SO YOU THOUGHT YOU WERE DONE? THE CONFIRMATION AND APPEAL OF ARBITRATION AWARDS

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At long last, the process is done. The discovery (and the attendant discovery disputes) were finished, the arbitration set, witnesses were flown in from around the country and the world, the evidence was heard and the arbitrator or panel of arbitrators issued their award. Perhaps you are satisfied with the award, and wish merely to have it confirmed so you may collect it (or at least try to collect it). Maybe the award is the greatest injustice ever worked by the law, and you wish to have it set aside. In either case you have entered the judicial review and enforcement phase of the arbitration proceeding, a phase that, despite the object of making arbitration a speedy and economical alternative to litigation, is becoming both more common and more protracted. The following article is intended to provide an overview of the post-arbitration process of judicial conformation and review under both state and federal law, to lay out the applicable deadlines and to identify the most common arguments you will either make or refute.[1]

A. The ABCs of Arbitration

Before addressing what happens after the arbitration is complete and the award has been rendered, it is important to review some of the most basic principles of arbitration, because these first principles affect the post-arbitration procedures and remedies that will be discussed herein.

"[A]rbitration 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." *In the Interest of C.A.K.*, 155 S.W.3d 554, 559 (Tex. App. — San Antonio 2004, pet. denied). In the context of an arbitration, "[a]n arbitrator's role is functionally equivalent to that of a judge," *Pullara v. American Arbitration Ass'n, Inc.*, 191 S.W.3d 903, 906 (Tex. App. — Texarkana 2006, pet. denied), and the arbitrator's award is in like a judgment, *Peacock v. Wave Tec Pools, Inc.*, 107 S.W.3d 631, 636 (Tex. App. — Waco 2003, no pet.), one issued by a court of last resort. *C.A.K.*, 155 S.W.3d at 560. The scope of the arbitrator's jurisdiction to decide a given dispute is defined by the contract giving rise to the right to seek arbitration. *American Realty Trust, Inc. v. JDN*

[1] This article will discuss cases under both the Federal Arbitration Act, 9 U.S.C. § 1, *et seq*. ("FAA") and the Texas General Arbitration Act, Tex. Civ. Prac. & Rem. Code § 171.001, *et seq*. ("TAA"). Where the FAA and the TAA contain different provisions the discussion of their provisions will be divided up. However, in many cases the provisions of the FAA and the TAA are very similar or identical; in such cases I will discuss them together, citing to FAA and TAA cases without distinguishing between the two.

Real Estate — McKinney, L.P., 74 S.W.3d 527, 531 (Tex. App. — Dallas 2002, pet. denied). A court that is asked to review some aspect of the arbitrator's award should not set the award aside merely because it would have reached a different decision in the case. *Crossmark, Inc. v. Hazar*, 124 S.W.3d 422, 429 (Tex. App. — Dallas 2004, pet. denied).

B. Confirmation of Arbitration Awards

If an arbitrator issues an award and the party against whom the award is issued does not promptly pay it, the first step is usually to have the award confirmed by the court. This confirmation turns the award into a judgment, and turns the prevailing party in the arbitration into a judgment creditor who is able to try to enforce the award as he would enforce any judgment. Tex. Civ. Prac. & Rem. Code § 171.092(a); *City of Baytown v. C.L. Winter, Inc.*, 886 S.W.2d 515, 518 (Tex. App. — Houston [1st Dist.] 1994, writ denied).

1. Applicable Deadlines

Under the FAA a party may apply to a court to have an arbitration award confirmed within one year of the date the award was made. 9 U.S.C. § 9. In contrast, Texas law imposes no deadline on a party's right to seek to have an arbitration award confirmed by the court, providing merely on application that it "shall be confirmed," Tex. Civ. Prac. & Rem. Code § 171.087, with no specific deadline listed. A motion to confirm an award entered under the TAA might be subject to the four year residual limitations period, Tex. Civ. Prac. & Rem. Code § 16.051, although no case has held has much.

2. Procedure

The procedure for having an arbitration award confirmed by the court is very straightforward. Under federal law, an order confirming an arbitration award is summarily issued in response to a timely motion asking that the award be confirmed. *Washington Mut. Bank v. Crest Mtg. Co.*, 418 F.Supp.2d 860, 862 (N.D. Tex. 2006); *Power Svcs. Assoc., Inc. v. UNC Metcalf Servicing, Inc.*, 338 F.Supp.2d 1375, 1382 (N.D. Ga. 2004); *see also* 9 U.S.C. § 9 (court "must grant" a request that the arbitration award be confirmed). In Texas, the parties merely file a motion with the court, Tex. Civ. Prac. & Rem. Code § 171.093 (motions under the TAA are considered in the same way as motions in a civil case),[2] asking

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[2] A sample motion asking that an arbitrator's award be confirmed, and an order granting the motion, are found in the Appendix as Tabs A and B.

that the arbitration award be confirmed, and this motion "shall confirm the award" unless the other side can convince the court that grounds exist to have the award vacated. Tex. Civ. Prac. & Rem. Code § 171.082(a).[3] As a practical matter, whether the FAA or the TAA applies, courts will routinely confirm an arbitration award as it is written, unless it can be convinced that the grounds exists to modify or to vacate the award.

C. Modification of an Arbitration Award by the Courts

Although most judicial review of arbitration awards involves a request that the court vacate the award entirely, sometimes a litigant is happy with the award but believes the arbitrator has made a mistake in the nature of scrivener's error that he would like the court to correct. Under both state and federal law courts are permitted to correct such mistakes, modifying but otherwise confirming the award made. The scope of this review for the purpose of modifying is very narrow: both the FAA and the TAA use identical wording and permit such modifications only on proof that the award is the product of an "evident material miscalculation" in the numbers or an "evident material mistake" in the description of some person or property at issue in the proceedings. 9 U.S.C. § 11(a); Tex. Civ. Prac. & Rem. Code § 171.091(a)(1). This kind of review is limited to pure inadvertent mistakes by the arbitrator. *Prestige Ford v. Ford Dealer Computer Svcs., Inc.*, 324 F.3d 391, 396 (5th Cir. 2003); *Crossmark*, 124 S.W.3d at 436. Ultimately, although no court has held as much, it seems as if a modification of an arbitration award on the grounds that it contains some kind of evident mistake allows the award to be modified under circumstances similar to those where a court is permitted to issue a judgment *nunc pro tunc*.

D. Motions to Vacate Arbitration Awards

However, the real fight is not whether the arbitration award should be confirmed or modified, but rather whether it should be vacated. In determining whether the grounds for vacating an arbitral award exist, parties should not lose sight of the forest for all of the trees. The prime objective of arbitration law is to "permit a just and expeditious result to be reached with a minimum of judicial interference." *Gulf Guar. Life Ins. Co. v. Connecticut Gen. Life Ins. Co.*, 304 F.3d 476, 492 (5th Cir. 2002) (*citing and quoting Marc Rich & Co., A.G. v. Transmarine Seaways Corp. of Monrovia*, 443 F.Supp. 386 (S.D. N.Y. 1978). Accordingly,

[3] A litigant in Texas court may take advantage of the procedure outlined in the TAA to confirm his award, even if the statute governing the arbitration is the FAA. *Jack B. Anglin Co., Inc. v. Tipps*, 842 S.W.2d 266, 268-69 (Tex. 1992) (recognizing that Texas procedural rules govern even if the issue is whether the FAA applies).

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attempts to have an arbitration award set aside are difficult, because arbitral awards are "entitled to great deference in a court of law, lest disappointed litigants seek to overturn every unfavorable arbitration award." *Blue Cross Blue Shield of Tex. v. Juneau*, 114 S.W.3d 126, 134 (Tex. App. — Austin 2003, no pet.); *accord, Crossmark*, 124 S.W.3d at 429. If there is any permissible way that the arbitrator could have arrived at the award, it should be affirmed. *Kergosien v. Ocean Energy, Inc*., 390 F.Supp.3d 346, 354-55 (5th Cir. 2004); *see also Peacock*, 107 S.W.3d at 635 (all reasonable presumptions will be indulged in favor of the arbitration award). Although this paper will discuss all of the ways such an award may possibly be assailed, it is important to remember that each of these arguments gives rise to only a narrow basis for vacating an arbitration award, and courts should and do afford great deference to the arbitrator and the award, only overturning the award if it can clearly be shown that it is in some way improper.

1. Applicable Deadlines

Under the Federal Arbitration Act, any request that an arbitration award be vacated, modified, corrected or otherwise changed must be made within three months of the date the award was filed or delivered. 9 U.S.C. § 12. A party who does not do so may not later complain about the award, even if his opponent later moves to confirm the award. *Smith v. J-Hite, Inc*., 127 S.W.3d 837, 841-42 (Tex. App. — Eastland 2003, no pet.) (per curiam) (deadline for seeking to have arbitration award changed was absolute, and counterclaim saving statute did not allow request for vacatur to be made after deadline had expired).

Under the Texas Arbitration Act the deadlines for challenging an award are similar, with a party required to move to vacate the award within 90 days of the date it was "delivered," or within 90 days of discovering that the award was the product of "corruption, fraud, or other undue means," Tex. Civ. Prac. & Rem. Code § 171.088(b), although this 90 day deadline may not apply to a request to vacate an award on non-statutory, common law grounds. *East Tex. Salt Water Disposal Co. v. Hughes*, 2006 WL 300410 at * 8 (Tex. App. — Tyler Feb. 8, 2006, pet. denied). However, a cautious litigant should not count on receiving a full 90 days. There is authority holding that if a party has moved to have its arbitration award confirmed and it is confirmed, a request that the award be vacated is untimely even if it is filed within the periods of time allowed by the FAA or the TAA. This decision is based on the idea that both the FAA and the TAA create a "due order" of consideration, and require considering requests that the arbitration award be vacated before considering requests that it be confirmed. *Hamm v. Millenium Income Fund, L.L.C.*, 178 S.W.3d 256, 263-64 (Tex. App. — Houston [1st Dist.] 2005, pet. denied), *cert. denied*, 75 USLW 3066 (Oct. 2, 2006); *see also, Zars v. Davis*, 2006 WL 2955326 at * 2 (Tex. App. — San Antonio Oct. 18, 2006, n.p.h.) (mem. op.) (following *Hamm* and affirming sanctions

imposed on litigant for trying to avoid 90 day deadline by arguing that motion to vacate was a counterclaim to motion to confirm). Effectively, *Hamm* allows the party who is satisfied with the arbitration award and wishes to have it judicially confirmed to shorten the TAA's deadline for asking that the award vacated to less than 90 days, if he can arrange to have its motion to confirm the award heard more quickly than that.[4]

2. Standards of Review

As a general proposition the judicial review of arbitration awards is both "strictly limited," *International Union of Operating Engineers, Local 351 v. Cooper Nat. Resources, Inc.*, 163 F.3d 916, 918 (5th Cir.), *cert. denied*, 528 U.S. 812, 120 S.Ct. 45 (1999), and "extremely deferential." *Peacock*, 107 S.W.3d at 635. However, the question of exactly how limited and how deferential depends non whether you are talking about the initial assault on the arbitration award in the trial court, or the appeal from the trial court's decision to the appellate court.

a. The Initial "Appeal" to the Trial Court — Extreme Deference

Given the underlying purposes of arbitration, courts are extremely deferential to an initial "appeal" of arbitration award to a trial court. In the words of one court, "[t]he standard of review for arbitration awards has been described as among the narrowest known to the law. The court may not vacate the Tribunal's award based on mere errors in interpretation or application of the law, or mistakes in factfinding." *Mantle v. Upper Deck Co.*, 956 F.Supp. 719, 726 (N.D. Tex. 1997) (internal citations and quotations omitted). Other courts

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[4] The FAA contains no specific deadline for an arbitrator to enter an award, and the TAA merely provides that an award be entered within the time established by the parties in their agreement to arbitrate or, if no such time is established, within the time established by court order. Tex. Civ. Prac. & Rem. Code § 171.053(c). However, the AAA has a rule requiring that its arbitrators return their awards within 30 days of the date the arbitration has closed, *Vascular Surgery Assoc., P.C. v. Business Sys., Inc.*, 628 N.E.2d 285, 286 (Ill. Ct. App. 1993), likely because the law of many states requires that awards be rendered within 30 days. To the extent that this AAA rule becomes a relevant deadline under the TAA because it is found to be part of the agreement to arbitrate it may require awards to be filed within 30 days, but because neither the FAA nor the TAA permit the vacation of an award on the grounds that it is late I believe a court could still confirm a late award, at least in the absence of proof that an objection was made to the award being late and probably also a showing of prejudice. *International Bank of Commerce — Brownsville v. International Energy Dev. Corp.*, 981 S.W.2d 38, 56 (Tex. App. — Corpus Christi 1998, pet. denied), *cert. denied*, 528 U.S. 1137, 120 S.Ct. 982 (2000).

more regularly characterize the standard of review as "extraordinarily narrow," *Kergosien*, 390 F.3d at 352; *accord, Bulko v. Morgan Stanley DW Inc*., 450 F.3d 622, 624 (5th Cir. 2006); *Prestige Ford*, 324 F.3d at 393, and hold that the judicial review of the arbitration award is intended only to identify those errors that are so fundamental as to render the entire arbitral process unfair. *Weinberg v. Silber*, 140 F.Supp.2d 712, 717 (N.D. Tex. 2001), *aff'd*, 57 Fed.Appx. 211 (5th Cir. 2003); *see also Harris v. Parker College of Chiropractic*, 286 F.3d 790, 792 (5th Cir. 2002) (listing limited grounds on which arbitration award may be vacated under the FAA). It does not allow the arbitration award to be set aside for any reason other than those permitted under the governing arbitration act or the common law. *Baker Hughes Oilfield Operations, Inc. v. Henning Production Co., Inc*., 164 S.W.3d 438, 442 (Tex. App. — Houston [14th Dist.] 2005, no pet.).

b. Further Appeal to the Court of Appeals

Because of the limited number of arguments that may be used to assail an arbitration award in the trial court, and appeal from the trial court's decision does not involve the typical questions of whether the evidence is sufficient to support the award that are the bread-and-butter of most other appeals. Instead, on further appeal to the appellate courts, the trial court's determination of whether the arbitration award should be vacated is reviewed *de novo*, *Brabham v. A.G. Edwards & Sons, Inc*., 376 F.3d 377, 380 (5th Cir. 2004); *Henry v. Haliburton Energy Svcs., Inc*., 100 S.W.3d 505, 508 (Tex. App. — Dallas 2003, pet. denied); *Thomas James Assoc., Inc. v. Owens*, 1 S.W.3d 315, 320 (Tex. App. — Dallas 1999, no pet.), and (to the extent that it has made any) its factual determinations are reviewed for plain error. *Positive Software Solutions, Inc. v. New Century Mtg. Corp*., 436 F.3d 495, 498 (5th Cir. 2006). Although there is ample authority that appellate judicial review of an arbitration award is at least as narrow as the review in the trial court, *Brabham*, 376 F.3d at 380, this is only because the review at the trial court level is itself very narrow, and the *de novo* standard of review applied by the appellate courts is the same *de novo* standard applied in other cases involving questions of law. *Gateway Technologies, Inc. v. MCI Telecommunications Corp*., 64 F.3d 993, 996 (5th Cir. 1995); *see also Hughes Training, Inc. v. Cook*, 254 F.3d 588, 592 (5th Cir. 2001), *cert. denied*, 534 U.S. 1172, 122 S.Ct. 1196 (2002) (decision of district court not to vacate arbitration award is reviewed in the same way as any other district court decision). Put another way, although appellate courts are applying the "wide open" *de novo* standard of review, the narrow grounds under which an arbitration award may be vacated means that the review is a wide open review of a few, very narrow issues.

c. Ability to Contractually Modify the Standard of Review

However, as limited as the standard of review is on appeal, it may be further limited by the parties in the contract that gives rise to the right to arbitrate. In the absence of fraud, misconduct or gross mistake[5] the parties to an agreement to arbitrate have the right to change the scope of the judicial review of an arbitration award, either broadening it or narrowing it. *C.A.K.*, 155 S.W.3d at 560; *Harris*, 286 F.3d at 792-93; *see also Gateway Technologies,* 64 F.3d at 996-97 (parties may contractually agree to allow judicial review that would otherwise be precluded by law; contract granted court the right to review "errors of law").[6] However, it is not yet clear whether Texas law will allow the parties to contractually waive one of the statutory grounds for vacatur; there is authority holding that they cannot. *Barsness*, 126 S.W.3d at 728; *Grissom v. Greener & Sumner Constr., Inc*., 676 S.W.2d 709, 711 (Tex. App. — El Paso 1984, writ ref'd n.r.e.). Therefore, any time a party seeks judicial review of an arbitration award, it is important to go back to the document that gave rise to the right to arbitrate in the first place and see if it has somehow narrowed or broadened the scope of judicial review that is permitted.[7]

3. Arbitrator is not Required to Provide a Rationale for the Award

Before addressing post-arbitration proceedings to confirm or to vacate an arbitration award, it is important to remember that neither the FAA nor the TAA requires an arbitrator to give any reasons for the award he renders. *Gray v. Noteboom*, 159 S.W.3d 750, 753 (Tex. App. — Fort Worth 2005, pet. denied); *Brabham*, 376 F.3d at 385; *Brown v. Lanier Worldwide, Inc*., 124 S.W.3d 883, 901 n. 32 (Tex. App. — Houston [14th Dist.] 2004, no pet.). This means that, as a practical matter, it is often difficult or even impossible to show the grounds exist for modifying or vacating an award, because in the absence of any express reasoning by the arbitrator the court will apply the very deferential standard or review governing arbitration awards and search for any basis on which the award may be confirmed.

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[5] These limitations prevent a party from contractually eliminating all judicial review of an arbitrator's decision. *Barsness v. Scott*, 126 S.W.3d 232, 238 (Tex. App. — San Antonio 2003, pet. denied).

[6] *Gateway Technologies* has been explicitly rejected by several Circuits, creating a split the Supreme Court may eventually have to address.

[7] A sample of a clause that modifies the review of an arbitrator's award found in an agreement used in a case arbitrated by the author is found in the Appendix at Tab C. It shows to what lengths some parties will go to try to use the contractual agreements that underlie the arbitration process to write their own rules.

4. Grounds for Vacating an Arbitration Award

When a dissatisfied party seeks judicial review of an arbitrator's award, he is almost always asking that the court vacate the award. Although there are broad similarities between how such a request is handled under the FAA and the TAA, there are enough differences in the particulars that this article will address them separately.

a. Under the Federal Arbitration Act

On appeal, the central issue is whether the arbitration proceedings leading to the award were unfair in a way that justifies setting aside the award. *Thomas James Assoc.*, 1 S.W.3d 315 at 320. Put another way, judicial review of an arbitration award under the FAA focuses on the integrity of the process, not the propriety of the result. *In the Interest of TBH-H*, 188 S.W.3d 312, 314 (Tex. App. — Waco 2006, no pet.); *Women's Reg. Healthcare, P.A. v. Fempartners of N. Tex., Inc.*, 175 S.W.3d 365, 367-68 (Tex. App. — Houston [1st Dist.] 2005, no pet.). As a matter of logic such a determination may be made only after the arbitral award has been issued, i.e., only after the process is complete. *Gulf Guar. Life Ins.*, 304 F.3d at 487-91 (court had no basis to intervene in arbitration process before issuance of award to interfere in procedure for selecting arbitrator or into question of whether arbitrator was biased); *accord, Smith, Barney, Harris Upham & Co. v. Robinson*, 12 F.3d 515, 520-21 (5th Cir. 1994).

i. Statutory Grounds

The FAA itself identifies several grounds that, if proven, justify the vacation of an arbitrator's award.

— Fraud or Corruption

The first statutory ground for vacating an award under the FAA is if the award was the product of "corruption, fraud, or undue means." 9 U.S.C. § 10(a)(1). In one of the few Fifth Circuit decisions to address this ground, the court held that proof of "fraud" requires showing of bad faith during the arbitration, such as bribery or the willful destruction or withholding of evidence, while "undue means" connotes behavior that is immoral if not actually illegal, *Matter of the Arbitration Between: Trans Chemical Ltd. and China Nat'l Mach. Import & Export Corp.*, 978 F.Supp. 266, 304 (S.D. Tex. 1997), *aff'd*, 161 F.3d 314 (5th Cir. 1998), including threatening to send "Guido" and "Knuckles" to pay the arbitrator

a visit. *National Cas. Gp. v. First State Ins. Gp.*, 430 F.3d 492, 499 (1st Cir. 2005). Given the nature of the charges, this is probably the rarest ground for asking that an arbitration award be vacated.

— Evident Partiality of the Arbitrators

Conversely, the second statutory grounds for seeking to have an arbitrator's award vacated is probably the most commonly asserted. Under 9 U.S.C. § 10(a)(2), an arbitration awards is subject to being vacated if it was the result of "evident partiality or corruption in the arbitrators." Despite the repetition of the word "corruption," this section is not understood to mean "corruption" in a criminal sense, but rather the corruption of the arbitral process by bias and partiality on the part of the arbitrator.

The reason evident partiality is probably the most common grounds for seeking to have an arbitration award vacated under the FAA is because the courts have held that an arbitrator is evidentially partial not only if he exhibits partially to one side over the other but also if he fails to disclose facts that might create a reasonable impression in the mind of an objective observer that the arbitrator is or might be partial to one side over the other. *Positive Software Solutions,* 436 F.3d at 502; *Perry Homes v. Cull*, 173 S.W.3d 565, 571 (Tex. App. — Fort Worth 2005, pet. filed). This basis of finding evident partiality is the most common because of a tension built into the arbitral system: parties to an arbitration want a qualified arbitrator, one who is familiar with the issues presented in the case being presented, but choosing an arbitrator who is familiar with the filed greatly increases the chance that he knows or has worked with the parties, the lawyers or the witnesses in the past, and therefore increases at least the appearance of partiality or favoritism. *Perry Homes*, 173 S.W.3d at 571. In applying this ground for vacating an arbitration award, courts have sought to strike a balance between requiring an arbitrator to disclose facts that would be of genuine interest to a party to the proceeding, and not allowing the party who has lost the arbitration to pursue an obvious "sour grapes" non-disclosure argument. As is always the case when courts are required to balance competing considerations it is difficult to both articulate a black-and-white rule and difficult to apply the rule to the satisfaction of all involved.

Courts have stated the obligation to disclose in a general fashion, writing (for example) that prospective arbitrators are required to disclose important information regarding personal, business and social relationships with those involved in the arbitration. *Perry Homes*, 173 S.W.3d at 571. An arbitrator's obligation to disclose is not limited to "direct" financial or business relationships, but includes an obligation to disclose any relationship that might reasonably show the arbitrator is not entirely impartial, *Burlington N. R.R. Co. v. TUCO, Inc.*, 960 S.W.2d 629, 636 (Tex. 1997); *Houston Village Bldrs., Inc. v. Falbaum*, 105

S.W.3d 28, 31 (Tex. App. — Houston [14th Dist.] 2003, pet. denied) (mand. denied), but does not extend to "trivial" relationships and connections. *Burlington N. R.R. Co.*, 960 S.W.2d at 637; *Perry Homes*, 173 S.W.3d at 571. As these general standards suggest, "arbitrators should err in favor of full disclosure." *Houston Village Bldrs.*, 105 S.W.3d at 33 n. 2; *accord, Burlington N. R.R. Co.*, 960 S.W.2d at 637; *Henry*, 100 S.W.3d at 509.

A policy of up-front disclosure is intended to allow the parties the opportunity to address issues of potential bias at the outset, before the arbitration occurs. *Thomas James Assoc.*, 1 S.W.3d at 320. A necessary corollary of this rule is that the burden is on the arbitrator to disclose relevant information to the parties. *Mariner Fin. Gp., Inc. v. Bossley*, 79 S.W.3d 30, 35 (Tex. 2002). This obligation to disclose means, as a general matter, a failure to disclose will allow a party to seek to vacate the award even if the undisclosed fact could have been discovered by that party; the purpose of requiring disclosures by arbitrators is to avoid speculative presumptions regarding what the parties did know or could have learned. *Houston Village Bldrs.*, 105 S.W.3d at 35.[8] The sufficiency of an arbitrator's disclosures are judged on a case-by-case basis. *Mantle*, 956 F.Supp. at 729.

The question of evident partiality as a basis for vacating an arbitration award has recently been discussed in great detail by the Fifth Circuit in *Positive Software Solutions, Inc. v. New Century Mtg. Corp*. The facts of *Positive Software Solutions* are straightforward, and involve a dispute over alleged copyright infringement. *Positive Software Solutions*, 436 F.3d at 496. The matter was sent to arbitration, and the parties chose a single arbitrator. *Id.* at 497. Despite being asked on several occasions to disclose all circumstances "likely to affect impartiality or create an appearance of partiality," including "past or present relationships with ... counsel, direct or indirect, whether ... professional ... or any other kind," the arbitrator indicated that he had nothing to disclose. *Id.* After the plaintiff lost, it discovered the arbitrator, both personally and through his former firm, had been co-counsel with the defendant's counsel in what was described as "protracted patent litigation" about a decade before. *Id.* at 497-98. Because this fact was not disclosed, the plaintiff moved to vacate the award, arguing it was the product of evident partiality based on the failure to disclose this prior relationship. *Id.* at 497. The district court vacated the award on these grounds, and the case was appealed to the Fifth Circuit. *Id.* at 498.

The opinion in *Positive Software Solutions* is significant, for a number of reasons. The court began by giving an overview of the law governing the determination of whether

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[8] Although if a relationship between the arbitrator and the other side was clearly known by a party at the time of the arbitration the courts could find that the party waived the right to complain that the relationship shows partiality if no timely objection is made. *See, e.g., Weber v. Merrill Lynch Pierce Fenner & Smith, Inc.*, 2006 WL 2583183 at * 3 (N.D. Tex. Sept. 1, 2006).

an arbitrator has or has not acted with evident partiality, and decided the better precedent was that evident partiality existed when "undisclosed facts show a reasonable impression of partiality." *Id.* at 501 (*citing and quoting Schmitz v. Zilveti*, 20 F.3d 1043 (9th Cir. 1994)). Based on this, the court held that while every failure to disclose a connection between an arbitrator and someone involved in the arbitration will not support a finding of evident partiality, full disclosure of material matter is necessary to show impartiality: "an arbitrator ... displays evident partiality *by the very failure to disclose* facts that might create a reasonable impression of the arbitrator's partiality. This evident partiality is demonstrated from the nondisclosure, *regardless of whether actual bias is established*." *Id.* at 502 (emphasis added). Applying this definition to the facts, the court found the district court's conclusion that the arbitrator had a long term professional relationship with one of the lawyers was factually correct, and because the existence of this relationship might convey the impression of partiality the legal effect of the nondisclosure required the award to be vacated. *Id.* at 503-04. The court then went on to reject the argument that the nondisclosure was waived because the objection was not raised until after the award was rendered, and to modify the district court's order to remove instructions about how the case was to be handled when it was arbitrated again. *Id.* at 504-05.

For the practitioner, *Positive Software Solutions* contains several lessons. At its heart *Positive Software Solutions* drives home what is a good rule for all ADR neutrals (whether they be arbitrators, mediators, private judges or whatever) to follow: when in doubt, disclose, so as to preclude a later challenge based on evident partiality. If the matter disclosed is trivial it is unlikely to bother the parties, if it bothers the parties it is probably not trivial, and disclosing all connection in advance means a failure to object until after the award will likely result in the objection being waived.[9] The Fifth Circuit also has clearly defined the term "evident partiality" and has followed the broader definition of the term, essentially mandating broad disclosure. Finally, the court refused to undercut the burdens imposed by this rule by finding waiver in the absence of either proper disclosure or actual knowledge of the matter to be disclosed; although the court does not appear willing to allow a party to an arbitration to learn some fact that might indicate partiality to "lie behind the log," it will not allow a failure to disclose some material matter to result in the waiver of the issue.

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[9] Some arbitrators balk at this rule, arguing a general rule in favor of disclosure means their lives becomes an open book and results in a ridiculous amount of disclosure regarding matters about which no one really cares. This may be true, but the result of insufficient disclosure is the waste of a vast amount of legal and judicial resources arbitrating a case to an award only to have the award set aside, and possible creating the impression (fair or unfair) that the arbitrator has acted less than ethically. On the whole, erring on the side of overdisclosure can only reduce the number of successful vacatur appeals, and so is both good practice and good policy.

However, this opinion as it stands will likely not be the Fifth Circuit's final word on the matter. The decision in *Positive Software Solutions* was issued on January 11, 2006, and on May 5, 2006 the Fifth Circuit took the unusual step of voting to grant a motion for rehearing *en banc*. The case was argued on September 27, 2006, and a decision on the rehearing is expected soon. Stay tuned.

— Procedural Misconduct

The third statutory ground for vacating an arbitration award under the FAA is if the arbitrator is guilty of "misconduct" because he "refused to postpone a hearing, upon sufficient cause shown" or if he refuses to hear "evidence pertinent and material to the controversy" or otherwise acts in a way that prejudices the rights of the parties. 9 U.S.C. § 10(a)(3). The "misconduct" referred to in the FAA refers not to bad faith but rather misbehavior untainted by fraud or corruption, and is in the nature of a bad decision or indiscretion. *Weinberg*, 140 F.Supp.2d at 719. Because all of these failings are procedural in nature I have characterized them as examples of "procedural misconduct," but they provide grounds to vacate an award only because they are potentially so serious that they affect the substance of the award entered.

The general rule is that the arbitrator has considerable discretion to allow or refuse a request for continuance, to accept or reject evidence that is submitted and to otherwise control the arbitration process, *Prestige Ford*, 324 F.3d at 394-95, *Mantle*, 956 F.Supp. at 736-37, but this discretion does not allow the arbitrator to deny a litigant an adequate opportunity to present their evidence and arguments. *Prestige Ford*, 324 F.3d at 395; *Babcock & Wilcox Co. v. PMAC, Ltd.*, 863 S.W.2d 225, 234 (Tex. App. — Houston [14th Dist.] 1993, writ denied). Therefore, it is appropriate to vacate an arbitration award where (for example) to refusal to allow the party to present its evidence deprived it of a fair hearing. *Karaha Bodas Co., L.L.C. v. Perusahaan Pertambangan Minyak Dan Gas Bumi Negara*, 364 F.3d 274, 300-01 (5th Cir. 2004).[10] Procedural decisions that do not prevent a party from presenting its case are insufficiently material to justify the subsequent vacation of the award under this section. *Laws v. Morgan Stanley Dean Witter*, 452 F.3d 398, 400 (5th Cir. 2006) (arbitrator's decision not to continue arbitration hearing did not justify vacation of award, despite fact he knew litigant was receiving discovery on the eve of the arbitration; record did

[10] Although it may look as if this citation was the result of the author falling asleep on his keyboard, these are the names of the parties. This suit was decided under the United Nations Convention on the Recgonition and Enforcement of Foreign Arbitral Awards, and was the appeal of a suit filed in Houston involving a Cayman Islands contractor and a government-owned Indonesia utility company. *Karaha Bodas Co.*, 364 F.3d at 281.

not shown the documents were complex, voluminous or important, arbitration had been pending for three years and litigant had waited until two months before the arbitration to seek discovery).

Although a party is likely always able to point to some decision made during the course of an arbitration regarding a request for continuance or regarding the admission or exclusion of evidence which he did not like, the broad scope of an arbitrator's discretion means it is very unlikely that this unfavorable decision will allow the arbitration award to be vacated, unless it is so unfavorable and so damaging that it entirely precluded the party from presenting its case. However, as pressures build on arbitrators to work more quickly and more efficiently to better realize the benefits that arbitration offers, this may become more of a "hot button" issue, and we may see an increase in requests that an arbitration award be vacated on this ground.

— Arbitrators Exceed Their Powers or Award is Indefinite

Finally, an arbitration award may be vacated if the arbitrator exceeds the powers vested in him or executes the powers with which he is vested so imperfectly that he fails to make a "mutual, final, and definite" award on the matter submitted to them. 9 U.S.C. § 10(a)(4). This ground for vacating award is perhaps the most limited of all; it is not intended to address procedural irregularities in the arbitration, but rather only to rein in an arbitrator who decides issues clearly beyond the scope of the dispute submitted to him, *Gateway Technologies,* 64 F.3d at 998 n. 7; *Mantle*, 956 F.Supp. at 733, *see also Beaird Indus., Inc. v. Local 2297, Int'l Union*, 404 F.3d 942, 946 (5th Cir. 2005) (arbitrator cannot act in a way directly contrary to the provisions of the contract that allows him to arbitrate a claim), or, conversely, to vacate the decision of an arbitrator who fails to issue a final decision on the matters which he is to decide. *In re Nestle USA — Beverage Div., Inc*., 82 S.W.3d 767, 777-78 (Tex. App. — Corpus Christi 2002, orig. proceeding).[11] However, if the parties actually submit to the arbitrator an issue that arguably is outside of the scope of his authority to decide, the courts may find that the arbitrator's decision on this issue lies within the scope

[11] Interestingly, the court in *Nestle* did not vacate the award, but sent the matter back to the arbitrator for a clarification of what the award meant. *Nestle USA*, 82 S.W.3d at 778. This is in keeping with the law of the Fifth Circuit, which holds that while the FAA does not specifically permit the remand of ana ward to the arbitrator courts have the inherent authority to do so and that doing so is in keeping with the purpose of arbitration, which is to have all disputes settled by the arbitrator(s) to whom the matter is submitted. *Weinberg*, 140 F.Supp.2d at 722-23.

of his authority, and was proper. *Kergosien*, 390 F.3d at 354.[12] Again, although Section 10(a)(4) if frequently raised as a grounds for vacating an arbitration award, courts only very rarely find that the award should be vacated because the arbitrator exceeded his authority or rendered a decision that is so flawed it cannot be enforced.

ii. Non-Statutory Grounds

In addition to the grounds enumerated in the FAA, the courts have created several other grounds for vacating arbitration awards, such as if the award violates public policy or is the product of a manifest disregard for the law. *Sarofim v. Trust Co. of the W.*, 440 F.3d 213, 216 (5th Cir. 2006); *Kergosien*, 390 F.3d at 353.[13] These non-statutory grounds in many ways represent a kind of ultimate backstop against a bad decision by arbitrators, and exist because courts, not arbitrators are the ultimate arbitrators of public policy. *Gulf Coast Indus. Workers Union v. Exxon Co., U.S.A.*, 991 F.2d 244, 248 n. 5 (5th Cir.), *cert. denied*, 510 U.S. 965, 114 S.Ct. 441 (1993).

— Award Violates Public Policy

The first non-statutory ground for vacating an arbitration award recognized by the federal courts is that the award violates public policy. The idea that a court should vacate an arbitration award that violates public policy is rooted in the general doctrine courts will not enforce contracts that violates the law or public policy, a doctrine that applies because arbitration awards are the products of contract. *Gulf Coast Indus. Workers Union*, 991 F.2d at 248-49 (*citing United Paperworkers Int'l Union, AFL-CIO v. Misco, Inc.*, 484 U.S. 29, 39, 108 S.Ct. 364 (1987)). However, the standard of proof is very high. In order for a court to vacate an arbitration award under federal law on the grounds that it violates public policy, the public policy must be "explicit, well defined and dominant." *Sarofim*, 440 F.3d at 219 (*citing W.R. Grace & Co. v. Local Union 759, Int'l Union of United Rubber, Cork, Linoleum & Plastic Workers of Am.*, 461 U.S. 757, 766, 103 S.Ct. 2177 (1983)). This means that courts cannot set aside arbitration awards on the basis of "imprecise" and "ill-defined" notions of what public policy is or should be, *Gulf Coast Indus. Workers Union*, 991 F.2d at

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[12] As a practical matter, a party that permits an arbitrator to decide an issue that is outside the scope of his contractual authority will likely be found to have waived any complaint about the arbitrator's actions.

[13] Other cases identify even more non-statutory grounds. *Weinberg*, 140 F.Supp.2d at 717.

249, and it is not enough for the party seeking to have an arbitration award set aside to identify general considerations of the law or proposed public interests; instead, the award may only be set aside if it runs afoul of settled "laws and legal precedents." *Sarofim*, 440 F.3d at 219; accord, *Prestige Ford*, 324 F.3d at 396.

Although many lawyers feel as if they can always make a public policy argument, the fact is there are relatively very things that are a fundamental part of settled public policy, and those few things that there are so well settled are also so well known that an arbitrator is unlikely to issue an award running afoul of these considerations. However, if the case involves some important public right that may not have been adequately represented because the public at large was not represented in the matter, the court may have more latitude to determine the award should be vacated. *Gulf Coast Indus. Workers Union*, 991 F.2d at 249-54 (court set aside arbitration award reinstating employee who had used drugs to safety-sensitive position in part because of danger worker presented to public at large).

— Award Shows a "Manifest Disregard" for the Law

The second non-statutory ground for vacating an arbitration award under the FAA is if the arbitrator has shown "manifest disregard" for the law. As set forth above an arbitral award is not subject to being reviewed for a mistake of law, so a showing of manifest disregard for the law requires showing more than some mistake has been made in applying the law. *Prestige Ford*, 324 F.3d at 395 (manifest disregard is a narrow rule of limited applicability). Instead, an arbitration award is subject to being vacated for manifest disregard for the law only where it can be shown there is a clearly applicable body of law and the arbitrator was aware of this fact, but nevertheless chose to ignore the law and rendered a decision contrary to this well-settled law. *Brabham*, 376 F.3d at 381-82; *Perry Homes*, 173 S.W.3d at 572; *see also Prestige Ford*, 324 F.3d at 395 (proof of manifest disregard requires showing a "willful inattentiveness" to the law). The error made by the arbitrator must be self-evident: "[t]he error must have been obvious and capable of being readily and instantly perceived by the average person qualified to serve as an arbitrator," *Kergosien*, 390 F.3d at 355, although in determining whether this is the case the reviewing court is not limited to considering matters set forth within the four corners of the award itself, and may instead look at all the information available to it. *Sarofim*, 440 F.3d at 217-18.

As a case from outside Texas shows, the standard that must be met to prove manifest disregard for the law by an arbitrator is a very high one, and therefore is a showing that will be made only very rarely:

While the law of the circuit does recognize that an arbitration decision can be

> vacated if the arbitrators, in making their decision, acted in manifest disregard of the law, a litigant arguing that an arbitrator acted in manifest disregard of the law must show something more than a misinterpretation, misstatement, or misapplication of the law. A manifest disregard for the law involves a conscious and deliberate decision to ignore the applicable law. Consequently, there must be some showing in the record, other than the result obtained, that the arbitrators knew the law and expressly disregarded it.
>
> We find no error in the district court's determination that there was no evidence to suggest that the arbitration panel deliberately ignored relevant law. At most, the arbitration panel may have misunderstood the effect and weight to be given to cases cited by the parties. On the record before us, we cannot find proof that the arbitrators recognized a clear rule of law and chose to ignore it. Therefore, we cannot find that the arbitrators acted in manifest disregard for the law.

Peebles v. Merrill Lynch, Pierce, Fenner & Smith Inc., 431 F.3d 1320, 1326-27 (11th Cir. 2005).

This also necessarily means that if the law vests the trier of fact with flexibility or discretion the refusal to follow such law does not show the kind of manifest disregard for the law justifying the vacation of an arbitration award. *See, e.g., Brabham*, 376 F.3d at 382 (although cases brought against brokers the courts say the "preferable" method for determining the investment returns that should have been realized is to look to the returns of well-recognized stock averages, the arbitrator's refusal to do so did not show a manifest disregard for the law). Finally, proof of manifest disregard also requires showing that the error of law resulted in an injustice, *Kergosien*, 390 F.3d at 355, and so an arbitration award is not subject to being vacated if the arbitrator has manifestly disregards the law on some collateral point, the resolution of which does not affect the award he has rendered.

iii. <u>What are not Grounds for Vacating an Arbitration Award</u>

Because of the deference shown to arbitral awards, the arguments commonly made in civil appeals are not grounds for setting aside such awards. For example, a mistake of fact does not permit the vacatur of an arbitration award, *Mantle*, 956 F.Supp. at 734, even if the fact-finding by the arbitrator was "improvident, even silly." *Kergosien*, 390 F.3d at 357 (*citing and quoting Misco, Inc.*, 484 U.S. at 39). Neither may an aggrieved party argue that the arbitrator's award is "arbitrary" or "capricious": these are not independent grounds for vacating an arbitration award, except to the extent that proof of one of more of the grounds

discussed above may be shown if it can be shown the award was made arbitrarily or capriciously. *Brabham*, 376 F.3d at 382-83.

b. Under the Texas General Arbitration Act

Although sometimes stated in a different way, the TAA recognizes most of the same grounds for vacating an arbitration award as does the FAA, and Texas courts have recognized some of the same non-statutory grounds for vacating arbitration awards as are recognized by the federal courts.

i. Statutory Grounds

— Fraud or Corruption

Like the FAA, the TAA recognizes that an arbitration award may be set aside if it was "obtained by corruption, fraud, or other undue means." Tex. Civ. Prac. & Rem. Code § 171.088(a)(1). The TAA also contains a separate provision allowing for the vacation of an arbitration award if the rights of a party were prejudiced by "corruption in an arbitrator." Tex. Civ. Prac. & Rem. Code § 171.088(a)(2)(B). Although a number of Texas cases recognize this as a ground for vacating an arbitration award, none of them discuss what kind of behavior might constitute "corruption" or "undue means," and none explain what might constitute "corruption in an arbitrator" that is independent of corruption, fraud and undue means. However, given that the language is almost identical to the language used in the FAA it is reasonable to assume that this section is directed at the same kind of conduct, i.e., where the award is the product of entirely improper, if not illegal, acts, such as a bribe paid to the arbitrator.

— Evident Partiality of the Arbitrators

As with the FAA, the TAA recognizes that an arbitration award may be set aside if it is the product of the evident partiality of the arbitrator. Tex. Civ. Prac. & Rem. Code § 171.088(a)(2)(A). Because evident partiality is difficult to show with direct evidence, litigants seeking to have an award set aside under the TAA will usually assert that the evident partiality is shown by the arbitrator's failure to disclose some information that bears on the question of his impartiality, a failure that can itself be evidence of evident partiality. *Kendall Bldrs., Inc. v. Chesson*, 149 S.W.3d 796, 804 (Tex. App. — Austin 2004, pet. denied). As

is the case under the FAA, claims of evident partiality based on nondisclosure is probably the most common ground for seeking to have an arbitration award vacated. However, while the failure to disclose some fact that may be indicative of bias may provide grounds for setting aside the arbitration award, it does not provide a basis for suing the arbitrator in tort. *Pullara*, 191 S.W.3d at 909 (although a failure to disclose can support the vacatur of an arbitration award under the appropriate circumstances, decisions by the Supreme Court recognizing that arbitrators have an obligation to disclose "did not create a cause of action against arbitrators for failing to perform their duty to disclose ...").

— Misconduct of the Arbitrators

There are relatively few cases addressing the next four statutory grounds for vacating an award under the TAA, the first of which is arbitrator "misconduct or willful misbehavior." Tex. Civ. Prac. & Rem. Code § 171.088(a)(2)(C). What authority there is makes clear that this provision is intended to address circumstances similar to the procedural misconduct provisions of the FAA, discussed above, and that the misconduct complained of must be so bad as to deprive the party of a fair hearing. *GJR Mgmt. Hldgs., L.P. v. Jack Raus, Ltd.*, 126 S.W.3d 257, 263 (Tex. App. — San Antonio 2003, pet. denied). However, because so many other "wrongs" an arbitrator may commit are covered by other, more specific portions of the TAA, such as the provision allowing an award to be vacated if the arbitrator "refused to postpone the hearing after a showing of sufficient cause for postponement," Tex. Civ. Prac. & Rem. Code § 171.088(a)(3)(B), or the arbitrator "refused to hear evidence material to the controversy," Tex. Civ. Prac. & Rem. Code § 171.088(a)(3)(C), or the arbitrator did not conduct the hearing in compliance with statutory requirements, Tex. Civ. Prac. & Rem. Code § 171.088(a)(3)(D), Section 171.088(a)(2)(C) of the TAA often turns into a "catch-all" for complaints about the arbitrator and his conduct. *See, e.g., GJR Mgmt. Hldgs.*, 126 S.W.3d at 263 (complaining that the arbitrator had "surfed the Internet and then examined witnesses based on information he had found" but did not make this information available to the parties and that he was emailing others instead of paying attention while the arbitration was ongoing).

Despite the relative dearth of authority on all of these grounds for vacating an arbitration award, what is clear is that under the TAA arbitrators have the same considerable degree of freedom to grant or deny continuances, receive evidence, etc., without having to worry that they will be found to have committed misconduct or otherwise denied a party a fair hearing. *See, e.g., Gold Rush, Inc. v. Wayne*, 2006 WL 2076725 at * 2-4 (Tex. App. — Corpus Christi July 27, 2006, n.p.h.) (mem. op.) (considering whether arbitrator should have granted continuance; court looked to cases determining whether continuance of a trial was required and found existence of alleged medical condition had not been proven and that party

did not use diligence to obtain evidence by other means; arbitrator did not improperly deny continuance); *Hoggett v. Zimmerman, Axelrad, Meyer, Stern & Wise, P.C.*, 63 S.W.3d 807, 811 (Tex. App. — Houston [14th Dist.] 2001, no pet.) (applying same rules; arbitrator did not improperly deny continuance). Therefore, as long as the arbitration process was not so fundamentally unfair as to deprive a party of the ability to present his case, vacatur on an arbitration award on any of these grounds will be rare.

— Arbitrators Exceed Their Powers

Arbitrators have no more right to exceed their powers under the TAA than they do under the FAA, and an award that exceeds the scope of the matter submitted for arbitration may be vacated. Tex. Civ. Prac. & Rem. Code § 171.088(a)(3)(A); *Pheng Inv., Inc. v. Rodriquez*, 196 S.W.3d 322, 329 (Tex. App. — Fort Worth 2006, no pet.). However, if the arbitration is conducted pursuant to an agreement to arbitrate all disputes (or words to that effect), it may be difficult to show the arbitrator has exceed his powers, because such language vests the arbitrator with the authority to determine any dispute raised between the parties. *See, e.g., Baker Hughes Oilfield Operations,* 164 S.W.3d at 443-45 (arbitration panel did not exceed its authority in making award for breach of contract even though party did not assert breach of contract in its pleadings, where arbitration clause allowed it to decide any controversy presented between the parties and facts presented breach of contract claim). If an arbitration award does exceed the arbitrator's authority, the court will only vacate the portion of the award the arbitrator did not have the power to render; the remainder of the award will be affirmed. *Peacock*, 107 S.W.3d at 639.

— Lack of an Agreement to Arbitrate

The final statutory ground for seeking vacation of an arbitration award under the TAA is that there was no agreement to arbitrate in the first place. Tex. Civ. Prac. & Rem. Code § 171.088(a)(4). In many ways this section is somewhat superfluous; if a court looks at the record and finds not agreement to arbitrate it is require to vacate the award, because arbitration is a product of contractual agreement, and a party cannot be forced to accept an arbitral forum if it has not agreed to do so. *Pepe Int'l Dev. Co. v. Pub Brewing Co.*, 915 S.W.2d 925, 931 (Tex. App. — Houston [1st Dist.] 1996, no writ) ("Arbitration is a creature of contract; thus when a party seeks to compel arbitration, he must first establish his right to that remedy under contract. Here, [certain defendants] were not parties to the underlying contract [providing for the arbitration of disputes], and therefore *have no right to arbitration of the claims against* them under the contract"); *accord, Smith v. Transport Workers Union of Am., AFL-CIO Air Transp. Local 556*, 374 F.3d 372, 374-75 (5th Cir. 2004). This means

if the court finds that the matter should not have been sent to arbitration (an issue that is necessarily presented as part of the post-arbitration judicial review process because the TAA only permits an interlocutory appeal of the *refusal* to send a matter to arbitration, Tex. Civ. Prac. & Rem. Code § 171.098(a)(1)), it should vacate the award, a result that only makes sense. However, it is important to remember that because the assertion that the contract containing an agreement to arbitrate was invalid is a question for the arbitrators, this claim does not provide grounds for the post-arbitration vacation of the arbitrator's award. *Women's Reg. Healthcare*, 175 S.W.3d at 368.

ii. Non-Statutory Grounds

In addition to the statutory grounds available under the TAA, Texas law also recognizes that an arbitration award may be vacated on certain common law grounds.

— Gross Mistake

The Texas equivalent of the federal concept of "manifest disregard" is the complaint that the arbitration award was the product of a "gross mistake." Proof that the award was the result of a gross mistake allows the award to be vacated. *Baker Hughes Oilfield Operations*, 164 S.W.3d at 446; *Crossmark*, 124 S.W.3d at 430 n. 6. A gross mistake is one that is so bad that it implies the award was the product of bad faith or a failure to exercise honest judgment by the arbitrator. *Baker Hughes Oilfield Operations*, 164 S.W.3d at 446. It is sometimes characterized as the claim that the arbitrator's decision was so far wrong that it ended up being arbitrary and capricious. *Pheng Inv., Inc.*, 196 S.W.3d at 330. An arbitrator who makes a decision based on case law will almost certainly not be found to have made a gross mistake that would justify vacating the award. *Universal Computer Systems, Inc. v. Dealer Solutions, L.L.C.*, 183 S.W.3d 741, 754 (Tex. App. — Houston [1st Dist.] 2005, pet. denied), *cert. filed*, 75 USLW 3106 (Sept. 7, 2006).

— Violation of Public Policy

Another non-statutory grounds under which a Texas court may vacate an arbitration award is if the award violates public policy. However, proof that an award violates public policy occurs only in the "extraordinary" case, and requires showing that the award violates a carefully articulated, fundamental and recognized public policy. *CVN Gp., Inc. v. Delgado*, 95 S.W.3d 234, 239 (Tex. 2002); *Action Box Co., Inc. v. Panel Prints, Inc.*, 130 S.W.3d 249, 251-53 (Tex. App. — Houston [14th Dist.] 2004, no pet.); *Crossmark*, 124 S.W.3d at 430.

An example of the kind of well-settled public policy of the State of Texas that an arbitrator cannot disturb is the public policy in favor of protecting homesteads from creditors and their claims. *CVN Gp.*, 95 S.W.3d at 239-42.

iii. What are not Grounds for Vacating an Arbitration Award

As is the case under the FAA, an arbitration award rendered under the TAA is not subject to being set aside on the grounds that it is the product of either a mistake of fact or mistake of law. *Pheng Inv., Inc.*, 196 S.W.3d at 329; *Baker Hughes Oilfield Operations*, 164 S.W.3d at 442; *Crossmark*, 124 S.W.3d at 429. Texas courts have also proved to be unwilling to accept arguments that attempt to pound a square peg into a round hole by attempting to characterize what amounts to a simple legal error as one of the grounds on which an arbitration award made be vacated. *See, e.g., Action Box Co.*, 130 S.W.3d at 251-53 (rejecting assertions that arbitrator's alleged misreading of settlement agreement showed that he had exceeded his powers, manifestly disregarded the law or offended a basic public policy of the state).; *Crossmark*, 124 S.W.3d at 435 (rejecting attempts to recharacterize legal argument regarding what documents should have been considered together as public policy argument).

5. Remedy if the Award is Vacated

Under both the FAA and the TAA, the usual remedy if an arbitration award is vacated for one of the reasons discussed above is usually to send the matter back to the arbitrators. Under the FAA the court has the "discretion" to send the matter back to the arbitrator, 9 U.S.C. § 10(b), and this discretion allows the court to decide whether it should be sent back to the same arbitrator or panel or a new one. *HMC Mgmt. Corp. v. Carpenters Dist. Council of New Orleans & Vicinity*, 750 F.2d 1302, 1305 (5th Cir. 1985); *Kergosien v. Ocean Energy, Inc.*, 280 F.Supp.2d 612, 617 (S.D. Tex. 2003), *rev'd on other grounds*, 390 F.3d 346 (5th Cir. 2004). Under the TAA, if the award is vacated for any reason other than the fact that there was no agreement to arbitrate in the first place, the court may sent the matter back to a new arbitrator(s), Tex. Civ. Prac. & Rem. Code § 171.089(a), but if the vacatur is on "procedural" grounds, in which case it may be returned to the same arbitrator. Tex. Civ. Prac. & Rem. Code § 171.089(b). However, the use of the word "may" in Section 171.089 has been held to be permissive, and therefore a court may be able to choose to allow the matter to be litigated rather than re-arbitrated. *Tri-Star Petroleum Co. v. Tipperary Corp.*, 107 S.W.3d 607, 614-15 (Tex. App. — El Paso 2003, pet. denied) (mand. denied); *contra, Koch v. Koch*, 27 S.W.3d 93, 96-97 (Tex. App. — San Antonio 2000, no pet.).