—COMMON LAW AND PUBLIC POLICY

While common law and public policy grounds for challenging arbitration decisions have not been awarded great deference, the courts consistently entertain these reasons for vacating, modifying, or correcting imperfect awards. Unless the Texas Supreme Court holds that the Texas General Arbitration Act preempts the common law grounds for review of errors, parties seeking to correct errors in the arbitration process should still advance these arguments.

A. Common Law Grounds

In defining the common law standards, courts have held that the test for determining whether to vacate an arbitration award is whether the award is "tainted with fraud, misconduct, or [such] gross mistake as would imply bad faith and failure to exercise honest judgment."[293] Other courts have

[292] *Id.* at 448 (citing TEX. CIV. PRAC. & REM. CODE ANN. § 171.091 (a)(3), (c) (Vernon 2005)).

[293] Universal Computer Sys., Inc. v. Dealer Solutions, L.L.C., 183 S.W.3d 741, 752 (Tex. App.—Houston [1st Dist.] 2005, pet. filed) (citing IPCO-G. & C. Joint Venture v. A.B. Chance Co., 65 S.W.3d 252, 256 (Tex. App.—Houston [1st Dist.] 2001, pet. denied) (quoting Teleometrics Int'l., Inc. v. Hall, 922 S.W.2d 189, 193 (Tex. App.—Houston [1st Dist.] 1995, writ denied))); Anzilotti v. Gene D. Liggin, Inc., 899 S.W.2d 264, 266 (Tex. App.—Houston [14th Dist.] 1995, no writ) (quoting Carpenter v. N. River Ins. Co., 436 S.W.2d 549, 551 (Tex. Civ. App.—Houston [14th Dist.] 1968, writ ref'd n.r.e.)); *see* Callahan & Assocs. v. Orangefield Indep. Sch. Dist., 92 S.W.3d 841, 844 (Tex. 2002) (citing *Teleometrics*, 922 S.W.2d at 193); L.H.

added that in order for a "gross mistake" to exist the "arbitrator's misconduct must be such that it deprived a party of a fair hearing."[294] "Gross mistake results in a decision that is arbitrary or capricious."[295] However, a gross mistake does not mean an egregious mistake of fact or law.[296] "An honest judgment made after due consideration given to conflicting claims, however erroneous, is not arbitrary or capricious."[297]

"The party seeking to vacate an arbitration award has the burden of demonstrating how the arbitrators made a gross mistake."[298] When asserting common law grounds to challenge the validity of an arbitration award, parties often confuse the standard with the ability to revisit either the factual or legal conclusions of the arbitrators. However, the courts will not allow a common law basis for objection to the award to be used as a vehicle for challenging the arbitrators' decisions. Rather, the party using a common law ground must only assert how the arbitrators' gross mistake, fraud, or misconduct occurred and whether it rises to the level of bad faith requiring the award to be voided. The courts will not retry the claim under the guise of determining whether the arbitrators committed a gross mistake. The decision of *Universal Computer Systems v. Dealer Solutions*, decided by the Houston Court of Appeals in November 2005, most poignantly demonstrates this fact.[299]

In *Universal Computer Systems*, the petitioner raised several factual and legal arguments that it considered gross mistakes.[300] First, Universal Computer Systems (UCS) asserted the arbitrators improperly interpreted a license agreement that existed between the parties.[301] The Houston Court of

Lacy Co. v. City of Lubbock., 559 S.W.2d 348, 352 (Tex. 1977); *Baker Hughes Oilfield Operations*, 164 S.W.3d at 446; Monday v. Cox, 881 S.W.2d 381, 385 n.1 (Tex. App.—San Antonio 1994, writ denied).

[294] C.D. Henderson, Inc. v. Yates Concrete, Inc., No. 05-04-00376-CV, 2005 WL 1120004, at *2 (Tex. App.—Dallas May 12, 2005, no pet.) (unreported mem. op.) (citing GJR Mgmt. Holdings, L.P. v. Jack Raus, Ltd., 126 S.W.3d 257, 263 (Tex. App.—San Antonio 2003, pet. denied)).

[295] *Universal Computer Sys.*, 183 S.W.3d at 752 (quoting Bailey & Williams v. Westfall, 727 S.W.2d 86, 90 (Tex. App.—Dallas 1987, writ ref'd n.r.e.)).

[296] *Anzilotti*, 899 S.W.2d at 266.

[297] *Universal Computer Sys.*, 183 S.W.3d at 752 (quoting Bailey & Williams v. Westfall, 727 S.W.2d 86, 90 (Tex. App.—Dallas 1987, writ ref'd n.r.e.)).

[298] *Id.* (citing *Anzilotti*, 899 S.W.2d at 267).

[299] *See generally id.*

[300] *Id.* at 744.

[301] *Id.* at 751.

Appeals found that "[i]t is not our province to determine the proper construction of the parties' license agreement. Instead, our review is limited to whether the arbitrators' failure to adopt UCS's interpretation of the license agreement constitutes bad faith or a failure to exercise honest judgment."[302] Noting that the record contained conflicting evidence as to the interpretation of the agreement, the court found that no bad faith had occurred.[303] Second, UCS asserted the arbitrators failed to follow leading case law or well settled law as to findings regarding trade secrets.[304] The Houston Court of Appeals held that "[t]hese alleged errors in the application of substantive law by the arbitrators during the proceedings in arbitration are not reviewable by the court on a motion to vacate an award."[305] Third, UCS argued that the arbitrators committed a gross mistake by failing to award damages for the misappropriation of its trade secrets.[306] The court held that the failure to award damages does not rise to the level of a gross mistake in light of the arbitrators' conclusions that the evidence on damages was speculative.[307] Finally, UCS asserted gross mistake based upon the arbitrators' finding that federal copyright law preempted trade secret misappropriation claims.[308] Again, the court refused to second guess the arbitrators' application of the law, explaining:

> [O]ur review is confined to whether the record indicates the arbitrators acted in bad faith or failed to exercise honest judgment—not whether we agree or disagree with their application of the law. Here, the arbitrators relied on four Texas state and federal cases in deciding the preemption issue, and we find nothing in the record indicating that the arbitrators acted in bad faith or failed to exercise honest judgment.[309]

[302] *Id.* at 753 (internal citations omitted) (citing House Grain Co. v. Obst, 659 S.W.2d 903, 907 (Tex. App.—Corpus Christi 1983, writ ref'd. n.r.e.).

[303] *Id.*

[304] *Id.*

[305] *Id.* (quoting Jamison & Harris v. Nat'l Loan Investors, 939 S.W.2d 735, 737 (Tex. App.—Houston [14th Dist.] 1997, writ denied). *See* Baker Hughes Oilfield Operations v. Hennig Prod. Co., 164 S.W.3d 438, 443 (Tex. App.—Houston [14th Dist.] 2005, no pet.).

[306] *Universal Computer Sys.*, 183 S.W.3d at 753.

[307] *Id*. at 754.

[308] *Id.*

[309] *Id*. (footnote omitted).

Finally, the Texas courts have rejected the "manifest disregard of the law" standard used in some federal court decisions concerning the Federal Arbitration Act.[310] Determining that the manifest disregard standard has only been examined in cases involving the Federal Arbitration Act, and noting that the United States Supreme Court had "largely rejected" the doctrine, the Houston Court of Appeals refused to apply the doctrine to an appeal involving the Texas General Arbitration Act.[311]

B. Public Policy Grounds

Parties may also use public policy grounds to attack the validity of an arbitration award. Evaluating whether public policy grounds may be advanced as a basis to avoid the enforcement of an arbitration award, the Texas Supreme Court reaffirmed its 1936 holding in *Smith v. Gladney* that "a claim arising out of an illegal transaction . . . is not a legitimate subject of arbitration, and an award based thereon is void and unenforceable in courts of the country."[312] But mere disagreement with the arbitrators' application of "contract interpretation" rules does not amount to a public policy ground for modifying, correcting, or vacating an arbitration award.[313] Similarly, an "arbitrator's mere disagreement with a judge does not violate public policy" or vice versa.[314] Instead, an arbitration award may be challenged using public policy grounds only "in an extraordinary case in which the award clearly violates carefully articulated, fundamental policy."[315] As an example, the court noted that "the homestead is given special protections in the Texas Constitution and in the Property Code provisions dealing with mechanic's liens. An arbitration award made in direct contravention of those protections would violate public policy."[316]

The public policy arguments asserted by challenging parties often delve into the underlying decisions of the arbitrators just as flawed common law theories tend to do. When reviewing public policy grounds to vacate an

[310] Action Box Co. v. Panel Prints Inc., 130 S.W.3d 249, 252 (Tex. App.—Houston [14th Dist.] 2004, no pet.).

[311] *Id.*

[312] CVN Group, Inc. v. Delgado, 95 S.W.3d 234, 237 (Tex. 2002) (quoting Smith v. Gladney, 128 Tex. 354, 98 S.W.2d 351, 351 (1936)).

[313] *See Action Box*, 130 S.W.3d at 253.

[314] *CVN Group*, 95 S.W.3d at 239.

[315] *Id*; *see Action Box*, 130 S.W.3d at 253; Crossmark, Inc. v. Hazar, 124 S.W.3d 422, 430 (Tex. App.—Dallas 2004, pet. denied).

[316] *CVN Group*, 95 S.W.3d at 239 (footnote omitted).

award, the courts do not review or revisit the arbitrators' alleged errors in applying the substantive law.[317] In *Crossmark v. Hazar*, the Dallas Court of Appeals wrote:

> Rather than raising public policy arguments, Crossmark's contentions raise only the legal argument of whether the arbitrators should have considered all the agreements together as one instrument. Crossmark's real contention is that the arbitrators erred by refusing to accept its failure of consideration defense. The trial court could not review these non-statutory and non-public policy grounds for challenging the award. . . . Any alleged errors by the arbitrators in applying the substantive law are not subject to review in the courts. Because Crossmark's arguments at most raise issues as to the application of law, as opposed to presenting fundamental public policy arguments, the trial court could not have set aside the arbitrators' award on the basis of Crossmark's first three issues. Consequently, the trial court properly confirmed and refused to vacate the award on public policy grounds.[318]

VIII. FURTHER PROCEEDINGS

A. Proceedings After Vacatur or Modification

If a party successfully challenges and vacates an arbitration award, the trial court should not then order the parties to trial. Errors in the first arbitration do not mean that the issues must thereafter be decided by the courts. Excepting instances where the grounds for vacating the award involved the finding that no agreement to arbitrate existed, the Texas General Arbitration Act provides that upon vacating an award the trial court should order a "rehearing before new arbitrators" chosen in accordance with

[317] *Crossmark*, 124 S.W.3d at 435.

[318] *Id.* (internal citations omitted) (citing *CVN Group*, 95 S.W.3d at 239; Courage Co. v. Chemshare Corp., 93 S.W.3d 323, 333 (Tex. App.—Houston [14th Dist.] 2002, no pet.); J.J. Gregory Gourmet Servs., Inc. v. Antone's Imp. Co., 927 S.W.2d 31, 35 (Tex. App.—Houston [1st Dist.] 1995, no writ); Anzilotti v. Gene D. Liggin, Inc., 899 S.W.2d 264, 266 (Tex. App.—Houston [14th Dist.] 1995, no writ)).

the parties' arbitration agreement or by the court if the parties' agreement does not contain a method for choosing arbitrators.[319] If the grounds for vacating the award arise from the arbitrators exceeding their authority, refusing to postpone a hearing, refusing to hear material evidence, or conducting the hearing in a manner that substantially prejudiced the rights of a party, then the trial court may refer the matter back to the original arbitrators or their successors.[320] When a party successfully moves to modify an award, the trial court shall modify the award to effect its intent and confirm the corrected award.[321]

Reviewing the statutory alternatives following the vacation of an award, the appellate court in *Koch v. Koch* found that the trial court did not possess the power to order the parties to trial.[322] The San Antonio Court of Appeals held:

> Because the statute does not provide language that allows the court to set the case for trial, we will follow the explicit language in the statute. Since the statute provides that the trial court is limited to either modifying the award or referring the matter back to the arbitrator for a rehearing, we find that the trial court abused its discretion when it sent the parties to trial because setting the dispute for trial is not within the alternatives permitted by the statute.[323]

B. Appealing the Trial Court's Decision

The Texas General Arbitration Act defines the instances when a party may appeal the trial court's decision concerning arbitration. Under the Act, a party may file an appeal of a "judgment," "decree," or "order" that:

> (1) denies an application to compel arbitration;
>
> (2) grants an application to stay arbitration;
>
> (3) confirms or denies confirmation of an award;
>
> (4) modifies or corrects an award; or

[319] *See* TEX. CIV. PRAC. & REM. CODE ANN. § 171.089(a) (Vernon 2005).

[320] *Id.* § 171.089(b).

[321] *Id.* § 171.091(c).

[322] 27 S.W.3d 93, 97 (Tex. App.—San Antonio 2000, no pet.).

[323] *Id.*

> (5) vacates an award without directing a rehearing.[324]

Evaluating the meaning of the statute, the Houston Court of Appeals determined that "a party may appeal any *final* judgment entered under chapter 171 and any order, even if interlocutory, of the five enumerated types."[325] Consequently, whether or not a judgment, decree, or order of the type identified in the statute constitutes a final judgment under Texas procedure, the Houston Court of Appeals believes and permits a party to file an immediate interlocutory appeal of such a decision.

Additionally, the Houston Court of Appeals may have expanded the statute by allowing a party to appeal on any other grounds for challenging a decision regarding the arbitration once the trial court does enter a final judgment, provided the judgment is entered under chapter 171.[326] The court reached this conclusion by noting that the Texas General Arbitration Act "does not restrict the authority of a court to enter other types of judgments relating to arbitrations."[327]

Interestingly though, after the court engaged in this analysis of the Texas General Arbitration Act, it allowed the appeal to proceed despite the fact that the trial court's judgment did not fall within the five types of orders listed in section 171.098(a) and failed to reference any other basis under chapter 171. The court justified its jurisdiction through the explanation that while the underlying judgment did not rely upon any specific authority to act within the Texas General Arbitration Act, the appeal arose from a decision denying a motion to modify or vacate an award:

> Although we do not adopt their reasoning, courts in other states have found denials of motions to vacate to be appealable on the basis that such a denial is equivalent to a confirmation of the award because confirmation is required

[324] TEX. CIV. PRAC. & REM. CODE ANN. § 171.098(a) (Vernon 2005).

[325] Action Box Co. v. Panel Prints, Inc., 130 S.W.3d 249, 251 (Tex. App.—Houston [14th Dist.] 2004, no pet.); *see also* Houston Vill. Builders, Inc. v. Falbaum, 105 S.W.3d 28, 30 (Tex. App.—Houston [14th Dist.] 2003, pet. denied) (considering the interlocutory appeal of the trial court's order vacating the arbitration award).

[326] *Action Box*, 130 S.W.3d at 251.

[327] *Id.* at 251 n.2.

> by the statute if a motion to vacate, modify, or correct is denied.[328]

Additionally, the court noted that the judgment disposed of all parties and requests for relief pending before the trial court, and consequently "[u]nder these circumstances, we find no basis to conclude that the judgment in this case falls outside of the general rule allowing the appeal of final judgments . . . ."[329]

One statutory basis for appeal concerns the trial court's attempt to modify or correct an award.[330] Adding to or supplementing the award falls within the category of "modifying or correcting" an award and provides a statutory basis for review.[331] "If an arbitration award includes an award of attorneys' fees, a trial court may not award additional attorneys' fees for enforcing or appealing the confirmation of the award, unless the arbitration agreement provides otherwise."[332] The Dallas Court of Appeals found that no legal basis existed for the trial court's attempt to award additional attorneys' fees.[333]

IX. CUSTOMIZING THE APPELLATE REVIEW

Parties may customize appellate review in their agreements. When drafting the arbitration agreement, parties have the choice, and often do agree, to incorporate the standards and procedures of an organization that supports, facilitates, or directs arbitration proceedings. When this occurs, the parties may affect and change the appellate review process through their arbitration agreement. For example, the Texas Supreme Court recognized that by choosing to arbitrate using the NASD rules, the parties agreed that the neutral arbitrator would follow the disclosure procedures set forth by the NASD.[334]

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[328] *Id.* at 251–52 n.3 (citations omitted).

[329] *Id.* at 251.

[330] TEX. CIV. PRAC. & REM. CODE ANN. § 171.098(a)(4) (Vernon 2005).

[331] *Id.*

[332] Crossmark, Inc. v. Hazar, 124 S.W.3d 422, 436 (Tex. App.—Dallas 2004, pet. denied) (citing Cooper v. Bushong, 10 S.W.3d 20, 26 (Tex. App.—Austin 1999, pet. denied); Int'l Bank of Commerce-Brownsville v. Int'l Energy Dev. Corp., 981 S.W.2d 38, 54–55 (Tex. App.—Corpus Christi 1998, pet. denied)).

[333] *Crossmark*, 124 S.W.3d at 436.

[334] Mariner Fin. Group v. Bossley, 79 S.W.3d 30, 35 (Tex. 2002); *see also* Anzilotti v. Gene D. Liggin, Inc., 899 S.W.2d 264, 265 (Tex. App.—Houston [14th Dist.] 1995, no writ) (noting

Similarly, a party may limit judicial review of the dispute through its arbitration agreement. In the divorce decision of *In re C.A.K.*, the San Antonio Court of Appeals found the parties had agreed to arbitrate the issues concerning the conservatorship of their child and waived any right to a judicial determination of the best interests of the child.[335] The court explained:

> The plain language of this provision expressly waives both parties' rights to assert the arbitrator's decisions are not in the best interest of the child and to seek judicial review. A party's express renunciation of a known right can establish waiver. Absent fraud, misconduct, or gross mistake, none of which Sondra claims, the express waiver by parties to an arbitration agreement of a right to judicial review is permissible and effective.[336]

However, the parties may not completely remove the judicial review process. Even if the parties' agreement contains a provision limiting or waiving any appeal of an arbitration award, the courts may still review an award when a party challenges the validity of the award under section 171.088 (pertaining to requests to vacate an award) or section 171.091 (pertaining to requests to modify or correct an award) of the Texas General Arbitration Act.[337] Consequently, while the parties to an arbitration agreement may waive common law and public policy grounds for challenging an arbitration award, the parties cannot agree to remove the statutory grounds for review.

X. CONCLUSION

Arbitration can provide a quick and efficient means to settle or resolve disputes, but errors resulting in an imperfect award may result in appeals to

that the parties incorporated the Construction Industry Arbitration Rules of the American Arbitration Association (AAA) into their arbitration agreement); Kline v. O'Quinn, 874 S.W.2d 776, 781 (Tex. App.—Houston [14th Dist.] 1994, writ denied) (noting that the parties incorporated the Commercial Arbitration Rules of the AAA into their agreement).

[335] 155 S.W.3d 554, 560 (Tex. App.—San Antonio 2004, pet. denied).

[336] *Id.* (citing Tenneco, Inc. v. Enterprise Prod. Co., 925 S.W.2d 640, 643 (Tex. 1996); Grissom v. Greener & Sumner Constr., Inc., 676 S.W.2d 709, 711 (Tex. App.—El Paso 1984, writ ref'd n.r.e.)).

[337] Barsness v. Scott, 126 S.W.3d 232, 238 (Tex. App.—San Antonio 2003, pet. denied).

the trial court or beyond. A party's best protection from error comes from the exercise of diligence prior to, during, and following the award.

Before a dispute ever arises, a party should consider the form of its arbitration provisions and determine whether it wants to delineate the procedure for choosing arbitrators, establish venue for the arbitration and subsequent judicial proceedings, and remove common law or public policy arguments as grounds for challenging an award. Additionally, if the parties intend to limit a right to pursue and recover certain types of remedies such as indirect, consequential, or punitive damages, the parties ought to specifically include a limitation in their arbitration agreement stating that the arbitrators possess no authority to consider such damages and that requests for such damages will not be submitted to the arbitrators for consideration. Finally, a party should remember that an arbitration provision may incorporate any industry group or association's procedures as a means to govern the arbitration proceeding and arbitrators' conduct.

Prior to beginning an arbitration hearing, a party should research its arbitrators to determine commonly known connections or relationships to the parties and witnesses, as well as work experience and positions held in the industry. The party should also follow up with a letter to the arbitrators requesting the disclosure of any basis for conflict or bias that might not be readily ascertained through investigation, and requesting continued disclosure if circumstances change.

A party should consider what kind of record will be created to preserve error, as well as being cognizant of the fact that the location of the hearing will set venue for any later trial court proceedings, if not already decided by the parties' agreement. If possible, the party should confirm with the arbitrators the form an award will take and whether the arbitrators will issue findings of fact in addition to identifying their calculations when reciting their rulings granting or denying relief.

Following receipt of an award, if venue has not already been determined by agreement or earlier proceedings, a party should quickly move to confirm or challenge the award in a proper venue of its own choosing. A successful party should diligently seek confirmation of the award, while a party who desires to challenge the award should be ready to file its motion to vacate, modify, or correct the award before a confirmation hearing. A confirming party should file a straightforward motion to confirm and should avoid filing a motion for summary judgment. A challenging party should file as complete a record as possible, taking care to highlight the evidence supporting its position.

As errors and irregularities may be corrected through a knowledgeable application of the Texas General Arbitration Act, a final arbitration award may not be the final word.