TRENDS AND PATTERNS IN ARBITRATION

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I. Introduction

What follows is an overview of the significant cases discussing the law governing arbitration decided since January, 2008, in Texas state courts, the Fifth Circuit and the U.S. Supreme Court. It borders on understatement to say that arbitration and arbitration-related issues are a hot legal topic; in fact, few areas of the law are hotter. Given the volume of cases decided in each year, it is difficult to usefully discuss each of them, so rather than trying to cover every case this article will identify certain recurring themes, and show how recent important decisions reflect these themes.

One theme running through this year's cases is the increasing "transactionalization" of arbitration provisions. By this I mean an arbitration clause that once simply said "Disputes will be arbitrated through the AAA" now runs for an entire paragraph, containing fee schedules, limitations on available remedies and the like. Because arbitration provisions are regularly enforced, transactional lawyers who write them are both trying to anticipate issues that will arise and to guaranty the most "bang for the buck" for their clients, and so are generating increasingly complicated and sophisticated arbitration clauses. However, it is the poor litigator who has to use, explain and enforce these paragraphs.

There are several problems with such clauses. The first is their very complexity invites new and different legal challenges, challenges which seriously undermine two of the major advantages of arbitration, speed and privacy. The second, and perhaps in the long run more disturbing problem, is that these over-engineered arbitration clauses rob both the arbitrator and the parties of the flexibility to have their disputes heard quickly and cheaply. Taken to extremes (as lawyers are wont to do), such complexity and procedure may end up killing the goose that laid the golden egg, either pricing the arbitration of disputes out of the market or forcing a reaction against arbitration that will result in a serious narrowing of the scope of its reach.

Another theme, one which seems to run counter to the theme of transactionalization, is that the scope of review of an arbitration award is becoming more limited. *Hall Street Associates* limited the grounds on which a party can seek review of an arbitrator's award, and other courts are following suit. While the control parties try to impose on the process in the name of freedom of contract increases, at the same time parties find themselves running up against a statutory wall, one which limits as a matter of law the circumstances under which an award may be affirmed and turned into a judgment by a court.

There is also an increasing degree of conflict between the provisions of contractual arbitration agreements and the availability of statutory rights and remedies. Historically this

was not an issue, as most arbitration provisions were contained in business contracts, and the disputes being arbitrated did not usually implicate any rights or remedies the Legislature had sought to guarantee by statute. Now that arbitration is widely invoked and used in employment, workers' compensation and consumer contexts, some of the limitations imposed by agreements to arbitrate clash with the protective provisions of various statutes. As we shall see, one particularly contentions area for such conflict involves class actions and class action waivers.

Finally, as a procedural matter, more and more cases are granting writs of mandamus to preclude the submission of a dispute to arbitration when some or all of the dispute is not actually arbitral. Although this gives rise to a certain symmetry (after all, parties who have unsuccessfully sought arbitration have been able to take interlocutory appeals or seek a writ of mandamus for years), this increasing resort to immediate litigation has a number of effects: it cheapens the "no adequate legal remedy" prong of mandamus, increases the amount and costs of litigation and increases the number of issues that are properly subject to litigation in court. However, in the opinion of the author, the worst part of these decisions is the proliferation of a series of "standardless standards," ones which allow mandamus but which do not really tell you when a court will grant mandamus and when it will not. This uncertainty, in turn, breeds more litigation, more expense and less efficiency, all of which are enemies of arbitration.

II. *Hall Street Associates* : An End to Non-Statutory Grounds to Assail Arbitrator's Awards — Or Is It?

Certainly the most important recent decision in arbitration law, and the one likely to have the most direct impact on arbitration practice, is the U.S. Supreme Court's decision in *Hall Street Associates*.

A. The Holding in *Hall Street Associates*

The precipitating facts of *Hall Street Associates* are fairly mundane: the parties had a dispute over a lease. *Hall Street Assoc., L.L.C. v. Mattel, Inc.*, ___ U.S. ___, 128 S.Ct. 1396, 1400 (2008). The lease apparently did not contain an arbitration provision, but after some litigation in federal district court the parties proposed to submit their remaining disputes to arbitration. *Hall Street Assoc*., 128 S.Ct. at 1400. However, the agreement to arbitrate provided two extra-statutory grounds for review by the district court of the arbitrator's award, allowing it to vacate the award if the findings of fact are "not supported by substantial evidence" or if the conclusions of law are "erroneous." *Id.* at 1400-01. The arbitrator ruled in favor of the tenant, and the landlord sought review in the district court, arguing the arbitrator had misapplied the law. *Id.* at 1401. The court agreed, and sent the

matter back to the arbitrator. *Id.* The arbitrator then amended his decision to favor the landlord, and the tenant appealed. *Id.* Ultimately, the Supreme Court took the case in order to decide "whether the grounds for vacatur and modification provided by §§ 10 and 11 of the FAA are exclusive." *Id.*

It found that they are. After reviewing the purpose and operation of the FAA, the Court noted that there was a split of authority as to whether the grounds set forth in the FAA for vacating or modifying an arbitration award were exclusive, or whether they could be supplemented by the agreement of the parties or common law. *Id.* at 1402-03. In deciding that the statutory grounds were exclusive, the Court distinguished its prior authorities that have been cited to support the conclusion that arbitral awards may be reviewed on grounds not named in the statute, such as manifest disregard for the law. *Id.* at 1403-04.

It then came to the heart of the opinion, rejecting the argument that because arbitration is a creature of contract the parties therefore have the right to contractually agree to what review of the award is allowed. It did so by rejecting the landlord's characterization of the issue as being one of freedom of contract, relying instead on general rules of statutory interpretation. *Id.* at 1404. According to the Court, statutes like the FAA which contain a fixed list of terms are to be interpreted to include only those things that fall within the ambit of the terms used, the rule of *ejusdem generis*. *Id.* at 1404-05. Moreover, it found the fact the FAA limits the power of a court to confirming the award "unless the award is vacated, modified, or corrected as prescribed in Sections 10 and 11 ..." also shows the enumerated grounds were intended to be the exclusive basis of allowing a court to do anything other than affirm an award. *Id.* at 1405. Its conclusion is that this narrow interpretation of the scope of review is in keeping with the general interest in making arbitration fast and inexpensive:

> Instead of fighting the text, it makes more sense to see the three provisions, §§ 9-11, as substantiating a national policy favoring arbitration with just the limited review needed to maintain arbitration's essential virtue of resolving disputes straightaway. Any other reading opens the door to the full-bore legal and evidentiary appeals that can render informal arbitration merely a prelude to a more cumbersome and time-consuming judicial review process.
>
> *Id.* (internal quotations omitted).

Finally, after finding the statutory grounds for assailing an arbitrator's award set out in the FAA are exclusive, the Supreme Court in *Hall Street Associates* (perhaps recognizing its decision could be read as prohibiting parties to contract for whatever kind of arbitration they wished) went on to say "we do not purport to say that they [the statutory grounds for review in the FAA] exclude more searching review based on authority outside the statute as

well." *Hall Street Assoc.*, 128 S.Ct. at 1406. It recognized that the FAA was "not the only way into court for parties wanting review of arbitration awards," and noting that state statutory and common law might provide for a different and more expansive scope of review. *Id.*

B. Cases Applying *Hall Street Associates*

As one would expect, lower courts have been quick to pick up the banner of *Hall Street Associates*, and the Fifth Circuit has (for a change) recently affirmed its intention to follow the Supreme Court's lead. *Citigroup Global Markets, Inc. v. Bacon*, 2009 WL 542780 (5th Cir. Mar. 5, 2009). Although the Texas Supreme Court has not yet spoken on the issue it likely will soon, and the intermediate Texas appellate courts have followed *Hall Street Associates*, both in cases where they are bound to do so, i.e., those involving the FAA, *see, e.g., Cameron Int'l Corp. v. Vetco Gray, Inc.*, 2009 WL 838177 at * 8 (Tex. App. — Houston [14th Dist.] Mar. 31, 2009, n.p.h.) (mem. op.); *Chandler v. Ford Motor Credit*, 2009 WL 538401 at * 3 (Tex. App. — San Antonio Mar. 4, 2009, no pet.) (mem. op.), as well as in those decided under the TAA. *Quinn v. NAFTA Traders, Inc.*, 257 S.W.3d 795, 798-99 (Tex. App. — Dallas 2008, pet. granted) (holding the statutory grounds for challenging an arbitrator's award under the TAA are also exclusive).

C. Questions Left Unanswered

The foregoing would seem to suggest that a fertile area of litigation of arbitration issues — whether, when and how courts may engage in more searching review of an award that allowed by statute — has been foreclosed. However, all is not lost (or won). While one door has been opened, the Court's vague reference to possible other grounds of review for an arbitrator's award may have opened a window. This raises several unanswered questions.

The first is when such review might be available. We now know the FAA limits the basis on which a court may review an arbitrator's award, and assume the Texas Supreme Court continues its federalization of Texas arbitration law and holds the same. Does this leave any other means for ensuring such review? Will the lack of such review have any effect on the prevalence of arbitration? Is this even a statutory question? — after all, both the FAA and the TAA really do little more than allow parties the option of turning the product of a private contractual agreement (the arbitrator's award) into the word of the state (an enforceable judgment).

Additionally, limiting the grounds for review may serve one important interest in arbitration — making the process less expensive — but it does a disservice to another, equally valid interest, allowing the parties to craft a contractual dispute resolution method

they are willing to accept. The landlord in *Hall Street Associates* predicted limiting the scope of review would cause a flight from arbitration, *Hall Street Assoc.*, 128 S.Ct. at 1406, and while this may or may not occur why is it that parties cannot contract for whatever standard of review they choose? If the issue is a close one or the case an important one, parties might well be unwilling to bet it all on one roll of the dice with an arbitrator who may make a mistake, knowing this mistake is essentially subject to no additional review. Will this result in a flight to the courts? Will is result in contractual arbitration review panels, or multiple levels of arbitral review? All of these questions remain unanswered.

Finally, beyond the question of whether and how parties can avoid the preclusive effects of the FAA, another question arises: wither public policy? Before *Hall Street Associates*, many cases recognized a non-statutory ground for vacating arbitration awards, that the award violates public policy. *See, e.g., Sarofim v. Trust Co. of the W.*, 440 F.3d 213, 216 (5th Cir. 2006). Although narrowly construed, this exception provided a mechanism for courts to avoid having to enforce an award that did something courts should not do. Recent Fifth Circuit authority confirms the public policy exception is alive and well (albeit still narrowly construed), but the case addressing it did not involve the FAA. *Continental Airlines, Inc. v. Air Line Pilots Ass'n, Int'l*, 555 F.3d 399, 414-18 (5th Cir. 2009). So what happens the first time an arbitrator issues an award the party believes is contrary to public policy; can the aggrieved party complain? And, if not, does this place courts in the position of enforcing a provision of an award that violates the public policy established by Congress? We shall see.

III. <u>*Perry Homes*: The Intersection of Arbitration and Politics</u>

The decision of the Texas Supreme Court in *Perry Homes v. Cull* has received a great deal of press, little of it related to the arbitration issues presented in the case. Instead, the focus has been on Perry Homes, who it had paid, how much it had paid and what effect these payments would have on the decision. When the decision came down in favor of *Perry Homes*, many were outraged, with some drawing explicit connections between the Court now and the Court in the mid-1980's, when it was subject to the 60 Minutes piece "Justice for Sale." All of this hoopla obscures the fact that the actual decision in *Perry Homes* was probably correct.

A. <u>The Path to the Supreme Court</u>

Factually, the dispute involved a claim against a homebuilder for faulty construction. *Perry Homes v. Cull*, 258 S.W.3d 580, 584-85 (Tex. 2008). The homeowners sued, the home builder sought to compel arbitration, the homeowners resisted and no one sought to have the court rule on the matter. *Perry Homes*, 258 S.W.3d at 585. Meanwhile, "extensive

discovery" was undertaken by the homeowners who, when trial was nigh, changed their minds and asked to be sent to the arbitrator. *Id.* Although the trial court questioned the propriety of this request, it ordered arbitration because it did not find the delay or the discovery had prejudiced the builder. *Id.*

The builder sought a writ of mandamus to vacate this referral to arbitration, but it was denied, *Id.*, the "traditionally" correct result because the builder had an adequate remedy by appeal.[1] The arbitrator then awarded the homeowners $800,000, and the builder moved to vacate the award on the grounds that arbitration should have been ordered after so much litigation. *Id.* The trial court affirmed the award, the appellate court affirmed the award with only minor modifications, and the Texas Supreme Court granted the builder's petition for review, *Id.*, affording Perry Homes an adequate legal remedy for its complaints.

B. The Decision in *Perry Homes*

The Court found the fact the builder had unsuccessfully argued it could not be sent to arbitration in a mandamus did not preclude the appellate review of its waiver claim, because the mandamus had been denied without a determination being made on the merits. *Id.* at 585-86. It then rejected the homeowner's argument, *a la Hall Street Associates*, that waiver was not a proper basis for setting aside an arbitrator's award, finding (reasonably enough) that the review of a decision to send a matter to the arbitrator was logically distinct from the review of the decision itself. *Id.* at 587. Finally, it addressed the central issue in the case, whether the homeowner's pre-arbitration litigation in court had waived the right to seek arbitration.

The Court found that it had. The question of whether litigation has waived the right to litigate is a question for the courts, *Id.* at 589, and so it asked whether the litigation process had been "substantially invoked." Beginning with the idea that the esteem courts feel for arbitration means there is a strong presumption against waiver, the Court nevertheless found the issue had to be decided on a case-by-case basis. *Id.* at 590-91. Relevant considerations in deciding whether waiver has occurred (drawn from cases inside and outside of Texas) are many, including: (1) whether the party seeking arbitration is the plaintiff (who filed in court) or the defendant (who was brought there); (2) the length of delay in seeking arbitration; (3) whether the movant knew of the arbitration clause; (4) how much of the work in the courtroom related to the merits rather than arbitrability or jurisdiction; (5) the time and expense incurred in litigating; (6) whether the movant sought or opposed arbitration earlier on; (7) whether affirmative claims were made or dispositive motions filed; (8) what

[1] It is not clear whether this was the basis of the court of appeals' decision to deny the requested mandamus.

discovery was done that would not be available in arbitration; (9) what court activity would be duplicated in the arbitration; and (10) when the case was to be tried. *Id.* at 591-92.

Turning to the merits, the Court began by declining the builder's request to find that proof of prejudice due to the litigation in court was not required to support a finding of waiver. *Id.* at 594-95. It then went on to detail all the homeowners had done in court, and found they substantially invoked the judicial process, giving particular weight to the inconsistent positions the homeowners had taken and the lateness of their request to arbitrate their claims. *Id.* at 595-97. Finally, it concluded that the homeowners had manipulated the litigation to their advantage, and this represented "the kind of inherent unfairness that constitutes prejudice under federal and state law." *Id.* at 597.

C. Waiver as a Basis for Avoiding Arbitration

I suspect *Perry Homes* will be the final statement on waiver of the right to seek arbitration from the Supreme Court for some time. Although *Perry Homes* presented the prejudice issue "backwards" (because it is usually the plaintiff who seeks to avoid arbitration by pointing to what the defendant did in the trial court), it reiterates some well-settled themes in waiver cases, such as they are fact-dependant and fairness counts.

If the Court broke any new ground it was in its discussion of prejudice. Although prejudice has long been required to support the argument that a litigant has waived the right to seek arbitration, and the Court reaffirmed that this was the case. However, its holding appears to say that prejudice does not require showing any *specific* loss the party seeking arbitration has been made to bear, and that generalized unfairness stemming from the differences between litigation and arbitration may be enough. Does this announce a new "prejudice light" standard, one where manipulation of the litigation process is presumptively prejudicial? How would such a standard work in the more typical waiver case? Ultimately, the fact-dependent nature of this inquiry all but guarantees more litigation on waiver issues, albeit with a more developed list of factors courts should consider.

Of course, as a result of all of this, we must remember, in *Perry Homes* a case that began in court, was arbitrated, confirmed by the district court, appealed and reversed by the Texas Supreme Court must be tried on the merits in court once again.

IV. *Poly-America*: Denying Statutory Remedies is Unconscionable, Maybe

Of potentially much more importance as a case is the Texas Supreme Court's decision in *In re Poly-America, L.P.*, which brings to the fore the increasing tension between statutory remedies and arbitration agreements.

A. The Path to the Supreme Court

Poly-America began as a retaliatory discharge case brought by an employee against his employer. *In re Poly-America, L.P.*, 262 S.W.3d 337, 343 (Tex. 2008) (orig. proceeding). The parties had agreed to arbitrate their disputes, and the arbitration agreement contained a number of specific provisions, including: (1) a one year limitations period on claims; (2) an agreement to split all fees and costs equally, with the employee's contribution capped at an amount equal to one month's gross pay; (3) severe limitations on discovery; and (4) strict limitations on damages which may be awarded, including no exemplary damages, no liquidated damages and no reinstatement. *Poly-America*, 262 S.W.3d at 344.

The employee sued and argued that the arbitration agreement was unconscionable and against public policy, and the employer sought to compel arbitration. *Id.* at 345. Arbitration was ordered, and the employee sought mandamus relief from the court of appeals. *Id.* It held the arbitration agreement's fee splitting and remedy limitations were unconscionable, and the employer then sought mandamus from the Texas Supreme Court. *Id.*

B. The Decision in *Poly-America*

Because the claims in the case were subject to the FAA, and the majority began by found courts were permitted (but not required) by the FAA to decide the merits of the arguments at issue by mandamus. *Id.* at 346-47. It then noted (as it always does) how favored arbitration is under federal law, but recognizes that as a contract the agreement to arbitrate is subject to state-law determinations on issues of unconscionability. *Id.* at 347-48. Under Texas state law, a contract to arbitrate is unconscionable if it is either so grossly one-sided as to be unenforceable, or which are contrary to public policy. *Id.* at 348-49. In a context such as this one, where the arbitration agreement would affect statutory rights not to be fired for suffering a workplace injury, the agreement is valid if it "does not waive the substantive rights and remedies the statute affords and the arbitration procedure are fair," allowing the employee to "effectively vindicate his statutory rights." *Id.* at 349 (internal quotations omitted).

Turning to the issue presented under the facts, the Court began by recognizing the anti-retaliation provisions of the Workers' Compensation Act show there was a strong public policy against allowing employers to fire injured workers just for making a claim to compensation benefits, because otherwise employers could avoid both common law liability and the more limited responsibilities imposed on them by the workers' compensation system. *Id.* at 350-51. It then asked whether the limitations on damages available interfered with the employee's ability to vindicate the rights he otherwise had under state law. In finding that it did, the Court held that allowing the employer to limit the employee's right to recover

exemplary damages for malicious wrongful discharge (which the Workers' Compensation Act would allow) "would undermine the deterrent purpose" of the law, and therefore was improper. *Id.* at 352-53.

However, the Court refused to find either the fee-splitting provision or the discovery limitations made the arbitration agreement unconscionable. Although for the record it decried the use of fee-splitting provisions in an attempt to deter potential claimants from making their claims, it found the evidence insufficient to allow it to conclude the fees were so high that the claimant could not pursue his claims. *Id.* at 356-57. With respect to the discovery limitations, it recognized such limitations might also have the effect of precluding a plaintiff from prevailing on a viable claim for lack of ability to prove what he has alleged, but it held it was too early to determine if this would happen to the claimant, and further noted that if it would the arbitrator had the power to set aside these limitations and fashion effective relief for the employee. *Id.* at 357-58.

Finally, the Court fashioned a remedy. The arbitration provision at issue had a severability clause. *Id.* at 359. Although some provisions of the agreement (the damage limitations) were unenforceable, and others (the fee-splitting provision and discovery limitations) could be unenforceable, the Court found that this clause would allow the offending provisions to be severed. *Id.* at 360. Because they could be severed, the trial court did not abuse its discretion in ordering the matter to arbitration, subject to the caveat that provisions of the agreement making it unconscionable would not be enforced. *Id.* at 360-61.

C. A Fundamental Tension: Statutory Rights and Negotiated Agreements About Rights Available to the Parties

Poly-America is an excellent illustration of several of the themes and trends discussed above. The arbitration clause at issue is a very complex one, with all kinds of moving parts. These moving parts gave the claimant sufficient traction to mount a number of challenges to the clause, both specific (challenges to certain provisions) and in the aggregate (the sum of these provisions makes the entire clause invalid). Given that the matter went all the way to the Supreme Court, one may reasonably question whether the employer got its money's worth out of the clause, and whether these provisions will, in the end, actually save it any of the money or time it presumably expected when it wrote the clause.

So too is this a case where the courts heard a mandamus request when a litigant had been ordered to arbitration, requests that are becoming more and more common. The author believes that this is eroding the distinction between appeals as of right and the theoretically "extraordinary" relief mandamus represents. Perry Homes prevailed in a traditional appeal; why should *Poly-America* have been handled differently?

Finally, the Court proved itself unwilling to allow parties, through an arbitration provision, to gut the statutory remedies the Legislature has crafted, remedies crafted to replace common law remedies in workplace injury cases. As we speak the Legislature is diligently working on a response to this portion of *Poly-America*, and it remains to be seen what (if anything) they will agree to do about it.

D. Intersection of Arbitrations and Class Actions

Echos of *Poly-America* are found in another case of which practitioners should take note, even though it was decided by the Second Circuit. The case addressing the intersection between arbitration, class action waivers and antitrust law, and arose out of a suit brought against a credit card issuer by the businesses who had agreed to accept its cards. *In re American Express Merchants' Litig.*, 554 F.3d 300, 304-05 (2nd Cir. 2009). The agreement between the parties contain: (1) an arbitration provision; and (2) a class action waiver, providing the only claims a claimant may pursue in arbitration are his own claims. *American Express Merchants' Litig.*, 554 F.3d at 305-07. The dispute broadly faulted AmEx for requiring merchants to accept all of the cards it issued cards (be they charge cards or credit cards) while charging them a high per transaction charge for the privilege that might be justified if the cards were charge cards, but not if they were mere credit cards. *Id.* at 307-08.[2] According to the merchants, this requirement created an illegal tying arrangement, violating federal antitrust law. *Id.* at 308.

In addressing the issue, the court discussed, at length, class action waivers in an arbitration context, but ultimately decided it could not be enforced in the case before it. *Id.* at 310-20. It noted that such provisions have been enforced in other courts, but that whether such clauses are a good idea and should be permitted is a matter of considerable debate. *Id.* at 301-04. In the case before it, the court was very strongly impressed by the opinion of an economist, who opined that the cost of pursuing individual anti-trust suits would be cost-prohibitive to plaintiffs. *Id.* at 316-18. However, rather than merely deciding the excessive cost made the "no class action" provision of the agreement procedurally unconscionable, the court went further, holding that because the effect of the provision was to effectively immunize a business from federal anti-trust laws it could not be enforced. *Id.* at 319-20.

Again, as was the case in *Poly-America*, a court refused to enforce an otherwise clear

[2] According to the decision, a charge card is a means of deferred payment that must be settled in full every month, whereas a credit card is an instrument for making a loan that does not necessarily have to be settled in full every month. The perception is that holders of charge cards were a higher class of customer than holders of credit cards, and therefore more desirable to merchants, and for whom a higher fee could reasonably be charged. *Id.*

provision of an arbitration agreement because it found the agreement would effectively deny the claimant an important right guaranteed by statute. Given the size of the issue, and the importance of arbitration, this may be a case the U.S. Supreme Court will agree to hear.

V. <u>Non-Signatories: Increasingly Bound by Arbitration Agreements</u>

Continuing a trend which has been ongoing for several years, the scope of who is bound by an arbitration agreement has also been clarified, with even more people who did not sign being bound. Two recent cases from the Texas Supreme Court reinforce this point.

The first case involves claims brought against a brokerage firm by an employee it had fired, allegedly for refusing to conceal another trader's fraudulent "churning" of customer accounts. *In re NEXT Fin. Gp., Inc.*, 271 S.W.3d 263, 265-66 (Tex. 2008) (per curiam) (orig. proceeding). The employee, who as a condition of employment was licensed by the National Association of Securities Dealers (now FINRA), had signed a NASD document binding him to arbitrate all claims under NASD rules, although his employer had not itself signed the agreement. *NEXT Fin. Gp.*, 271 S.W.3d at 265. His firm moved to have his suit against it arbitrated, and the Supreme Court held his claims against this non-signatory had to be arbitrated, because his employer was a third-party beneficiary of the employee's contract with NASD. *Id.* at 267.

The second, more recent case involved a wrongful death suit, and the Court found the parents and children of an employee who was killed at work, and who had signed an agreement to arbitrate his claims under an "occupational injury plan" (offered in lieu of workers' compensation) were bound to arbitrate their claims against the employer. *In re Labatt Food Svc., L.P.*, 52 Tex. Sup. Ct. J. 352, 2009 WL 353524 at * 2-4 (Feb. 13, 2009). In reaching this conclusion, it rejected the claim that wrongful death beneficiaries (whose claims depend on the statutes creating a wrongful death claim) should be treated differently than others, because the claims they assert actually belong to them, not to the decedent, finding that the derivative nature of the claims (i.e., no death of the employee = no wrongful death claims for statutory beneficiaries) means they are bound by the decedent's agreement to arbitrate. *Labatt Food Svc.* at * 5-6. It also rejected the claim that a provision of the agreement, which required the family of the dead employee to indemnify the employer for claims for death due to occupational causes made other than pursuant to the plan, was an invalid pre-injury waiver of claims the Labor Code did not allow to be waived, finding the challenge (which claimed the contract as a whole, rather than the arbitration clause itself, was unconscionable and therefore unenforceable was one for the arbitrator). *Id.* at * 6-8.

VI. Other Issues

Finally, there are a series of less seminal cases decided in the last year that nevertheless are interesting, or which highlight some particular facet of appellate practice.

A. The Overview

Every year also seems to see a case which really does not say anything new, but which is a notably lucid explanation of current law. This year, that case is *In re Green Tree Servicing, LLC*, 275 S.W.3d 592 (Tex. App. — Texarkana 2008, orig. proceeding). In *Green Tree Servicing*, the Texarkana Court of Appeals laid out general statements of law regarding: (1) the enforceability of arbitration clauses; (2) the scope of the FAA; (3) when mandamus is available to a party denied arbitration under a contract subject to the FAA: (4) when a party waives its right to seek arbitration by litigating; (5) when such a contract is procedurally unconscionable; and (6) when such a contract is substantively unconscionable. *Green Tree Servicing*, 275 S.W.3d at 598-604. If you have a case involving any of these issues, and need a good general overview to provide the court, you might start by looking at *Green Tree Servicing*.

B. The Oddball

Similarly, even year seems to bring a case that presents an entirely new issue, one never seen in Texas before. This year that case is *Roehers v. FSI Hldgs., Inc.*, 246 S.W.3d 796 (Tex. App. — Dallas 2008, pet. denied), which involved (of all things) the claim that the party administrating the arbitration committed an error that requires vacation of the award. Factually, the case was pending with the AAA, and required three arbitrators. *Roehers*, 246 S.W.3d at 801-02. The AAA disqualified the arbitrator chosen by the appellants on grounds of partiality. *Id.* The panel then decided the case, with one of its members indicating it would have made a fee award to the appellants, i.e., the decision was not unanimous. *Id.* at 802. In court, the appellants argued that the award was subject to being vacated because the panel exceeded its powers, an argument in turn based on the claim the AAA's failure to allow them to choose the arbitrator they wanted violated the terms of the arbitration agreement. Id. at 806. According to the Appellants, their inability to choose the person they want resulted in a dis-empowered arbitration panel, one with no power to act. *Id.*

Although the Court ultimately concluded the AAA had the power to disqualify a partial arbitrator because all three members of the panel were required to be impartial, *Id.* at 807-09, this case represents the first time of which the author is aware in Texas of a party seeking to vacate an arbitration award because of something the party administering the arbitration did or did not do. As a practical matter *Roehers* might well be a one-off, because

of all the things an arbitration administrator does, very few things will even arguably affect the composition and integrity of the panel, as so it is probably difficult for the AAA to make come kind of mistake that would cause the resulting award to be subject to vacature.

C. The FAA Still Sweeps All Before It

As if it were necessary, the Supreme Court has once again reminded us that the preemptive scope of the FAA is considerable, at least if the contract involving the claim to be arbitrated affects interstate commerce. The case involved a contract for Alex E. Ferrer, who appears on television deciding cases as "Judge Alex." *Preston v. Ferrer*, ___ U.S. ___, 128 S.Ct. 978, 981-82 (2008).[3] The contracts was supposedly subject to the California Talent Agency Act, which supposedly vested the California Labor Commissioner with exclusive jurisdiction to hear the dispute. *Preston*, 128 S.Ct. at 982. A suit challenging this authority went up through the courts in California, and thence to the Supreme Court. The Supreme Court held that, California law notwithstanding, the FAA superceded state laws which purported to lodge primary jurisdiction in a forum other than the agreed arbitral one. *Id.* at 983-87.

D. Claim that Arbitration is Too Expensive is a Tough Sell

As with the Supreme Court did in *Poly-America*, courts are very reluctant to find that an arbitration agreement is substantively unconscionable because it requires a claimant to pay so much in fees and expenses that it, as a practical matter, precludes the assertion of the claim.

For example, in a case where the arbitration was to occur before a three-member panel in Boston "in accordance with the commercial arbitration rules of the American Arbitration Association," the claimant's lawyer submitted an affidavit claiming that the costs associated with pursuing the claim through the AAA would total approximately $35,000, an amount the claimant could not afford. *Aspen Tech., Inc. v. Shasha*, 253 S.W.3d 857, 864 (Tex. App. — Houston [14th Dist.] 2008, orig. proceeding and no pet.). On appeal, the court found this evidence was insufficient to show the claim was too expensive to pursue. *Aspen Tech.*, 253 S.W.3d at 864. In reaching this conclusion, it held: (1) the fact the agreement required the arbitration to occur under AAA rules did not mean it had to be done through the AAA, and so the cost of having the matter heard before the AAA proved nothing; and (2) even if it was

[3] As an aside, I wonder who really watches the judge shows? I also wonder if their enjoyment would be affected by the fact that the "judge" (who is really acting as an arbitrator, for the entertainment of the audience) had to go to the Supreme Court to get the arbitration provision of his own contract clarified?

tried before the AAA, its rules allow the panel to apportion costs as it sees fit. *Id.* at 864-65. Putting aside for a minute the question of whether the fact a claimant could theoretically recover his fees if he wins shows anything about whether he can afford to pay the fees in the first instance, *Aspen Technology* is a good illustration of the lengths to which courts are willing to go to avoid finding an arbitration agreement is substantively unconscionable on cost grounds.

E. Arbitration is Still a Contract

Because arbitration is a creature of contract, general rules governing contract interpretation still apply. This means, for example, that a provision of an arbitration agreement which provides that judicial proceedings by a party does not affect the party's right to arbitrate is not necessarily binding. *Haddock v. Quinn*, 2009 WL 485710 at * 12 (Tex. App. — Fort Worth Feb. 26, 2009, orig. proceeding and n.p.h.) (not yet released for publication). This is for two reasons: (1) such a provision is usually understood to allow a party to seek a provisional or interim remedy in court (such as an injunction to preserve the status quo), not to mean that no amount of litigation may waive the right to seek arbitration, *Haddock* at * 12; and (2) a provision against waiver found in a contract may itself be waived by conduct (just like any other provision of a contact), *Guzman v. Ugly Duckling Car Sales of Tex., L.L.P.*, 63 S.W.3d 522, 528 (Tex. App. — San Antonio 2001, pet. denied), which in turn means a provision saying litigation does not result in waiver of the right to seek arbitration may be waived if the litigation would otherwise support a waiver argument.

Similarly, because the scope of the agreement to arbitrate is contractual, the parties may have agreed to arbitrate some claims but not others. Although the typical "all claims arising from ... in tort or contract" arbitration clause will usually sweep broadly enough to cover all claims, what if the clause allows the court to say with "positive assurance" that the claim is not subject to arbitration? The answer is some claims will be arbitrated, while others can be tried. *Wee Tots Pediatrics, P.A. v. Morohunfola*, 268 S.W.3d 784, 791-92 (Tex. App. — Fort Worth 2008, orig. proceeding and no pet.) (arbitration agreement specifically permitted employer to pursue claim for injunctive relief to prevent competition and disclosure of confidential information; clear language of clause excepted such claims from requirement that remainder of claims be arbitrated).

F. How Long is Too Long?

Lest we forget, arbitration is supposed to be quick. So what happens when you receive an arbitration award, but fail to argue that it is incomplete or that it requires some reinterpretation by the panel who made it for seven years? Although the court facing this issue expressed some skepticism whether the relief sought (remand to the arbitration panel)

was even available, it did not decide the issue. Instead, the answer appears to be you lose any right you might have had to have the issue considered by the original panel who made the award. *In re Akin, Gump, Strauss, Hauer & Feld, LLP*, 252 S.W.3d 480, 491-95 (Tex. App. — Houston [14th Dist.] 2008, orig. proceeding). A good rule of thumb: if there is a significant chance that one or more of the members of your arbitration panel has died of old age before you request some kind of relief, you have waited too long.

G. Discovery? About What?

In most cases, requests that a matter be sent to arbitration do not raise significant evidentiary issues: you cite the petition to show the relief sought, the arbitration clause to show what is covered, and ask to be sent to an arbitrator. However, in those cases where discovery may be necessary to determine whether a given claim does or does not fall within the ambit of a given arbitration clause, courts do not abuse their discretion in allowing such discovery, at least if it is targeted to the arbitration issue and not to the merits of the claims. *Houston Pipe Line Co. v. O'Connor & Hewitt, Ltd.*, 269 S.W.3d 90, 99-100 (Tex. App. — Corpus Christi 2008, orig. proceeding and pet. filed) (mand. filed)[4] (discovery permitted because claim was based on assertions of price manipulation made in a published article, and plaintiffs did not have sufficient information to determine whether the claims were true). Despite this, do not look for the regular allowance of discovery in support of or opposition to a motion to compel arbitration.

H. You Want Me to Go Where?

Nor is the issue in a dispute over arbitration always whether to arbitrate or to litigate, but rather where everything is going to happen. This is illustrated by a case from Houston, which on its face presented a quotidian dispute between an oil company and its engineering subcontractor. *ODL Svcs., Inc. v. Conocophillips Co.*, 264 S.W.3d 399, 403-04 (Tex. App. — Houston [1st Dist.] 2008, orig. proceeding and no pet.). The subcontractor demanded arbitration, and the oil company filed a declaratory judgment suit seeking a declaration that the matter was not subject to being arbitrated and an injunction against allowing the arbitration to proceed. *ODL Svcs.*, 264 S.W.3d at 406-07. Although not highlighted by either party or the court, the real dispute seems to have one of jurisdiction and venue: if not arbitrated in Houston, the claim would be against a Venezuelan subsidiary of the oil company for work done in Venezuela, and therefore probably would have to be submitted to the courts of Venezuela. Id. at 405-09. *ODL Services* does, however, contain a good discussion of the law governing who decides issues of arbitrability, the court or the arbitrator.

[4] This may be the single most complex case history the author has ever seen.

I. <u>Arbitration — Not so Secret, After All</u>

Finally, a case that should give everyone who conducts arbitrations pause. Generally, we believe that, like Las Vegas, what is said in arbitration stays in arbitration. However, this is not always the case. In a dispute that arose over whether an employee was terminated with or without cause (and therefore whether he was entitled to severance pay), the employee sought to introduce evidence gathered and used in connection with the employer's arbitration claim against its auditors, a claim involving much of the same conduct as the employer claimed gave it cause to fire the employee. *Knapp v. Wilson N. Jones Mem. Hosp.*, 2009 WL 387174 at * 5 (Tex. App. — Dallas Feb. 19, 2009, n.p.h.). On appeal, the court found the confidentiality provisions of the TAA did not preclude the presentation of evidence and documents used in arbitration in all circumstances, and that confidentiality was more akin to an evidentiary privilege, and can be waived. *Knapp* at * 6. Finding that the issues in the arbitration were related to the claims involving the employee, and finding his rights would be affected if he was denied access to the information, the court found the trial court should have allowed him access to and the use of certain relevant materials from the arbitration. *Id.* at * 6-9. Whether or not it was correctly decided, *Knapp* may empower those who wish to breach the confidentiality provisions of the arbitration process to try to do so more often, something both arbitrators and arbitration advocates should keep in mind.