

## TAA Offers Increased Access to Judicial Review of Arbitration Awards

Litigation Update, Articles, Arbitration, Alternative Dispute Resolution / August 22, 2019 / Andrew “Drew” Robertson

Both federal and Texas state law favor arbitration as a method of dispute resolution. Generally speaking, the Federal Arbitration Act (FAA)[1] applies to any contract for a transaction involving interstate commerce, while the Texas Arbitration Act (TAA)[2] can apply to any contract capable of invoking Texas law. The TAA is not preempted by the FAA except where it would refuse to enforce an arbitration agreement that the FAA would enforce. This means that either statute (or both) will usually be available as an option for most parties negotiating contracts in Texas.[3] So which statute should you choose to govern your arbitration? While the language and purpose of each statute is very similar, parties negotiating contracts in Texas (or under Texas law) should consider a major advantage offered by the TAA that is not available under the FAA: the ability to contractually limit the powers of your arbitrator and even provide for judicial review of the final arbitration award.

Unlike a judgment from a court of law, the final decision of an arbitrator is not automatically subject to review by filing an appeal. In most cases, the arbitrator’s decision will be final and binding on the parties—even where the arbitrator has incorrectly applied the law—unless one of a few, narrow exceptions allowing for judicial review of the decision are met. The FAA, like the TAA, provides an enumerated list of circumstances in which a district court can vacate or modify an arbitration award. Under the FAA, these lists are found in 9 U.S.C.A. §§ 10 and 11. For the TAA, they are found in Tex. Civ. Prac. & Rem. Code §§ 171.088 and 171.091. In 2008, the Supreme Court of the United States held “that §§ 10 and 11 respectively provide the FAA’s exclusive grounds for expedited vacatur and modification.”[4]

In other words, the circumstances enumerated in these sections are the only circumstances under which a court may set aside or amend an arbitration award. Eight years later, the Supreme Court of Texas agreed that § 171.088 likewise provides an exhaustive list that cannot be added to or expanded upon by the Courts.[5] This restricted availability for review or appeal is often viewed as a significant disadvantage to arbitration. But Texas law offers a solution to this problem. While the Supreme Court of Texas agrees with the Supreme Court of the United States on the exclusiveness of statutory grounds for review, there is a major, and sometimes overlooked, distinction between the way that federal law and Texas law views the ability of the parties to **contract** for judicial review within the bounds of the statutes.

In *Hall Street Associates, LLC v. Mattel, Inc.*, the Supreme Court of the United States rejected an attempt by the parties to contract around the FAA and provide for increased judicial review of their arbitration. In that case, the parties included a judicial review provision in their arbitration agreement that gave the United States District Court power to “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.”[6] The Supreme Court held that the FAA prohibited the parties from granting this review power to the federal courts because 9 U.S.C.A. §§ 10 and 11 provided the exclusive avenues for review.[7] However, the Supreme Court also recognized that “[t]he FAA is not the only way into court for parties wanting review of arbitration awards,” and expressly left the door open to the possibility that the states may recognize a different scope of judicial review under their own arbitration laws.[8]

In *Nafta Traders, Inc. v. Quinn*, the Supreme Court of Texas was asked to consider whether Texas's arbitration statute—the TAA—also precludes an agreement for judicial review of an arbitration award. The parties in that case had negotiated a similar arbitration provision to the one in *Hall Street*, except that it phrased the availability for judicial review as an affirmative limitation on the arbitrator's power. Specifically, the contract at issue in that case stated: "The arbitrator does not have authority (i) to render a decision which contains a reversible error of state or federal law, or (ii) to apply a cause of action or remedy not expressly provided for under existing state or federal law."<sup>[9]</sup>

Refusing to follow the federal courts' interpretation of the FAA in construing Texas state law, the Supreme Court of Texas noted that one express ground for vacating, modifying, or correcting an arbitration award under the TAA is that the arbitrators have "exceeded their powers."<sup>[10]</sup> And, "[i]n arbitration conducted by agreement of the parties, the rule is well established that an arbitrator derives his power from the parties' agreement to submit to arbitration."<sup>[11]</sup> In other words, arbitrators hearing disputes under Texas arbitration law have only as much power as the parties have agreed to give them. Acknowledging that "Texas law recognizes and protects a broad freedom of contract," the Supreme Court of Texas held that the TAA allows parties to limit an arbitrator's power by providing for limitations and even appellate remedies in the arbitration clause of their contracts.<sup>[12]</sup>

In plain English, the practical effect of the *Hall Street* and *Nafta Traders* opinions is this:

1. Under the FAA, parties cannot contractually agree to any more judicial review of an arbitrator's decision than what the statute allows; but
2. Under the TAA, the parties are able to define the limits of the arbitrator's authority by specifically restricting his or her power to enter arbitration awards that are contrary to the law and by providing for judicial review of such decisions to the same extent that a judge's decisions would be subject to an appeal.

Texas parties negotiating an arbitration provision in their contract may want to keep this availability of judicial review in mind when determining whether to agree to arbitrate their claims under the FAA or the TAA, as that decision can have a major impact on the ability to challenge an arbitrator's final decision in the future. To take advantage of the availability for increased judicial review under the TAA, the parties must do at least (3) things:

1. Expressly state that arbitration will be conducted pursuant to the Texas Arbitration Act (TAA), especially in any cases where the FAA could also be applicable;<sup>[13]</sup>
2. Frame the judicial review portion of the arbitration agreement as a limitation on the arbitrator's power to enter an award;<sup>[14]</sup> and
3. Specifically define what will be subject to review (for example, any final decision that contains a reversible error under state or federal law or any final decision that awards a remedy not available under state or federal law, etc.).

[1] 9 U.S.C.A. § 2, et seq.

[2] Tex. Civ. Prac. & Rem. Code § 171.001, et seq.

[3] See *In re D. Wilson Const. Co.*, 196 S.W.3d 774, 782 (Tex. 2006); *Rich v. Cantilo & Bennett, L.L.P.*, 492 S.W.3d 755, 759 n.2 (Tex. App.—Austin, pet. denied).

[4] *Hall Street Assocs., L.L.C. v. Mattel, Inc.*, 522 U.S. 576, 584 (2008).

[5] *Hoskins v. Hoskins*, 497 S.W.3d 490, 497 (Tex. 2016).

[6] *Hall Street*, 522 U.S. at 579.

[7] *Id.* at 584.

[8] *Id.* at 590.

[9] *Nafta Traders, Inc. v. Quinn*, 339 S.W.3d 84, 88 (Tex. 2011).

[10] *Id.* at 90.

[11] *Id.* (internal quotation omitted).

[12] *Id.* at 95–97.

[13] See *In re Olshan Foundation Repair Co., LLC*, 277 S.W.3d 124, 127 (Tex. App.—Dallas 2009, orig. proceeding) ("In deciding the TAA applies and not the FAA, we follow the Texas Supreme Court's test that states, *inter alia*, where the

transaction involves interstate commerce, a choice-of-law provision that does not specifically exclude the application of federal law will not be read as having such an effect.”) (internal quotations omitted); *contra Ancor Holdings, LLC v. Peterson, Goldman & Villani, Inc.*, 294 S.W.3d 818, 829 (Tex. App.—Dallas 2009, no pet.) (refusing to consider the potential application of other law, like the TAA, because “the parties pursued arbitration according to the terms of the Guaranty, which expressly invoked the FAA.”).

[14] *See Nafta Traders*, 339 S.W.3d at 95–97; *contra Hoskins*, 497 S.W.3d at 495 (“The arbitration agreement in this case contained no restriction (either directly or indirectly) on the arbitrator’s authority to issue a decision unsupported by the law. Unlike the reversible error challenge to the award in *Nafta Traders*, Leondard’s manifest-disregard complaints cannot be characterized as assertions that the arbitrator exceeded his powers.”).

## Related Attorneys

---

Andrew “Drew” Robertson

## Related Practices

---

Litigation