GETTING OUT OF THE AWARD: HOW *NAFTA TRADERS V. QUINN* AFFECTS THE GROUNDS FOR VACATING AN ARBITRATION AWARD IN TEXAS

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I. INTRODUCTION

“When will mankind be convinced and agree to settle their difficulties by arbitration?”

*Benjamin Franklin*

Arbitration is, above all else, a creature of agreement.1 An arbitration is a:

contractual proceeding by which the parties to a controversy or dispute, in order to obtain a speedy or inexpensive final disposition of the 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.2

It is a method of settling disputes outside the traditional legal process that aims to provide inexpensive and speedy resolution of a controversy.3

For an arbitration to be binding, the parties must agree to arbitrate.4 In this agreement, the parties have almost unfettered power to set the terms

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1 See *Nafta Traders, Inc. v. Quinn*, 339 S.W.3d 84, 94 (Tex. 2011).

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and procedures for their arbitration. The differences between courtroom litigation and arbitration include the costs, the formality, the confidentiality and privacy, the selection of the decision-maker, and the finality of a decision. Arbitration awards provide finality in that they may only be challenged in the courts on limited bases. Traditionally, arbitration awards could not be challenged on the grounds that the arbitrator made a mistake of law—that was part of the risk associated with submitting your dispute to arbitration.

Recently, however, the finality associated with arbitrations has been challenged. Can parties, in their arbitration agreement, provide that the award can be challenged by a district court on grounds of legal error? The Supreme Court of the United States addressed this question directly in arbitrations under the Federal Arbitration Act and answered resoundingly in the negative—the statutory grounds for vacatur and modification of arbitration awards under the Federal Arbitration Act are the exclusive grounds, and those grounds do not include mere mistakes of law.

However, that decision was limited to the Federal Act and does not apply to arbitrations conducted pursuant to state arbitration acts. Accordingly, three years later, the Texas Supreme Court addressed the same issue under the Texas General Arbitration Act and held to the contrary—parties may limit the power of the arbitrators to only rendering awards with no legal errors, thus an award containing a mistake of law can be challenged in the courts under the statutory “exceeds authority” ground. What the Texas Supreme Court did not make clear, however, was whether the statutory grounds for modification or vacatur under the Texas General Arbitration Act are exclusive—that is, whether the common law grounds survive.

This note will outline the recent Texas Supreme Court case of *Nafta Traders, Inc. v. Quinn* and its implications on arbitration agreements, particularly whether common law defenses to arbitration still exist in Texas.

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7 See e.g., *Hall*, 552 U.S. at 582.
8 See id. at 585.
9 See e.g., id. at 590; *Nafta Traders, Inc. v. Quinn*, 339 S.W.3d 84, 96–97 (Tex. 2011).
10 *Hall*, 552 U.S. at 578.
11 Id. at 590.
12 *Nafta Traders, Inc.*, 339 S.W.3d at 91–92.
13 See id. at 97 (holding only on the TAA).
Part II will begin by outlining the history of arbitration of in Texas, including common law arbitration and statutory arbitration under both the Texas General Arbitration Act (TAA) and the Federal Arbitration Act (FAA). Part III will overview the 2008 United States Supreme Court decision in *Hall Street Associates, L.L.C. v. Mattel, Inc.* and its implications on arbitrating under the FAA. Part IV will overview the 2011 Texas Supreme Court decision of *Nafta Traders, Inc. v. Quinn* and the effects of its express holding on arbitrating under the TAA. Finally, Part V will discuss the unanswered questions of *Nafta Traders* and the possible interpretations of the dicta and silence in the opinion, including how drafters and litigators can navigate the now muddied waters of arbitration agreements and court oversight.

II. BACKGROUND OF ARBITRATION IN TEXAS

A. Common-Law Arbitration

The common law tradition of arbitration dates back to the pre-Revolution English courts. After an agreement was submitted to arbitration and an arbitration award rendered, the English courts would give full effect to those awards, even ordering penalties in the event of a breach. During the 19th century, the courts of this country adopted the English view that arbitration awards, once rendered, were enforceable. But an executory agreement to arbitrate would not be enforced—that is, an agreement to arbitrate is executory until the award is rendered. Courts would not award of a stay of proceedings on a cause of action before the court.

The Texas tradition of arbitration can also be traced back to Spanish influences. In fact, the Constitution of Coahuila and Texas of 1827 provided in Title II, Art. 178 that: “Every inhabitant of the state shall be perfectly free to terminate his controversies, whatever be the state of the

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15 See id.
16 See id. at 984.
17 See id.
18 See id.
19 See William F. Weeks, Debates of the Texas Convention 357–58 (1846).
trial, by means of arbitrators . . . .”20 The First Constitution of the State of Texas of 1845 expressly empowered the Texas Legislature to pass laws providing for arbitration,21 and the first Texas Legislature acted accordingly, passing an arbitration statute on April 25, 1846.22 The Act of 1846 empowered courts to enter arbitration awards as judgments.23 Additionally, the 1846 Act made arbitration agreements not revocable if made in accordance with the statute, a deviation from the common law.24

Although the 1846 Arbitration Statute did deviate from the common law regarding the revocability of executory agreements, the 1846 Statute did not supersede the common law.25 Agreements failing to comply with the statute could still be enforced according to the rules of common-law arbitration.26 The 1879 codification of the Arbitration Act specifically included language to this effect, providing that statutory arbitration was not the exclusive method available.27 Even though this language was subsequently dropped from the Texas arbitration statutes, Texas courts have continued to recognize the viability of common-law arbitration and that statutory arbitration does not supersede common-law arbitration.28 Additionally, Texas law provided that: “The common law of England (so far as it is not inconsistent with the Constitution and laws of this State) shall, together with such Constitution and laws, be the rule of decision, and shall continue

21 TEX. CONST. OF 1845, ART. VII, § 15.
23 Id.
24 Id.; L.H. Lacy Co. v. City of Lubbock, 559 S.W.2d 348, 352 (Tex. 1977).
26 See Rector v. Hunter, 15 Tex. 380, 381 (1855) (Texas Supreme Court upholding an arbitration award as a common-law award when the agreement to arbitration did not comply with the 1846 Arbitration Statute).
27 BATT'S ANN. REV. CIV. STAT. OF TEX., tit. VI, art. 61 (Eugene von Boeckmann Publ’g Co. 1895).
28 See, e.g., L.H. Lacy Co., 559 S.W.2d at 352 (Texas Supreme Court upholding an arbitration award as enforceable under Texas common law); see also Carpenter, 436 S.W.2d at 553.
in force until altered or repealed by Congress.”

This provision has additionally been construed as permitting common-law arbitration.

Under Texas common law, as under the English tradition, either party to an executory agreement providing for arbitration is allowed to revoke the agreement at any time before the arbitration proceedings result in an award. However, once the parties to a contract have submitted their disputes to arbitration and an award is rendered, the parties are bound by the award if no fraud, mistake, or misconduct was involved. This rule applies to pre-dispute arbitration, those agreements to arbitrate future disputes, as well as post-dispute arbitration, those agreements entered into after a dispute arises. While statutory arbitration requires an agreement in writing, oral agreements to arbitrate resulting in an arbitration award may be enforced as common-law awards when not in conflict with the Statute of Frauds. Additionally, to successfully withdraw from an executory arbitration agreement, the withdrawal must be unequivocal and must take place prior to the rendition of an award. Finally, because common-law arbitration and statutory arbitration coexist in Texas, it is irrelevant whether the parties intended a statutory or common law arbitration if the proceedings can be upheld under either system.

To summarize, the requirements for a common-law arbitration award are as follows: (1) the question to be arbitrated be a matter in dispute between the parties; (2) the arbitrators be selected; (3) terms for the arbitration be agreed upon; (4) the arbitrators act in accordance with said agreement; and (5) that the award be published—that is, that it be made

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30 See Carpenter, 436 S.W.2d at 553.
31 See L.H. Lacy Co., 559 S.W.2d at 352.
32 See id.
33 See id.
34 See Faggard v. Williamson, 23 S.W. 557, 558 (Tex. Civ. App.—Fort Worth 1893, no writ); see also Hill v. Walker, 140 S.W. 1159, 1161–62 (Tex. Civ. App.—Austin 1911, writ ref’d). However, these cases predate the Texas General Arbitration Act of 1965, and there have been no Texas cases regarding the enforcibility of oral common-law arbitration agreements. Accordingly, it is unclear if the Texas Supreme Court, if asked to consider this question today, would uphold an oral agreement to arbitrate, even under the common-law system.
35 See L.H. Lacy Co., 559 S.W.2d at 352.
36 Id. (citing Forshey v. H & H R.R. Co., 16 Tex. 516, 538 (1856)).
known to the parties. Additionally, a common-law award may be challenged on the grounds of fraud, partiality, or mistake. However, the party seeking to set aside the award must specifically plead one of the aforementioned grounds.

B. Statutory Arbitration: The FAA and the TAA

Due to the judicial hostility toward executory arbitration agreements, states began enacting arbitration agreements as early as 1846 making even executory arbitration agreements enforceable. The federal government responded to state arbitration acts by passing the United States Arbitration Act of 1925. The U.S. Supreme Court upheld that Act as constitutional in 1932 in *Marine Transit Corp. v. Dreyfus*. The purpose of 1925 Act was to alter the judicial atmosphere previously existing. The House Committee Report stated:

> Arbitration agreements are purely matters of contract, and the effect of the bill is simply to make the contracting party live up to his agreement. He can no longer refuse to perform his contract when it becomes disadvantageous to him. An arbitration agreement is placed upon the same footing as other contracts, where it belongs.

The 1925 Act was codified and amended as the United States Arbitration Act, commonly referred to as the Federal Arbitration Act (FAA). The FAA makes clear a strong federal policy in favor of arbitration, creating a presumption in favor of arbitration once a valid

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37 *Hill*, 140 S.W. at 1162.
39 See *Eubank*, 194 S.W. at 217–18.
40 Kulukundis Shipping Co., S/A, v. Amtorg Trading Corp., 126 F.2d 978, 984 (2d Cir. 1942) (noting that New York was the first state to pass an arbitration statute in 1920). However, Texas enacted an arbitration statute in 1846. See *supra* note 22 and accompanying text.
42 284 U.S. 263, 279 (1931).
44 Id.
45 See United States Arbitration Act, 43 Stat. at 883.
arbitration agreement is established. The FAA applies to all contracts involving interstate commerce in both state and federal court, and parties are free to elect whether the FAA, state law, or both apply to their agreement. However, the FAA preempts state law where it conflicts in a manner to frustrate the federal interest. This has been interpreted to mean that state law that is more restrictive of arbitration than the FAA is preempted to the extent it is in conflict with the FAA.

The FAA applies if: (1) the agreement is in writing; (2) the agreement involves interstate commerce or maritime transactions except certain employment contracts; and (3) the agreement is valid and enforceable under traditional contract defenses in law or equity. Once it is determined that the FAA governs a dispute, federal law applies to all questions of interpretation, construction, validity, revocability and enforceability. However, the FAA does not confer independent subject matter jurisdiction to the federal district courts. The federal courts use a “look through” approach to determine if the court would have jurisdiction of the substantive controversy between the parties absent an agreement to arbitrate pursuant to the FAA.

Statutory arbitration in Texas has existed since 1846, almost 80 years longer than federal statutory arbitration. The modern Texas General Arbitration Act (TAA), enacted in 1966, is similar to the FAA in most

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47. 9 U.S.C. § 1 (2006); see also Moses H. Cone Mem’l Hosp. v. Mercury Constr. Corp., 460 U.S. 1, 25 n.32 (1983) (noting that the substantive law the Act created is applicable in both state and federal court).
48. See Ford v. NYLCare Health Plans of the Gulf Coast, Inc., 141 F.3d 243, 247–48 (5th Cir. 1999).
49. See Nafta Traders, Inc. v. Quinn, 339 S.W.3d 84, 97–98 (Tex. 2011).
54. See Volvo Trucks N. Am., Inc. v. Crescent Ford Truck Sales, Inc., 666 F.3d 932, 935 (5th Cir. 2012).
55. See supra notes 40–41 and accompanying text.
regards. Notably, however, the TAA requires parties sign the agreement for a claim of personal injury or when the consideration is less than or equal to $50,000. Both statutes include nearly identical provisions for appellate procedure and statutory grounds for vacatur and modification of an arbitration award. Like the FAA, the TAA dictates a strong policy in favor of arbitration, mandating courts compel arbitration upon a showing of an agreement to arbitration. Also, like the FAA, a valid agreement under the TAA can be a pre-dispute agreement or post-dispute agreement and agreements to arbitrate are generally not revocable. Under the TAA, an agreement to arbitrate is enforceable if: (1) the agreement is in writing; (2) the dispute or agreement is not a collective bargaining agreement, a claim for workers’ compensation benefits, or made before January 1, 1966; (3) the agreement is signed, if necessary under Section 171.002(b) or Section 171.002(c); (4) the agreement was not unconscionable at the time the agreement was made; and (5) the matter in dispute is within the scope of the arbitration agreement.

C. Enforcement and Appeal of Arbitration Awards

An arbitration award is generally given the same effect as a final judgment of a court of last resort. A party seeking the entry of the arbitration award files a petition or motion to confirm the award. The filing must include: (1) a plea to the jurisdiction of the court; (2) a copy of the arbitration agreement; (3) the issues subject to the arbitration; (4) a copy

57 See Tex. Civ. Prac. & Rem. Code Ann. § 171.002. Additionally, Section 171.002 requires the advice and signature of legal counsel for personal injury claims (§ 171.002(c)) and requires the advice of counsel when the consideration is less than or equal to $50,000 (§ 171.002(b)).
60 Id. § 171.001.
61 Id. § 171.001(a).
62 Id. § 171.002(a).
63 Id. § 171.002.
64 Id. § 171.022.
of the award; or (5) a showing of the need for the court order sought by the
applicant.\textsuperscript{68} Both the TAA and the FAA permit courts to confirm an
arbitrator’s award upon application of a party unless grounds are offered for
vacating, modifying or correcting an award.\textsuperscript{69}

Section 10(a) of the FAA provides that a trial court may vacate an
award upon the application of any party to the arbitration: (1) where the
award was procured by corruption, fraud, or undue means; (2) where there
was evident partiality or corruption in the arbitrators, or either of them;
(3) where the arbitrators were guilty of misconduct in refusing to postpone
the hearing, upon sufficient cause shown, or in refusing to hear evidence
pertinent and material to the controversy; or of any other misbehavior by
which the rights of any party have been prejudiced; or (4) where the
arbitrators exceeding their powers, or so imperfectly executed them that a
mutual, final, and definite award upon the subject matter submitted was not
made.\textsuperscript{70} The TAA provides five specific grounds for vacating an award:
(1) the award was procured by corruption, fraud or other undue means;
(2) there was evident partiality, misconduct or willful misbehavior by an
arbitrator prejudicing the rights of a party; (3) the arbitrators exceeding their
powers; (4) the arbitrators refused to postpone the hearing upon sufficient
cause being shown, or refused to hear material evidence or otherwise
conducted the hearings contrary to the provisions of the Act so as to
prejudice substantially the rights of a party; or (5) there was no arbitration
agreement, the court did not previously compel or stay arbitration, and the
party did not participate in the arbitration hearing without objection.\textsuperscript{71} The
grounds under the FAA and the TAA are, on appearance, identical, except
the TAA expressly states that the lack of an arbitration agreement is
grounds for vacating.\textsuperscript{72} However, as discussed below, the “exceeds

\textsuperscript{68} Id. § 171.085; 9 U.S.C. § 9 (2006).

disagreement among the federal courts as to whether district courts have the power to enter the
award as a judgment absent an express provision in the parties’ agreement. Compare \textit{Varley v.
Tarrytown Assocs.}, 477 F.2d 208, 210 (2d Cir. 1973) (holding parties must have agreed that
judgment shall be entered on award), with \textit{Commonwealth Edison Co. v. Gulf Oil Corp.}, 541 F.2d
1263, 1273 (7th Cir. 1976) (holding parties deemed to have consented to entry of judgment on
arbitration award). This article will proceed under the assumption the court in question has the
power to enter the award as a judgment.

\textsuperscript{70} 9 U.S.C. § 10(a)(1)–(4).


\textsuperscript{72} Compare \textit{id.} § 171.088, with 9 U.S.C. § 10.
authority” ground has been interpreted differently in the FAA and the TAA.\(^73\)

Under the common law of Texas, a trial court can invalidate an award only if the arbitrator, in making the decision, committed fraud, misconduct, or such gross mistake as would imply bad faith or failure to exercise an honest judgment.\(^74\) A mere mistake of fact or law is insufficient under the common law to set aside an arbitration award.\(^75\) Only those errors of fact or law that result in a fraud or some great and manifest wrong and injustice warrant setting aside an arbitration award.\(^76\)

III. THE U.S. SUPREME COURT, THE FAA, AND \textit{HALL STREET ASSOCIATES V. MATTEL, INC.}

\textbf{A. Case Background and Facts}

This landmark decision began as a lease dispute between tenant Mattel, Inc. and landlord Hall Street Associates, L.L.C., in Oregon.\(^77\) The lease provided that the tenant, Mattel, would indemnify the landlord, Hall Street, for any costs associated with the tenant or the tenant’s predecessor’s failure to follow environmental laws.\(^78\) In 1998, tests of the property’s water wells revealed high levels of pollutants, prompting Mattel to sign a consent order with the Oregon Department of Environmental Quality.\(^79\) Subsequently, in 2001, Mattel gave notice to Hall Street of intent to terminate the lease.\(^80\) Hall Street filed suit in response, claiming Mattel did not have the right to vacate the lease on the given date.\(^81\) Additionally, Hall Street sought indemnification for the costs to clean up the polluted well.\(^82\)

The parties proceeded to a bench trial before the United States District Court for the District of Oregon on the issue of terminating the lease, on


\(^{74}\) See Nuno v. Pulido, 946 S.W.2d 448, 452 (Tex. App.—Corpus Christi 1997, no writ).

\(^{75}\) Id.

\(^{76}\) Id.

\(^{77}\) Hall St. Assocs., 552 U.S. at 579.

\(^{78}\) Id.

\(^{79}\) Id.

\(^{80}\) Id.

\(^{81}\) Id.

\(^{82}\) Id.
which Mattel succeeded. The parties then attempted mediation of the indemnification issue unsuccessfully, after which they proposed to submit the issue to arbitration. The arbitration agreement, which the court approved and entered as an order, included a provision whereby, “[t]he Court shall vacate, modify or correct any award: (i) where the arbitrator’s findings of facts are not supported by substantial evidence, or (ii) where the arbitrator’s conclusions of law are erroneous.”

The arbitrator then found for Mattel, holding that no indemnification was due because the testing requirements of the Oregon Drinking Water Quality Act are characterized as dealing with human health, not environmental contamination, and the lease only required compliance with environmental laws. Consequently, Hall Street filed a motion to vacate the award in the District Court on the grounds that this award was legal error. The District Court, applying the parties’ contracted standard of review, granted Hall Street’s motion, vacating the award and ordering the parties back to arbitration.

On remand, the arbitrator amended the decision in favor of Hall Street, ruling that the Act was an applicable environmental law. Both parties challenged the award, Hall Street challenging the arbitrator’s calculation of interest and Mattel challenging the District Court’s earlier order vacating the award. The District Court modified the award to correct the calculation of interest, once more applying the parties contracted standard of review. Both parties appealed this ruling, and the Ninth Circuit reversed in favor of Mattel. The Ninth Circuit held that the terms of the arbitrator agreement altering the standard of judicial review were unenforceable but severable, instructing the District Court to confirm the original arbitration

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83 Id.
84 Id.
85 Id.
86 Id. at 580.
87 Id.
88 Id.
89 Id.
90 Id.
91 Id.
92 Id. at 580–81.
award in favor of Mattel unless the award should be vacated or modified under one of the express statutory grounds in the FAA.  

However, on remand the District Court vacated the award because the award “supposedly rested on an implausible interpretation of the lease and thus exceeded the arbitrator’s powers, in violation of 9 U.S.C. § 10.” The Ninth Circuit reversed, holding that implausibility is not a valid ground for vacating or correcting an arbitration award under Sections 10 or 11 of the FAA, implying holding that a mistake of law does not exceed powers. The Supreme Court granted certiorari on May 29, 2007 to decide, “whether the grounds for vacatur and modification provided by [Sections] 10 and 11 of the FAA are exclusive.”


Justice Souter, writing for a 6-3 majority, quickly answered the certified question: The statutory grounds for vacatur and modification are exclusive and cannot be modified by contract. Hall Street argued that the FAA’s general policy of treating arbitration agreements as enforceable compels the Court to read Sections 10 and 11 of the FAA as being nonexclusive. That is, because arbitration is a creature of contract and the FAA favors enforcing arbitration agreements, if parties choose to include other grounds for vacatur or modification in their otherwise valid arbitration agreements, courts should enfore those agreed upon grounds. However, the Court quickly rejected this argument, reasoning that “the FAA has textual features at odds with enforcing a contract to expand judicial review following the arbitration. . . . [and] the text compels a reading of the [Sections] 10 and 11 categories as exclusive.”

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93 Id. at 581 (quoting Hall St. Assocs. v. Mattel, Inc., 113 Fed. App’x 272, 272–73 (9th Cir. 2004)).
94 Hall St. Assocs., 552 U.S. at 581 n.1.
95 Id. (citing Hall St. Assocs. v. Mattel, Inc., 196 Fed. App’x 476, 477–78 (9th Cir. 2006), vacated, 552 U.S. 576 (2008)).
96 Hall St. Assocs., 552 U.S. at 581.
97 See id. at 578.
98 Id. at 584.
99 Id. at 586.
The language of Section 9 states that, on application for an order confirming the arbitration award, the court “must grant” the order “unless the award is vacated, modified, or corrected as prescribed in Sections 10 and 11” of the FAA.100 While most of the provisions of the FAA operate as “default” rules if not otherwise provided for the arbitration agreement,101 Section 9 is a mandatory provision, stating that the district court “must grant . . . unless . . . .”102 The Court went on to reason that, “it makes more sense to see the three provisions, [Sections] 9–11, as substantiating a national policy favoring arbitration with just the limited review needed to maintain arbitration’s essential virtue of resolving disputes straightaway.”103

While resolving the circuit split regarding expanded judicial review under the FAA, the Court expressly noted that this was not the end of the issue.104 The Court noted that the “FAA is not the only way into court for parties wanting review of arbitration award: they may contemplate enforcement under state statutory or common law, for example, where judicial review of different scope is arguable.”105 And state-by-state, courts are interpreting their own state arbitration acts, many refusing to follow the Hall Street rationale.106

IV. TEXAS’S ANSWER: NAFTA TRADERS, INC. V. QUINN

A. Case Background and Facts

Margaret A. Quinn sued her former employer, Nafta Traders, Inc., an international re-distributor of athletic apparel and footwear, for sex discrimination in terminating her from her position as Vice President of Operations.107 Nafta’s employee handbook, however, contained a section titled “Arbitration,” requiring all disputes arising out of the employment relationship or its termination be submitted to binding arbitration, not

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101 See, e.g., Section 5, which provides that, “If in the agreement provision be made for a method of naming or appointing an arbitrator . . . such method shall be followed; but if no method be provided therein . . . the court shall designate and appoint an arbitrator . . . .” 9 U.S.C. § 5.
103 Id. at 588.
104 See id. at 590.
105 Id.
107 See Nafta Traders, Inc. v. Quinn, 339 S.W.3d 84, 87 (Tex. 2011).
specifying whether the TAA or the FAA would apply. After Quinn filed suit, the district court signed an agreed order compelling arbitration on Nafta’s motion to compel arbitration under the FAA.

The parties arbitrated under the American Arbitration Association (AAA), as provided for in the employee handbook. The arbitrator awarded Quinn $30,000 in back pay, $30,000 in mental anguish, $29,301 in “special damages,” $104,828 in attorney’s fees, and costs. The parties made a record of the proceedings.

After the award was rendered, Quinn moved the trial court to confirm the award under the TAA. However, Nafta moved for vacatur under the FAA, the TAA, the common law, and the provision of the employee handbook stating: “The arbitrator does not have authority (i) to render a decision which contains a reversible error of state or federal law, or (ii) to apply a cause of action or remedy not expressly provided for under existing state or federal law.” Nafta asserted that the arbitrator applied federal law to Quinn’s claim when only a violation of Texas law had been plead, that the evidence did not support a finding of sex discrimination, that the award of attorney’s fees was improper, that the “special damages” award resulted in double recovery, and that the record did not support an award of mental anguish. In response, Quinn argued that none of the grounds asserted by Nafta are recognized under the TAA or the FAA as a basis for vacating an

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108 See id. The relevant portions of the arbitration section provide:

In the event there is a dispute arising out of your employment relationship with the Company or its termination . . . the parties agree to submit such dispute to arbitration in lieu of pursuing a trial in a court of law.

The arbitration will be conducted by the American Arbitration Association or other mutually agreeable arbitration service . . . . The arbitrator shall be required to state in a written opinion the facts and conclusions of law relied upon to support the decision rendered. The arbitrator does not have authority (i) to render a decision which contains a reversible error of state or federal law, or (ii) to apply a cause of action or remedy not expressly provided for under existing state or federal law.

Id. at 87 n.7.
109 See id. at 87–88.
110 See id. at 87 n.7, 88.
111 Id. at 88.
112 Id.
113 Id.
114 Id.
115 Id.
arbitration award, that neither the TAA nor the FAA permit expansion of the grounds for vacating by agreement, that the handbook should not be interpreted as enlarging the grounds for vacating as it is too vague and one-sided, and that the grounds asserted by Nafta should be rejected as meritless.116

The district court confirmed the award without any reasoning, giving no indication of whether it considered Nafta and Quinn’s arguments or whether Nafta’s claims were permissible under the TAA, FAA or common law.117 Nafta appealed, and the Dallas Court of Appeals heard oral arguments.118 After oral arguments but before the court of appeals issued an opinion, the United States Supreme Court decided Hall Street, holding that the FAA’s grounds for vacating are exclusive and cannot be expanded or enlarged by contract.119 The court of appeals applied the TAA rather than the FAA, noting that neither party disputed on appeal that the TAA, governed the case rather than the FAA.120 The court of appeals held that, due to the similarities between the TAA and the FAA, the TAA should be construed as Hall Street had construed the FAA and that “parties seeking judicial review of an arbitration award covered under the TAA cannot contractually agree to expand the scope of that review and are instead limited to judicial review based on the statutory grounds enumerated in the statute.”121 Accordingly, the court of appeals affirmed the judgment of the district court.122

B. Texas Supreme Court’s Holding: The TAA Does Not Preclude Parties from Agreeing to Limit an Arbitrator’s Authority in a Manner That Expands the Scope of Judicial Review.

Writing for a unanimous Court,123 Justice Hecht stated:

[T]he purpose of the TAA is to facilitate arbitration agreements, which have been enforceable in Texas by

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116 Id.
117 Id.
118 Id.
120 See Nafta Traders, 339 S.W.3d at 89.
122 Id. at 799–800.
123 Nafta Traders, 339 S.W.3d at 87.
Constitution or statute since at least 1845. Specifically, the TAA contains no policy against parties’ agreeing to limit the authority of an arbitrator to that of a judge, but rather, an express provision requiring vacatur when “arbitrators [have] exceeded their powers.”

The Texas Supreme Court expressly rejected the rationale of the United States Supreme Court in *Hall Street* that an agreement cannot expand the scope of judicial review. The Texas Court noted that while the parties in *Hall Street* did not “couch their agreement in terms of limiting the arbitrator’s authority to issue a decision unsupported by the law and the evidence, that was certainly the practical effect of what they expressly agreed to—that the court could not ‘enter judgment’ on such a decision.” Refusing to distinguish the two cases on the phrasing of the arbitration agreement, the Court went on to note, “[t]he parties in *Hall Street* attempted to accomplish indirectly the same end that Quinn and Nafta sought directly—a limit on the arbitrator’s authority.” Recognizing that the Texas Supreme Court is bound by *Hall Street* in construing the FAA, the Texas Supreme Court held to the contrary under the TAA: the TAA permits an agreement limiting the authority of an arbitrator in deciding a matter, thus allowing for judicial review of an arbitration award for reversible error when reversible error is beyond the authority of the arbitrator.

**C. Nafta Traders on Remand: Sufficiently Preserving the Record**

Despite Nafta’s victory at the Texas Supreme Court, the Dallas Court of Appeals, on remand, concluded Nafta’s complaints lacked merit and affirmed the trial court’s order confirming the arbitrator’s award. Quoting the Texas Supreme Court above, the Court of Appeals noted that, “[a]n arbitration award is not susceptible to full judicial review merely because

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124 *Id.* at 96 (footnotes omitted) (quoting TEX. CIV. PRAC. & REM CODE ANN. § 171.088(a)(3)(A) (West 2011)).
125 *Id.* at 92–93.
126 *Id.* at 92.
127 *Id.*
128 *Id.* at 91.
129 *Id.* at 97.
the parties have agreed.”131 Additionally, the Court of Appeals noted that, “[a] reviewing court must have a sufficient record of the arbitration proceedings and the party challenging the award must have properly preserved its complaint ‘just as if the award were a court judgment on appeal.’”132

Reviewing Nafta’s claims on appeal, the Court of Appeals considered six different claims. The first two claims involved improper application of substantive law to Quinn’s employment discrimination claim.133 While the Court of Appeals was not persuaded by the merits of these claims, ultimately, the court held that the claims were waived because they were not presented to the arbitrator.134 Nafta also challenged the award of attorney’s fees.135 However, this argument was likewise never presented to the arbitrator and was thus waived.136

Nafta raised two challenges for sufficiency of the evidence, which may be raised for the first time on appeal.137 Nafta challenged the finding that Quinn’s sex was a motivating factor in her termination for sufficiency of the evidence and challenged the award of damages for emotional injuries for sufficiency of the evidence.138 The Court of Appeals, in evaluating the thorough record of the arbitration proceedings, concluded that the evidence was both legally and factually sufficient to support the arbitrator’s determinations on both issues.139

V. **Nafta Traders’ Unanswered Questions**

A. *Are There “Magic Words” Required for Expanded Judicial Review?*

In *Nafta Traders*, the parties used language limiting the power of the arbitrator, impliedly expanding the judicial review of the district court

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131 *Id.* at 719 (quoting *Nafta Traders*, 339 S.W.3d at 101–02).
132 *Id.* (quoting *Nafta Traders*, 339 S.W.3d at 101–02).
133 *Id.*
134 *Id.* at 719–20.
135 *Id.* at 722.
136 See *id.* at 722–23.
137 See *id.* at 720, 723; see also TEX. R. APP. P. 33.1(d).
138 See *Quinn II*, 360 S.W.3d at 721, 723.
139 *Id.* at 721–22, 724.
through one of the statutory grounds for vacatur.140 In *Hall Street*, the parties used language commanding the trial court to vacate for legal error, not expressly invoking one of the statutory grounds for vacatur.141 Nevertheless, the Texas Supreme Court expressly stated in *Nafta Traders* that the *Hall Street* agreement language functioned the same as the *Nafta Traders* language.142 The Texas Supreme Court seems to be holding that had the parties in *Nafta Traders* used the same language as the parties in *Hall Street*, the outcome under the TAA would be the same; that is, under the TAA, parties can provide in their arbitration agreement that the trial court must vacate an award containing a mistake of law. So long as the language can be interpreted to be a limit on the arbitrator’s power (the “flip-side” of expanded judicial review), the provision should be enforceable under the TAA.143

Additionally, if the parties include language in their arbitration agreement that the FAA shall govern the disputes, expanded judicial review under the TAA is not available.144 The parties in *Hall Street* agreed specifically that their arbitration agreement was to be governed by the FAA and no other law.145 The parties in *Nafta Traders*, however, did not specify which statute would govern.146 Thus, the Court was able to interpret their agreement in light of the TAA.147 Parties wishing to limit the power of the arbitrator and, thus, expand the scope of judicial review must be sure to not include language limiting their arbitration agreement to the FAA.

B. What Record Is Required to Permit Review for Reversible Error?

To quote Justice Hecht in *Nafta Traders*: “An arbitration award is not susceptible to full judicial review merely because the parties have agreed. A court must have a sufficient record of the arbitral proceedings, and complaints must have been preserved, all as if the award were a court judgment on appeal.”148 Accordingly, the trial court must act as an appellate

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140 See *Nafta Traders*, Inc. v. Quinn, 339 S.W.3d 84, 88 (Tex. 2011).
142 *Nafta Traders*, 339 S.W.3d at 92.
143 Id.
144 Id. at 91; see *Hall St. Assocs.*, 553 U.S. at 581.
145 See *Hall St. Assocs.*, 553 U.S. at 590.
146 *Nafta Traders*, 339 S.W.3d at 87.
147 See id. at 99–100.
148 Id. at 101 (footnote omitted).
court, enforcing the requirements Rules 33 and 34 of the Texas Rules of Appellate Procedure for preserving complaints and the record, in ruling on motions to confirm, modify, or vacate an arbitration award. Parties cannot agree to any other standard of review—only that of a court of appeals.

The consequences of this principle are that the parties must choose between the traditional efficiencies of the arbitration process, with its risky finality, and the benefits of expanded judicial review, with potentially higher costs and time to preserve a proper record. If parties want to limit the power of the arbitrator, thus expanding judicial review, the parties must keep a record of the arbitration, raise all arguments and defenses to the arbitrator, properly present objections to the arbitration, and preserve those objections. And the party must raise all arguments in its motion to vacate to the trial court, just as a party on appeal from a trial court must raise all issues at all stages of the appeal.

C. Practical Advice for Practitioners

The moral of *Nafta Traders v. Quinn* is that parties agreeing to arbitrate under the TAA may expand the scope of judicial review, whether or not they couched the clause as a limitation on the arbitrator’s powers or an expansion of the powers of the trial court. The trial court, however, is limited to that of a Texas Court of Appeals, governed by Rules 33 and 34 of the Texas Rules of Appellate Procedure. Accordingly, parties must preserve the record to challenge the legal soundness of an arbitration award. Such expanded judicial review is not available to every arbitration award, rather it must be provided for by clear agreement.

Chief Justice Jefferson noted in his concurrence: “This case asks whether parties can agree to ‘try’ a case privately, but then enlist state

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149 *Id.* at 101, nn.79–80.
150 *Id.* at 102.
151 *Id.* at 101–02.
152 On remand, the Dallas Court of Appeals held that three of *Nafta Traders*’ arguments were never presented to the arbitrator, thus waived under Rule 33, and that only those arguments challenging the legal and factual sufficiency of the evidence were properly raise for the first time on appeal under Rule 34. *See generally,* *Quinn II,* 360 S.W.3d 713 (Tex. App.—Dallas, pet. denied); *see also supra* at notes 130–139 and accompanying text.
153 *See supra* at notes 132, 149 and accompanying text.
154 *See Quinn II,* 360 S.W.3d at 719.
155 *See Nafta Traders,* 339 S.W.3d at 101.
courts to review the decision for reversible errors of state or federal law.\footnote{156}{Id. at 103 (Jefferson, C.J., concurring).}

For many parties, this may be a desirable option as traditional arbitrations are very risky—the award cannot be challenged except in very narrow circumstance.\footnote{157}{See supra notes 70–72 and accompanying text.} Parties can select experts in their field to serve as arbitrators, can schedule the arbitration more at their convenience, and may be able to preserve the confidentiality of arbitrations past.\footnote{158}{See Nafta Traders, 339 S.W.3d at 102–03.} However, if the award is challenged, the confidentiality is no more, as the record from the arbitration becomes public domain in the appeal.\footnote{159}{See, e.g., id. at 87–89, 103 (stating that arbitration is private but describing the facts of the case in a published Texas Supreme court opinion).} Additionally, the costs and time of such an arbitration can outweigh the potential benefits.\footnote{160}{Id. at 94.}

If a party does wish to conduct such an arbitration, whereby the award is reviewable for legal error, that party must include a clear agreement to either: (1) limit the power of the arbitrator to only making an award with no legal error, or (2) expressly expand the scope of review for reversible error.\footnote{161}{Id. at 92–93.} The parties must maintain a record of the arbitration and preserve all error.\footnote{162}{See supra note 132 and accompanying text.} Finally, the parties must be able to arbitrate under the TAA. Additionally, three other states have permitted expanded judicial review of arbitration awards under their own state law: Alabama, California, and Connecticut.\footnote{163}{Raymond James Fin. Servs., Inc. v. Honea, 55 So. 3d 1161, 1170 (Ala. 2010); Cable Connection, Inc. v. DIRECTV, Inc., 190 P.3d 586, 599 (Cal. 2008); HH E. Parcel, LLC v. Handy & Harman, Inc., 947 A.2d 916, 926 n.16 (Conn. 2008).}

To conclude his concurrence, Chief Justice Jefferson criticized the current court system.\footnote{164}{See Nafta Traders, 339 S.W.3d at 103 (Jefferson, C.J., concurring).} If litigants were satisfied with the current system, he reasoned, they would not be leaving the system to arbitrate.\footnote{165}{See id.} He criticized the high cost of litigation, the crippling burdens oppressive discovery imposes, and the lack of modern case-management practice.\footnote{166}{See id.}
Finally, he criticized the elected, political official litigants are forced to endure as judge whose “only qualification is the possession of a law license, and who need not have significant experience as an advocate or as a judge” and “who are swept in and out of office based not on considerations of merit, but on the vagaries of partisan election.” He ends his concurrence with a call to the bar to address the problems with the justice system that continually “compel litigants to circumvent the court.” As a result of *Nafta Traders*, parties in Texas can now create a private trial. While there are many criticisms to such an arbitration, it is, perhaps, the future of litigation.

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167 Id.
168 Id. at 103–04.