# ARBITRATION CLAUSES: ENFORCEMENT AND SURPRISES

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An arbitration clause allows a party to contract for a means of alternative dispute resolution. Parties to a contract can decide that disputes that may arise will go to arbitration rather than litigation. An arbitration clause can apply to all disputes that arise under a contract or only to certain types to disputes. If another party refuses to arbitrate per the contract's terms, a party may have to go to court to enforce the arbitration clause. Federal law creates a strong presumption in favor of enforcing arbitration clauses and provides a means to compel arbitration through the courts. However, the fact that there is an arbitration clause does not necessarily mean that an arbitration will occur. The entire contract must be examined to determine if the clause is applicable to the dispute and whether it is enforceable. Further, the arbitration clause can open the door for a few surprises the signatories may not have anticipated, such as a third party attempting to compel a signatory to arbitration.

## A. ENFORCEMENT OF AN ARBITRATION CLAUSE UNDER THE FEDERAL ARBITRATION ACT

### 1. The Federal Arbitration Act

An arbitration clause in a contract will most likely be enforced due to the strong presumption created under federal law in favor of arbitration.[1] The Federal Arbitration Act ("FAA") provides a basis to enforce many arbitration clauses as it applies to any contract involving a maritime transaction or evidencing a transaction involving foreign or interstate commerce. *See* 9 U.S.C.A. § 1. [2] *See Freudensprung v. Offshore Technical Services, Inc.*, 379 F.3d 327 (5th Cir. 2004). Interstate commerce extends beyond the interstate shipment of goods to include all contracts which relate to interstate commerce. *In re First Merit Bank, N.A.*, 52 S.W.3d 749, 754 (Tex. 2001).

Under the FAA, a strong presumption in favor of arbitration clauses is created. *OPE International LP v. Chet Morrison Contractors, Incorporated*, 258 F.3d 443, 446 (5th Cir. 2001). Under § 2 of the FAA, an arbitration agreement "shall be valid, irrevocable, and enforceable." 9 U.S.C.A. § 2.[3] If a party refuses a demand to arbitrate pursuant to a valid arbitration clause, the other signatory to the contract may file an action in court to enforce the agreement and have the court order arbitration. *See* 9 U.S.C.A. § 4.[4] If a dispute ordered to arbitration is currently in litigation, a party may petition the court for a stay of the litigation pending the arbitration; the stay must be granted. 9 U.S.C.A. § 3.[5]

### 2. Application of the Federal Arbitration Act

In order for a court to compel arbitration under the FAA, an aggrieved party must demonstrate that the dispute falls within the scope of the arbitration clause. Until a party is aggrieved, i.e. an arbitration demand is refused, the FAA is not applicable. Once a party can seek enforcement under the FAA, the court will examine whether there is an agreement to arbitrate and whether the agreement pertains to the current dispute between the parties.

To utilize the FAA to enforce an arbitration agreement, a demand for arbitration must have been issued and refused. §4 of the FAA provides in part, "A party aggrieved by the alleged failure, neglect, or refusal of another to arbitrate under a written agreement for arbitration may petition any United States district court . . . for an order directing that such arbitration proceed in the manner provided for in such agreement." 9.U.S.C.A. §4. Only an aggrieved party can seek an order compelling arbitration. *Painewebber Incorporated v. Faragalli*, 61 F.3d 1063, 1068 (3rd Cir. 1995) ("Unless and until an adverse party has refused to arbitrate a dispute putatively governed by a contractual arbitration clause, no breach of contract has occurred, no dispute over whether to arbitrate has arisen, and no harm has befallen the petitioner–hence the petitioner cannot claim to be 'aggrieved' under the FAA."). "[I]t is doubtful that a petition to compel arbitration filed before the 'adverse' party has refused

arbitration would present an Article III court with a justiciable case or controversy in the first instance." *Id.* at 1067.

The court's initial query into the arbitration clause begins with the question of whether the parties agreed to arbitrate the dispute in question. State-law principles will be applied to make the determination. *Fleetwood Enterprises, Inc. v. Gaskamp*, 280 F.3d 1069, 1073 (5th Cir. 2002). Whether the parties agreed to arbitrate involves a two-part inquiry: "(1) whether there is a valid agreement to arbitrate between the two parties; and (2) whether the dispute in question falls within the scope of that arbitration agreement." *Id.* Ambiguities are to be resolved in favor of arbitration. *Id.*

The United States Supreme Court established four guiding principles regarding arbitrability. First, "arbitration is a matter of contract and a party cannot be required to submit to arbitration any dispute which he has not agreed to submit." *AT&T Techs., Inc. v. Communications Workers of Am.*, 475 U.S. 643, 648, 106 S.Ct. 1415, 1418, 89 L.Ed.2d 648 (1986). Second, the court is to determine the question of arbitrability unless the parties clearly provide otherwise. Third, the court must not rule on the potential merits of the underlying claims when addressing the issue of arbitrability. Finally, "where the contract contains an arbitration clause, there is a presumption of arbitrability . . . 'unless it may be said with positive assurance that the arbitration clause is not susceptible of an interpretation that covers the asserted dispute.'" *Id.* at 650, 106 S.Ct. at 1419 *quoting United Steelworkers of Am. V. Warrior & Gulf Navigation Co.*, 363 U.S. 574, 584-585, 80 S.Ct. 1347, 1353-1354, 4 L.Ed.2d 1409 (1960). A contractual provision excluding a particular dispute from arbitration can overcome the presumption in favor of arbitration. *Id.*

3. <u>States Cannot Use Legislation to Invalidate Arbitration Clauses.</u>

Federal law protects arbitration clauses from state legislation that could invalidate the terms of an arbitration clause. 9 U.S.C.A. § 2 provides that a written contract provision to settle disputes by arbitration "shall be valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of the contract." 9 U.S.C.A. § 2. This language has been interpreted to bar states from enacting laws that will invalidate arbitration provisions. "'In enacting §2 of the [FAA], Congress declared a national policy favoring arbitration and withdrew the power of the states to require a judicial forum for the resolution of claims which the contracting parties agreed to resolve by arbitration.'" *OPE International LP v. Chet Morrison Contractors, Incorporated*, 258 F.3d 443, 446 (5th Cir. 2001) *quoting Southland Corp. v. Keating*, 465 U.S. 1, 10, 104 S.Ct. 852, 79 L.Ed.2d 1 (1984).

A good example of state legislation that would invalidate arbitration clauses can be found in Louisiana R.S. 9:2779, which states in part:

> A. The legislature finds that, with respect to construction contracts, subcontracts, and purchase orders for public and private works projects, when one of the parties is domiciled in Louisiana, and the work to be done and the equipment and materials to be supplied involve construction projects in this state, provisions in such agreements requiring disputes arising thereunder to be resolved in a forum outside of this state or requiring their interpretation be governed by the laws of another jurisdiction are inequitable and against the public policy of this state.
>
> B. The legislature hereby declares null and void and unenforceable as against public policy any provision in a contract, subcontract, or purchase order, as described in Subsection A, which either:

> (1) Requires a suit or arbitration proceeding to be brought in a forum or jurisdiction outside of this state; rather such actions or proceedings may be pursued in accordance with the Louisiana Code of Civil Procedure or other laws of this state governing similar actions.
>
> (2) Requires interpretation of the agreement according to the laws of another jurisdiction.

LSA-R.S. 9:2779. LSA-R.S. 9:2779 does not address all sections of a contract; rather it focuses on choice of forum or choice of law clauses in a contract. The statute would nullify an arbitration provision that contained a forum selection clause mandating that arbitration occur outside Louisiana or a choice of law clause that required the law of another state be applied.

The Fifth Circuit specifically examined LSA-R.S. 9:2779 in *OPE International LP v. Chet Morrison Contractors, Incorporated*, 258 F.3d 443 (5th Cir. 2001). Therein, the Fifth Circuit determined that the Louisiana statute conflicted with § 2 of the FAA as R.S. 9:2779 conditioned the enforceability of arbitration agreements on selection of a Louisiana forum, which was not a requirement that applied to contracts generally. *OPE International LP*, 258 F.3d at 447. As a result, the FAA preempted LSA-R.S. 9:2779. *Id.* Courts will enforce the national policy declared by Congress favoring arbitration and prevent states from requiring a judicial forum when the parties agreed to arbitration. *Id.* at 446. § 2 of the FAA only preempts state law that invalidates arbitration agreements. *See Doctor's Assocs., Inc. v. Casarotto*, 517 U.S. 681, 686-87, 116 S.Ct. 1652, 134 L.Ed.2d 902 (1996); *Bradley v. Harris Research, Inc.*, 275 F.3d 884, (9th Cir. 2001).

## B. THE REACH OF AN ARBITRATION CLAUSE

### 1. An Arbitration Clause Extending to Other Contracts in a Business Transaction

Many times more than one contract can be executed as part of business deal or other matter, but not all the contracts involved may provide for arbitration. If a dispute arises, a party may attempt to avoid arbitration and only sue under the contract that lacks an arbitration provision. However, under general principles of contract law, separate agreements executed contemporaneously by the same parties, for the same purposes, and as part of the same transaction, are to be construed together." *Neal v. Hardee's Food Systems, Inc.*, 918 F.2d 34, 37 (5th Cir. 1990). The arbitration clause of the other contract could apply to the dispute. The application of the clause would depend on the applicability of the arbitration clause to the dispute in question and the interaction of the contracts at issue.

Just such a scenario arose in *Personal Security & Safety Systems v. Motorola, Inc.*, 297 F.3d 388 (5th Cir. 2002). In that case, PSSI and Motorola entered into a Stock Purchase Agreement and a Product Development Agreement as part of the same transaction. PSSI later sued Motorola alleging a breach of the Stock Purchase Agreement, and Motorola sought to compel arbitration under the Product Development Agreement. *Id.* at 391. The Fifth Circuit examined the interaction of the two agreements. The arbitration provision in the Product Development Agreement addressed all disputes between the parties, not just those disputes under that particular contract. As a result, the arbitration clause extended to PSSI's dispute with Motorola under the Stock Purchase Agreement. *Id.* at 392-393. Both contracts were key elements of the transaction, and each contract addressed different facets of the parties' relationship. Thus, the Court found that both contracts must be construed together. *Id.* at 393. *See also Neal*, 918 F.2d at 37-38 (A purchase

agreement and six license agreements for the purchase of six Hardee's restaurants had to be construed together. Each agreement was dependent on the overall deal and aimed towards the goal of making Plaintiff a Hardee's franchisee.)

2. Enforcement of an Arbitration Clause by a Non-Signatory to the Contract

Situations arise where a non-signatory to a contract can demand and compel arbitration against a party to the contract. Two theories a non-signatory could rely on to compel a signatory to arbitrate are equitable estoppel and claiming to be a third party beneficiary of the contract. The necessary support for these options can arise from items such as the wording or intent of the contract or the allegations a signatory made in a lawsuit.

Equitable estoppel provides a basis for compelling arbitration based on fairness. A non-signatory can rely on equitable estoppel to compel a signatory to arbitrate in two circumstances: (1) where the signatory's claims against a non-signatory arise out of and relate directly to the contract containing the arbitration clause; and (2) when claims made by the signatory against a non-signatory and another signatory raise allegations of substantially interdependent and concerted misconduct by both parties. *Grigson v. Creative Artists Agency, L.L.C.*, 210 F.3d 524, 527 (5th Cir. 2000).

To determine if a non-signatory is a third party beneficiary of a contract, the Court must examine the signatories' intentions at the time they executed the contract. A presumption arises that the parties contracted only for themselves. In order to overcome this presumption, the intent to have the contract extend to a third party beneficiary must be "clearly written or evidenced in the contract." *Sapic v. Government of Turkmenistan*, 345 F.3d 347, 362 (5th Cir. 2003) *quoting Fleetwood Enterprises, Inc. v. Gaskamp*, 280 F.3d 1069, 1075-76 (5th Cir. 2002). It is not enough for a person or company to benefit from the contract, to be directly affected by the signatories' conduct or have a substantial interest in the contract's enforcement. *Id.*

In *Grigson v. Creative Artists Agency, L.L.C.*, 210 F.3d 524 (5th Cir. 2000), a non-signatory successfully enforced an arbitration clause. A dispute arose over the alleged intentionally limited distribution of the movie "Return of the Texas Chain Saw Massacre". Grigson acted as trustee for the film's owners, and Ultra Muchos, Inc. and River City Films, Inc. had entered into a distribution agreement with Columbia TriStar Home Video, Inc. The distribution agreement provided for arbitration of certain disputes in Los Angeles County California. Grigson, Ultra Muchos, and River City filed a lawsuit against the movie's star Matthew McConaughey and his agency, Creative Artists Agency, LLC, alleging tortuous interference with the distribution agreement. However, TriStar was not named as a defendant. *See Id.* at 526-531.

McConaughey and Creative Artists attempted to compel arbitration under the distribution agreement even though they were not signatories to the agreement. Ultra Muchos and River City were signatories, and Grigson admitted he was a third party beneficiary of the distribution agreement. The defendants argued that the allegations of tortuous interference were intertwined with the distribution agreement, providing them with a basis to compel arbitration. For example, the petition alleged that TriStar delayed release of the movie to later take advantage of McConaughey's fame, but Creative Artists pressured TriStar to retreat from a distribution plan based on McConaughey's fame. Further, TriStar's actions would need to be examined as the claims required analysis of its actions to determine whether it performed properly under the distribution agreement. The Court noted that TriStar was not included in this lawsuit and viewed this exclusion as an obvious attempt to avoid the arbitration clause in the distribution agreement. The claims asserted against the defendants were based heavily on the distribution agreement. The situation in *Grigson* constituted a prime example of when equitable estoppel should be applied as the claims were intertwined with and dependent upon the

distribution agreement, and the defendants' and TriStar were allegedly involved in interdependent and concerted misconduct. *See Id.*

3. Attempting to Compel a Non-Signatory to the Contract to Arbitration

A signatory to a contract compelling a non-signatory to arbitrate constitutes a very difficult challenge. Arbitration is based on contract principals. A signatory compelling a non-signatory to arbitrate would involve forcing a contractual clause upon a non-party that never agreed to that contract. "[A] signatory may not estop a non-signatory from avoiding arbitration regardless of how closely affiliated that non-signatory is with another signing party." *MAG Portfolio Consult, GMBH v. Merlin Biomed. Group LLC*, 268 F.3d 58, 62 (2nd Cir. 2001). However, the Fifth Circuit recognized six theories that could be used to possibly compel a non-signatory to arbitration: "(a) incorporation by reference; (b) assumption; (c) agency; (d) veil-piercing/alter ego; (e) estoppel; and (f) third-party beneficiary. *See Sapic v. Government of Turkmenistan*, 345 F.3d 347 (5th Cir. 2003).

The difficulty of compelling a non-party to arbitrate is demonstrated in *Fleetwood Enterprises, Inc. v. Gaskamp*, , 280 F.3d 1069 (5th Cir. 2002), where the issue arose as to whether children were third party beneficiaries of a contract. In that case, their parents had signed a contract for a mobile home. Despite living in the home and benefiting from the home, the children were not third party beneficiaries of the contract their parents signed to purchase the mobile home. They were not named or mentioned in the contract, and there was no indication that the contract in question was meant to benefit anyone other than their parents. At most, the children were incidental beneficiaries, which was not enough to make them third party beneficiaries. *Fleetwood Enterprises*, 280 F.3d at 1076.

## C. OTHER PROVISIONS WITHIN THE CONTRACT CAN IMPACT AN ARBITRATION CLAUSE

An arbitration clause in a contract cannot be read separately from the rest of the contract. "[I]t is a 'cardinal principle' of contract construction that all provisions of a contract be given effect whenever possible." *Higman Marine Services, Inc. v. BP Amoco Chemical Company*, 114 F.Supp.2d 593, 597 (S.D. Tex. 2000). Other provisions within the contract can impact the arbitration or even prevent the arbitration from occurring. For example, an arbitration can be conditioned upon certain requirements being met such as the arbitration occurring in a specific forum, only one arbitration can be held to settle all disputes with common questions of law and fact, or mandating that a mediation occur prior to an arbitration. Further, the scope of the arbitration provision could be limited by the type of disputes it covers, or a provision in the contract may provide the parties with the option of litigation over arbitration. The federal presumption in favor of arbitration will not mandate that a party be forced to arbitrate a dispute that it is not contractually bound to arbitrate.

1. Exclusion of a Dispute from an Arbitration Clause

Including an arbitration provision in a contract does not necessarily mean that a dispute will be subject to arbitration; language within the contract or arbitration provision can exclude specific disputes from arbitration. Parties that intend for an arbitration clause to reach all disputes between them must specifically state that in the provision. The language of the clause will determine which disputes must be arbitrated. In *Texaco, Inc. v. American Trading Transportation Co.*, 644 F.2d 1152 (E.D. La. 1981), a vessel called the Baltimore Trader was owned by American Trading and under charter to Texaco. The vessel departed from a Texaco dock on the Mississippi River and failed to complete the port-hand turnabout, colliding with another boat, Theodohos, which was moored at the dock. *Id.* at 1153. Texaco filed suit against

the vessels and the owners/operators and asserted claims that were related to the accident. The charter for the boat between American and Texaco contained an arbitration provision providing for arbitration of "'[a]ny and all differences and disputes . . . arising out of this Charter.'" *Id.* at 1154 (*quoting* the Charter at issue in the litigation). However, an attempt to compel arbitration failed. The court determined that the litigation involved collisions between the vessels and the dock; the dispute had nothing to do with the charter. The collision did not arise out of or depend on the charter. As a result, the charter's arbitration provision was not applicable to Texaco's lawsuit as the arbitration provision only extended to disputes arising out of the charter. The court noted that the parties chose the restrictive language in place; they could have provided for "arbitration of all disputes between the parties involving the chartered vessel." *Id.*

2. A Contract Can Provide the Option of Arbitration or Litigation

Parties to a contract can elect to include a contractual provision that provides the option of arbitration or litigation, and the Court should enforce the party's choice if the contract language provides such an option. The parties must be clear through their drafting on how they wish such a clause to apply to future disputes. The option could be available in all disputes or only a narrow category of disputes. In *Higman Marine Services, Inc. v. BP Amoco Chemical Company*, 114 F.Supp.2d 593 (S.D. Tex. 2000), the dispute in question involved more that $250,000 in damages. The contract's arbitration provision applied to "any and all unsettled claims, differences and disputes of whatsoever nature arising out of or relating to the contract." *Id.* at 596. However, the arbitration provision also provided an option, "In lieu of binding arbitration, a party hereto ('claimant') having an extraordinary claim (one totaling in excess of U.S. $250,000 . . .) not previously submitted by that claimant for resolution through binding arbitration, may elect to have the extraordinary claim resolved through litigation . . ." *Id.* The Court interpreted the arbitration provision as providing plaintiffs with the option of litigation, which plaintiffs chose. The Court would not compel plaintiffs to arbitration as a result. *Id.* at 597-599.

3. Judicial Review of an Arbitration Award Controlled by Contract

At the conclusion of the arbitration, the arbitrator issues the award, but the question can remain open as to whether a party will challenge the award. If a party challenges the award in court, a district court will conduct a very narrow review of an arbitration award. *Antwine v. Prudential Bache Securities, Inc.*, 899 F.2d 410, 413 (5th Cir.1990). The FAA limits the circumstances in which an award may be vacated. An arbitration award may only be vacated when: "(1) the award was procured by corruption, fraud, or undue means; (2) there is evidence of partiality or corruption among the arbitrators; (3) the arbitrators were guilty of misconduct which prejudiced the rights of one of the parties; or (4) the arbitrators exceeded their powers." 9 U.S.C.A. § 10(a)(1)-(4).[6] The parties can take steps to protect the type of judicial review they want through contract.

The parties to an arbitration agreement do not have to rely on the courts and law to completely determine the scope of judicial review permitted. The Fifth Circuit and Texas courts have held that the parties can expand the scope of appellate review allowed as long as the contract clearly states their intention. *See Gateway Technologies, Inc. v. MCI Telecomm. Corp.*, 64 F.3d 993 (5th Cir. 1995); *Tanox, Inc. v. Akin Gump Strauss Hauer & Feld, L.L.P.*, 105 S.W.3d 244 (Tex.App.—Houston [14th Dist.] 2003, pet. denied).[7] For example, in *Gateway Technologies, Inc. v. MCI Telecomm. Corp.*, 64 F.3d 993 (5th Cir. 1995), the Fifth Circuit upheld a clause in the arbitration agreement that allowed errors of law to be appealed. The court concluded

that the parties permitted "de novo review of issues of law embodied in the arbitration award." *Id.* at 997. The contractual provisions allowing expanded review of an arbitrator's decisions and/or award must be very clear.

Limiting judicial review of an arbitration award constitutes another option. Some parties attempt to make the arbitrator's award final through the contract and not allow any type of judicial review. Courts have taken the approach of enforcing these provisions but not to the extent that the parties are deprived of rights set forth in common law or statutory law. For example, the Second Circuit refused to enforce such a provision finding that the vacatur grounds of the FAA, set forth in 9 U.S.C.A. § 10, and in the common law are the limit to how far a party can restrict judicial review. *Hoeft v. MVL Group, Inc.*, 343 F.3d 57, 64 (2nd Cir. 2003). *But see MACTEC, Inc. v. Gorelick*, 427 F.3d 821, 825 (10th Cir. 2005), *cert. denied*, 125 S. Ct. 1622 (March 27, 2006) (Enforcing an agreement that foreclosed judicial review of an arbitration award beyond the district court level.). Another approach a party may take could be to contractually agree to the option of appealing an arbitrator's award to a private appellate arbitration panel. The parties then retain more control over how the appeal will be conducted and what rules will be followed.

## D. CONCLUSION

Parties must carefully consider the impact of an arbitration clause in contracts they enter into. They need to understand the disputes that will be subject to arbitration, what parties are subject to arbitration, how the arbitration will proceed and other contractual provisions that will affect the arbitration clause. Numerous questions and challenges can arise in attempts to enforce and/or avoid an arbitration clause. Careful drafting can eliminate a lot of uncertainty in the future as to how the arbitration will proceed and what legal challenges can be raised. The parties can plan ahead and define what disputes will be subject to arbitration and how the arbitration will proceed. They can set forth in the contract how the arbitration will occur by defining items such as the forum where it must occur, the law that must be applied, how the arbitrator will be selected, and what rules and procedures will be applicable to the arbitration. They can even go so far as to define the enforceability and appealability of the arbitration award. Planning ahead when entering into an arbitration agreement can eliminate questions and uncertainty. Defining how the arbitration will occur will help ensure that the parties are able to pursue arbitration as they originally envisioned.

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[1] Texas enacted its own Texas Arbitration Act ("TAA"), Tex. Civ. Prac. & Rem. Code § 171.001 *et. seq.*, to provide for enforcement of arbitration clauses. The TAA applies generally to all arbitration agreements, but specific types of agreements are exempt from its application such arbitration agreements between an employer and labor union and claims for worker's compensation benefits. CPRC §. 171.001 & 171.002. Under the TAA, Texas courts may compel arbitration and stay litigation, among other things. CPRC § 171.021. Similar to analysis under the FAA, a court will examine whether there is a valid agreement to arbitrate that encompasses the dispute at issue. *See Nationwide of Bryan, Inc. v. Dyer*, 969 S.W.2d 518 (Tex.App.—Austin 1998, no pet.). Once an arbitration agreement is established, a presumption is created favoring arbitration, and doubts are to be resolved in favor of arbitration. *See id.* When the parties' arbitration agreement does not specify whether the FAA or TAA applies, the court examines whether the transaction affects interstate commerce; if it does, the FAA will apply. *In re Education Management Corp., Inc.*, 14 S.W.3d 418, 423 (Tex.App.—Houston [14th Dist.] 2000, orig. proceeding).

[2] 9 U.S.C.A. § 1: "Maritime transactions" and "commerce" defined; exceptions to operation of title

"Maritime transactions", as herein defined, means charter parties, bills of lading of water carriers, agreements relating to wharfage, supplies furnished

vessels or repairs to vessels, collisions, or any other matters in foreign commerce which, if the subject of controversy, would be embraced within admiralty jurisdiction; "commerce", as herein defined, means commerce among the several States or with foreign nations, or in any Territory of the United States or in the District of Columbia, or between any such Territory and another, or between any such Territory and any State or foreign nation, or between the District of Columbia and any State or Territory or foreign nation, but nothing herein contained shall apply to contracts of employment of seamen, railroad employees, or any other class of workers engaged in foreign or interstate commerce.

[3] 9 U.S.C.A. § 2: Validity, irrevocability, and enforcement of agreements to arbitrate

A written provision in any maritime transaction or a contract evidencing a transaction involving commerce to settle by arbitration a controversy thereafter arising out of such contract or transaction, or the refusal to perform the whole or any part thereof, or an agreement in writing to submit to arbitration an existing controversy arising out of such a contract, transaction, or refusal, shall be valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract.

[4] 9 U.S.C.A. § 4: Failure to arbitrate under agreement; petition to United States court having jurisdiction for order to compel arbitration; notice and service thereof; hearing and determination

A party aggrieved by the alleged failure, neglect, or refusal of another to arbitrate under a written agreement for arbitration may petition any United States district court which, save for such agreement, would have jurisdiction under Title 28, in a civil action or in admiralty of the subject matter of a suit arising out of the controversy between the parties, for an order directing that such arbitration proceed in the manner provided for in such agreement. Five days' notice in writing of such application shall be served upon the party in default. Service thereof shall be made in the manner provided by the Federal Rules of Civil Procedure. The court shall hear the parties, and upon being satisfied that the making of the agreement for arbitration or the failure to comply therewith is not in issue, the court shall make an order directing the parties to proceed to arbitration in accordance with the terms of the agreement. The hearing and proceedings, under such agreement, shall be within the district in which the petition for an order directing such arbitration is filed. If the making of the arbitration agreement or the failure, neglect, or refusal to perform the same be in issue, the court shall proceed summarily to the trial thereof. If no jury trial be demanded by the party alleged to be in default, or if the matter in dispute is within admiralty jurisdiction, the court shall hear and determine such issue. Where such an issue is raised, the party alleged to be in default may, except in cases of admiralty, on or before the return day of the notice of application, demand a jury trial of such issue, and upon such demand the court shall make an order referring the issue or issues to a jury in the manner provided by the Federal Rules of Civil Procedure, or may specially call a jury for that purpose. If the jury finds that no agreement in writing for arbitration was made or that there is no default in proceeding thereunder, the proceeding shall be dismissed. If the jury finds that an agreement for arbitration was made in writing and that there is a default in proceeding thereunder, the court shall make an order summarily directing the parties to proceed with the arbitration in accordance with the terms thereof.

[5] 9 U.S.C.A. § 3: Stay of proceedings where issue therein referable to arbitration

If any suit or proceeding be brought in any of the courts of the United States upon any issue referable to arbitration under an agreement in writing for such arbitration, the court in which such suit is pending, upon being satisfied that the issue involved in such suit or proceeding is referable to arbitration under such an agreement, shall on application of one of the parties stay the trial of the action until such arbitration has been had in accordance with the terms of the agreement, providing the applicant for the stay is not in default in proceeding with such arbitration.

[6] In Texas, judicial review of the award will be very limited, and any doubts are resolved in favor of the arbitrator's award. The court may not vacate the arbitrator's award even if the award is based on a mistake of law or fact. *Universal Computer Sys., Inc. v. Dealer Solutions*, 183 S.W.3d 741, 752 (Tex. 2005). The only way a court will vacate an award arbitration award is "if the decision is tainted with fraud, misconduct, or gross mistake as would imply bad faith and failure to exercise honest judgment." *Id. quoting IPCO-G. & C. Joint Venture v. A.B. Chance Co.*, 65 S.W.3d 252, 256 (Tex.App.-Houston [1st Dist.] 2001, pet. denied).

[7] The First, Third and Fourth Circuits follow *Gateway* and allow parties to contract for expanded judicial review. *See Puerto Rico Tele. Co. v. U.S. Phone Mfg. Corp.*, 427 F.3d 21 (1st Cir. 2005); *Roadway Package Sys., Inc. v. Kayser*, 257 F.3d 287 (3rd Cir. 2001); *Syncor Int'l Corp. v. McLeland*, 120 F.3d 262 (4th Cir. Aug. 11, 1997) (mem. opinion). However, the Seventh, Ninth and Tenth Circuits refuse to allow parties to contractually agree as to the scope of judicial review; instead, the parties must follow the FAA's vacatur provisions under 9 U.S.C.A. § 10. *Chicago Typographical Union v. Chicago Sun-Times, Inc.*, 935 F.2d 1501 (7th Cir. 1991); *Hyocera Corp. v. Prudential-Bache Trade Serv., Inc.*, 341 F.3d 987 (9th Cir. 2003 (en banc); *Bown v. Amoco Pipeline Co.*, 254 F.3d 924 (10th Cir. 2001).