CONTRACTING FOR THE ARBITRATION THAT YOU WANT

Fifth Annual Construction Symposium
City Place Conference Center
Dallas, TX

January 29, 2010

Tara L. Sohlman
Cooper & Scully, P.C.
900 Jackson Street, Suite 100
Dallas, TX 75202
214/712-9500
214/712-9540 (Fax)

TABLE OF CONTENTS

PAGE

TABLE OF AUTHORITIES

CASES

STATUTES

MISCELLANEOUS

CONTRACTING FOR THE ARBITRATION THAT YOU WANT

Numerous contracts contain arbitration provisions, but few parties to a contract consider the future impact of an arbitration clause should a dispute arise. There are pros and cons to arbitration. If the parties decide that they want to arbitrate a dispute, they can craft how the arbitration occurs before a dispute ever arises. It is much easier to negotiate dispute resolution options when the parties are getting along and perhaps more trustful of each other than after a dispute has arisen.

Arbitration offers numerous benefits, but some of these are dependent upon how the arbitration is structured under the terms of the contract. The right arbitration agreement can provide an alternative to litigation where the parties arbitrate in front an arbitrator with special knowledge as to the issues being presented and experience more efficiency, convenience, privacy and finality. However, these same advantages can be lost without the proper arbitration format, and downsides can appear. A party can end up with an arbitrator that makes errors as to legal decisions or ignores the law and relies more on equity to make the final decision, discovery that is too restrictive, higher costs than what would be incurred in litigation, and very few efficiency gains. The finality that is so highly valued can also be interpreted as limited judicial review of an arbitrator's decisions. An award is very difficult to challenge and overturn.

Given the risks and rewards, a party must carefully consider what could result if one agrees to arbitration and if that is an option that one wants. Do not blindly insert an arbitration clause or, if you have a choice, accept an arbitration clause in a contract without considering its impact on you and others who may be affected by the clause. The arbitration section of a contract becomes very important when a dispute arises and litigation erupts. The scope of an arbitration clause, its enforceability, and the parties bound by it and/or who can enforce it can all become significant and important questions. Just as critical will be the procedures applicable to the arbitration that are included in the contract, whether set forth specifically in the contract or through adoption of an association's rules such as the American Arbitration Association.

I. ARBITRATION CLAUSES ARE CONTRACT CLAUSES

Arbitration clauses are usually part of a broader contract and are examined as contractual agreements. Interpretation and enforcement of arbitration clauses bring in statutory and contract law. Arbitration agreements are based upon contract law and are placed on the same footing as other contracts. *Allied-Bruce Terminix Cos. V. Dobson*, 513 U.S. 265, 271, 115 S. Ct. 834, 130 L. Ed. 2d 753 (1995). Ordinary contract principles determine who is bound by an arbitration clause, *Double G Energy, Inc. v. At Gas Gathering, Inc.*, 2005 U.S. Dist. LEXIS 15544, *20 (N.D. Texas 2005), and what disputes are subject to the contract clause. *AT&T Techs., Inc. v. Communs. Workers of Am.*, 475 U.S. 643, 648, 106 S. Ct. 1415, 89 L. Ed. 2d 648 (1986). In the U.S., the enforcement of arbitration agreements is governed by the Federal Arbitration Act ("FAA"), 9 U.S.C. §1, *et. seq*. Texas also has its own Texas Arbitration Act ("TAA"), Tex. Civ. Prac. & Rem. Code §171.001, *et. seq.* If the parties' agreement does not specify whether the FAA or TAA will control, a court will examine whether the transaction affects interstate commerce. If interstate commerce is affected, the FAA will apply. *In re Education Management Corp., Inc.*, 14 S.W.3d 418, 423 (Tex.App.—Houston [14th Dist.] 2000, orig. proceeding). When the parties contract for application of the FAA to the arbitration, courts treat application of the FAA as a choice-of-law clause. *Teel v. Beldon Roofing & Remodeling Co.*, 2007 Tex.App. LEXIS 3721, *3-*4 (Tex.App.-San Antonio 2007, pet. denied). Neither party needs to introduce evidence to establish that the transaction at issue involves or affects interstate commerce. When the arbitration clause requires that the FAA be applied, the FAA will apply

even if the transaction did not involve interstate commerce. *Id.*

As with other contractual provisions, the parties can contract for what they want to occur in arbitration. The parties define what disputes are subject to arbitration, set forth how the arbitrator will be selected and address how the arbitration will occur. Defining the scope of an arbitration clause's reach and procedural issues are discussed in more detail below.

Parties also need to consider other clauses in the contract that can have an effect on the arbitration clause. An arbitration clause in a contract cannot be read separately from the rest of the contract. "[I]t is a 'cardinal principle' of contract construction that all provisions of a contract be given effect whenever possible." *Higman Marine Services, Inc. v. BP Amoco Chemical Company*, 114 F.Supp.2d 593, 597 (S.D. Tex. 2000). Other provisions within the contract can impact the arbitration or even prevent the arbitration from occurring. For example, arbitration can be conditioned upon certain requirements being met, such as the arbitration occurring in a specific forum, only one arbitration can be held to settle all disputes with common questions of law and fact, or mandating that mediation occur prior to arbitration.

Should parties choose to take control of their arbitration option, they have multiple decisions to make. Those decisions range from what claims are subject to arbitration, who is subject to the arbitration clause and/or can enforce it, and how the arbitration will proceed. The parties need to determine if they want to specifically address all these areas or leave them open for the courts and/or the arbitrator to decide.[1] Despite the freedom to contract, the parties are limited in defining the role of judicial review.

II. THE STRENGTH AND SCOPE OF THE ARBITRATION CLAUSE

Parties to a contract can determine which claims will be subject to arbitration as the language of the arbitration clause defines its reach. An arbitration clause does not mean that all claims between the parties to the contract are subject to arbitration. The parties can limit the arbitration to specific types of claims or broaden it to include all claims that may arise that can be the subject of arbitration. The Court should enforce the parties' choice, but the parties must be clear through their drafting on how far the arbitration provision will reach. Courts will examine the specific language of the clause to learn the parties' intent as to what claims are subject to arbitration and also who can enforce the arbitration clause. Under the FAA, arbitration is a matter of consent. The FAA's purpose is to enforce existing arbitration agreements but not to extend them beyond their terms. *In re Merrill Lynch Trust Company FSB*, 235 S.W.3d 185, 192 (Tex. 2007). The written agreement will define the scope of the arbitration clause; the parties' subsequent conduct will not modify it. *See In re Dillard's Dep't Stores, Inc.*, 186 S.W.3d 514, 515 (Tex. 2006). Even third-parties trying to bring claims that belong to a party to the contract, such as derivative claims and/or subrogation claims, are subject to an arbitration agreement that a party entered into, if that arbitration clause encompasses the claims. *See In re Golden Peanut, LLC*, 2009 Tex. LEXIS 968, 53 Tex. Sup. J. 149 (Tex. 2009) (Wrongful death beneficiaries were derivative claimants and were bound by decedent's agreement to arbitrate.).

The language used to define the parties' arbitration option will be enforced, even if it means that the parties must proceed with litigation. Parties can determine to have some claims subject to arbitration and leave others for litigation or leave the choice open for a later determination. In *Higman Marine Services, Inc. v. BP Amoco Chemical Company*, 114 F.Supp.2d 593 (S.D. Tex. 2000), the dispute in question involved more than $250,000 in damages. The contract's arbitration provision applied to "any and all unsettled claims, differences and disputes of whatsoever nature arising out of or relating to the contract." *Id.* at 596. However, the arbitration provision also provided an option, "In lieu of binding arbitration, a party hereto ('claimant') having an extraordinary claim (one totaling in excess of U.S. $250,000 . . .) not previously submitted by

that claimant for resolution through binding arbitration, may elect to have the extraordinary claim resolved through litigation . . ." *Id.* The Court interpreted the arbitration provision as providing plaintiffs with the option of litigation, which plaintiffs chose. The Court would not compel plaintiffs to arbitration as a result. *Id.* at 597-599.

Arbitration clauses are classified as either broad or narrow clauses. Narrow arbitration clauses only apply to those disputes that "arise out of" or "arise under" the contract. Under a narrow arbitration clause, only disputes relating to the interpretation and performance of the contract itself would be subject to arbitration. *Wood v. Penntex Resources, L.P.*, 458 F.Supp.2d 355, 373 (S.D. Tex. 2006). In contrast, broad arbitration clauses extend to disputes that "relate to" or "are connected with" the contract. Under broad arbitration clauses, all disputes are embraced that have a significant relationship to the contract regardless of the labels applied. *Id.*

An example of a broad arbitration clause can be found in *Bloxom v. Landmark Publishing Corporation*, 184 F.Supp.2d 578 (E.D. Texas 2002). In this case, the arbitration clause applied to a "dispute, controversy or claim arising out of or in connection with this Agreement or any alleged breach thereof." *Id.* at 583. The court interpreted clause as being a broad arbitration clause. In that case, the arbitration clause applied to the claims for fraud, deceptive trade practices regarding the agreement and the alleged breach of the agreement. The fraud claim pertained to the making of the agreement, and the deceptive trade practices claims had a significant relationship to the agreement as did the breach of contract agreement. As a result, all of these claims fell within the scope of the arbitration clause. *Id.* at 584. *See also Valero Energy Corp. v. Teco Pipeline Co.*, 2 S.W.3d 576, 591 (Tex.App.—Houston [14th Dist.] 1999, no pet.) (arbitration agreement applying to "any dispute with respect to any matter within the operating agreement" covered related torts.).

A narrower arbitration clause will not be expanded to encompass all claims between the parties. Parties that intend for an arbitration clause to reach all disputes between the parties must specifically state that in the provision. How the wording of an arbitration clause can impact what claims are subject to arbitration can be seen in the case of *Texaco, Inc. v. American Trading Transportation Co.*, 644 F.2d 1152 (E.D. La. 1981). In that case, a vessel called the Baltimore Trader was owned by American Trading and under charter to Texaco. The vessel departed from a Texaco dock on the Mississippi River and failed to complete the port-hand turnabout, colliding with another boat, Theodohos, which was moored at the dock. *Id.* at 1153. Texaco filed suit against the vessels and the owners/operators and asserted claims that were related to the accident. The charter for the boat between American and Texaco contained an arbitration provision providing for arbitration of "'[a]ny and all differences and disputes . . . arising out of this Charter.'" *Id.* at 1154 (*quoting* the Charter at issue in the litigation). However, an attempt to compel arbitration failed. The court determined that the litigation involved collisions between the vessels and the dock; the dispute had nothing to do with the actual charter. The collision did not arise out of or depend on the charter. As a result, the charter's arbitration provision was not applicable to Texaco's lawsuit as the arbitration provision only extended to disputes arising out of the charter. The court noted that the parties chose the restrictive language in place; they could have provided for "arbitration of all disputes between the parties involving the chartered vessel." *Id.*

III. DEFINING THE ARBITRATION RULES AND PROCEDURES IN AN ARBITRATION CLAUSE

In addition to determining what claims will be subject to arbitration, parties to a contract need to consider how they want the arbitration to proceed. A contract can set forth simple or detailed guidelines and rules as to how the arbitration will occur. The parties can decide to invoke the arbitration rules and procedures of groups such as the American Arbitration Association, the International Chamber of Commerce or the CPR Institute for Dispute Resolution.[2] An arbitration clause can simply state, "All disputes relating to this Agreement

shall be submitted to arbitration in accordance with the American Arbitration Association's rules and procedures." If such an option is selected, a party needs to know the various rules and procedures of the organization selected and understand the impact of that association's requirements. Using such an approach will still leave many unanswered procedural and substantive questions that will need to be resolved. A party can be better prepared for arbitration by planning ahead and considering what needs to occur, concerns one may have, and how one wants the arbitration structured. By looking at such issues, the parties can contract for what they want to occur for the most part.

Drafting an arbitration clause must be done thoughtfully and carefully. The terms and conditions contained in an arbitration clause can have a very large impact should the parties disagree as to how they want the arbitration to proceed once a dispute has arisen. Then the interpretation will be out of their hands and left to a judge or an arbitrator. The legal implications and strategy impacted by arbitration will be important in a contract dispute; non-lawyers should seek advice from experienced attorneys to help ensure that they know what they are agreeing to and/or to achieve the type of arbitration they envision.

An arbitration clause can be drafted so that parties know what to expect and can plan for what they want to occur should arbitration be required. The areas that need to be addressed will depend upon the issues the parties want to outline and questions they want resolved. Typical issues that can be addressed include the conditions precedent, law that will apply to the dispute, the forum where the arbitration will occur, the arbitrator's qualifications, selection of the arbitrator(s), how discovery will be conducted, applicability of the rules of evidence, how expenses will be divided, type and form of the award, confidentiality, and more.

1. Conditions Precedent

The contract can set forth conditions that must occur before the parties can arbitrate. The conditions can include negotiations, review of a dispute by a third-party, mediation and more. The question becomes how effective such conditions precedent will be to truly resolving the dispute. If both parties are willing to truly engage in these prior steps, they can help avoid further expense and delay and bring about a quicker resolution. However, the conditions precedent can also serve to delay arbitration and/or add increased expense, i.e. mediation fees. Options can be set forth in the contract, but if they are included as conditions precedent then they will have to be completed before parties can begin arbitration.

2. Applicable Law

The parties can contract as to what jurisdiction's law will be controlling in the arbitration. For example, the parties can choose to have Texas law applied. The parties need to consider the law of the jurisdiction chosen as the specific laws imposed on the arbitration can frame how the contract is interpreted, causes of action, damages, and more. Each jurisdiction will have its own unique laws that create both advantages and disadvantages for both parties. If the parties do not determine which jurisdiction's law will apply, the arbitrator will have to decide which jurisdiction's law will be applied, and the parties will be bound by the arbitrator's determinations most likely given the limited judicial review available on an arbitrator's decisions and/or awards. Be aware that the vast majority of states have enacted statutes that impact enforcement of arbitration clauses, and enforcement is also governed by the Federal Arbitration Act, 9 U.S.C. §1, *et. seq.*

3. Forum Selection

Foresight as to where parties want to arbitrate will help fend off surprises in the future. Parties can choose a particular location, city or state. Without deciding the location ahead of time, the arbitration can potentially occur in either party's home city, at a location convenient for both parties, the city where the construction project is located, or somewhere not related to the parties' locations or the project's locations. Again, an arbitrator may dictate where the arbitration will occur. The parties can address this unknown by including where the arbitration will occur in the arbitration clause.

4. Arbitrator's Qualifications and Selection

An arbitration clause should address how the arbitrator will be selected and what, if any, qualifications an arbitrator must possess. Parties must decide how many arbitrators they want to use, i.e. only one or a panel of three. A panel can become expensive; parties can opt to set a threshold damage limit that must be met before a panel is required, i.e. $250,000.00. They must also determine how the arbitrator(s) will be selected. The parties can agree to an arbitrator(s) beforehand and include the arbitrator's identity in the contract. The risk becomes that the arbitrator may not be available for a myriad of reasons when the arbitration actually arises. The parties can also provide a list of possible arbitrators to select from, set forth a nomination and striking procedure, or to even agree to postpone selection until the time of the arbitration. In addition to setting forth the procedure to select the arbitrator, parties can determine the qualifications an arbitrator(s) must possess. For example, they may require that the arbitrator be an engineer or architect. However, the risk becomes that the arbitrator will not have any experience with the law and will misconstrue or misapply the law. They can also require that the arbitrator be an attorney with experience in construction law. A panel can consist of a combination of individuals, i.e. two attorneys and an engineer or architect. The qualifications of the arbitrator must be considered carefully. The parties have the opportunity to dictate qualifications such as what type of background the arbitrator must have and to mandate that the arbitrator be familiar with or possess a background in their industry. This provides the parties with protection against an unknowledgeable arbitrator presiding over their arbitration.

5. How the Arbitration Will Be Conducted

The procedures and rules applicable to the arbitration can be decided by adopting those of an organization or association, the parties outlining their own rules, or leaving all such decisions up to the arbitrator. Obviously, the last option presents the most risk. Adopting an organization or associations' rules pertaining to arbitration can also leave important questions open. The parties can only ensure that their concerns are addressed by defining in their contract which rules and procedures will be followed during the arbitration.

Deadlines can be set to allow the arbitration to move forward. The parties can set multiple deadlines such as when discovery related motions or motions for summary judgment must be filed, a time limit during which discovery can occur, deadlines for submission of pre and post-hearing briefs, a deadline for exchange of exhibits and evidence that will be used in the hearing, and a time limit on how long the hearing may last.

Limiting discovery is an advantage presented by arbitration. Parties can opt to set limits on the amount of written discovery that can be exchanged, define rules as to what documents or other information must be produced, set limits on the number and length of depositions that can be taken, limit the amount of time during which discovery may occur and more. The parties can also simply default to following a jurisdiction's rules, such as the Texas Rules of Civil Procedure. The parties can also opt to leave all these determinations to the arbitrator.

The parties also need to consider how disputes that arise between the parties prior to the hearing will be handled. For example, how will a discovery dispute be resolved, can the parties seek summary judgment, and can other written motions be submitted to the arbitrator? The parties can determine when motions can be submitted to an arbitrator, set limits on briefs, set a specific timeframe for when particular motions must be raised. Parties can also address whether to allow briefs to be submitted prior to and/or at the close of the arbitration hearing. As with other decisions and procedures, the parties can also default to allowing the arbitrator to set the rules.

For the arbitration hearing, the parties must decide how evidentiary decisions will be handled. They can set forth specific rules of evidence that will apply or default to a jurisdiction's rules, such as the Texas Rules of Evidence. In many arbitrations, the

jurisdiction's rules of evidence will not apply, and the arbitrator is left with the discretion to determine what evidence will be admitted and considered. The parties need to specify what rules will be followed if they do not want to rely upon the arbitrator to decide on the evidentiary rules.

The process an arbitration hearing will follow can also be addressed. Parties can make many decisions that will streamline the evidentiary process. The parties can determine how evidence must be presented, whether and how evidence may be exchanged prior to the hearing, set a time limit as to presentation of evidence for each party, or limit the number of witnesses a party may call.

6. The Arbitration Award

At the end of the arbitration, the arbitrator will issue a decision/award. The decision can be announced orally and/or in writing. The parties can also require that the arbitrator provide the reasons supporting his decision or simply announce who is being awarded damages and the amount. The parties can place limits on the power an arbitrator has in making that decision. For example, an arbitrator may only be able to award monetary damages as opposed to compelling performance under the contract, only be able to award compensatory damages, or may face a cap on the total damages that can be awarded.

IV. LIMITED OPTIONS TO VACATE AN ARBITRATOR'S AWARD

Be careful when entering into an agreement with an arbitration clause or even when drafting your own because once the agreement is formed it is very, very difficult to avoid arbitration when a dispute arises. If the arbitration clause applies to the claims at issue, you will most likely be unable to avoid arbitration. Under § 2 of the FAA, an arbitration agreement "shall be valid, irrevocable, and enforceable." 9 U.S.C. § 2. A strong presumption exists under Texas and federal law in favor of arbitration; thus, courts will resolve any doubts about an agreement's scope in favor of arbitration. *See, e.g., OPE International LP v. Chet Morrison Contractors, Incorporated*, 258 F.3d 443, 446 (5th Cir. 2001); *In re FirstMerit Bank*, 52 S.W.3d 749, 752 (Tex. 2001). "Where the contract contains an arbitration clause, there is a presumption of arbitrability . . . 'unless it may be said with positive assurance that the arbitration clause is not susceptible of an interpretation that covers the asserted dispute.'" *AT&T Techs., Inc. v. Communications Workers of Am.*, 475 U.S. 643, 650 (1986) (quoting *United Steelworkers of Am. v. Warrior & Gulf Navigation Co.*, 363 U.S. 574, 584-85 (1960)).

Once in arbitration, the parties will have difficulty in having the arbitrator's decisions and/or award reviewed or overturned. In the past, there were two avenues for review of an arbitrator's award, 9 U.S.C. §10 and §11 and manifest disregard of the law. The FAA mandates that a court must grant an order confirming an arbitration award unless the award is "vacated, modified, or corrected as prescribed in sections 10 and 11 . . ." 9 U.S.C. §9[3]. Under 9 U.S.C. §10[4], a court can 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 or material to the controversy; or of any other misbehavior by which the rights of a 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). 9 U.S.C. §11[5] addresses correcting or modifying an award but not vacating it.

A successful challenge to an award under 9 U.S.C. §10 is extremely difficult. §10(a) does not provide courts with authority to review an arbitrator's decision on the merits, and a vacatur will not be based on the merits of a party's claim. *Householder Group v. Caughran*, 2009 U.S. App. LEXIS 25507, *4 (5th Cir. 2009). For example, a challenge based upon §10(a)(2) requires that a party produce specific facts allowing a reasonable person to conclude the arbitrator was partial to one person. This burden is high as the proof must show that the alleged partiality is "'direct, definite and capable of demonstration rather than remote, uncertain or speculative.'" *Id.*, 2009 U.S. App. LEXIS 25507, *7 *quoting Weber v. Merrill Lynch Peirce Fenner & Smith, Inc.*, 455 F.Supp.2d 545, 550 (N.D. Tex. 2006).

Manifest disregard arose from language used by the U.S. Supreme Court in *Wilko v. Swan*, 346 U.S. 427, 436-437, 74 S. Ct. 182, 98 L. Ed. 168 (1953), wherein the Court stated, "[T]he interpretations of law by arbitrators in contrast to manifest disregard are not subject, in the federal courts, to judicial review for error in interpretation." *Id.* Over the years, courts developed interpretations of what constituted a manifest disregard of the law by the arbitrator. The Fifth Circuit did not adopt the manifest disregard standard as a nonstatutory ground for vacatur until 1999. *Williams v. CIGNA Fin. Advisors, Inc.*, 197 F.3d 752, 759 (5th Cir. 1999). The Fifth Circuit defined manifest disregard as meaning:

> more than error or misunderstanding with respect to the law. The error must have been obvious and capable of being readily and instantly perceived by the average person qualified to serve as an arbitrator. Moreover the term "disregard" implies that the arbitrator appreciates the existence of a clearly governing principle but decides to ignore or pay no attention to it.

Prestige Ford v. Ford Dealer Computer Servs., Inc., 324 F.3d 391, 395 (5th Cir. 2003) *citing Merrill Lynch, Pierce, Fenner & Smith, Inc. v. Bobker*, 808 F.2d 930, 933-934 (2nd Cir. 1986).

The U.S. Supreme Court's decision in *Hall Street Associates, LLC v. Mattel, Inc.*, 128 S. Ct. 1396, 170 L. Ed. 2d 254 (2008) eliminated the ability to grant enhanced judicial review of an award under the contract and may have eliminated the manifest disregard standard, leaving only 9 U.S.C. §10 as the basis for vacating an arbitration award. In *Hall Street*, the parties had contracted for expanded judicial review of the reward, beyond what is allowed by 9 U.S.C. §10 and §11. Specifically, their arbitration clause provided that the court:

> may enter judgment upon any award, either by confirming the award or by vacating, modifying or correcting the award. The Court shall vacate, modify or correct any award: (i) where the arbitrator's findings of facts are not supported by substantial evidence or (ii) where the arbitrator's conclusions of law are erroneous.

Id. at 1400. 9 U.S.C. §9 provides a court with the power to confirm an arbitrator's award unless the award is vacated under 9 U.S.C. §10 or modified or corrected under 9 U.S.C. §11. 9 U.S.C. §9 mandates that the court must confirm the award unless there are grounds to not do so under 9 U.S.C. §10 or §11. There is no additional language allowing the parties to provide their own remedy through contract. The only way an award cannot be confirmed by a court is if one of the specific grounds set forth in 9 U.S.C. §10 or §11 apply. The Court explained:

> [I]t makes more sense to see the three provisions, §§9-11, as substantiating a national policy favoring arbitration with just the

> limited review needed to maintain arbitration's essential virtue of resolving disputes straightaway. Any other reading opens the door to the full-bore legal and evidentiary appeals that can 'rende[r] informal arbitration merely a prelude to a more cumbersome and time-consuming judicial review process' and bring arbitration theory to grief in postarbitration process.

Id. at 1405 *quoting Kyocera Corp. v. Prudential-Bache Trade Servs.*, 341 F.3d 987, 998 (CA9 2003)(en banc).

While the decision in *Hall Street* determined that parties could not contract for expanded judicial review; the parties to a contract retain the ability to define the arbitration itself through contract, for the most part. In dicta, the Court addressed that the FAA allows the parties to tailor many features of the arbitration through contract, including how arbitrators are selected, the arbitrators' qualifications, the scope of the arbitration clause, applicable procedures and substantive law. *Id.* at 1404.

Hall Street addressed the manifest disregard standard, but the Court's final intentions as to whether manifest disregard survived is up for debate. Hall argued that this standard should be added to §10, and if judges could add to the list of grounds to vacate or modify an award then parties should be able to do the same via contract. However, the *Wilko* language, quoted above, does not add support to Hall's argument; instead, the language rejects general review of an arbitrator's award, which is what Hall wants allowed. The Court addressed possible interpretations of manifest disregard but pointed out that in the past the Court never embellished the *Wilko* language and only took it as it found it. Hall's argument was rejected by the Court. *Id.* at 1403-1404. Given the U.S. Supreme Court's clarification that the *Wilko* case's reference to manifest disregard was not meant to be embellished, the lower courts are now left to determine if a separate common law basis remains for review of an arbitrator's award if the award is based on a manifest disregard of the law.

The Fifth Circuit decided the manifest disregard standard did not survive *Hall Street.* In *Citigroup Global Mkts., Inc. v. Bacon*, 562 F.3d 349 (5th Cir. 2009), the Court addressed whether the district court had properly granted a motion to vacate an arbitration award on the basis that the arbitrators manifestly disregarded the law (the district court's decision was issued before *Hall Street* was decided). The Fifth Circuit interpreted *Hall Street* as restricting the grounds for vacatur to only those grounds set forth in 9 U.S.C. §10 and eliminating manifest disregard of the law as an independent ground for vacatur. The Court overruled previous authority that allowed an arbitration award to be vacated based upon manifest disregard of the law. Based on the Supreme Court's discussion of manifest disregard and *Wilko*, the Fifth Circuit concluded that "*Hall Street* rejected manifest disregard as an independent ground for vacatur and stood by its clearly and repeatedly stated holding . . . that §§10 and 11 provide the exclusive bases for vacatur and modification of an arbitration award under the FAA." *Id.* at 353.

Four other circuits have examined whether manifest disregard of the law remains a valid ground for vacatur and have reached differing conclusions. The First Circuit agrees with the Fifth Circuit's interpretation that *Hall Street* eliminated manifest disregard as a basis for vacatur. *See Ramos-Santiago v. United Parcel Serv.*, 524 F.3d 120, 124 (1st Cir. 2008). In contrast, the Sixth Circuit interpreted *Hall Street* to only apply to contractual expansions of the grounds for review; thus, manifest disregard of the law remains a viable option. *Coffee Beanery, Ltd. v. WW, LLC*, 300 Fed. Appx. 415, 418-419, 2008 U.S. App. LEXIS 23645, at *4 (6th Cir. 2008). Likewise, the Second Circuit has interpreted *Hall Street* as allowing manifest disregard to survive by interpreting it as shorthand for 9 U.S.C. §10(a)(4). *Stolt-Nielsen SA v. Animal Feeds Int'l Corp.*, 548 F.3d 85, 93-95 (2nd Cir. 2008). The Ninth Circuit agrees with the Second Circuit's approach in

interpreting manifest disregard as being a shorthand version of 9 U.S.C. §10(a)(4) and limiting the holding of *Hall Street. Comedy Club Inc. v. Improv West Assocs.*, 553 F.3d 1277, 1290, 2009 WL 205046, at *9 (9th Cir. 2009).

V. TAKING CONTROL OF THE ARBITRATION OFFERS THE BEST PROTECTION

Providing rules and guidelines on how the arbitration will occur, what the applicable law will be, how the arbitrators will be selected and more allows the parties to structure the arbitration to meet their expectations. If they are simply going into an arbitration without knowing what will occur, what the arbitrator's qualifications will be or more, there is a large risk that the parties will encounter the costs and disadvantages of arbitration. If that is the case, they would likely be better off proceeding with litigation. The law gives the parties the room to contract for an arbitration that will be beneficial for both of them; they are the ones that need to take advantage of that opportunity. The finality of the award and limited judicial review should be an advantage and not a burden when the parties plan ahead for arbitration. The benefits of arbitration come forth the most when it is planned in advanced and structured to meet the parties' needs and expectations.

---

[1] Questions relating to an arbitration clause can be classified as relating to substantive arbitrability or procedural arbitrability. Substantive arbitrability encompasses "gateway" arbitration issues that a court must decide, such as whether a dispute is encompassed by an agreement to arbitrate. *In re Neutral Posture Inc.*, 135 S.W.3d 725, 728 (Tex.App.-Houston [1st Dist.] 2003, orig. proceeding); *Valero Energy Corp. v. Teco Pipeline Co.*, 2 S.W.3d 576, 583 (Tex.App.-Houston [14th Dist.] 1999, no pet.). Procedural arbitrability issues are for the arbitrator to decide and encompass those questions that grow out of the dispute and relate to the final disposition. Determining whether conditions precedent to arbitration were complied with constitutes an example of a procedural arbitrabililty issue, i.e. notice and time limits. *In re Neutral Posture Inc.*, 135 S.W.3d at 728; *Valero Energy Corp.*, 2 S.W.3d at 583.

[2] More information on these associations and their arbitration rules and formats can be found online: American Arbitration Association www.adr.org; International Chamber of Commerce www.iccwbo.org; and the CPR Institute for Dispute Resolution www.cpradr.org. There are many other such organizations and associations that offer alternative dispute resolution services; these references are only intended to serve as examples.

[3] 9 U.S.C. §9: Award of arbitrators; confirmation; jurisdiction; procedure

If the parties in their agreement have agreed that a judgment of the court shall be entered upon the award made pursuant to the arbitration, and shall specify the court, then at any time within one year after the award is made any party to the arbitration may apply to the court so specified for an order confirming the award, and thereupon the court must grant such an order unless the award is vacated, modified, or corrected as prescribed in sections 10 and 11 of this title (9 U.S.C.S. §§10, 11). If no court is specified in the agreement of the parties, then such application may be made to the United States court in and for the district within which such award was made. Notice of the application shall be served upon the adverse party, and thereupon the court shall have jurisdiction of such party as though he had appeared generally in the proceeding. If the adverse party is a resident of the district within which the award was made, such service shall be made upon the adverse party or his attorney as prescribed by law for service of notice of motion in an action in the same court. If the adverse party shall be a nonresident, then the notice of the application shall be served by the marshal of any district within which the adverse party may be found in like manner as other process of the court.

[4] 9 U.S.C. §10: Same; vacation; grounds; rehearing

(a) In any of the following cases the United States court in and for the district wherein the award was made may make an order vacating the award upon the application of any party to the arbitration--

(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.

(b) If an award is vacated and the time within which the agreement required the award to be made has not expired, the court may, in its discretion, direct a rehearing by the arbitrators.
(c) The United States district court for the district wherein an award was made that was issued pursuant to section 580 of title 5 may make an order vacating the award upon the application of a person, other than a party to the arbitration, who is adversely affected or aggrieved by the award, if the use of arbitration or the award is clearly inconsistent with the factors set forth in section 572 of title 5.

[5] 9 U.S.C. §11: Same; modification or correction; grounds; order

In either of the following cases the United States court in and for the district wherein the award was made may make an order modifying or correcting the award upon the application of any party to the arbitration--

(a) Where there was an evident material miscalculation of figures or an evident material mistake in the description of any person, thing, or property referred to in the award.

(b) Where the arbitrators have awarded upon a matter not submitted to them, unless it is a matter not affecting the merits of the decision upon the matter submitted.

(c) Where the award is imperfect in matter of form not affecting the merits of the controversy.

The order may modify and correct the award, so as to affect the intent thereof and promote justice between the parties.