Trends In Litigating Arbitration: Using Motions To Compel Arbitration And Motions To Vacate Arbitration Awards

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ARBITRATION has been used in commercial disputes since at least the 13th century.[1] George Washington included an arbitration provision in his will,[2] and arbitration remains the preferred choice for parties engaging in international transactions[3] – especially those involving foreign direct investment in another country.[4] Litigation in the home courts of the government who owes you money for a dam or power plant is an unattractive option. At home, some states have been hostile to arbitration while others have not. Congress reconciled those differences by adopting the New York approach in the Federal Arbitration Act ("FAA") of 1925.[5] The Supreme Court has interpreted the FAA broadly – Congress invoked the full preemptive power of the Commerce

[1] New York State Bar Association Dispute Resolution Section Arbitration Committee, *Report on Arbitration Discovery in Domestic Commercial Cases*, at n.1 (2009), *available at*: http://www.nysba.org/Content/NavigationMenu42/April42009HouseofDelegatesMeetingAgendaItems/DiscoveryPreceptsReport.pdf ("Some date arbitration back to Phoenician merchants. Alexander the Great's father, Phillip the Second, used arbitration as a means for resolving border disputes.")

[2] "My Will and direction expressly is, that all disputes (if unhappily any should arise) shall be decided by three impartial and intelligent men, known for their probity and good understanding; two to be chosen by the disputants--each having the choice of one--and the third by those two. Which three men thus chosen, shall, unfettered by Law, or legal constructions, declare their sense of the Testators intention; and such decision is, to all intents and purposes to be as binding on the Parties as if it had been given in the Supreme Court of the United States." *available at*: http://gwpapers.virginia.edu/documents/will/text.html.

[3] Theodore Eisenberg & Geoffrey P. Miller, *The Flight From Arbitration: An Empirical Study of* Ex Ante *Arbitration Clauses in the Contracts of Publicly Held Companies*, 56 DEPAUL L. REV. 335, 341 (2007) (*hereinafter*, Eisenberg & Miller (2007)).

[4] Arbitration awards are widely recognized and enforced internationally under the New York Convention. Perhaps ironically, less credit is given to foreign judgments. *Id.* at 341-42.

[5] Codified as 9 U.S.C. §§ 1-16 (2006). *See also* Theodore Eisenberg & Geoffrey P. Miller, *The Flight to New York: An Empirical Study of Choice of Law and Choice of Forum Clauses in Publicly-Held Companies' Contracts*, 30 CARDOZO L. REV. 1475, 1483-84 (2009) (*hereinafter*, Eisenberg & Miller (2009)) ("As the early leading venue for commercial arbitration, New York's arbitration business was hampered by the legal doctrine that arbitration agreements were revocable at will and not specifically enforceable in court. . . The New York business community and attorneys persuaded the New York legislature to repeal the rule of revocability in 1920 . . . The New York arbitration advocates sought enactment of a federal law, leading to passage of the Federal Arbitration Act of 1925, which requires federal courts to enforce pre-dispute arbitration agreements.").

Clause,[6] stated a "national policy favoring arbitration," preempted inconsistent state laws,[7] and separated the arbitration clause from the surrounding contract for purposes of deciding who decides arbitrability.[8]

When court dockets clogged in the 1970s,[9] Chief Justice Burger convened the Pound Conference in 1976 to explore "multi-door courthouse" solutions that offered litigation alternatives.[10] The modern Alternative Dispute Resolution movement grew quickly from Pound. ADR has been well-received generally, and even the criticisms of arbitration are confined to relatively few categories of claims. Indeed, "there is little opposition today to arbitration between sophisticated commercial parties."[11] Still, "litigating arbitration" has been a conspicuous part of the dockets of the United States and State Supreme Courts in recent years.[12] Since written agreements to arbitrate are enforceable "save upon such grounds as exist at law or in equity for the revocation of any contract,"[13] litigants have sought to

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[6] Allied-Bruce Terminix Cos. v. Dobson, 513 U.S. 265, 272, 277 (1995); *see also* Eisenberg & Miller (2007), *supra* note 3, at 339.

[7] Vaden v. Discover Bank, 129 S.Ct. 1262, 1271 (2009); Hall Street Associates, L.L.C. v. Mattel, Inc., 128 S.Ct. 1396, 1405 (2008); Preston v. Ferrer, 128 S.Ct. 978, 981 (2008); Buckeye Check Cashing, Inc. v. Cardegna, 546 U.S. 440, 443 (2006); Southland Corp. v. Keating, 465 U.S. 1, 10 (1984); *see generally*, Note, *Mandatory Arbitration Clauses: Proposals for Reform of Consumer-Defendant Arbitration*, 122 HARV. L. REV. 1170 (2009).

[8] Prima Paint Corp. v. Flood & Conklin Manufacturing Co., 388 U.S. 395, 420-421 (1967) (Under the Separability Rule, the arbitrator should resolve claims that the entire agreement, as opposed to the arbitration agreement in particular, was fraudulently induced.); *see also* Aaron-Andrew P. Bruhl, *The Unconscionability Game: Strategic Judging and the Evolution of Federal Arbitration Law*, 83 N.Y.U. L. REV. 1420, 1471 (2008).

[9] Steven S. Gensler, *Justness! Speed! Inexpense! An Introduction to the Revolution of 1938 Revisited: The Role and Future of the Federal Rules*, 61 OKLA. L. REV. 257, 263 n.34 (2008), citing Steven N. Subrin, *Federal Rules, Local Rules, and State Rules: Uniformity, Divergence, and Emerging Procedural Patterns*, 137 U. PA. L. REV. 1999, 2022 (1989) ("Professor Subrin similarly identifies1970 as the 'apex' of the 'spirit of extensive attorney latitude' in discovery.").

[10] "Most trace the beginnings of the backlash against discovery to Chief Justice Burger's remarks at the 1976 Pound Conference, where he noted 'widespread complaints' of the misuse and abuse of pretrial procedures." Gensler, *supra* note 9, at 263 n.35; *see*, The Honorable Warren E. Burger, Keynote Address, 70 F.R.D. 79, 95-96 (1976). Harvard Professor Frank Sander is credited with the term "multi-door courthouse". *See* Frank A.E. Sander, *Varieties of Dispute Processing*, *in* THE POUND CONFERENCE: PERSPECTIVES IN JUSTICE IN THE FUTURE 84 (A. Leo Levin & Russell R. Wheeler eds, 1979); *see also* Jeffrey W. Stempel, *Reflections on Judicial ADR and the Multi-door Courthouse at Twenty: Fait Accompli, Failed Overture, or Fledgling Adulthood?*, 11 OHIO ST. J. ON DISP. RESOL. 297 (1996); Thomas J. Stipanowich, *ADR and the "Vanishing Trial": The Growth and Impact of "Alternative Dispute Resolution*", 1 J. EMPIRICAL LEGAL STUD. 843, 848 (2004); Thomas J. Stipanowich, *Rethinking American Arbitration*, 63 INDIANA L. J. 425 (1988).

[11] Bruhl, *supra* note 8, at 1489.

[12] The United States Supreme Court has already decided at least six arbitration cases in just two terms. Arthur Anderson LLP v. Carlisle, 129 S.Ct. 1896 (2009) (third-party to arbitration agreement could invoke stay provision if state contract law allowed him to enforce agreement); Kimberlin v. Renasant Bank, (08-816) (summarily vacated and remanded for further consideration in light of Arthur Anderson LLP v. Carlisle); 14 Penn Plaza LLC v. Pyett, 129 S.Ct. 1456 (2009) (collective bargaining agreement that clearly and unmistakably required union members to arbitrate ADEA claims was enforceable as a matter of federal law); Vaden, 129 S.Ct. 1262 (2009) (federal court may look through a petition to compel arbitration to determine whether it has jurisdiction); Hall St. Assocs., 128 S.Ct. 1396 (2008) (grounds stated in FAA for vacating, or for modifying or correcting, an arbitration award constitute the exclusive grounds); Improv W. Assocs. v. Comedy Club, Inc., 129 S. Ct. 45 (2008) (granting certiorari and summarily remanding to Ninth Circuit for further consideration in light of *Mattel*); Preston, 128 S.Ct. 978 (2008) (when parties agree to arbitrate all questions arising under contract, FAA supersedes state laws lodging primary jurisdiction in another forum, whether judicial or administrative); *see generally* Donald R. Philbin, Jr. & Audrey Lynn Maness, *Litigating Arbitration: A 2007 Texas Arbitration Review*, 60 BAYLOR L. REV. 613 (2008) (half of the Texas Supreme Court's mandamus docket); Donald R. Philbin, Jr. & Audrey Lynn Maness, *Alternative Dispute Resolution in the Fifth Circuit Survey*, 40 TEX. TECH. L. REV. 445 (2008).

[13] 9 U.S.C. § 2 (2006); "[O]rdinary state-law principles that govern the formation of contracts"

avoid arbitration by raising a variety of common law contract defenses, such as lack of assent,[14] lack of consideration,[15] administrative pre-emption,[16] unconscionability,[17] fraud and duress,[18] and material breach.[19] Beyond litigating arbitration, legislative efforts are pending in Congress and statehouses to expand or curtail the use of arbitration in specific contexts.[20]

This article examines litigation trends associated with the rapid expansion of private arbitration as a dispute resolution mechanism.[21] In particular, this article evaluates the two most common legal measures associated with arbitration proceedings, the Motion to Compel Arbitration, which attempts to enforce arbitration agreements against unwilling participants, and the Motion to Vacate Arbitration Award, which attempts to void the result of a consummated arbitration. This article traces the procedure underlying these motions, discusses trends in case law with respect to each of these motions, and considers the future role of each of these motions in practice.

I. DISPUTE RESOLUTION OPTIONS

Parties have options in resolving disputes.[22] They range from ignoring a problem (many go away and some get worse) to legislative or constitutional attempts to alter the playing field. Absent agreement between the disputants, litigation is the default mechanism. For the party desiring to avoid litigation, there are a wide number of choices, even within the broad categories of dispute resolution alternatives.[23] Mediation comes in flavors ranging from facilitating open discussions to actively helping parties put deals together and evaluating issues. It may be instructive to take a wide-angled look at some of the dispute resolution options available to parties negotiating deals or picking up the pieces of one that may have gotten off track. Here is a graphical depiction of many dispute resolution options.

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will apply to this analysis. First Options of Chicago, Inc. v. Kaplan, 514 U.S. 938, 944 (1995).

[14] *See e.g.,* Morales v. Sun Constructors, Inc., 541 F.3d 218 (3rd Cir. 2008); Hardin v. First Cash Financial Services, Inc., 465 F.3d 470 (10th Cir. 2006).

[15] *See e.g.,* Mazera V. Varsity Ford Management Services, LLC, 565 F.3d 997 (6th Cir. 2009);

[16] *See e.g.,* Preston, 128 S.Ct. at 984.

[17] *See e.g.*, Kam-Ko Bio-Pharm Trading Co. Ltd-Australasia v. Mayne Pharma (USA) Inc., 560 F.3d 935 (9th Cir. 2009); Rogers v. Royal Caribbean Cruise Line, 547 F.3d 1148 (9th Cir. 2008).

[18] *See e.g.,* Buckeye Check Cashing, 546 U.S. at 446; Morales, 541 F.3d at 223.

[19] *See e.g.,* Hooters of America, Inc. v. Phillips, 173 F.3d 933 (4th Cir. 1999).

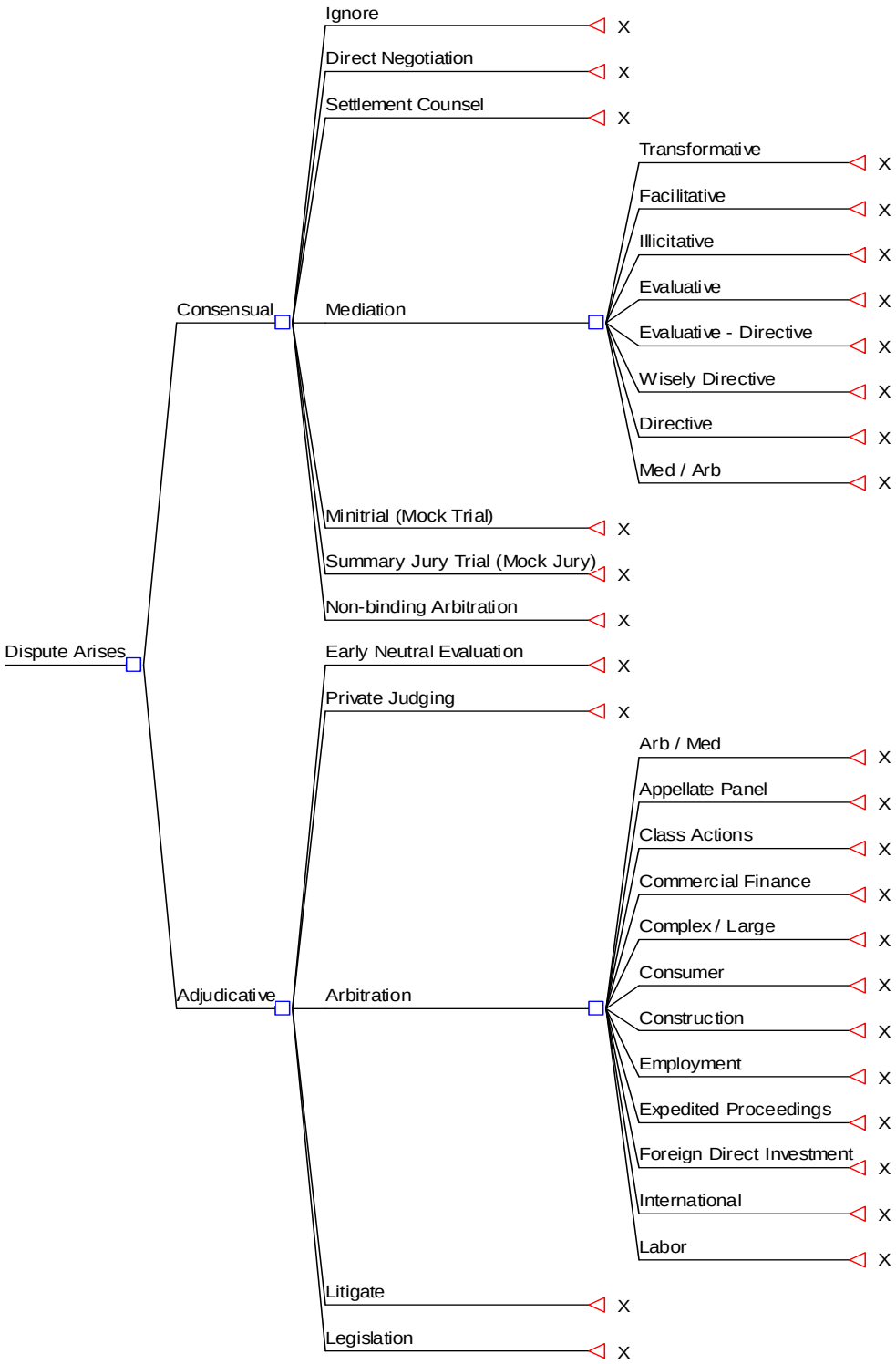
[20] Arbitration of employment, consumer, franchise, and civil rights claims has attracted the most attention. The Arbitration Fairness Act of 2009 (H.R. 1020; S. 931) seeks to limit the enforceability of pre-dispute arbitration clauses in these cases. Specialized bills target nursing home and other contracts are among the fifty plus bills currently pending in Congress. These bills include: Fairness in Nursing Home Arbitration Act of 2009, Consumer Fairness Act of 2009, Labor Relations First Contract Negotiations Act of 2009, Freedom From Unnecessary Litigation Act of 2009, Predatory Mortgage Lending Practices Reduction Act, National Labor Relations Modernization Act, Taxpayer Abuse Prevention Act, Payday Loan Reform Act of 2009, Servicemembers Access to Justice Act of 2009, Employee Free Choice Act of 2009, Public Safety Employer-Employee Cooperation Act of 2009, Whistleblower Protection Enhancement Act of 2009, Patent Reform Act of 2009, Patient Advocate Act of 2009, Equitable Compensation for American Victims of Torture Act of 2009. Some seek to expand the use of arbitration, in the labor – management context, for instance, and others seek to limit the use of arbitration.

[21] *See* Andrew J.S. Colvin, *From Supreme Court to Shopfloor: Mandatory Arbitration and the Reconfiguration of Workplace Dispute Resolution*, 13 CORNELL J. L. & PUB. POL'Y 581, 587 (2004).

[22] John Lande, *A Guide for Policymaking That Emphasizes Principles, and Public Needs*, 26 ALTERNATIVES. TO THE HIGH COST OF LITIG. 197 (December, 2008).

[23] Donald R. Philbin, Jr., *Comprehensive Trial Preparation Includes ADR Process Design: What Type of Mediator Best Fits This Case?*, 11 CONFLICT MANAGEMENT Newsletter 17 (ABA, Section of Litigation, Fall 2007), *reprinted* as Donald R. Philbin, Jr., *Trial Preparation Includes ADR Process Design: What Type of Mediator Fits Best?*, 9 ABA COMMERCIAL & BUSINESS LIT. 1 (ABA LIT. WINTER 2008).

CHART 1: DISPUTE RESOLUTION OPTIONS GRAPHED



A. Pre-Dispute Actions

Arbitration is the focus of this article. There are a host of arbitration providers, and many of these administering agencies have specialized rules for different kinds of disputes. The American Arbitration Association, for example, has multiple sets of rules.[24] So the question facing drafters is not simply whether to leave disputes to the default system or select an alternative, but how each will be modified pre- and post-dispute.[25] Parties often elect to use the judicial system and choose to select a particular judicial forum, apply a certain state's substantive law, or agree to waive a jury trial. Recently, arbitration clauses are increasingly added[26] or even included as boilerplate when entering a deal. For example, arbitration agreements are now found in most types of commercial contracts, including in nearly thirty-seven percent of executive employment contracts.[27]

With the increase in the use of ADR clauses has come criticism of boilerplate contractual terms. An individual arbitration clause was found to be substantively unconscionable in Bexar County, Texas because the billed arbitration costs were three-times the contract price and amounted to 28% of plaintiff's annual household income.[28] Even beyond these cases, some fear that arbitration has become "arbigation," and too expensive by itself.[29]

Unfortunately, dispute resolution clauses are often lightly negotiated when deals are coming together because no one anticipates that their deal will ever have to be unwound. And research confirms that deal-makers are not the only ones afflicted with optimistic overconfidence early in a relationship. Couples marrying estimate their chances of divorce at zero, even when they know the divorce rate in general hovers between 40 – 50%.[30] Carefully tailoring ADR clauses to the specific deal may still be one of the most effective ways to avoid costly collateral litigation.

B. Post-Dispute Arbitration

Adapting to changing needs or hoping to control costs, counsel often must negotiate and guide parties through customized processes on an *ad hoc* basis after a dispute arises. This option appears tempting because of the parties' mutual interest in controlling the course of litigation. Parties may elect to settle their dispute using a less expensive regional arbitration provider or tee a couple of issues up for a quick summary judgment motion or bench trial, even though their contract calls for use of a standard arbitration provider.[31] However *Hall Street Associates v. Mattel*,[32] has shown the limits to this approach. In *Hall Street,* companies in the middle of a federal court trial over environmental damage to leased premises decided to

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[24] *Available at* http://www.adr.org/arb_med.

[25] *See generally*, Practicing Law Institute, *Drafting Dispute Resolution Clauses, in* INTERNATIONAL ARBITRATION 2008, April 10, 2008 – PLI New York Center.

[26] *See* Stipanowich, *supra* note 10, at 870.

[27] Eisenberg & Miller (2007), *supra* note 3, at 351.

[28] Olshan Foundation Repair Co. v. Ayala, 180 S.W.3d 212 (Tex. App. 2005); *distinguished by* TMI, Inc. v Brooks, 225 S.W.3d 783 (Tex. App. 2007) and *In re* MHI Partnership, Ltd., 2008 WL 2262157 (Tex. App. 2008) (not published).

[29] *See* Arthur B. Pearlstein, *The Justice Bazaar: Dispute Resolution Through Emergent Private Ordering as a Superior Alternative to Authoritarian Court Bureaucracy*, 22 OHIO ST. J. ON DISP. RESOL. 739, 788 (2007).

[30] Donald R. Philbin, Jr., *The One Minute Manager Prepares for Mediation: A Multidisciplinary Approach to Negotiation Preparation,* 13 HARV. NEGOT. L. REV. 249, 282 (2008), *citing* Russell Korobkin, *Psychological Impediments to Mediation Success: Theory and Practice,* 21 OHIO ST. J. ON DISP. RESOL. 281, 284-85 (2006).

[31] Robert W. Loree, *Contesting the Motion to Compel Arbitration*, SAN ANTONIO LAWYER at 7 (May-June 2009).

[32] Hall St. Assocs., 128 S. Ct. at 1404; *see also* John F. Manning, *Federalism and the Generality Problem in Constitutional Interpretation*, 122 HARV. L. REV. 2003, 2007 n.15 (2009).

arbitrate a single issue and return to court if they thought the arbitrator misapplied the law. The Supreme Court subsequently limited their ability to provide contractually for such expanded judicial review, even though expanded review had been recognized in the First, Third, Fifth and Sixth Circuits when the parties crafted their provision.[33] *Hall Street Associates* has clearly had "the effect of further restricting the role of federal courts in the arbitration process."[34] By concluding "that §§ 10 and 11 provide the exclusive regimes for review under the FAA,"[35] the Court raised serious questions about whether "manifest disregard of the law" survived as a ground for vacatur, placing counsel on notice that even mutually agreed upon arbitration provisions remain subject to the constraints of the FAA.

II. AVOIDING AND ENFORCING ARBITRATION

Arbitration litigation has two main pressure points: (1) arbitrability – is the asserted claim covered by an arbitration clause to which no defenses have been sustained; and (2) award confirmation – are there statutory reasons why the award should be vacated or modified?

A. Before Arbitration Begins (Motions to Compel)

If the parties have entered into an agreement containing an arbitration clause that encompasses the dispute (or, if a third-party is claiming the benefits of a contract containing such a clause in many instances), the burden generally shifts to the party seeking to avoid arbitration to prove a defense. Appendix A uses representative Texas state precedent to illustrate some of the available defenses and their success rates at different levels of appeal.[36] If the party seeking to compel arbitration demonstrates that a valid agreement to arbitrate exists, and the party seeking to avoid arbitration does not present a valid defense, a motion to compel arbitration will be granted, and any legal proceedings will generally be stayed pending the conclusion of arbitration.

1. Interlocutory Appeals of Orders Denying Motions to Compel

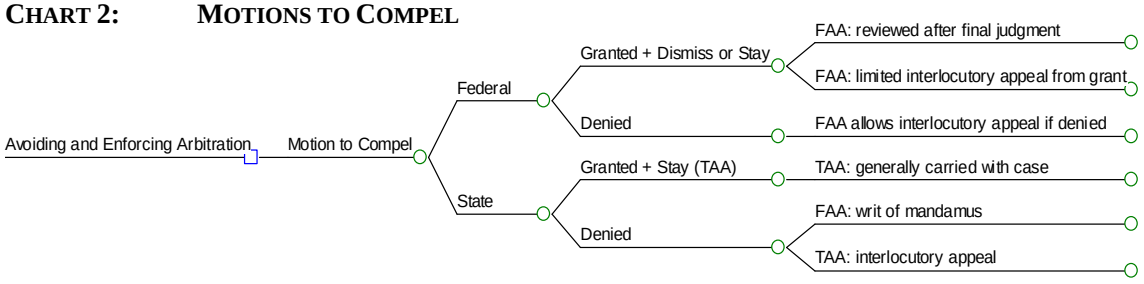
The methods for appealing the grant or denial of a motion to compel have historically been convoluted in some jurisdictions, though state legislatures have recently begun the process of streamlining their arbitration appellate procedure.[37] At the risk of oversimplification, interlocutory appeal is available under the FAA for a *denial* of a Motion to Compel Arbitration. Congress added a ban on interlocutory appeals of orders compelling arbitration in 1988 to "prevent arbitration from bogging down in preliminary appeals."[38] Since the FAA has been interpreted as the full exercise of the Commerce Clause and to preempt inconsistent state statutes, most appeals arise under the FAA. Because the FAA does not confer independent subject-matter jurisdiction on the federal courts absent diversity of parties or another independent jurisdictional ground, state courts are generally left to interpret the federal statute.

2. Standard of Review of Motions to Compel Arbitration

[33] Hall Street Assoc., 128 S.Ct. at 1403 n.5.
[34] *See* Citigroup Global Markets, Inc. v. Bacon, 562 F.3d 349, 351 (5th Cir. 2009).
[35] *Id*. at 353.
[36] *See generally* Philbin & Maness, *Alternative Dispute Resolution in the Fifth Circuit Survey*, *supra* note 12, at 448-452.
[37] For example, Texas S.B. No. 1650 (2009) attempts to homogenize Texas appellate practice with the interlocutory appeals permitted by 9 U.S.C. § 16.
[38] Perry Homes v. Cull, 259 S.W.3d 580, 586 (Tex. 2008).

Though the FAA and state arbitration laws are not identical, they generally agree on the court's limited role in deciding issues of arbitrability.[39] Judicial review under the FAA is limited to determining (1) whether a valid arbitration agreement exists between the parties before the court, and (2) whether the scope of the agreement encompasses the claims raised.[40] In deciding the former question, courts apply state law principles regarding the formation of contracts.[41] Accordingly, courts look to state law contract principles to determine whether the parties assented to an agreement to arbitrate or whether state law provides a defense to a contract to arbitrate.[42]

CHART 2: MOTIONS TO COMPEL



Appendix A provides a graphical trend analysis by court level. Will Pryor summarized such outcomes recently: "The message of Texas appellate decisions is clear: arbitration provisions are going to be enforced in almost any circumstance and, when requested, trial courts shall not delay the referral of the dispute."[43]

3. The Unconscionability Defense

As discussed above, litigants have alleged a wide-variety of defenses based on state contract law principles. As the Supreme Court has narrowed the list of successful claims (finding, for example, that the FAA covers employment contracts) and referred many of these questions to the arbitrator to decide under the *Prima Paint* separability rule, unconscionability has become the most attractive tool to those trying to avoid arbitration.[44] In fact, one commentator recently sampled the increase in unconscionability-related arbitration cases over a thirteen year period,[45] finding "squishy state law doctrines like unconscionability"[46] were up from virtually no cases in 1994 to nearly twenty percent of all vacatur challenges in 2007.

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[39] "Under the FAA, an order denying a motion to compel arbitration is immediately appealable. . . If the FAA does not apply, then the state version of the Uniform Arbitration Act or the Revised Uniform Arbitration Act will apply in 49 states (except Alabama). Those statutes are similar to the FAA, except that some states, like New York and Georgia, prohibit consumer arbitration agreements." Alan S. Kaplinsky, *The Use of Pre-Dispute Arbitration Agreements by Consumer Financial Services Providers*, *in* CONSUMER FINANCIAL SERVICES LITIGATION INSTITUTE 2008 (PLI, 2008). *See* WYO. STAT. ANN. § 1-36-119 (2003) ("[a]n appeal may be taken from: (i) An order denying the application to compel arbitration . . . ."); Rogers v. Dell Computer Corp, 138 P.3d 826, 830 (Okla. 2005); *see also* 9 U.S.C. § 4; TEX. CIV. PRAC. & REM.CODE § 171.021 (2005). *see generally* Michelle St. Germain, Note, *The Arbitrability of Arbitrability*, 2005 J. DISP. RESOL. 523 (2005).

[40] *In re* Oakwood Mobile Homes, Inc., 987 S.W.2d 571, 573 (Tex. 1999) (per curiam), *abrogated by In re* Halliburton Co., 80 S.W.3d 566 (Tex. 2002).

[41] Kaplan, 514 U.S. at 944.

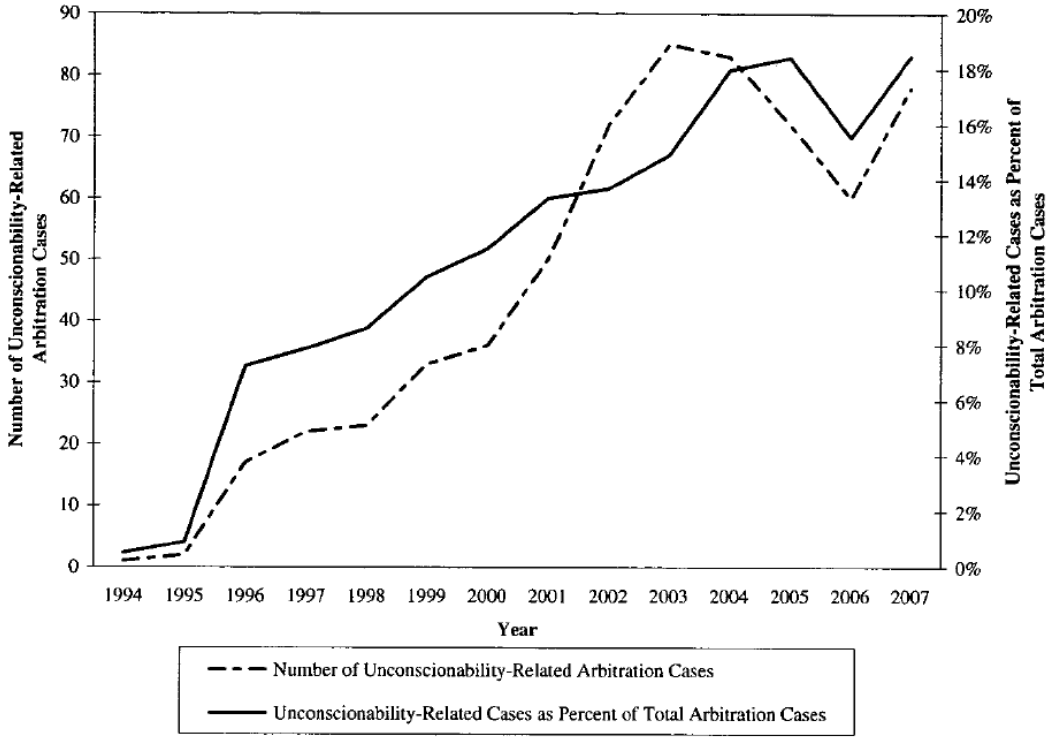
[42] *See id.*; *see also* Buckeye Check Cashing, 546 U.S. at 446; *see generally* Saavedra v. Dealmaker Developments, LLC, 8 So.3d 758 (La. Ct. App. 2009); *In re* Labatt Food Service, L.P., 279 S.W.3d 640 (Tex. 2009).

[43] Will Pryor, *Alternative Dispute Resolution*, 61 S.M.U. L. REV. 519, 524 (2008); the Texas sampling contained in Appendix A concentrates in courts affecting the San Antonio region.

[44] Bruhl, *supra* note 8, at 1425; *see also* Robert W. Loree, *Contesting the Motion to Compel Arbitration*, SAN ANTONIO LAWYER at 6 (May-June 2009). *See also*, Christopher R. Drahozal, *Arbitration Costs and Contingent Fees Contracts*, 59 VAND. L. REV. 729, 750-57 (2006).

[45] *Id.* at 1440.

[46] *Id.* at 1463.



The increase is borne both of necessity and creativity. Many of the other traditional defenses often argued have become less successful as "the Court has shut off various means of resisting arbitration."[47] Some of the defense's popularity is a by-product of *Prima Paint* severability – the arbitrator generally decides defensive issues unless they are only directed at the arbitration clause, rather than the contract as a whole.[48] Rather than proving to an arbitrator that an entire contract was fraudulently induced, litigants are aiming procedural and substantive unconscionability rifle shots at the clauses – challenging the arbitration clause itself, rather than the entire contract.[49] Such questions usually go to the court, not the arbitrator.[50] And the

[47] *Id.* at 1425.

[48] Prima Paint Corp. v. Flood & Conklin Mftg. Co., 388 U.S. 395 (1967).

[49] *See* Chalk v. T-Mobile USA, Inc., 560 F.3d 1087, 1093-97 (9th Cir. 2009).

[50] "[W]hen the crux of the complaint challenges the validity or enforceability of the agreement containing the arbitration provision, then the question of whether the agreement, as a whole, is unconscionable must be referred to the arbitrator. When the crux of the complaint is not the invalidity of the contract as a whole, but rather the arbitration provision itself, then the federal courts must decide whether the arbitration provision is invalid and unenforceable under 9 U.S.C. § 2 of the FAA." Nagrampa v. MailCoups, Inc., 469 F.3d 1257, 1263-64 (9th Cir. 2006) (en banc), *citing* Prima Paint (internal citations omitted); *see also* Bruhl, *supra* note 8, at 1472-73 ("[I]t is fair to say that, rightly or wrongly, many courts have for a long time ruled on unconscionability challenges to various aspects of arbitration agreements (and many courts still do) – occasionally expressly stating that the matter was for the court, other times simply so assuming without a second thought. Even fairly recently, defendants did not even argue that such matters were for the arbitrator. But this may be starting to change. In the last several years, one can discern the outlines of a nascent trend toward a federal rule shifting more authority over such challenges to the arbitrator, so that the arbitrator would decide whether (for example) a bar on punitive damages or collective proceedings or discover in arbitration is valid.") (internal citations omitted).

unconscionability argument takes advantage of a rub between federal and state law to give sympathetic judges a route to denying the motion to compel with a better chance of appellate success.[51] The success of these challenges varies geographically, with litigants finding considerably more success in New York, Connecticut and California than in other states.[52]

Because courts cannot hold arbitration clauses *per se* unconscionable, their analyses typically "focus on particular aspects of arbitration clauses that allegedly render them unconscionable or otherwise impermissibly frustrate the plaintiff's substantive rights."[53] Examples include:

(1) limitations on the type or amount of relief (punitive damages);
(2) provisions forbidding class-wide relief;
(3) "nonmutual" clauses;
(4) clauses that select allegedly biased arbitrators;
(5) cost allocating clauses; and
(6) confidentiality provisions.[54]

As a practical matter, it becomes difficult for appellate courts to determine whether the trial court has analyzed the arbitration clause for unconscionability in a way that it would not do to the contract if it did not have an arbitration clause.[55] Those "apples-to-apples" comparisons are often difficult to make.[56]

The Supreme Court has declined dozens of petitions for certiorari raising the issue since 2000,[57] despite clarion calls from dissenting judges, prominent Supreme Court litigators, and influential interests groups.[58] "Pro-arbitration forces decry the rise of unconscionability analysis, while consumer activists and employee advocates find unconscionability an unsatisfactory defense against the spread of arbitration."[59] The Supreme Court could extend *Prima Paint* separability, but has thus far passed on a number of opportunities to do so.[60] Alternatively, Congress could amend the FAA to specify that "courts, rather than arbitrators, should rule on challenges to the validity of arbitration agreements."[61] For now, the unconscionability defense appears to be the pressure valve that holds the system in an equally disagreeable state of equilibrium.

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[51] Bruhl, *supra* note 8, at 1442-43; *See also id.* at 1456 (quoting one appellate judge as saying: "'We have had case after case where we have written our way around the federal United States Supreme Court law. And they have denied certiorari.'").

[52] One California study found that "unconscionability challenges to arbitration agreements, which accounted for about two-thirds of all unconscionability challenges, succeeded at a rate several times higher than the rate for other types of contracts." Bruhl, *supra* note 8, at 1457, citing Stephen A. Broome, *An Unconscionable Application of the Unconscionability Doctrine: How the California Courts Are Circumventing the Federal Arbitration Act*, 3 HASTINGS BUS. L.J. 39, 44-48 (2006); *see also* Lawrence R. Mills *et al*., *Vacating Arbitration Awards: Study Reveals Real-World Odds of Success by Grounds, Subject Matter and Jurisdiction*, DISP. RESOL. MAG., SUMMER 2005, at 23. 25 ("The figures also indicated that vacatur was attempted more often and succeeded more often, both on an absolute and on a percentage basis, in just three states than anywhere else in the nation. Of 120 cases in which vacatur was sought in a state court, 27 were brought in California, 25 in New York and 12 in Connecticut." In these states, the grant rate was 30 percent, compared with 21 percent in other states studied.).

[53] Bruhl, *supra* note 8, at 1437.

[54] *Id.* at 1439.

[55] *Id*. at 1449.

[56] *Id*. at 1450.

[57] *Id.* at 1465-66.

[58] *Id*. at 1466, citing Nagrampa, 469 F.3d at 1313 (9th Cir. 2006) (en banc) (Kozinski, J., dissenting) ("I would not be the least surprised to see the Supreme Court of the United States soon take a close look at whether the unconscionability doctrine, as developed by some state courts, undermines the important policies of the Arbitration Act.").

[59] Bruhl, *supra* note, 8 at 1486.

[60] *See id*.

[61] *Id.* at 1487. The proposed Arbitration Fairness Act of 2009 (H.R. 1020; S. 931) contains such a provision. *See* Edna Sussman, *The Unintended Consequences of the Proposed Arbitration Fairness Act*, 56 FED. LAWYER 48 (May 2009).

B. Challenging an Arbitration Award After It's Made (Motions to Vacate)

If it sounds increasingly difficult to defeat the question presented by a motion to compel arbitration, vacatur of an arbitration award after it has been made is even more difficult. At a recent CLE seminar, a panelist asked roughly 200 participants if anyone had ever heard of an arbitration award being vacated. No one had. The panelist used the response to underscore the point that litigants should attack arbitration prior to attending it.[62] A well-respected federal judge recently noted that, "Judicial review of arbitration awards is essentially limited to review for extreme arbitrator misconduct such as fraud or corruption."[63]

Under § 10 of the FAA, courts are permitted to vacate an arbitration award:

> (1) where the award was procured by corruption, fraud, or undue means;
> (2) where there was evident partiality or corruption in the arbitrators, or either of them;
> (3) where the arbitrators were guilty of misconduct in refusing to postpone the hearing, upon sufficient cause shown, or in refusing to hear evidence pertinent and material to the controversy; or of any other misbehavior by which the rights of any party have been prejudiced; or
> (4) where the arbitrators exceeded their powers, or so imperfectly executed them that a mutual, final, and definite award upon the subject matter submitted was not made.

9 U.S.C. § 10(a).[64] Other grounds have been judicially added. These additional grounds spring from the FAA or have been forged in common law. And courts are now sorting out whether such grounds stem from common law or are derived from §10(a)(4). The answer to that question has been resolved differently in different courts.

"Manifest disregard of the law" was an oft-used ground for vacatur, prior to the U.S. Supreme Court's action in *Hall Street Associates*. In *Hall Street Associates*, the Court limited the grounds for vacatur of an arbitration award to those expressly set forth in the FAA.[65] "[T]he text [of the Federal Arbitration Act] compels a reading of the §§ 10 and 11 categories as exclusive."[66] *Hall Street Associates* threw the entire doctrine of "manifest disregard" into question. The Fifth Circuit has already dispensed with it, while the Second has retained it, but has drawn a certiorari grant on the question.[67]

The question then is what vacatur grounds realistically remain if manifest disregard dies. Prior to *Hall Street Associates*, several practitioners and arbitrators conducted a study of federal and state vacatur cases during a ten-month period in 2004.[68] What they found was that vacatur challenges were more prevalent in some states than others, and there was variability in success rates for different grounds.[69]

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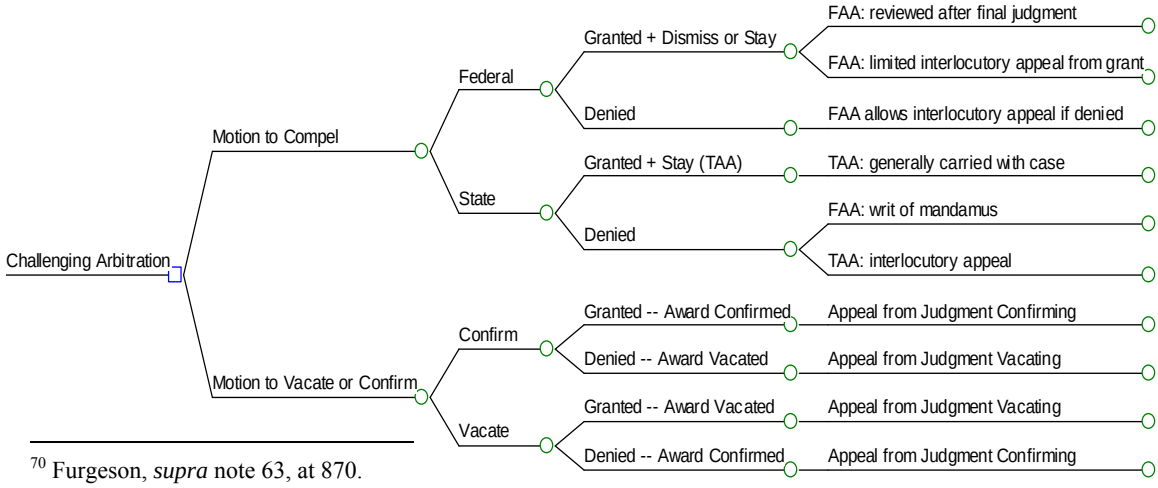
[62] *See also* Loree, *supra* note 44, at 22.
[63] The Honorable Royal Furgeson, *Civil Jury Trials R.I.P.? Can It Actually Happen In America?* 40 ST. MARY'S L.J. 795, 869-70 (2009).
[64] *See* Citigroup Global Markets, Inc. v. Bacon, 562 F.3d 349, 352 (5th Cir. 2009).
[65] *See* Hall Street Associates, 128 S.Ct. at 1403.
[66] *Id*. at 1404
[67] *See* Stolt Niesen SA v. Animalfeeds Int'l Corp., 548 F.3d 85 (2d Cir. 2008) *cert. granted* 2009 WL 803120 (June 15, 2009).
[68] Lawrence R. Mills *et al*, *supra* note 52, at 23.
[69] *Id.* at 25.

Vacatur Ground	Asserted (#)	Success (%)
"exceeded their powers , or so imperfectly executed the that a . . . final and definitive award upon the subject matter submitted was not made.	101	20.8%
"manifestly disregarded the law"	52	4.0%
"misbehavior by which the rights of a party were prejudiced" (including "irrational," "violated public policy," or was "arbitrary and capricious"	42	17.0%
"refused to postpone the hearing upon sufficient cause shown"	12	16.7%
"evident partiality or corruption in the arbitrators" (including arbitrator disclosures)	33	12.1%
"refused to hear evidence pertinent and material to the controversy"	24	12.5%
"was procured by corruption, fraud or undue means"	13	7.6%

According to Judge Furgeson, "The results of this study show the remote likelihood of having an arbitration award vacated under this system of limited review."[70] To some, these trends demand fundamental reform of the FAA. To others, *Hall Street Associates* simply reinforced the view that arbitration is to be quicker, less expensive, and final. For now, success rates on vacatur challenges to arbitration awards made after hearings are low. In fact not a single one of the sample cases in Appendix A vacates an arbitrated case on vacatur grounds.

CHART 3: CHALLENGING ARBITRATION



[70] Furgeson, *supra* note 63, at 870.

Conclusion

Arbitration has become a widely used litigation alternative. "For those to whom our current civil justice system now represents a grossly inefficient and costly mechanism for conflict resolution, the increasing use of mediation, arbitration, and collaboration for all types of disputes will be as beneficial to society as it is inevitable."[71] While attempts to avoid arbitration remain controversial in the courts, in Congress and in various state legislatures, whichever side of the policy debate you take, litigating arbitration will continue to be a dynamic area. The frequency of appeals relating to arbitration, in itself, adds variability to the process. Variability leads to further litigation, and most all litigation is settled short of judgment.[72]

[71] Pryor, *supra* note 43, at 529.

[72] Nathan L. Hecht, *Arbitration and the Vanishing Jury Trial: Jury Trials Trending Down in Texas Civil Cases*, 69 TEX. B.J. 854, 855 (2006).

APPENDIX A: ARBITRATION CASE TREND CHART

		Case Name	Compel Arbitration?					
			Trial Court		Court of Appeals		Supreme Court	
			Yes	No	Yes	No	Yes	No
Pre-Arbitration Challenge	Interlocutory	*In re* Gulf Exploration, LLC, 2009 WL 1028049 (Tex. April 17, 2009, orig. proceeding).	√			√	√	
		In re Bank of America, N.A., 278 S.W.3d 342 (Tex. 2009, orig. proceeding).	√			√*	√*	
		In re Int'l Profit Associates, Inc., 274 S.W.3d 672 (Tex. 2009, orig. proceeding).		√*		√*	√*	
		In re Lyon Financial Services, Inc., 257 S.W.3d 228 (Tex. 2008, orig. proceeding).		√*		√*	√*	
	Preemption	Eastland v. Camp Mystic, Inc., 2009 WL 260523 (Tex. App. Feb. 4, 2009), petition for review filed (Feb 17, 2009).		√		√		
		In re Olshan Foundation Repair Company, 277 S.W.3d 124 (Tex. App. 2009, orig. proceeding).		√		√		
		In re MP Ventures of South Texas, Ltd., 276 S.W.3d 524 (Tex. App. 2008, orig. proceeding).		√	√			
		In re Nexion Health at Humble, Inc., 173 S.W.3d 67 (Tex. 2005, orig. proceeding) (per curiam).		√			√	
		In re Palacios, 221 S.W.3d 564 (Tex. 2006, orig. proceeding) (per curiam).	√				√	
		In re Wilson D. Construction Co., 196 S.W.3d 564 (Tex. 2006, orig. proceeding).		√		√	√	
		In re Heritage Building Systems, Inc., 185 S.W.3d 539 (Tex. App. 2006, orig. proceeding).		√	√			
	Agreement Formation	*In re* Macy's TX I, L.P., 2008 WL 2828794 (Tex. App. July 23, 2008, orig. proceeding).		√		√		
		In re Dillard Department Stores, Inc., 198 S.W.3d 778 (Tex. 2006, orig. proceeding) (per curiam).		√		√	√	

		Case Name	Compel Arbitration?					
			Trial Court		Court of Appeals		Supreme Court	
			Yes	No	Yes	No	Yes	No
		In re Dallas Peterbilt, Ltd. L.L.P., 196 S.W.3d 161 (Tex. 2006, orig. proceeding) (per curiam).		√		√	√	
		In re American Nat'l Insurance Co., 242 S.W.3d 831 (Tex. App. 2007, orig. proceeding).		√		√		
	Scope	City of Seguin v. Worth, 2008 WL 2835295 (Tex. App. July 23, 2008).	√			√		
	Scope	*In re* Igloo Products Corp., 238 S.W.3d 574 (Tex. App. 2007, orig. proceeding).		√		√		
	Defenses	Global Evangelism Educational Ministries, Inc. v. Caddell, 2009 WL 398255 (Tex. App. February 18, 2009).		√	√			
	Defenses	Forest Oil Corporation v. McAllen, 268 S.W.3d 51 (Tex. 2008).		√		√	√	
	Defenses	*In re* NEXT Financial Group, Inc., 271 S.W.3d 263 (Tex. 2008, orig. proceeding).		√		√	√	
	Defenses	*In re* Citigroup Global Markets, Inc., 258 S.W.3d 623 (Tex. 2008, orig. proceeding).		√		√	√	
	Defenses	*In re* Fleetwood Homes of Texas, L.P., 257 S.W.3d 692 (Tex. 2008, orig. proceeding).		√		√	√	
	Defenses	*In re* Farmers and Ranchers Mutual Insurance Company, 2008 WL 2133116 (Tex. App. May 21, 2008, orig. proceeding).		√	√			
	Defenses	Security Service Federal Credit Union v. Sanders, 264 S.W.3d 292 (Tex. App. 2008).		√	√			
	Defenses	Global Financial Services, L.L.C. v. McLean, 2008 WL 372521 (Tex. App. February 13, 2008).		√	√			
	Defenses	*In re* Dillard Department Stores, Inc., 186 S.W.3d 514 (Tex. 2006, orig. proceeding) (per curiam).		√		√	√	
	Defenses	*In re* Vesta Ins. Group, Inc., 192 S.W.3d 759 (Tex. 2006, orig. proceeding).		√		√	√	

		Case Name	Compel Arbitration?					
			Trial Court		Court of Appeals		Supreme Court	
			Yes	No	Yes	No	Yes	No
		In re Bank One, N.A., 216 S.W.3d 825 (Tex. 2007, orig. proceeding).		√		√	√	
		Structured Capital Resources Corp. v. Arctic Cold Storage, LLC, 237 S.W.3d 890 (Tex. App. 2007).		√	√			
		In re RLS Legal Solutions, LLC, 221 S.W.3d 629 (Tex. 2007, orig. proceeding).		√		√	√	
		USB Financial Services, Inc. v. Branton, 241 S.W.3d 179 (Tex. App. 2007)		√	√			
	Binding Non-signatories	*In re* Labatt Food Service, L.P., 279 S.W.3d 640 (Tex. 2009, orig. proceeding).		√		√	√	
		In re Jindal Saw Limited, 2009 WL 490082, 52 Tex. Sup. Ct. J. 407 (Tex. Feb. 27, 2009, orig. proceeding).		√		√	√	
		In re H & R Block Financial Advisors, Inc., 235 S.W.3d 177 (Tex. 2007, orig. proceeding).		√		√	√	
		In re Cutler-Gallaway Services, Inc., 2007 WL 1481999 (Tex. App. May 23, 2009, orig. proceeding).	√		√			
		In re Weekley Homes, L.P., 180 S.W.3d 127 (Tex. 2005, orig. proceeding).		√			√	
		In re Kellogg Brown & Root, Inc., 166 S.W.3d 732 (Tex. 2005, orig. proceeding).		√	√			√
		In re Vesta Ins. Group, Inc., 192 S.W.3d 759 (Tex. 2006, orig. proceeding) (per curiam).		√		√	√	
		In re Kaplan Higher Education Corp., 235 S.W.3d 206 (Tex. 2007, orig. proceeding) (per curiam).		√		√	√	
		In re Merrill Lynch Trust Co., FSB, et al., 235 S.W.3d 185 (Tex. 2007, orig. proceeding).		√		√		√
		In re Bayer Materialscience, LLC, 265 S.W.3d 452 (Tex. App. 2007, orig. proceeding).		√		√		

		Case Name	Compel Arbitration?					
			Trial Court		Court of Appeals		Supreme Court	
			Yes	No	Yes	Yes	No	Yes
		In re SSP Partners, 241 S.W.3d 162 (Tex. App. 2007, orig. proceeding).		√		√		
		In re Poly-America, L.P., 262 S.W.3d 337 (Tex. 2008, orig. proceeding).	√			√	√	
		In re Palm Harbor Homes, Inc., 195 S.W.3d 672 (Tex. 2006, orig. proceeding).		√		√	√	
		In re U.S. Home Corp., 236 S.W.3d 761 (Tex. 2007, orig. proceeding).		√			√	
		Olshan Foundation Repair Co. v. Ayala, 180 S.W.3d 212 (Tex. App. 2005). *See also TMI* and *MHI* below.		√		√		
	Unconscionability	TMI, Inc. v. Brooks, 225 S.W.3d 783 (Tex. App. 2007).		√	√			
		In re MHI Partnership, Ltd., 2008 WL 2262157 (Tex. App. May 29, 2008, orig. proceeding).		√	√			
		In re Mission Hosp., Inc., 2007 WL 3026604 (Tex. Oct. 18, 2007, orig. proceeding) (not reported).		√	√			
		In re Weeks Marine, Inc., 242 S.W.3d 849 (Tex. App. 2007, orig. proceeding).		√	√			
		Morningstar Gas, Inc. v. The Matthews Firm, P.L.L.C., 2009 WL 97563 (Tex. App. Jan. 14, 2009).		√		√		
	Defenses	Perry Homes v. Cull, 258 S.W.3d 580 (Tex. 2008).	√		√			√
		Chambers v. O'Quinn, 242 S.W.3d 30 (Tex. 2007).	√		√			√*
	Trial Court Modification	*In re* Interest of T.B., a child, 2009 WL 891882 (Tex. App. April 3, 2009, orig. proceeding).		√*	√			
		Lopez v. Lopez, 2009 WL 618464 (Tex. App. March 11, 2009).	√		√			
		Mann v. Mann, 2008 WL 577266 (Tex. App. March 5, 2008).	√		√			
		Hilms v. Hilms, 2008 WL 859218 (Tex. App. April 2, 2008).	√*		√*			

		Case Name	**Compel Arbitration?**					
			Trial Court		**Court of Appeals**		**Supreme Court**	
			Yes	**No**	**Yes**	**Yes**	**No**	**Yes**
		Aspri Investments v. Afeef, 2008 WL 441802 (Tex. App. Feb. 20, 2008).	√		√			
		Statewide Remodeling Inc. v. Williams, 244 S.W.3d 564 (Tex. App. 2008).	√		√			
	Exceeding Authority	Lee v. Daniels & Daniels, 264 S.W.3d 273 (Tex. App. 2008), rehearing overruled (Jul 28, 2008), review denied (Feb 13, 2009), rehearing of petition for review denied (Apr 17, 2009).	√			√		
		City of Beaumont v. Int'l Ass'n. of Firefighters, 241 S.W.3d 208 (Tex. App. 2007).	√			√		
		Ayala v. First Community Bank, N.A., 2007 WL 3380015 (Tex. App. Nov. 15, 2007) (not reported).	√			√		
	Manifest Disregard	Chandler v. Ford Motor Credit Company, LLC, 2009 WL 538401 (Tex. App. March 4, 2009).	√		√			
		Galvan v. Centex Home Equity Co, 2008 WL 441773 (Tex. App. Feb. 20, 2008).	√		√			
		Teel v. Beldon Roofing & Remodeling Co., 281 S.W.3d 446 (Tex. App. 2007), *review denied* (Jan 25, 2008).	√		√			