

**TEXAS GENERAL ARBITRATION ACT VS.  
FEDERAL ARBITRATION ACT:  
CHOICE OR DILEMMA FOR TEXAS EMPLOYERS?**

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*Circuit City Stores v. Adams*,<sup>1</sup> and *Gilmer v. Interstate/Johnson Lane Corp.*,<sup>2</sup> paved the way for broad use of compulsory binding arbitration agreements in employment. *Southland Corp. v. Keating*<sup>3</sup> held that the Federal Arbitration Act (FAA) preempts conflicting state laws. Courts have declared that the FAA controls and will be applied when interstate commerce is affected. The interstate commerce test is far-reaching. However, there are cases in which courts have decided that the Texas General Arbitration Act (TGAA) controlled the agreement. The acts have many similarities and some differences. This paper will analyze select provisions of the two statutes together with relevant case law to compare and contrast the two acts and to shed light on when the TGAA may control the compulsory arbitration agreement and how this might be accomplished. To date, thirty-five states have adopted at least some variation of the Uniform Arbitration Act promulgated by the National Conference of Commissioners on Uniform State Laws in 1955.<sup>4</sup> With the inevitable proliferation of litigation over compulsory binding arbitration agreements, studies of distinctions between the federal act and state acts may reveal a melding effect or may indicate real disparities with evolutionary implications for academics, the courts, employers and employees.

## I. BACKGROUND

The United States Arbitration Act was originally enacted in 1925 and was codified in Title 9 of the United States Code in 1947 as the Federal Arbitration Act (FAA). The Act is found at 9 U.S.C., Sections 1-307 in its current form with the international-related New York and Panama Conventions. The Texas General Arbitration Act (TGAA) was initially enacted with the state's 1965 adoption of the Uniform Arbitration Act. In its current form, with substantial additions and amendments in 1997, the TGAA may be found at Texas Civil Practices and Remedies Code, Sections 171.001-171.098.

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<sup>1</sup> *Circuit City Stores v. Adams*, 532 U.S. 105, 121 S.Ct. 1302, 149 L.Ed.2d 234 (2001).

<sup>2</sup> *Gilmer v. Interstate/Johnson Lane Corp.*, 500 U.S. 20, 111 S.Ct. 1647, 114 L.Ed.2d 26 (1991).

<sup>3</sup> *Southland Corp. v. Keating*, 465 U.S. 1, 104 S.Ct. 852, 79 L.Ed.2d 1 (1984).

<sup>4</sup> TEX. CIV. PRAC. & REM. CODE ANN., Title 7, Alternate Methods of Dispute Resolution, Chapter 171 General Arbitration (Vernon Supp. 2002).

## II. OVERVIEW OF THE TEXAS ACT AS COMPARED TO THE FEDERAL ACT

The TGAA includes considerably more detail than the FAA in its coverage of arbitration agreements, the arbitration process itself, and related proceedings, including those to compel or stay arbitration and to confirm, vacate, modify, or correct an award.<sup>5</sup> Both acts require a writing or written provision for an arbitration agreement.<sup>6</sup> Both make an arbitration agreement valid, irrevocable and enforceable except on grounds at law or in equity for revocation of an ordinary contract.<sup>7</sup> The courts follow the same analysis under both acts in determining arbitrability of an agreement: (1) whether there is an arbitration agreement and if so, (2) whether the claims between the parties come within the scope of the agreement. State contract laws are applied under both acts in each of the determinations. The courts are guided by the same strong federal and State of Texas presumptions favoring arbitration in analyses under both acts.<sup>8</sup>

There are, however, two major differences in the scope of the two acts. The FAA covers all contracts involving interstate commerce except those of employees “actually engaged in the movement of goods in interstate commerce in the same way that seamen and railroad workers are.”<sup>9</sup> There is no similar language in the TGAA excluding a specific class of employees, but the Texas law includes a list of five situations to which the chapter does not apply,<sup>10</sup> and for some agreements otherwise not covered provides coverage but requires a written agreement to arbitrate, signed by both parties and their attorneys. An agreement to arbitrate a claim for personal injury also specifically requires advice of counsel.<sup>11</sup>

The requirement found in Section 171.003 of the Texas statute for construing “the chapter to effect its purpose and make uniform the construction of other states’ law applicable to an arbitration” has no comparable provision in the federal act. According to the U.S. Supreme Court, the Federal Arbitration Act creates a substantive body of law, applicable in the state courts.<sup>12</sup>

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<sup>5</sup> TEX. CIV. PRAC. & REM. CODE ANN. §§ 171.001-171.098 (Vernon Supp. 2002).

<sup>6</sup> 9 U.S.C. § 2 (1947); TEX. CIV. PRAC. & REM. CODE ANN. §171.001(a).

<sup>7</sup> 9 U.S.C. § 2; TEX. CIV. PRAC. & REM. CODE ANN. § 171.001(b).

<sup>8</sup> *Dustrol, Inc. v. Champagne-Webber, Inc.*, 2001 WL 1326477, at \*3-\*5 (slip copy) (N.D. Tex. 2001).

<sup>9</sup> 9 U.S.C. § 1; *Circuit City Stores v. Adams*, 532 U.S. 105, 121 S.Ct. 1302 (2001); *Miller v. Public Storage Management, Inc.*, 121 F.3d 215, 217-218 (5<sup>th</sup> Cir. 1997)(*quoting* *Rojas v. TK Communications, Inc.*, 87 F.3d 745, 748 (5<sup>th</sup> Cir. 1996)).

<sup>10</sup> These include collective bargaining agreements between an employer and a union; agreements for acquisition by individuals of property, services, money, or credit with consideration provided by the individual not more than \$50,000 (unless there is a written agreement to arbitrate signed by each party and the party’s attorney); claims for personal injury (unless there is a written agreement to arbitrate entered into on advice of counsel, signed by each party and the party’s attorney); claims for workers’ compensation benefits; or agreements made before January 1, 1966.

<sup>11</sup> TEX. CIV. PRAC. & REM. CODE ANN. § 171.002.

<sup>12</sup> *In re Conseco Fin. Servicing Corp.* 19 S.W.3d 562, 567 (Tex. App.-Waco 2000), *quoting* *Perry v. Thomas*, 482 U.S. 483, 489, 107 S.Ct.2520, 2525, 96 L.Ed.2d 426 (1987).

A. PROCEEDING TO COMPEL ARBITRATION

In a proceeding to compel arbitration, there are some distinctions that could be significant for employers. A bona fide dispute regarding the existence of an arbitration agreement is grounds for a court to try that issue summarily.<sup>13</sup> If the existence of an agreement to arbitrate is denied, Texas law provides for a court to summarily determine that issue.<sup>14</sup> Under the TGAA, the decision to compel arbitration involves a two-step inquiry. The first determination must be whether a valid enforceable arbitration agreement exists,<sup>15</sup> with the burden of proving such an agreement on the party moving to compel arbitration.<sup>16</sup> If the moving party meets the burden, a presumption in favor of arbitration arises, and the burden shifts to the party opposing arbitration to show that the agreement itself is not enforceable or that the dispute is not within the scope of the agreement.<sup>17</sup>

The party seeking to compel arbitration under both the federal and the Texas statutes must pursue parallel proceedings, including an interlocutory appeal of the order denying arbitration under the Texas act and a writ of mandamus from denial under the Federal act.<sup>18</sup> A trial court is required to compel arbitration if it finds both a valid agreement to arbitrate and asserted claims that are within the agreement under both the FAA<sup>19</sup> and the TGAA.<sup>20</sup> Texas procedure will control a Texas court's decision as to whether a disputed claim is subject to an arbitration clause.<sup>21</sup>

The courts have required the party seeking to compel arbitration under the federal statute to present evidence that is sufficient to establish its right to arbitrate.<sup>22</sup> Under the FAA, if the arbitration agreement covers the claims in dispute and the party challenging arbitration has not proven its defenses, the trial court has no discretion but to compel arbitration and stay its proceedings.<sup>23</sup> Under the FAA, if all issues are subject to arbitration, a district court is not precluded from dismissing an action.<sup>24</sup> The federal district court hearing the *Weiner v. Southwest Airlines Co. Funded Welfare Benefit Plan* case said that clearly the same rule should apply to a case covered by the Texas act.<sup>25</sup> On appeal, a district court's grant of a motion to compel arbitration under the federal statute

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<sup>13</sup> TEX. CIV. PRAC. & REM. CODE ANN. § 171.023.

<sup>14</sup> *Id.* § 171.021.

<sup>15</sup> *ASW Allstate Painting & Constr.Co. v. Lexington Ins.*, 188 F.3d 307, 311 (5<sup>th</sup> Cir. 1999).

<sup>16</sup> *Henry v. Gonzalez*, 18 S.W.3d 684, 688-89 (Tex. App.- San Antonio 2000).

<sup>17</sup> *Id.* at 689. *See also* *Fleetwood Enters., Inc. v. Gaskamp*, 280 F.3d 1069 (5<sup>th</sup> Cir. 2002).

<sup>18</sup> *Jack B. Anglin Co., Inc. v. Tipps*, 842 S.W.2d 266, 272 (Tex. 1992).

<sup>19</sup> *In re H.E. Butt Grocery Co.*, 17 S.W.3d 360 (Tex. App. – Houston [14<sup>th</sup> Dist.] 2000).

<sup>20</sup> *OPE Int'l LP v. Chet Morrison Contractors, Inc.*, 258 F 3d 443, 445-46 (5<sup>th</sup> Cir.2001).

<sup>21</sup> *Jack P. Anglin Co., Inc.*, 842 S.W.2d at 268.

<sup>22</sup> *In re Valle Redondo, S.A.*, 47 S.W.3d 655, 661 (Tex. App.-Corpus Christi 2001)(*quoting from* *Cantella & Co. v. Goodwin*, 924 S.W.2d 943, 944 (Tex. 1996)).

<sup>23</sup> *In re FirstMerit Bank, N.A.* 52 S.W.3d 749, 753-54 (Tex. 2001).

<sup>24</sup> *Weiner v. Southwest Airlines Co. Funded Welfare Benefit Plan*, 2002 WL 335453, \*3 (N.D.Tex.), *citing* *Fedmet Corp. v. M/V Buyalyk*, 194 F.3d 674, 678 (5<sup>th</sup> Cir. 1999).

<sup>25</sup> *Id.* at \*4.

will be reviewed *de novo* by the Fifth Circuit Court of Appeals,<sup>26</sup> as will the denial of a motion to compel arbitration.<sup>27</sup>

Under the federal act, if the making of an agreement is in issue, the court shall proceed summarily to trial. However, the federal act provides that the party in default may demand a jury trial.<sup>28</sup> The right to a jury trial on issues of the existence or scope of an arbitration agreement would not serve the purpose of most employers, since the party resisting arbitration would be the one who must show that he is entitled to a jury trial under §4 of the federal act.<sup>29</sup> An employer who has chosen arbitration to resolve disputes with employees would be less likely than an employee to try to escape such an agreement. While the federal statute appears to be fairly generous in providing the option of a jury trial, the courts have made clear that a party to an arbitration agreement cannot obtain a jury trial merely by demanding one. The courts have suggested that in order to be entitled to the jury trial, a party is required to make some showing that the law would relieve him of the duty to arbitrate if his allegations are true. In addition, some evidence to support the allegations of fact must be produced.<sup>30</sup> The right to a jury trial under the FAA does not include the right to have a jury decide whether a contract exists.<sup>31</sup>

The provisions in the federal statute for jury trial are sometimes illusory in Texas, because Texas procedure will control a decision by a Texas court as to whether a disputed claim is subject to an arbitration agreement that is covered by the federal act.<sup>32</sup> That procedure provides for the court to decide based on affidavits, pleadings, discovery, and stipulations, unless the facts are controverted by some admissible evidence, in which case the trial court must conduct an evidentiary hearing.<sup>33</sup>

## B. STAY OF RELATED PROCEEDINGS

The two statutes have slightly different provisions for a stay of related court proceedings. Under the TGAA, an order compelling arbitration must include a stay of a proceeding that involves an issue subject to arbitration when that issue is severable from the remainder of the proceeding. The stay is available not only upon the issuance of an order for arbitration but also upon application for such an order.<sup>34</sup>

The FAA has less detail, providing for a stay of a related proceeding upon application of a party who is not in default in proceeding with arbitration.<sup>35</sup> The arbitration clause itself may be a factor in the court's decision to grant a stay. If the clause is a broad one, the action should be stayed and the arbitrators permitted to make a

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<sup>26</sup> *OPE Interntl. LP*, 258 F.3d at 445.

<sup>27</sup> *Webb v. Investacorp*, 89 F.3d 252, 257 (5<sup>th</sup> Cir. 1996)(citing *Snap-On Tools Corp. v. Mason*, 18 F.3d 1261 (5<sup>th</sup> Cir. 1994)).

<sup>28</sup> 9 U.S.C. § 4.

<sup>29</sup> *Bhatia v. Johnston*, 818 F.2d 418, 422 (5<sup>th</sup> Cir. 1987).

<sup>30</sup> *Dillard v. Merrill Lynch, Pierce, Fenner & Smith, Inc.*, 961 F.2d 1148, 1153 (5<sup>th</sup> Cir. 1992), *cert. den.* 506 U.S. 1079, 113 S. Ct.1046, 122 L.Ed.2d 355 (citing *T & R Enters. v. Continental Grain Co.*, 613 F.2d 1272, 1278 (5<sup>th</sup> Cir. 1980)).

<sup>31</sup> *Oasis Oil and Ref. Corp. v. Armada Transp. & Ref. Co.*, 719 F.2d 124, 126 (5<sup>th</sup> Cir. 1983).

<sup>32</sup> *Jack B. Anglin Co., Inc. v. Tipps*, 842 S.W.2d 266, 268 (Tex. 1992).

<sup>33</sup> *Leander Cut Stone Co. v. Brazos Masonry, Inc.*, 987 S.W.2d 638, 640 (Tex. App.-Waco, 1999).

<sup>34</sup> TEX. CIV. PRAC. & REM. CODE ANN. §§ 171.021, 171.025.

<sup>35</sup> 9 U.S.C. § 3 (1947).

determination on the scope of the clause and whether it covers the dispute at hand.<sup>36</sup> If both federal and state litigation is pending, a balancing test, including consideration of how much progress has been made in each of the two actions, must be used in determining whether to stay a federal suit in deference to the state court litigation.<sup>37</sup> In the *Moses H. Cone Memorial Hospital* case, the U.S. Supreme Court explained that a stay of litigation is not enough where the party opposing arbitration is the one from whom payment or performance is being sought. Without an order compelling the parties to arbitration, the “recalcitrant party [is] free to sit and do nothing – neither to litigate nor to arbitrate.”<sup>38</sup> If the asserted claims are covered by the arbitration agreement and the party opposing arbitration does not prove its defenses, a Texas trial court hearing a case under the FAA must stay its own proceedings and compel arbitration.<sup>39</sup> In an unpublished opinion, a Texas appeals court pointed out that the TGAA permits an interlocutory appeal from an order denying an application to compel arbitration, but a party may not appeal the denial of a motion to compel under the FAA or under the common law.<sup>40</sup> The Fifth Circuit has said recently that Section 3 of the FAA does not give courts the authority to compel arbitration but merely the power to stay proceedings pending the outcome of arbitration.<sup>41</sup>

### C. ARBITRATORS

Both the TGAA and the FAA provide for a court to appoint an arbitrator upon application of a party, but the provisions for such appointment apply in different situations. Both statutes provide for the court to act when a method of appointment is not specified in the arbitration agreement or an agreed method fails.<sup>42</sup> The state act also provides for situations in which the agreed method cannot be followed or an appointed arbitrator fails or is unable to act and no successor has been appointed.<sup>43</sup> The federal statute also provides for filling a vacancy, but in addition, the federal act allows the court to act “if for any other reason there shall be a lapse in the naming of an arbitrator or arbitrators or umpire...”<sup>44</sup> The TGAA says the court “shall appoint one or more qualified arbitrators...”<sup>45</sup> and their powers and determination of a question are exercised by a majority unless the agreement or the law specifies otherwise.<sup>46</sup> The FAA allows the court to appoint “an arbitrator or arbitrators” but concludes the applicable section with a provision that “unless otherwise provided in the agreement the arbitration shall be by a single arbitrator.”<sup>47</sup>

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<sup>36</sup> Complaint of Hornbeck Offshore Corp., 981 F.2d 752, 754 (5<sup>th</sup> Cir. 1993).

<sup>37</sup> *Moses H. Cone Memorial Hosp. v. Mercury Constr. Corp.*, 460 U.S. 1, 21, 103 S. Ct. 927, 940, 74 L.Ed.2d 765, 783 (1983).

<sup>38</sup> *Id.* at 942-43.

<sup>39</sup> *In re FirstMerit Bank, N.A.*, 52 S.W.3d 749, 753-54 (Tex. 2001).

<sup>40</sup> *Orkin Exterminating Co., Inc. v. Pollack*, 1999 WL 1134491 (Tex.App.-Dallas) (unpublished opinion).

<sup>41</sup> *Hill v. G.E. Power Sys., Inc.* 2002 WL 206335 (5<sup>th</sup> Cir. (Tex.)).

<sup>42</sup> TEX. CIV. PRAC. & REM. CODE ANN. § 171.041; 9 U.S.C. § 5.

<sup>43</sup> *Id.* § 171.041.

<sup>44</sup> 9 U.S.C. § 5 (1947).

<sup>45</sup> TEX. CIV. PRAC. & REM. CODE ANN § 171.041.

<sup>46</sup> *Id.* § 171.042.

<sup>47</sup> 9 U.S.C. § 5.

#### D. THE HEARING

The TGAA gives the arbitrators specific authority to set the time and place for the arbitration hearing. Notice must be given to the parties no later than the fifth day before the hearing.<sup>48</sup> The FAA has no specific language about the hearing itself, other than the provisions for witnesses. The FAA specifies that a witness may be directed to bring “any book, record, document, or paper” which may be material to the case.<sup>49</sup> The TGAA is slightly broader in its language, allowing for production of “books, records, documents, or other evidence.”<sup>50</sup> Both acts provide substantial power for the arbitrator to call witnesses, pay fees to the witnesses,<sup>51</sup> and require the production of evidence. Both acts have similar provisions for compelling the attendance of witnesses. Punishing them for contempt is specifically mentioned in the FAA,<sup>52</sup> while the TGAA applies the same rules to these witnesses as to those in a civil action in district court.<sup>53</sup>

Section 171.050 of the TGAA allows the arbitrators to authorize a deposition to be taken in the same manner as in district court civil actions. Depositions are specifically allowed if a witness cannot be required to appear or is unable to come to the hearing or if needed with an adverse witness for discovery or evidentiary purposes. The federal act makes no specific provisions for depositions.

#### E. THE AWARD

Under the Texas statute, the arbitration award must be in writing and signed by each arbitrator, a copy must be delivered to each party, and the time for awards is to be by agreement, as ordered by the court, or as extended by written agreement. Any objection to the time of the award is waived unless the party making the objection notifies the arbitrators before the award has been delivered.<sup>54</sup> Under the TGAA, an arbitrator’s award has the same effect as the judgment of a court of last resort.<sup>55</sup> The federal statute has no comparable language.

##### 1. CONFIRMATION OF THE AWARD

Confirmation of an award by a court is an option under both statutes. The Texas Arbitration Act provides at section 171.087 that a court shall confirm an award on application of a party, unless grounds are offered for vacating, modifying, or correcting

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<sup>48</sup> TEX. CIV. PRAC. & REM. CODE ANN. § 171.044.

<sup>49</sup> 9 U.S.C. § 7 (1947).

<sup>50</sup> TEX. CIV. PRAC. & REM. CODE ANN. § 171.051.

<sup>51</sup> The FAA provides for “the fees of witnesses before masters of the United States courts.” The TGAA fee is “the same as the fee for a witness in a civil action in a district court.”

<sup>52</sup> 9 U.S.C. § 7.

<sup>53</sup> TEX. CIV. PRAC. & REM. CODE ANN. § 171.051.

<sup>54</sup> *Id.* § 171.053.

<sup>55</sup> *Holk v. Biard*, 920 S.W.2d 803 (Tex. App.—Texarkana 1996).

the award. When the award is confirmed, the trial court shall render a judgment in conformity with it and enforce that judgment as any other would be enforced.<sup>56</sup>

Because Texas had no authority on the issue of appellate review when a trial court vacates an award and orders a new arbitration, a Houston appeals court looked to the law of other states that had adopted the Uniform Arbitration Act. Using that analysis the court found that under the Texas act, if a trial court vacates an award and remands a case for a new arbitration but does not specifically deny a motion to confirm an award, the order vacating the award does not automatically deny the motion to confirm but rather makes moot consideration of the application to confirm.<sup>57</sup> In a later TGAA case involving applications to vacate and to confirm, the trial court denied the application to confirm an award, granted the application to vacate, and ordered a rehearing before a new arbitration panel. On appeal, one party argued that the trial court's order was not appealable because it was interlocutory. The other argued that the order was final because it denied confirmation, which is appealable under the TGAA, and ordered a rehearing before new arbitrators, which was a new arbitration process. In a case of first impression for a Texas state court, the Houston appeals court addressed the question of whether the Texas act allows an appeal from an order vacating an arbitration award and directing a rehearing.<sup>58</sup> The court found no statutory basis allowing appeal of a trial court's order that denied confirmation of an award, as well as vacated the award and directed a rehearing.<sup>59</sup> The Fifth Circuit said that the predecessor Texas arbitration statute<sup>60</sup> with essentially the same language as the current one<sup>61</sup> did not allow for such an appeal.<sup>62</sup>

The federal act provides in section 9 some additional limits on confirmation. Within one year after the award is made, any party to the arbitration may apply for a court order confirming. If the parties have agreed that a court judgment shall be entered confirming the award, they may apply to the court specified in the agreement. If there is no court specified, the application would be to the district court of the district where the award was made. The court must grant the order of confirmation unless the award is vacated, modified or corrected under section 10 or section 11. The FAA also provides in this section for service on the adverse party.

## 2. MODIFICATION OR CORRECTION OF THE AWARD

The TGAA allows modification or correction of an award by the arbitrators in several situations. Application to the court is required by the 90<sup>th</sup> day after a copy of the award is delivered to the applicant. Problems with the award itself, such as miscalculation of numbers or mistake in the description of a "person, thing, or property referred to in the award," or imperfection in the form of the award which does not affect the merits of the

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<sup>56</sup> TEX. CIV. PRAC. & REM. CODE ANN. § 171.016.

<sup>57</sup> *Stolhandske v. Stern*, 14 S.W.3d 810, 815 (Tex. App.-Houston [1<sup>st</sup>] 2000) (citing *North Carolina v. Davidson & Jones Constr. Co.*, 72 N.C.App 149, 323 S.E.2d 466, 469 (1984)).

<sup>58</sup> *Prudential Sec., Inc. v. Vondergoltz*, 14 S.W.3d 329, 330 (Tex. App.-Houston [14<sup>th</sup>] 2000).

<sup>59</sup> *Id.* at 331.

<sup>60</sup> TEX. REV. CIV. STAT. ANN. ART. 238-2 § A.

<sup>61</sup> TEX. CIV. PRAC. & REM. CODE ANN. § 171.098.

<sup>62</sup> *Prudential Sec., Inc.*, 14 S.W.3d at 331, citing *Atl. Aviation, Inc. v. EBM Group, Inc.*, 11 F.3d 1276, 1279 (5<sup>th</sup> Cir. 1994).

dispute can lead to a court's modifying or correcting. In addition, if the arbitrators have made an award on a matter that was not submitted for arbitration and if correction will not affect the merits of the decision on the matters that were before them, they may modify or correct the award.<sup>63</sup>

The FAA provides that the United States court in the district where the award was made may order modification or correction, and that application by a party is also required.<sup>64</sup> Notice of a motion to modify or correct must be served on the adverse party or that party's attorney within three months after the award is filed or delivered. The grounds for modification or correction are similar in both statutes. Section 11 of the FAA sets out the similar grounds in that act. The miscalculation of numbers, a mistake in descriptions, an award on a matter not submitted, or an imperfection in the form of the award are grounds used as the basis for modifying or correcting an award under the federal act.<sup>65</sup>

### 3. VACATION OF THE AWARD

The grounds for vacating an award under the TGAA are very similar to the grounds for modification or correction. In Texas, arbitrations may be conducted under common law or the TGAA. The party seeking to have an award vacated must have either a statutory or a common law ground for setting it aside.<sup>66</sup> A court may not set aside an award based on a mere mistake of either fact or law. Without some statutory or common law ground to vacate or modify an arbitration award, a reviewing court has no jurisdiction to review other issues.<sup>67</sup> The common law grounds for vacating an award include "fraud, misconduct, or gross mistake that implies bad faith and failure to exercise honest judgment."<sup>68</sup> In a recent Fifth Circuit decision on a case heard by a federal district court applying the TGAA, the court ruled on the appropriate standard of review for the circuit court to use in reviewing a district court's refusal to vacate an arbitration award, holding that the standard to be used is the same as for any other district court decision, accepting findings of fact that are not clearly erroneous and deciding questions of law *de novo*.<sup>69</sup> The *de novo* standard is to be applied to pure questions of law. The default standard is applied to questions of fact and mixed questions of law and fact, with an award vacated only for manifest disregard of the law, or on the grounds listed in the FAA.<sup>70</sup>

The limited grounds listed in section 10 are the basis for vacating an award under the FAA.<sup>71</sup> The federal grounds for vacation are the same as those for modification or

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<sup>63</sup> TEX. CIV. PRAC. & REM. CODE ANN. § 171.091.

<sup>64</sup> 9 U.S.C. § 11 (1947).

<sup>65</sup> *Id.*

<sup>66</sup> Koch v. Koch, 27 S.W.3d 93, 96 (Tex. App.- San Antonio 2000).

<sup>67</sup> CVN Group, Inc. v. Delgado, 47 S.W. 3d 157, 162 (Tex. App.-Austin 2001).

<sup>68</sup> J.J. Gregory Gourmet Servs., Inc. v. Antone's Import Co., 927 S.W.2d 31, 33 (Tex. App.- Austin 2001).

<sup>69</sup> Harris v. Parker College of Chiropractic, 2002 WL 460067, \*2 (5<sup>th</sup> Cir.(Tex.)); *see also* Hughes Training v. Cook, 254 F.3d 588, 592 (5<sup>th</sup> Cir. 2001).

<sup>70</sup> *Harris*, 2002 WL 460067, at \*3.

<sup>71</sup> 9 U.S.C. § 10 (a) (1992). (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

correction, appearing as a single section. Under the FAA, a district court's review of arbitration is a narrow one<sup>72</sup> and a court may vacate an award only for the four reasons set out in section 10 of the statute.<sup>73</sup> In *Williams v. Cigna Financial Advisors, Inc.*,<sup>74</sup> the Fifth Circuit noted that panels of that circuit previously had recognized at least three non-statutory grounds for vacating an arbitration award in FAA cases. These include (1) an award that is contrary to public policy;<sup>75</sup> (2) an award that is arbitrary and capricious;<sup>76</sup> and (3) an award that fails "to draw its essence from underlying contract."<sup>77</sup> The *Williams* case was the first Fifth Circuit case in which the court considered favorably and recognized as a fourth nonstatutory basis for vacating an award an arbitrator's acting with "manifest disregard for the law" in making the award.<sup>78</sup>

One statutory ground for vacating an arbitration award under section 10 of the federal act is evident partiality of arbitrators.<sup>79</sup> In a 1997 case, *Burlington N.R.R. v. TUCO Inc.*, applying the Texas statute, the Texas Supreme Court considered approaches taken by various federal and state courts in deciding whether nondisclosure of certain information by an arbitrator was grounds to vacate an award based on evident partiality. The court considered the narrow reasonable person standard used by some courts<sup>80</sup> and the broader reasonable impression standard used by other courts.<sup>81</sup> In adopting the broader standard, the court held that "a prospective neutral arbitrator selected by the parties or their representatives exhibits evident partiality if he or she does not disclose facts which might, to an objective observer, create a reasonable impression of the arbitrator's partiality."<sup>82</sup> A Houston appeals court ruled that a trial court is required to vacate an award if a neutral arbitrator shows "evident partiality," and that nondisclosure of facts which fit the reasonable impression test will be enough to establish evident partiality, regardless of whether the nondisclosed information would itself establish that partiality or bias.<sup>83</sup> In

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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; (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.

<sup>72</sup> *Antwine v. Prudential Bache Sec., Inc.* 899 F.2d 410, 413, (5<sup>th</sup> Cir. 1990).

<sup>73</sup> 9 U.S.C. § 10(a).

<sup>74</sup> *Williams v. Cigna Fin. Advisors, Inc.* 197 F.3d 752, 761 (5<sup>th</sup> Cir. 1999). *See also Hughes Training*, 254 F.3d at 593.

<sup>75</sup> *Williams*, 197 F.3d at 758, *citing* *Exxon Corp. v. Baton Rouge Oil and Chemical Workers*, 77 F.3d 850, 853 (5<sup>th</sup> Cir. 1996) and *Gulf Coast Industrial Workers Union v. Exxon Co., U.S.A.*, 991 F.2d 244, 248-255 (5<sup>th</sup> Cir. 1993).

<sup>76</sup> *Williams*, 197 F.3d at 758, *citing* *Manville Forest Products Corp. v. United Paperworkers Intern'l Union*, 831 F.2d 72, 74 (5<sup>th</sup> Cir. 1987); *Safeway Stores v. Am. Bakery & Confectionary Workers, Local 111*, 390 F.2d 79, 82 (5<sup>th</sup> Cir. 1968).

<sup>77</sup> *Williams*, 197 F.3d at 758, *citing* *Nauru Phosphate Royalties, Inc. v. Drago Daic Interests, Inc.*, 138 F.3d 160, 164 (5<sup>th</sup> Cir. 1998); *Exxon Corp. v. Baton Rouge O.C.W.*, 77 F.3d at 853; *Executone Information Systems, Inc. v. Davis*, 26 F.3d 1314, 1324 (5<sup>th</sup> Cir. 1994); *Anderman/Smith Operating Co. v Tennessee Gas Pipeline Co.*, 918 F.2d 1215, 1218 (5<sup>th</sup> Cir. 1990).

<sup>78</sup> *Williams*, 197 F.3d at 758.

<sup>79</sup> 9 U.S.C. § 10 (a)(2).

<sup>80</sup> *Burlington N.R.R. v. TUCO Inc.*, 960 S.W.2d 629, 633 (Tex. 1997).

<sup>81</sup> *Id.* at 634.

<sup>82</sup> *Id.* at 636.

<sup>83</sup> *Texas Commerce Bank v. Universal Tech. Inst. of Tex., Inc.*, 985 S.W.2d 678, 680 (Tex. App.- Houston [1<sup>st</sup>] 1999).

applying the *TUCO* standard to an FAA case, a state appeals court concluded, “the public policy of encouraging up-front disclosure of possible arbitrator bias or partiality is equally applicable to arbitrations governed by the TAA or the FAA.”<sup>84</sup> Nondisclosure constitutes evident partiality only if the nondisclosure might create the reasonable impression of impartiality.<sup>85</sup>

A significant difference between the acts is the provision in the FAA for a person other than a party to the arbitration but who is adversely affected or aggrieved by the award to apply for the award to be vacated. A United States district court where the award was made may issue an order granting such an application.<sup>86</sup>

## F. APPEALS

The right to appeal has some significant differences under the two acts. Under the Texas statute, an interlocutory appeal is the approach used when a trial court denies a motion to compel arbitration.<sup>87</sup> Under the FAA, the party seeking to compel arbitration after an improper denial by a trial court must file a request for a writ of mandamus,<sup>88</sup> which is available only to correct a clear abuse of discretion or the violation of a duty imposed by law when there is no adequate legal remedy.<sup>89</sup> The TGAA provides that a party may appeal a judgment, decree or order, including a denial to compel arbitration, a grant of an application to stay arbitration, a confirmation or denial of confirmation of an award, a modification or correction of an award, or a vacation of an award without directing a rehearing.<sup>90</sup> Although the Texas statute does provide a party the right to appeal an interlocutory order vacating an arbitration award, the review is limited to cases in which the trial court vacates the award without directing a rehearing.<sup>91</sup> By limiting appellate review in this way, the Texas legislature expressed its intention that other orders vacating awards will not be subject to review.<sup>92</sup> However, the Federal Arbitration Act provides no such limitation. All orders vacating arbitration awards are immediately appealable.<sup>93</sup>

Several Texas appeals courts have concluded that contrary to the *dicta* of the Texas Supreme Court in *Jack B. Anglin Co. Inc. v. Tipps*,<sup>94</sup> the Texas statute does not provide for an appeal from an order to compel arbitration.<sup>95</sup> The FAA allows for appeal of an order refusing a stay of related proceedings but does not, as in the Texas act, allow an

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<sup>84</sup> Thomas James Assocs., Inc. v. Owens, 1 S.W.3d 315, 321 (Tex. App.- Dallas 1999).

<sup>85</sup> *Id.*

<sup>86</sup> 9 U.S.C. § 10 (b) (1992).

<sup>87</sup> J. M. Davidson, Inc. v. Webster, 2001 Tex. App. LEXIS 3678.

<sup>88</sup> *In re L & L Kempwood Assocs., L.L.P.*, 9 S.W.3d 125, 128 (Tex. 1999).

<sup>89</sup> Walker v. Packer, 827 S.W.2d 833, 839-40 (Tex. 1992).

<sup>90</sup> TEX. CIV. PRAC. & REM. CODE ANN. § 171.098.

<sup>91</sup> Stolhandske v. Stern, 14 S.W.3d 810, 813 (Tex. App.- Houston [1<sup>st</sup>] 2000).

<sup>92</sup> *Id.* at 814.

<sup>93</sup> 9 U.S.C. § 16(a)(1)(E) (1990).

<sup>94</sup> 842 S.W.2d 266, 271-72 (Tex. 1992).

<sup>95</sup> *In re Van Blarcum*, 19 S.W.3d 484, 489 fn7 (Tex. App.-Corpus Christi 2000) *citing* Lipshy Motorcars, Inc. v. Sovereign Assocs., 944 S.W.2d 68, 69-70 (Tex. App.—Dallas 1997); Elm Creek Villas Homeowner Ass’n, Inc. v. Beldon Roofing, 940 S.W.2d 150, 154 (Tex. App.—San Antonio 1996); and Gathe v. Cigna Healthplan of Texas, Inc., 879 S.W.2d 360, 362 (Tex. App.—Houston [14<sup>th</sup> Dist.] 1994).

appeal from an order granting a stay of arbitration. With some exceptions the federal act provides that there is no appeal from an interlocutory order granting a stay in related proceedings, compelling arbitration, or refusing to enjoin arbitration.<sup>96</sup>

#### G. ADDITIONAL PROVISIONS

The Texas statute has several provisions that do not have corollaries in the federal statute. These include the following:

1. The court may not enforce an unconscionable agreement to arbitrate.<sup>97</sup>
2. The court may not refuse to order arbitration because of lack of merit or bonafides or because there is no showing of fault or ground for the claim.<sup>98</sup>
3. The arbitrators have the authority to adjourn or postpone the hearing.<sup>99</sup>
4. If a party who has been notified does not appear at the hearing, the arbitrators may hear and determine the controversy based on the evidence produced.<sup>100</sup>
5. Unless the agreement provides otherwise, at the hearing a party is entitled to be heard, to present material evidence, and cross-examine witnesses.<sup>101</sup>
6. A party is entitled to representation by an attorney and any waiver of that right before the proceeding is ineffective.<sup>102</sup>
7. The arbitrators shall award attorney's fees in addition to the award itself only if so provided in the agreement or by law in a civil action related to the award.<sup>103</sup>
8. A proceeding to stay arbitration is allowed on application and a showing of no agreement to arbitrate.<sup>104</sup>

### III. WHEN THE TGAA MAY CONTROL THE COMPULSORY ARBITRATION AGREEMENT

The FAA only applies to maritime transactions or contracts evidencing transactions involving interstate commerce.<sup>105</sup> Commerce must simply be involved or affected.<sup>106</sup> The requirement that the contract "involve interstate commerce" has been construed and applied broadly.<sup>107</sup> It extends to any contract affecting commerce, as far as the Commerce

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<sup>96</sup> 9 U.S.C. § 16 (1990).

<sup>97</sup> TEX. CIV. PRAC. & REM. CODE ANN. § 171.022.

<sup>98</sup> *Id.* § 171.026.

<sup>99</sup> *Id.* § 171.045.

<sup>100</sup> *Id.* § 171.046.

<sup>101</sup> *Id.* § 171.047.

<sup>102</sup> *Id.* § 171.048.

<sup>103</sup> *Id.* § 171.053(c).

<sup>104</sup> *Id.* § 171.023(a).

<sup>105</sup> 9 U.S.C. § 2 (1947).

<sup>106</sup> *Allied-Bruce Terminix Co. v. Dobson*, 513 U.S. 265, 115 S.Ct. 834, 130 L.Ed.2d 753 (1995); *In re L & L Kempwood Assocs. v. Omega Builders, Inc.*, 9 S.W.3d 125 (Tex. 1999); *Jack B. Anglin Co. v. Tipps*, 842 S.W.2d 266 (Tex. 1992).

<sup>107</sup> *L & L Kempwood Assocs.*, 9 S.W.3d at 127.

Clause of the United States Constitution will reach.<sup>108</sup> The transaction need not “substantially” affect commerce, but rather, commerce must merely in fact be involved or affected.<sup>109</sup> “Involving commerce” encompasses all Texas employment contracts except those related to interstate transportation workers, *i.e.*, “...seamen, railroad workers, and any class of workers actually engaged in the movement of goods in interstate commerce in the same way that seamen and railroad workers are.”<sup>110</sup> Stated another way, “An employment relationship involving commerce is a sufficient transaction to fall within the act [FAA].”<sup>111</sup> The FAA applies in the employer-employee relationship when business operations involve interstate commerce.<sup>112</sup> When there is no express agreement to arbitrate under the FAA, the issue of affecting commerce is one of fact, and the party urging arbitration may show that the transaction affects commerce in a variety of ways. Location of headquarters in another state, transportation of materials across state lines, manufacture of parts in a different state, preparation of billings out of state, and interstate mail and phone calls in support of a contract have all been used.<sup>113</sup>

Generally, when the FAA applies, it preempts all otherwise applicable state laws, including the TGAA.<sup>114</sup> The FAA does not, however, create an independent basis for federal court subject matter jurisdiction. For a party to file a suit in federal court to compel arbitration under the FAA, the federal court must first have diversity or federal question jurisdiction over the underlying civil action. “A party may obtain relief in federal court under the FAA only when the underlying civil action would otherwise be subject to the court’s federal question or diversity jurisdiction.”<sup>115</sup> Furthermore, FAA preemption of the TGAA does not constitute a federal question, because conflict preemption does not create an independent basis for jurisdiction. It is a defense.<sup>116</sup>

Notwithstanding the general preemption rule, and following the express freedom-to-contract philosophy intended and enunciated by Congress in the act,<sup>117</sup> the U.S. Supreme Court has allowed parties to choose, by choice-of-law provision, which act will govern

<sup>108</sup> *Allied-Bruce Terminix Co.*, 513 U.S. 265.

<sup>109</sup> *L & L Kempwood Assocs.*, 9 S.W.3d at 127.

<sup>110</sup> *Circuit City Stores, Inc. v. Adams*, 532 U.S. 105, 121 S.Ct. 1302, 149 L.Ed. 234 (2001); *Rojas v. TK Communications, Inc.*, 87 F.3d 745, 748 (5<sup>th</sup> Cir. 1996) (*citing and quoting with approval* *Asplundh Tree Expert Co. v. Bates*, 71 F.3d 592 (6<sup>th</sup> Cir. 1995)).

<sup>111</sup> *In re Anaheim Angels Baseball Club*, 993 S.W.2d 875, 877 (Tex. App. – El Paso 1999, orig. proc.).

<sup>112</sup> *In re John Profancik and Conversant Technologies, Inc.*, 31 S.W.3d 381, 384-85 (Tex. App. – Corpus Christi 2000); *Hou-Scape, Inc. v. Lloyd*, 945 S.W.2d 202, 205 (Tex. App. – Houston [1<sup>st</sup> Dist.] 1997, orig. proceed).

<sup>113</sup> *In re John Profancik*, 31 S.W.2d at 877; *In re Joseph Jebbia*, 26 S.W.3d 753, 758-59 (Tex. App. – Houston [14<sup>th</sup> Dist.] 2000); *Stewart Title Guar. Co. v. Mack*, 945 S.W.2d 330, 332 (Tex. App. – Houston [1<sup>st</sup> Dist.] 1997, *writ dismissed w.o.j.*).

<sup>114</sup> *Perry v. Thomas*, 482 U.S. 483, 107 S.Ct. 2520, 96 L.Ed.2d 426 (1987); *Southland Corp. v. Keating*, 465 U.S. 1, 104 S.Ct. 852, 79 L.Ed.2d 1 (1984); *Allied-Bruce Terminix, Inc.*, 513 U.S. 265, *Jack B. Anglin Co., Inc.*, 842 S.W.2d at 271 (Tex. 1992); *In re Anaheim Angels Baseball Club*, 993 S.W.2d at 877.

<sup>115</sup> 9 U.S.C. § 4 (1947); *Rio Grande Underwriters, Inc., v. Pitts Farms, Inc.*, 276 F.3d 683, 685 (5<sup>th</sup> Cir. 2001).

<sup>116</sup> *Rio Grande Underwriters, Inc.*, 276 F.3d 683.

<sup>117</sup> Section 2 of the Act states that any contract involving interstate commerce... “shall be valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract,” 9 U.S.C. § 2, and Section 4 provides for the right to obtain an order directing that the “arbitration proceed in the manner provided for in [the parties’] agreement.” 9 U.S.C. § 4 (emphasis added); *Volt Info. Sciences, Inc. v. Bd. of Trustees*, 489 U.S. 468, 474-75 (1989).

the arbitration. According to the decision in *Volt Info. Sciences, Inc.*, this applies even when the arbitration agreement clearly falls within the coverage of the FAA.<sup>118</sup> More specifically, the Court stated,

But it does not follow that the FAA prevents the enforcement of agreements to arbitrate under different rules than those set forth in the Act itself. Indeed, such result would be quite inimical to the FAA's primary purpose of ensuring that private agreements to arbitrate are enforced according to their terms. Arbitration under the Act is a matter of consent, not coercion, and parties are generally free to structure their arbitration agreements as they see fit. Just as they may limit by contract the issues which they will arbitrate, [see *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614, 628, 105 S.Ct. 3346, 3354-55, 87 L.Ed.2d 444 (1985)], so too may they specify by contract the rules under which that arbitration may be conducted.<sup>119</sup>

For a TGAA choice-of-law provision to be given effect by the courts, however, there are essentially two requirements. The first is that the application of the choice-of-law provision, *i.e.*, the state law, must be consistent with (and not conflict with or undermine) "the goals and policies of the FAA."<sup>120</sup> Courts have refused to allow the TGAA to control the arbitration where the state law is contrary to the strong federal public policy favoring arbitration. As stated by the Fifth Circuit Court of Appeals in *Miller v. Public Storage Management, Inc.*, "...Texas state law does not favor arbitration for personal injury or workers' compensation claims [referring to the TGAA exemptions]. The FAA preempts conflicting state anti-arbitration law."<sup>121</sup> The second is that the choice-of-law provision needs to be clear and unequivocal that state law is to be applied (so as to effectively exclude federal law).<sup>122</sup> Initially, when both acts were referred to or implicated in a contract involving interstate commerce, the FAA was automatically held to control.<sup>123</sup> More recently, in deciding ambiguities and irreconcilable differences in choice-of-law provisions, the courts apply common law contract rules of construction. The purpose is to harmonize all provisions of the parties' agreements as far as possible to reflect and give effect to the intentions of the parties.<sup>124</sup>

Therefore, the Texas General Arbitration Act will control the disposition of the arbitration agreement, (1) if the agreement is silent as to which act applies and the underlying transaction and business operations do not involve interstate commerce, or (2) if the arbitration agreement itself is ambiguous or contains dual-reference conflicting provisions and the court applies rules of contract construction to find that the TGAA was

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<sup>118</sup> *Volt Info. Sciences, Inc.*, 489 U.S. 468, 474-75.

<sup>119</sup> *Id.* at 479.

<sup>120</sup> *Id.* at 478-79.

<sup>121</sup> *OPE Int'l LP v. Chet Morrison Contractors, Inc.*, 258 F.3d 443, 446-47 (5<sup>th</sup> Cir. 2001); *Miller v. Pub. Storage Management, Inc.*, 121 F.3d 215, 219 (5<sup>th</sup> Cir. 1997).

<sup>122</sup> *Mastrobuono v. Shearson Lehman Hutton, Inc.*, 514 U.S. 52, 59-64, 115 S.Ct. 1212, 131 L.Ed.2d 76 (1995); *In re L & L Kempwood Assocs. v. Omega Builders, Inc.*, 9 S.W.3d 125, 127-28 (Tex. 1999).

<sup>123</sup> *EZ Pawn Corp. v. Mancias*, 934 S.W.2d 87, 91 (Tex. 1996).

<sup>124</sup> *Mastrobuono*, 514 U.S. 52, 59-64; *Ford v. Nylcare Health Plans of the Gulf Coast Inc.*, 141 F.3d 243 (5<sup>th</sup> Cir. 1998); *Henry v. Gonzalez*, 18 S.W.3d 687-89 (Tex. App. – San Antonio 2000).

intended, again provided that the transaction does not involve interstate commerce, or (3) where interstate commerce is involved and there is conflict between choice of law provisions in the underlying contract and the arbitration agreement, and the court reconciles the two in favor of the TGAA being intended as the controlling choice for the arbitration agreement, or (4) even if the contract evidences a transaction affecting commerce, the TGAA is expressly stated as the controlling law by clear and specific choice-of-law language, and the applicable Texas law to be applied does not undermine the FAA goals and policies favoring arbitration.

#### IV. CONTROL OF THE AGREEMENT BY THE TGAA

One of the critical considerations for an employer seeking to draft an arbitration agreement is whether all or only limited claims or disputes will be included within its coverage. Will the arbitration only include claims that literally arise out of the underlying contract between the parties? Or, is the arbitration clause broad enough to embrace all disputes between the parties, such as tort claims or Title VII claims, having a significant relationship to the underlying contract? The scope of an arbitration agreement is a question of law.<sup>125</sup> The test to determine whether a claim falls within the scope of an agreement under the FAA is whether the dispute “touches matters covered by the agreement.”<sup>126</sup> The similar test provided by the TGAA is whether the claim “is so interwoven with the underlying contract that it could not stand alone, that is, whether the claim is actionable without reference to the underlying contract.”<sup>127</sup> The Fifth Circuit stated in a 1998 case that “there is no perceptible difference between the federal and the Texas standards in this respect.”<sup>128</sup> There are essentially two parts to this determination under either act. The first requires the court to assess whether the arbitration agreement is broad or narrow. Broad clauses use the phrases, “relating to” or “in connection with”. Narrow arbitration provisions use the phrase, “arising under”. Then, and even if the court finds that the parties intended a broad coverage, it must still determine if the claim sufficiently “relates to the contract” to be considered as “touching” or “so interwoven” with the underlying contract. The test here is whether the claim, such as a tort claim, could be maintained without reference to the contract. That is, can the action stand alone notwithstanding that the underlying contract may be implicated as a factual matter?<sup>129</sup>

The issue of which act will control arises most often when an appellate court is required to review a trial court’s order denying an application or motion to compel arbitration pursuant to an agreement. An initial decision on which act controls is essential to the jurisdiction of the appellate court. Under the TGAA, an interlocutory appeal may be taken from a trial court’s denial of a motion to compel arbitration.<sup>130</sup> Mandamus is the

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<sup>125</sup> *Certain Underwriters at Lloyd’s of London v. Celebrity, Inc.*, 950 S.W.2d 375, 377 (Tex. App. -- Tyler 1996).

<sup>126</sup> *Pennzoil Exploration & Prod. Co.v. Ramco Energy Ltd.*, 139 F.3d 1061, 1068 (5<sup>th</sup> Cir.1998).

<sup>127</sup> *Fridl v. Cook*, 908 S.W.2d 507, 511 (Tex. App.-El Paso 1995).

<sup>128</sup> *Ford v. Nylcare Health Plans of the Gulf Coast Inc.*, 141 F.3d 243, 250, n.7 (5<sup>th</sup> Cir. 1998).

<sup>129</sup> *A & A Global Indus., Inc. v. Wolfe*, 2001 WL 1343628, \*3 (slip copy) (N.D.Tex.); *Dustrol, Inc. v. Champagne-Webber, Inc.*, 2001 WL 1326477, \*6 (slip copy) (N.D.Tex.); *Coffman v. Provost Umphrey Law Firm, L.L.P.*, 161 F.Supp. 720, 725 (N.D.Tex. 2001).

<sup>130</sup> TEX. CIV. PRAC. & REM. CODE ANN. §171.098(a)(1).

appropriate remedy when the trial court improperly denies a motion to compel arbitration pursuant to the FAA.<sup>131</sup> A party seeking to compel arbitration under both the TGAA and the FAA must pursue parallel proceedings: an interlocutory appeal of the order denying arbitration under the Texas act, and a request for a writ of mandamus from the denial under the federal act. The federal act does not provide for an interlocutory appeal in state courts from the denial of a motion to compel arbitration. If a party only pursues an interlocutory appeal, and the FAA covers the matter, then the state appellate court has no jurisdiction to decide the matter.<sup>132</sup>

A number of courts have dealt with determination of which act controlled the arbitration agreement. In *Ford v. NYLCARE Health Plans of the Gulf Coast*, an orthopedic surgeon brought a Lanham Act false advertising action against HMO's. The doctor had signed a medical services contract with an arbitration clause that stated in pertinent part:

Any controversy or claim arising out of or relating to this Agreement, or the breach thereof shall be settled by arbitration in accordance with the Texas General Arbitration Act, and judgment upon the award rendered may be enforced in any court of the State of Texas having jurisdiction thereof....the arbitration proceeding shall be conducted in Harris county, Texas....<sup>133</sup>

Appearing on the front page of the agreement was **“NOTICE: THIS AGREEMENT IS SUBJECT TO ARBITRATION UNDER THE TEXAS GENERAL ARBITRATION ACT.”** The contract evidenced transactions involving interstate commerce and was clearly covered by the FAA, but the parties had specifically chosen the TGAA. The Fifth Circuit Court of Appeals held that parties may designate state law to govern the scope of an arbitration clause in an agreement otherwise covered by the FAA. Citing *Volt*, the court found that parties were free by contract to specify the law governing the interpretation of the scope of the arbitration clause just as they could contractually select the rules of arbitration. The court cited the U. S. Supreme Court decision in *Mastrobuono v. Shearson Lehman Hutton, Inc.*,<sup>134</sup> for the proposition that determination of the intent of the parties to choose state law to govern the scope of the agreement requires an attempt to harmonize all parts of the agreement. The rule in *Mastrobuono* was that a choice-of-law provision in an arbitration clause covered arbitration, and a general choice-of-law clause in the underlying contract covered the rights and duties of the parties. As a result, the Fifth Circuit determined that the doctor's false advertising tort claim was not so intertwined with enforcement of the contract that it would fall within the scope of the arbitration agreement.

*ASW Allstate Painting & Construction Co., Inc. v. Lexington Insurance Company*,<sup>135</sup> is a construction case, but it is instructive for employment arbitration. A company, TVO,

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<sup>131</sup> *In re L & L Kempwood Assocs.*, 9 S.W.3d 125, 128 (Tex. 1999).

<sup>132</sup> *Jack B. Anglin Co., Inc.*, 842 S.W.2d 266, 271-73; *J. M. Davidson, Inc., v. Webster*, 49 S.W.3d 507, 510-11 (Tex. App. – Corpus Christi 2001); *Texas Commerce Bank v. Universal Technical Inst. of Texas, Inc.*, 985 S.W.2d 678 (Tex. App. – Houston [1<sup>st</sup>] 1999).

<sup>133</sup> 141 F.3d 243, 246 (5<sup>th</sup> Cir. 1998).

<sup>134</sup> 514 U.S. 52, 64, 115 S.Ct. 1212, 131 L.Ed.2d 76 (1995).

<sup>135</sup> *ASW Allstate Painting & Constr. Co., Inc. v. Lexington Ins. Co.*, 188 F.3d 307 (5<sup>th</sup> Cir. 1999).

owned apartments in Kansas City, Missouri. TVO contracted with ASW for renovations and repairs. A fire caused extensive damage to the premises, and the insurer, Lexington, paid TVO about \$647,000.00 of the estimated \$823,000.00 damages under the insurance policy. After paying TBO, Lexington alleged that it was subrogated to TVO in TVO's tort damages claim against ASW. ASW filed a declaratory judgment petition in the district court for the Western District of Texas, basing jurisdiction on diversity of citizenship. ASW asserted that it was not bound to arbitrate by the construction contract. Lexington filed a motion to compel arbitration. The renovation contract between TVO and ASW contained a general choice-of-law clause stating that the laws of the State of Texas shall govern the contract. It also had a compulsory binding arbitration provision that required all disputes between owner and contractor arising out of or in relation to the contract be decided by arbitration. The Fifth Circuit Court cited *Volt* and *Ford* in determining that the TGAA applied. It reaffirmed that the parties may choose state arbitration rules through choice-of-law, and the FAA does not preempt state arbitration rules as long as the state rules do not undermine the goals and policies of the FAA. The strong presumption in Texas public policy favoring arbitration is similar to the federal public policy of ensuring enforceability, according to their terms, of private agreements. The court had previously held [in *Ford*] that the TGAA can govern the scope of an arbitration agreement without undermining the federal public policy underlying the FAA.

*D. Wilson Construction Co. v. Cris Equipment Co., Inc.*,<sup>136</sup> is another instructive construction contract case. The general conditions of the subcontract underlying the dispute provided: "All claims, disputes and other matters in question arising out of, or related to, this Subcontract, or the breach thereof, shall be decided by arbitration, which shall be conducted in the same manner and under the same procedures as provided in the Contract documents with respect to disputes between the Owner and the Contractor...." The Contract Documents stated that arbitration would be conducted according to the Construction Industry Arbitration Rules of the American Arbitration Association and further specified that the contract would be governed by "the law of the place where the project is located." The uncontroverted evidence was that the overall contract evidenced transactions involving interstate commerce and was presumptively covered by the FAA. The Corpus Christi Court of Appeals held that because the parties agreed that the laws of Texas, *i.e.*, the law of the place where the project is located, govern the contract, the TGAA would control. It cited *Volt* for the proposition that parties may specify which rules would apply and enforcing the rules so designated was consistent with the goals of the FAA. The court also cited *Mastrobuono* for the rule that when the FAA is applicable but state law is specified, the FAA will "trump" state law where the parties have agreed to arbitrate a claim that is not arbitrable under state law. Further applying *Mastrobuono*, the court then had to construe the contract regarding the timeliness of demand for arbitration as a condition precedent to entitlement to arbitration. The court held that a party is not entitled to demand arbitration if conditions precedent to the demand are not satisfied.

In *Russ Berrie and Company, Inc. v. Gantt*,<sup>137</sup> the El Paso Court of Appeals first addressed which act is to apply. Russ Berrie was a New Jersey corporation and Gantt, the employee, was a resident citizen of Odessa, Texas. The underlying contract was for sales

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<sup>136</sup> 988 S.W.2d 388 (Tex. App. – Corpus Christi 1999).

<sup>137</sup> 998 S.W.2d 713 (Tex. App. – El Paso 1999).

employment in a designated territory, and it was clear from its language that the employment relationship was at will. The contract also contained a general mandatory binding arbitration clause for any existing or future employment-related disputes. The arbitration was to be administered under the Employment Dispute Resolution Rules of the American Arbitration Association. The agreement also stated that “The laws of the State of New Jersey shall govern the interpretation of this agreement.” Gantt filed suit for wrongful termination in retaliation for filing a claim for a back injury under the Texas Workers’ Compensation Act, and Russ Berrie moved to compel arbitration, which the trial court denied. Russ Berry filed a direct interlocutory appeal but no application for writ of mandamus. “If a party is unsure which act applies, it must file both an interlocutory appeal and a mandamus to insure our jurisdiction is invoked.”<sup>138</sup> The appellate court decided that the FAA did not apply, because (1) the contract stipulated that state law, New Jersey, controlled, and (2) the record did not have sufficient facts as to the nature of Russ Berrie’s business or whether Gantt’s designated sales territory required interstate travel. It could not find whether the contract evidenced a transaction involving interstate commerce. The court therefore had jurisdiction, and interlocutory appeal was proper. The court further decided that New Jersey employment at will and contract law controlled over Texas law on the merits. As a result, the agreement was found not to be illusory, because New Jersey law implies a duty of good faith and fair dealing in all contracts, including employment contracts. Since this also bound the company to the arbitration agreement, the contract was supported by consideration and was not illusory. Therefore, the arbitration clause was enforceable under the law chosen by the parties.

*Davidson v. Webster*<sup>139</sup> was another case in which employment at will was at issue relative to arbitration. Webster, a former employee, brought a wrongful discharge action claiming retaliation for filing a workers’ compensation claim. The employer, Davidson, filed a motion to compel arbitration under its broad form stand-alone “Alternate Dispute Resolution Policy.” The employee had signed the policy at the initiation of employment. The motion to compel was denied by the trial court, and Davidson filed parallel interlocutory and mandamus proceedings for review in the appellate court. After stating the general rules for appellate jurisdiction, the court further recited the general rules for the standard of review:

A party seeking to compel arbitration must establish the existence of an arbitration agreement and show that the claims raised fall within the scope of that agreement....When one party denies he is bound by an arbitration agreement, the trial court must summarily determine whether an agreement to arbitrate exists between the parties....A court may summarily decide whether to compel arbitration on the basis of affidavits, pleadings, discovery, and stipulations....However, if material facts necessary to determine the issue are controverted, the trial court must conduct an evidentiary hearing to determine the material facts in dispute....Once a party establishes a claim within the scope of the arbitration agreement, the trial court must compel arbitration and stay its

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<sup>138</sup> *Id.* at 714-15.

<sup>139</sup> 49 S.W.3d 507 (Tex. App. – Corpus Christi 2001).

own proceedings unless the party opposing arbitration meets its burden of presenting evidence that prevents enforcement....”<sup>140</sup> (case cites omitted.)

The appeals court reviewed the trial court’s decision on the existence of an arbitration agreement under the abuse of discretion standard.

Whether an agreement imposes a duty on the parties to arbitrate a dispute is a matter of contract interpretation and a question of law for the court...The Federal Arbitration Act and the Texas Arbitration Act both provide that a contract to submit to arbitration is valid and enforceable ‘save upon such grounds as exist at law or in equity for the revocation of any contract.’ 9 U.S.C. § 2 (2000); Tex. Civ. Prac. & Rem. Code Ann. § 171.001 (Vernon Supp. 2001);...A party seeking to compel arbitration must first establish his right to that remedy under a contract....Texas law favors arbitration....Although there is a presumption in favor of arbitration, a court may not order arbitration in the absence of a valid arbitration agreement....The existence of a valid agreement is determined by the substantive contract law of Texas....”<sup>141</sup> (case cites omitted.)

The appellate court held that the Alternate Dispute Resolution Policy was not enforceable by the employer, because (1) the employee’s employment was at will; (2) the policy did not bind both parties, in that the employer expressly retained all rights to unilaterally modify or abolish any personnel policy, including the arbitration policy; and (3) the employee gave no consideration for the purported agreement, because the employee was already working for the employer when he was compelled to sign the agreement and the implied promise of continued employment is illusory. Because no binding arbitration agreement existed, the court affirmed the trial court denial of the employer’s motion for compulsory arbitration.

*In Re Haliburton Company*<sup>142</sup> involved claims of race and age discrimination. In 1997, Haliburton instituted a stand-alone Dispute Resolution Program providing for binding arbitration of all employment disputes. Texas contract law governed the validity of the agreement. The Texas Supreme Court held that the employee’s at-will status did not preclude the agreement, because the company gave unequivocal notice to the employee of the definitive changes to the at-will employment relationship, and the employee accepted by continuing to work with knowledge of the changes. The notice stated the nature of the program, the effective date, and that the employee would be indicating acceptance by continuing to work for the company after the effective date. The promise by the employer to submit all disputes to binding arbitration was adequate consideration. The promises in the agreement were not illusory, because they bound both parties and were not dependent upon continued employment. The employer could not terminate the agreement without ten days’ prior notice, and any amendment or termination would not affect claims of which the company already had notice.<sup>143</sup>

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<sup>140</sup> *Id.* at 511.

<sup>141</sup> *Id.* at 512.

<sup>142</sup> *In re Haliburton*, 80 S.W.3d 566 (Tex. 2002).

<sup>143</sup> *Id.* at 568-71.

An attorney/client employment contract containing an agreement to arbitrate became an issue in a legal malpractice case, *Henry v. Gonzalez*.<sup>144</sup> The contract had internal inconsistencies, with Provision 10 providing for the agreement to be “construed under and in accordance with...” “and ...governed by the laws of the State of Texas.” Provision 11, however, provides for disputes to “be resolved by binding arbitration pursuant to the Federal Arbitration Act...” Immediately above the signature lines appeared a clause stating in all capital letters “THIS CONTRACT IS SUBJECT TO ARBITRATION UNDER THE TEXAS GENERAL ARBITRATION STATUTE.” As part of a rather convoluted legal action, the attorneys filed a motion to compel arbitration, which was not granted by the trial court but was not specifically denied. The attorneys then filed a petition for writ of mandamus under the FAA and an interlocutory appeal under the TGAA.<sup>145</sup> The Texas appeals court concluded that the TGAA governed the dispute.<sup>146</sup> The bases for its decision were, “(1) Provision 10 provides that ‘anything covered’ in the contract shall be governed by Texas law, (2) the prominent bold type states that any arbitration will be governed by the TAA [TGAA], and (3) all parties involved in the suit are Texas residents, the contract was signed in Texas, the contract was to be performed in Texas only, and the dispute does not relate in any way to interstate commerce. Because we conclude that this dispute is governed by the TAA [TGAA], we deny appellants’ petition for writ of mandamus filed pursuant to the FAA. We now proceed to the merits of the interlocutory appeal.”<sup>147</sup> In determining whether to compel arbitration, a court must determine whether a valid, enforceable arbitration agreement exists, and if so, whether the asserted claims are within the scope of the agreement.<sup>148</sup> One of the points at issue was whether termination of the attorney/client contract by the attorneys also terminated the arbitration clause. The Houston Court of Appeals recognized in *Pepe International Dev. Co. v. Pub Brewing* that the TGAA mandates that an agreement to arbitrate is separable from a written contract in which the agreement is contained.<sup>149</sup> The Dallas Court of Appeals held in the *Dallas Cardiology Assoc.* case that the same rule would apply in a case brought under the current Texas act. If the evidence shows a valid arbitration agreement and claims falling within the scope of the agreement, a trial court has no discretion but to compel arbitration.<sup>150</sup> The attorneys’ repudiation of the underlying contract did not defeat the validity and enforcement of the internal arbitration provision.

*In re Anaheim Angels Baseball Club*<sup>151</sup> involved a suit by a professional baseball player against the club for breach of contract in failing to provide adequate medical care for injuries. The Minor League Uniform Player Contract contained a clause providing that in the event of any dispute or claim arising under the contract, “...the decision of Club regarding the dispute or claim always shall be subject to Player’s rights of appeal

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<sup>144</sup> 18 S.W.3d 684 (Tex. App. – San Antonio 2000).

<sup>145</sup> *Id.*, at 687-88.

<sup>146</sup> *Id.*, at 688.

<sup>147</sup> *Id.*

<sup>148</sup> *Dallas Cardiology Assoc. P.A. v. Mallick*, 978 S.W. 2d 209, 212 (Tex. App.-Texarkana 1998, writ denied).

<sup>149</sup> 915 S.W. 2d 925, 932 (citing *Miller v. Puritan Fashions Corp.*, 516 S.W. 2d 234, 238 (Tex. App-Waco 1974, writ ref. n.r.e.) (covering separability under the FAA)).

<sup>150</sup> *Dallas Cardiology Assoc. P.A.*, 978 S.W.2d at 212-13.

<sup>151</sup> 993 S.W.2d 875 (Tex. App. – El Paso 1999).

which Player may exercise by filing a written, itemized and detailed appeal form with the Commissioner....The decision of the Commissioner shall be final and the Player agrees and understands that the decision of the Commissioner may be not be [sic] challenged in any federal or state court or any other tribunal.”<sup>152</sup> The club sought to compel arbitration, and the trial court denied the request. In deciding which act applied, the El Paso Court of Appeals held that an employment relationship involving commerce was a sufficient transaction to fall within the FAA.<sup>153</sup> It also held that the employment relationship between a professional baseball player and professional baseball club related to interstate commerce, because the club’s principle place of business was in Anaheim, California and it conducted business across state lines by agreeing with the ball player to play baseball for the California team with its minor league team based in Midland, Texas. The U.S. Supreme Court had previously stated in *Flood v. Kuhn*<sup>154</sup> that “professional baseball is a business and it is engaged in interstate commerce.” Therefore, the FAA and not the TGAA controlled and mandamus was the proper remedy. However, in next analyzing the contract itself to determine if an agreement to arbitrate actually existed, the court found that the language merely established an internal administrative appeal to the Commissioner of baseball rather than an arbitration proceeding. The clause did not mention “arbitration”; did not provide rules of arbitration; and the language contemplated a proceeding without hearing, evidence, recording, written award, or other formalities normally associated with arbitration.<sup>155</sup>

## V. CONCLUSION: CHOICE OR DILEMMA?

There is a choice, but it is also a dilemma. The public policies, guidelines, and analysis by the courts toward determining arbitrability or enforcement of an arbitration agreement under the two acts are fairly well established. In most respects, there is substantial similarity and consistency, a kind of melding. The differences between the Federal Arbitration Act and the Texas General Arbitration Act, particularly in the areas of scope and certain procedural rules, *e.g.* appellate review of an adverse decision on compelling arbitration, may provide an employer with reasons for choosing one over the other. Since the employer and its attorney usually will decide how to shape an arbitration agreement with employees, some familiarity with the similarities and differences provides a tool for making more informed choices. Both acts have been around for a considerable time. *Gilmer* and now *Circuit City* have led to an explosion in the use of compulsory binding arbitration agreements and the concomitant burgeoning development of case law. Comparative and continuous academic studies of state acts relative to the FAA, together with applicable case law, are necessary to keep pace and to assist various stakeholder constituencies in understanding and applying the current state of the law as well as identifying patterns and new developments with future implications.

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<sup>152</sup> *Id.* at 877.

<sup>153</sup> *Id.*

<sup>154</sup> 407 U.S. 258, 282 (1972).

<sup>155</sup> *In re Anaheim Angels Baseball Club, Inc.*, 993 S.W.3d at 880.