ARBITRATION
STRATEGY & IMPACT IN HIGH TECH CASES

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Chapter 12
# Table of Contents

I. INTRODUCTION .......................................................................................................................... 1  
II. BENEFITS OF ARBITRATION OVER CONVENTIONAL LITIGATION .......................................... 1  
III. CONFIDENTIALITY OF ARBITRATION PROCEEDINGS ................................................................. 1  

IV. APPEALABILITY OF ARBITRATION AWARDS UNDER FEDERAL LAW ........................................... 3  
   A. The Treatment of Manifest Disregard in the Fifth Circuit ............................................................. 4  
   B. Contractual Expansion of the Scope of Review ............................................................................. 5  
   C. Alternative Forms of Dispute Resolution with Broader Scope of Review ........................................ 6  

V. CONCLUSION .................................................................................................................................. 6  

VI APPENDICES ................................................................................................................................... 7  
   A. Sample Standard AAA Arbitration Clause .................................................................................... 7  
   B. Sample CPR Arbitration Clause .................................................................................................... 8  
   C. Sample Clause with Forum Selection and Damage Limitations ..................................................... 9  
   D. Sample Clause for Two Step Dispute Resolution Process ........................................................... 10  
   E. CPR Sample Confidentiality Agreement ......................................................................................... 12  
   F. CPR Sample Agreement to Arbitrate Patent Dispute .................................................................. 14  
   G. Other Sample Clauses .................................................................................................................. 17  
   H. Sample Arbitration Scheduling Order ........................................................................................... 19
ARBITRATION - STRATEGY & IMPACT

I. INTRODUCTION

This article will explore the benefits of arbitration over conventional litigation, the problems associated with broadening the scope of review associated with arbitration awards, the extent of confidentiality associate with arbitration and some judicially made grounds for vacating an arbitration award.

II. BENEFITS OF ARBITRATION OVER CONVENTIONAL LITIGATION

Arbitration has been recognized as an alternative to litigation that provides many benefits that litigation cannot provide. Some of the benefits that have been cited consist of the following: reduced costs, reduced time for finalization of dispute, informal discovery and evidence rules, greater privacy, arbitrator expertise, and the possibility of reaching an amicable resolution. See Michael L. Taviss, Adventures in Arbitration: The Appealability Amendment to the Federal Arbitration Act, 59 U. Cin. L. Rev. 559, 565 (1990). The ability to obtain an arbitrator with expertise on the dispute subject matter and the law pertaining to the dispute is a great assistance in high-tech and other complex cases. Id. Additionally, arbitration has been said to allow an Aequitable playing field@ by excluding the courts of jurisdiction. See Richard H. Kreindler, Arbitration or Litigation? ADR Issues in Transnational Disputes, Fall, 52-Fall Disp. Resol. J. 79, 80 (1997). Many people have argued that one of the main disadvantages to arbitration is the lack of appellate review of the arbitration decision. On the other hand, there is a growing perception that if arbitration awards were subjected to broader review, many of the advantages to arbitration would be severely compromised.1

Over time, the courts have fought with this dilemma. Courts have attempted to maintain a strict rule, only allowing for narrow grounds upon which an arbitration decision may be vacated, but yet not adhere so strictly to that rule that an Anything goes attitude prevails over arbitration decisions.2 Many times it is viewed as a simple trade off of more privacy for less appealability of the award. This article will explore the extent of confidentiality involved in arbitrations and some of the grounds available upon which a party can have relief from an arbitration award governed by the Federal Arbitration Act (FAA) with a focus on Texas.

III. CONFIDENTIALITY OF ARBITRATION PROCEEDINGS

As stated above, privacy of the parties is one of the benefits of arbitration over litigation. However, the extent of confidentiality available under state and federal law is unclear.

The Texas Alternative Dispute Resolution Procedures Act (AAPs) has been described as the most complete in conferring the cloak of confidentiality on communications made during alternative dispute resolution procedures. (Smith v. Smith, 154 F.R.D. 661, 666-67 (N. D. Tex. 1994) (referencing Michael D. Young & David S. Ross, Confidentiality of Mediation Procedures, C879 ALI-ABA 571, 578 (1993)) 3 Under the Texas arbitration statute, all communications made during the proceeding are confidential. See Tex. Civ. Practice & Rem. Code 1 154.073 (a) (West 1999). More importantly, the statute also prohibits the use of any such communications as evidence at a later trial. Id.; Texas Parks and Wildlife Dept. v. Davis, 988 S.W.2d 370, 375 (Tex. App.--Austin 1999) (finding that the manner in which the participants negotiated during the proceeding could not be disclosed to the trial court).

1 The law favors arbitration and, with respect to review by the courts of an arbitration decision, it is a well-known accepted law principle, there exists a strong presumption favoring the validity of the award. Newark Stereotypers' Union v. Newark Morning Ledger Co., 261 F. Supp. 832, 835 (D.N.J. 1966) (internal citations omitted).

If this were not the general rule, then judges would repeatedly be substituting their own judgment in place of the parties chosen arbitrators. Id. This would make an award the commencement, not the end, of litigation. @Id. (emphasis added).

2 At is true that the arbitrator is not free to dispense his own brand of industrial justice .... Newark Stereotypers' Union No. 18, 261 F. Supp. at 835 (quoting United Steelworkers of America v. Enterprise Wheel & Car Corp., 363 U.S. 593, 597 (1960); see also Teamsters, Chauffers, Warehousemen, Helpers and Food Processors, Local Union 657 v. Stanley Structures, Inc., 735 F.2d 903, 905 (5th Cir. 1984) (Arbitration agreements do not grant arbitrators carte blance ....@.

3 A Texas is the vanguard of affording protection to communications made during ADR procedures (Smith, 154 F.R.D. at 666-67 (quoting Michael D. Young & David S. Ross, Confidentiality of Mediation Procedures, C879 ALI-ABA 571, 578 (1993)).
In fact, the statute further protects the participants by specifically stating that any record made of the proceeding is confidential as well, and the participants and third parties facilitating the procedure cannot be forced to testify in any litigation relating to or arising out of the disputed matter. See Tex. Civ. Prac. & Rem. Code 154.073(b); see also Rutherford v. Blanks, No. 04-95-00770-CV (Tex. App.--San Antonio June 28, 1996, writ denied) (per curiam) (not designated for publication), 1996 WL 355354 (noting that arbitrators are protected from being forced to testify). Additionally, the arbitrators and parties cannot be subject to process requiring their disclosure of all confidential information or data relating to or arising out of the matter in dispute. See Tex. Civ. Prac. & Rem. Code 154.073.

This protection is not an absolute privilege. The statute clearly states that oral communications or written materials used in or disclosed during the arbitration are admissible or discoverable in a later proceeding if they are admissible or discoverable independent of the procedure. See Tex. Civ. Prac. & Rem. Code 154.073(c). This means that a party cannot enter arbitration and bring forward all its culpable documents and then claim a privilege from their use as evidence in a later case. See Smith, 154 F.R.D. at 669 (oral communications and written materials that are otherwise admissible or discoverable are not made inadmissible or non-discoverable solely because they have been uttered or disseminated in an alternative dispute resolution proceeding). However, the provision does not allow a party to compel an arbitrator or the other party to testify regarding statements made or conduct that occurred during the arbitration. See Smith, 154 F.R.D. at 669 (stating that Tex. Civ. Prac. & Rem. Code 154.073(c) should be interpreted to have the same effect as Rule 408 of the Texas Rules of Civil Evidence). That is precisely what the statute is meant to protect, the parties' personal thoughts about their strength and weaknesses with their case, offers they made, and other similar thoughts revealed at the proceeding, from being used against them in a later hearing.

The Texas statute does allow the courts some leeway from the confidential status where it conflicts with other legal requirements for disclosure. See Rutherford, 1996 WL 355354 (the issue of confidentiality may be presented to the court having jurisdiction of the proceedings to determine, in camera, whether the facts, circumstances, and context of the communications or materials sought to be disclosed warrant a protective order of the court or whether the communications or materials are subject to disclosure). However, this is not a mandatory procedure forced upon the courts. Rather, it is an exception to the statute's otherwise broad prohibition against disclosing confidential oral communications and written materials. See Smith, 154 F.R.D. at 670.

Without the subsection, the statute arguably would prevent judges from ever discovering the content of any of the communications and conduct that occurred at the arbitration proceeding. Id. (citing 154.053(c)).

The extent of protection under federal law is less clear. The only reference to confidentiality in relation to dispute resolution communications in the federal statute is in Title 5, which relates to arbitrations and other dispute resolution methods in the administrative process. See 5 U.S.C.A. 574 (West Supp. 1999). In Title 9, which deals with dispute resolution procedures in the non-administrative process, the statute fails to mention confidentiality. Moreover, participants to an arbitration should be aware that neither the Texas statute nor the federal statute, by their specific language, protects arbitration awards as confidential.

4Additionally, Texas Civ. Prac. & Rem. Code 154.053 (b) and (c) lists the standards and duties of impartial third parties. Section 154.053(b) states that unless given permission by the disclosing party, the third party may not reveal to either party information that was given in confidence and shall always maintain the confidentiality of such communications. See Texas. Civ. Prac. & Rem. Code 154.053(b). The next provision states that without permission, all matters, including the conduct and demeanor of the parties, as well as their counsel, during the settlement process, are confidential and cannot be revealed, even to the trial court. See Tex. Civ. Prac. & Rem. Code 154.053(c).

5In addition to the state statutes and federal statutes, private organizations have rules that govern arbitrators. See, e.g., The Code of Ethics for Arbitrators in Commercial Disputes, Canon VI (B) (imposing a duty of confidentiality on arbitrators for all matters relating to the proceedings or decision); JAMS/Endispute Comprehensive Rules for Commercial, Real Estate and Construction Cases, Rule 25(a) (imposing confidentiality on arbitrators unless otherwise required by law or judicial decision). The participants would be wise to thoroughly read any statute or order under which the arbitration is governed to discover the extent of confidentiality provided for in such.
federal courts have not defined confidentiality. Therefore, outside administrative proceedings, participants are not guaranteed full confidentiality.

International arbitrations can present additional confidentiality problems. The participants may find themselves in the dilemma of being forced to produce in litigation all the documents that were previously produced in arbitration. A court could find that those documents are discoverable in a later civil suit if the arbitration agreement and final consent award fail to address the issue of confidentiality. See United States v. Panhandle Eastern Corp., 118 F.R.D. 346, 350 (D. Del. 1988) (refusing to exclude documents from prior arbitration on grounds of confidentiality where no evidence existed of agreement by parties concerning confidentiality of documents). The participants may be able to avoid this problem, in some jurisdictions, by entering into a thorough agreement with the other side to preserve the confidentiality of all communications and documents from the arbitration. See infra III. B.

IV. APPEALABILITY OF ARBITRATION AWARDS UNDER FEDERAL LAW

The FAA lists the statutory grounds upon which a vacatur may be founded. Until recently, section 10 of the FAA set forth the only grounds upon which a vacatur could be granted in the Fifth Circuit. McIlroy v. PaineWebber, Inc., 989 F.2d 817, 820 (5th Cir. 1993) (referencing R.M. Perez & Assoc., Inc. v. Welch, 960 F.2d 534 (5th Cir. 1992)). These grounds are: 1) where the award was procured by corruption, fraud, or undue means; 2) where there was evident partiality or corruption in any arbitrator; 3) where the arbitrator was 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 arbitrator exceeded his/her 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) (West 1999). These grounds provide for a very limited scope of review. Antwine v. Prudential Bache Sec., Inc., 899 F.2d 410, 413 (5th Cir. 1990) (noting the scope of review is extraordinarily narrow see also Newark Stereotypers' Union, 261 F. Supp. at 835 (stating that the statutory grounds for vacating an award must be read in light of the rule that the Court's function in

vacating, or confirming, an arbitration award is severely limited). As a general rule, whenever the reviewing court determines that the subject matter or remedy is within the arbitrator's scope of authority, it will not second-guess the merits of the arbitrator's decision. Eljer Mfg., Inc. v. Kovin Dev. Corp., 14 F.3d 1250, 1255-56 (7th Cir. 1994) (stating courts can only vacate if an arbitrator exceeds the power given to him by the parties). "As long as the arbitrator is even arguably construing or applying the contract and acting within the scope of his authority, we cannot overturn his decision simply because it disagrees with his factual findings, contract interpretation, or choice of remedies." Van Waters & Rogers, Inc. v. International Brotherhood of Teamsters, Chauffeurs, Warehouseman & Helpers of America, Local Union 70, 913 F.2d 736, 739 (9th Cir. 1990) (citing United Paperworks International Union v. Misco, Inc., 484 U.S. 29, 37-38 (1987), 510 U.S. 965 (1993). The Fifth Circuit has adhered to this principle, holding that if the award is rationally inferable from the facts before the arbitrator, the reviewing court must affirm the award. Valentine Sugars, Inc. v. Donau Corp., 981 F.2d 210, 214 (5th Cir. 1993). Arbitrators are not required to provide reasons for their award. Id. The Supreme Court has set the clear principle that courts cannot vacate arbitration awards based merely on errors in the interpretation or application of the law, nor can vacatur be based upon mistakes in fact-finding. Misco, Inc., 484 U.S. at 38.

Over time, to ease the harshness of unfair decisions by arbitrators, several courts have created some non-statutory grounds for review. Some of

Other other circuits have similarly held that mere errors in the interpretation of the law will not merit vacatur of an arbitration award. See Eljer Mfg., Inc., 14 F.3d at 1256.

Other than manifest disregard, several courts have vacated judgments based upon the award violating public policy, see also Newark Stereotypers' Union, 261 F. Supp. at 835 (stating that the statutory grounds for vacating an award must be read in light of the rule that the Court's function in

This paper will not explore the statutory grounds=parameters, but rather will focus on non-statutory grounds for review.
these non-statutory grounds have been applied more than others and the availability or usefulness of some of them is unclear. This paper will focus on one non-statutory ground, manifest disregard of the law.

Most circuits have held that if an arbitrator's decision was made with a manifest disregard for the law, the decision can be vacated. See Advest, Inc. v. McCarthy, 914 F.2d 6 (1st Cir. 1990); Merrill Lynch, Pierce, Fenner & Smith v. Bobker, 808 F.2d 930 (2d Cir. 1986); United Transportation Union Local 1589 v. Suburban Transit Corp., 51 F.3d 376 (3d Cir. 1995); Remmey v. PaineWebber, Inc., 32 F.3d 143 (4th Cir. 1994), cert. denied, 513 U.S. 1112 (1995). See, e.g., Eljer Mfg., Inc., 14 F.3d 1250 (7th Cir.); Lee v. Chica, 983 F.2d 883 (8th Cir.), cert. denied, 510 U.S. 906 (1993); Jenkins v. Prudential-Bache Sec., Inc., 847 F.2d 631 (10th Cir. 1988). The only circuit to date that has not accepted this ground is the Eleventh Circuit. See Robbins v. Day, 954 F.2d 679, 685 (11th Cir. 1992), disapproved on other grounds, First Options of Chicago, Inc. v. Kaplan, 514 U.S. 938, 115 S.Ct. 1920 (1995).

A. The Treatment of Manifest Disregard in the Fifth Circuit

Manifest disregard of the law by arbitrators is a judicially-created ground for vacating an arbitration award. Until December of 1999, the Fifth Circuit did not recognize the doctrine of manifest disregard of the law as a ground for vacating a commercial arbitration decision. See McLoyd, 989 F.2d 817, 820, n. 2 (5th Cir. 1993); Castleman v. AFC Enters., Inc., 995 F.Supp. 649, 653, n.3 (N.D. Tex. 1997); R.M. Perez & Associates, Inc. v. Welch, 960 F.2d 534, 539 (5th Cir. 1992); Forsythe Int‘l, S.A. v. Gibbs Oil Co., 915 F.2d 1017, 1020 (5th Cir. 1990) (in dictum, court stated that judicial review of a commercial arbitration decision was confined to the grounds listed in section 10 and 11 of the FAA); Williams v. Cigna Fin. Advisors Inc., 197 F.3d 752 (5th Cir. 1999) (recognizing manifest disregard as a valid ground for vacatur in compulsory arbitration of employee federal rights case).

In Williams, the Fifth Circuit recognized for the first time that a compulsorily adjudication of an employee’s federal statutory employment claim could be vacated for an arbitrator’s manifest disregard of the law.10 Id. Although the Williams court acknowledged the ground as a viable doctrine, it did not find that the arbitrators acted contrary to the applicable law. Id. at 762.

As a preliminary matter, the court noted that under the FAA, a review of a district court decision to uphold an arbitration award, where the parties agreed to arbitration, is done by accepting findings of fact that are not clearly erroneous but deciding questions of law de novo. Williams, 197 F.3d at 757 (referencing First Options of Chicago, Inc., 514 U.S. 938, 948 (1995); Gateway Technologies, Inc. v. MCI Telecommunications Corp., 64 F.3d 993, 996 (5th Cir. 1995)). The court acknowledged that a party that has been forced into arbitration, normally has a right to a merit review by a court, but that a party’s voluntary agreement to arbitrate under the FAA is a waiver of much of that right’s practical value. Id. (referencing First Options of Chicago, Inc. at 942). The party still can ask a court to review the arbitrator’s decision, but the court will set that decision aside only in very unusual circumstances. See, e.g., 9 U.S.C. Sec 10 (award procured by corruption, fraud, or undue means; arbitrator exceeded his powers); Wilko v. Swan, 346 U.S. 427, 436-37 (1953) (parties bound by arbitrator’s decision not in manifest disregard of the law). Williams, 197 F.3d at 757 (quoting First Options of Chicago, Inc. at 942 (noting that Wilko was overruled on other grounds by Rodriguez de Quijas v. Shearson/American Express, Inc., 490 U.S. 477 (1989)).

Before deciding whether the Fifth Circuit would recognize manifest disregard of the law as a ground for vacatur, the court acknowledged that its decision would affect the review of arbitration decisions under Title VII of the Civil Rights Act of 1964 and other federal employment rights statutes. Williams, 197

10 The Fifth Circuit, prior to Williams, had allowed at least three other non-statutory grounds for vacating an arbitration decisions. The first ground was that the decision was contrary to public policy. See Exxon Corp. v. Baton Rouge Oil and Chem. Workers, 77 F.3d 850, 853 (5th Cir. 1996); Gulf Coast Indus., Workers Union v. Exxon Co., U.S.A., 991 F.2d 244, 248-55 (5th Cir.) (citing Misco, Inc., 484 U.S. at 43. The second reason allowing vacatur was that the award was arbitrary and capricious. See Manville Forest Products Corp. v. United Paperworkers Int’l Union, 831 F.2d 72, 74 (5th Cir. 1987); Safeway Stores v. American Bakery and Confectionery Workers, Local 111, 390 F.2d 79, 82 (5th Cir. 1968). The final recognized ground for vacating the decision was if the Award failed to draw its essence from underlying contract. See Nauru Phosphate Royalties, Inc. v. Drago Daic Interests, Inc., 138 F.3d 160, 164 (5th Cir. 1998) (other citations omitted); Williams, 197 F.3d at 758.
F.3d at 758. The court then based its decision heavily upon the United States Supreme Court language in *First Options of Chicago, Inc.*. *Id.* at 759; see *First Options of Chicago, Inc.*, 514 U.S. at 942 (stating that parties would be bound by arbitrator decision if it was not in manifest disregard of the law). The Fifth Circuit found this language to be a clear approval of the manifest disregard standard in all FAA cases. *Williams*, 197 F.3d at 759.

After determining that manifest disregard was a valid standard, the court analyzed what the appropriate definition of *A* manifest disregard@would be. *Id.* at 761-62. Since the Supreme Court had not defined *A* manifest disregard, the court reviewed the vast definitions that other circuits had given the term.11 The Fifth Circuit agreed with the D.C. Circuit definition that required the manifest disregard of the law to be analyzed in two parts. *Id.* at 762. The first part of the inquiry is a determination, based upon the information presented to the reviewing court, whether it is clear that the arbitrators acted contrary to the governing law. *Id.* Only if the court finds it manifest, should it proceed to the second inquiry. The second part of the analysis is to determine if the arbitrator contrary actions resulted in significant injustice, considering all the circumstances involved of the case, including the arbitrator powers to judge norms appropriate to the parties relationships. *Id.* In applying the new standard, the Fifth Circuit found that the actions of the arbitrators were not contrary to the applicable law, and thus, upheld the arbitrators award. *Id.* at 762. Thus, the extent that this ground will assist unsatisfied participants in overturning unfavorable arbitration awards remains to be seen.

### B. Contractual Expansion of the Scope of Review

A more recent trend for dealing with the limited chance of review of arbitration decisions has been through the parties agreement for a different standard of review. Some courts have allowed parties submitting to arbitration, to expand the scope of judicial review of the decision via a contract between the parties. *First Options* has provided the language that many of the courts allowing such contractual expansions have looked to as supporting such rights. *First Options* stated that *A* basic objective in this area is not to resolve disputes in the quickest manner possible, no matter what the parties wishes, ... but to ensure that commercial arbitration agreements, like other contracts are enforced according to their terms. *First Options*, 514 U.S. at 947 (citations omitted); see also, *Mastrobuono v. Shearson Lehman Hutton, Inc.*, 514 U.S. 52, 57 (1995) (noting federal policy favors enforcement of arbitration terms agreed to by the parties).

Relying upon this philosophy, several courts, including the Fifth Circuit, have expressly authorized the arbitrating parties ability to alter the scope of review. See *New England Utils. v. Hydro-Quebec*, 10 F. Supp.2d 53, 64 (D. Mass. 1998) (restating the Supreme Court view that the objective of arbitration law is the ensure that commercial arbitration agreements, like other contracts are enforced according to their terms); *Fils et Cables d Acier de Lens v. Midland Metals Corp.*, 584 F. Supp. 240 (S.D.N.Y. 1984); *Gateway Technologies, Inc.*, 64 F.3d at 996. However, parties should be very careful to fully express their intent to change the scope of review in their contracts. See *Mantle v. Upper Deck Co.*, 956 F. Supp. 719, 726 (N.D. Tex. 1997) (ruling that the court was required to apply the default standard of review specified in the FAA since the parties did not expressly provide for expanded judicial review of an arbitration agreement). Expectedly, not all courts have been open to the idea of changing to scope of review.

Most opposed to it have based their decisions upon the loss of the advantages associated with arbitration if broader review is allowed. See *Konicki v. Oak Brook Racquet Club, Inc.*, 441 N.E.2d 1333 (Ill. App. Ct. 1982); *Chicago Typographical Union v. Chicago*
Sun-Times, Inc., 935 F.2d 1501 (7th Cir. 1991); UHC Mgt.Co., Inc. v. Computer Sciences Corp., 148 F.3d 922, 997 (8th Cir. 1998) (casting doubt over whether it would allow expanded review of arbitration awards). Thus, the availability of this procedure is limited.

C. Alternative Forms of Dispute Resolution with Broader Scope of Review

One final cure for the harshness of narrow appealability has been utilized by some states. The parties in such jurisdictions have been offered an alternative form of arbitration that includes an automatic right of appeal or a similar referral program. Texas is one state that has enacted such a program. Texas allows parties to appoint a special judge to hear the case under the substantive and procedural standards used in other civil cases. See Tex. Civ. Prac. & Rem. Code ' 151.001-151.013 (West 1999).

After a decision is given by the special judge, the decision must comply with the requirements for a verdict by the court, and the right to appeal is preserved. See id. at ' 151.011, 151.013. However, the participants do forego one benefit of arbitration by choosing this alternative, rules of procedure and evidence apply to the trial by a special judge.). See id. at ' 151.005.

V. CONCLUSION

In conclusion, arbitration can provide many benefits over litigation, but the extent of some benefits remains unclear. As discussed, the extent of confidentiality under federal law is less apparent than under Texas state law. Texas law states that communications and conduct during the arbitration is confidential, whereas, the federal law is silent on the matter outside the administrative proceeding scope. Additionally, neither state nor federal law appears to protect the arbitration award from discoverability.

One of the main complaints about arbitration is the ability to obtain judicial review of many arbitration decisions, due to the limited nature of the statutory grounds for appeal. As a result, many jurisdictions have created judicially-made grounds for review. Manifest disregard of the law is one such doctrine which just recently was adopted by the Fifth Circuit in December of 1999. Despite its adoption, the Fifth Circuit has yet to vacate a decision based upon this standard. However, the acknowledgment of the doctrine provides at least a hope of review. Additionally, the Fifth Circuit has allowed the scope of review to be broadened by the use of other tools available to participants, such as a trial by a special judge or allowing participants to enter into contracts in which they agree upon a particular scope of review.

The only severe downside to the broader scope of review appears to be a trade-off of the advantages of less time and confidentiality that are usually associated with arbitration. It is a choice that parties need to examine carefully.
A. Sample Standard AAA Arbitration Clause

Any controversy or claim arising out of or relating to this contract, or the breach thereof, shall be settled by arbitration in accordance with the [appropriate] rules of the American Arbitration Association.
B. Sample CPR Arbitration Clause

Any dispute arising out of or relating to this contract or the breach, termination or validity thereof [which has not been resolved by a non-binding procedure as provided herein within [90] days of the initiation of such procedure,] shall be settled by arbitration in accordance with the [then current] CPR Non-Administered Arbitration Rules in effect on the date of this agreement, by [a sole arbitrator] [three independent and impartial arbitrators, none of whom shall be appointed by either party]; [provided, however, that if either party will not participate in a non-binding procedure, the other may initiate arbitration before expiration of the above period.] The arbitration shall be governed by the United States Arbitration Act, 9 U.S.C. 1-16, and judgment upon the award rendered by the arbitrator(s) may be entered by any court having jurisdiction thereof. The place of arbitration shall be _______. The arbitrator(s) [are] [are not] empowered to award damages in excess of compensatory damages [and each party hereby irrevocably waives any right to recover such damages with respect to any dispute resolved by arbitration].

The statute of limitations of the State of _______ applicable to the commencement of a lawsuit shall apply to the commencement of an arbitration hereunder, except that no defenses shall be available based upon the passage of time during any negotiation or mediation called for by the preceding paragraphs.
C. Sample Clause with Forum Selection and Damage Limitations

Any controversy or claim arising out of or relating to this Agreement or the validity, inducement, or breach thereof, shall be settled by arbitration before a single arbitrator in accordance with the Commercial Arbitration Rules of the American Arbitration Association (AAA) then pertaining, except where those rules conflict with this provision, in which case this provision controls. The parties hereby consent to the jurisdiction of the Federal District Court for the ________ District of _____(state)_____ for the enforcement of these provisions and the entry of judgment on any award rendered hereunder. Should such court for any reason lack jurisdiction, any court with jurisdiction shall enforce this clause and enter judgment on any award.

The arbitrator shall be an attorney specializing in business litigation who has at least 15 years of experience with a law firm of over 25 lawyers or was a judge of a court of general jurisdiction. The arbitration shall be held in _____(location)____ and the arbitrator shall apply the substantive law of the State of ______, except that the interpretation and enforcement of this arbitration provision shall be governed by the Federal Arbitration Act. Within 30 days of initiation of arbitration, the parties shall reach agreement upon and thereafter follow procedures assuring that the arbitration will be concluded and the award rendered within no more than six months from selection of the arbitrator. Failing such agreement, the AAA will design and the parties will follow such procedures.

Each party has the right before or during the arbitration to seek and obtain from the appropriate court provisional remedies such as attachment, preliminary injunction, replevin, etc., to avoid irreparable harm, maintain the status quo or preserve the subject matter of the arbitration. THE ARBITRATOR SHALL NOT AWARD ANY PARTY PUNITIVE, EXEMPLARY OR CONSEQUENTIAL DAMAGES, AND EACH PARTY HEREBY IRREVOCABLY WAIVES ANY RIGHT TO SEEK SUCH DAMAGES.
D. Sample Clause for Two Step Dispute Resolution Process

DISPUTE RESOLUTION. Any dispute between the parties, either with respect to the interpretation of any provision of this Agreement, or with respect to performance by SELLER or BUYER under this Agreement, shall be controlled by this Section.

A. Upon the written request of either Party, each of the Parties will appoint a designated representative with corporate authority to resolve disputes, whose task it will be to meet for the purpose of endeavoring to resolve such dispute.

B. The designated representatives shall meet as often as the Parties deem reasonably necessary to gather and share information concerning the dispute.

C. Such designated representatives shall discuss the problem and negotiate in good faith in an effort to resolve the dispute without the necessity of initiating an arbitration.

D. During the course of such negotiation, all reasonable requests made by one Party to the other for non-privileged information, reasonably related to this Agreement, will be honored in order that each of the Parties may be fully advised of the other's position.

E. The specific format for such negotiations will be left to the discretion of the designated representatives, but may include the preparation of an agreed statement of facts or written statements of position furnished to the other Party.

F. Notwithstanding the provisions of this Section, at any time, either party may proceed to demand arbitration proceedings based on Section entitled "ARBITRATION."

ARBITRATION. Whenever one Party gives written notice of a demand to the other to arbitrate any dispute that arises under this Agreement, the Parties shall proceed according to the terms of this Section of the Agreement. The Parties agree to apply and abide by the American Arbitration Association Rules for Commercial Disputes and, the Texas Rules of Evidence and Procedure.

A. The arbitration dispute will not be administered by the American Arbitration Association, but rather by the Arbitration Panel which will be constituted as follows:

(1) The Arbitrator shall be a retired trial judge.

(2) The Parties agree to pre-pay the arbitrator's fees within 10 days of appointment.

B. The discovery period for any arbitration shall begin 10 business days after the demand for arbitration is made to the other Party and discovery shall conclude 30 business days later.

(1) Each Party may take a total of no more than 20 hours of depositions.

(2) Each Party shall produce all relevant documents to the other within 10 business days after demand for arbitration is made.

(3) Each Party shall produce a list of all individuals with relevant knowledge about the dispute within 10 business days after demand for arbitration is made.
C. The arbitration hearing shall take place within 60 business days after demand is made for arbitration.

   (1) The location for the arbitration hearing shall be at BUYER's offices.

   (2) The arbitration hearing shall last no more than 2 business days and all post hearing briefs shall be delivered to the Arbitrators within 7 business days following the hearing.

   (3) No hearing transcription shall be made.

D. The arbitrator shall issue an award within 10 business days following the conclusion of the arbitration hearing.

   (1) The arbitration award shall be for an amount of money only, if appropriate. The Arbitrator may not grant any equitable relief or specific performance of any terms of the Agreement.

   (2) The arbitration award shall determine which Party shall reimburse the other for the cost of the arbitration.

E. The arbitration award shall be final and not subject to appeal except in the event of fraud or misconduct of the arbitrators.

FEES AND COSTS. In any arbitration, the prevailing Party will be entitled to recover, in addition to its damages (subject to limitations stated elsewhere in this Agreement), its reasonable attorneys' fees, expert witness fees, costs of arbitration, and other ordinary and necessary costs of litigation, as determined by the court or arbitrators. Such costs include, without limitation, costs of any legal proceedings brought to enforce an arbitration award, judgment or decree.

EQUITABLE REMEDIES. Notwithstanding the provisions for arbitration in this Agreement, BUYER may proceed to the state or federal courts in Dallas County, Texas for the purpose of obtaining equitable relief, including, but not limited to Temporary Restraining Orders, Temporary Injunctions, and/or Specific Performance.

CONTINUITY DURING DISPUTE. In the event there is a dispute between BUYER and SELLER, SELLER shall continue to perform the services described in the Section entitled "DESCRIPTION OF SELLER' SERVICES."
E. CPR Sample Confidentiality Agreement

AGREEMENT made __________, 2000 between _______________ and ________________. A dispute has arisen between the parties. The parties have agreed to attempt to resolve their dispute through an alternative dispute resolution (ADR) process. The parties have chosen _______ as the Neutral to assist them in the resolution of their dispute. The parties and the Neutral wish to protect the confidentiality of the ADR process.

Accordingly, the parties and the Neutral agree as follows:

1. Compromise Negotiation

The entire ADR process (the ADR) is a compromise negotiation for purposes of the Federal Rules of Evidence and state rules of evidence.

2. Scope

All transcripts, documents, things and other information produced and the testimony given in or attendant to the ADR shall be maintained in confidence by the parties and the Neutral and shall be used only for purposes of the ADR. The parties will insure that their respective agents, employees, attorneys and experts agree in writing to be bound by the provisions of this agreement.

3. Termination

The obligations of paragraph 2 hereof shall terminate with respect to any particular portion of the confidential information (i) when a receiving party (including the Neutral) can document that such portion

(a) was in the public domain at the time of its communication thereof to such party,

(b) entered the public domain through no fault of the receiving party subsequent to the time of communication thereof,

(c) was in the receiving party’s possession free of any obligation of confidence at the time of its communication thereof,

(d) was rightfully communicated to the receiving party free of any obligation of confidence subsequent to the time it was communicated by the party to this proceeding, or

(e) was developed by employees or agents of the receiving party, either:

i. independently of and without reference to any information that was disclosed in confidence by the other party; or

ii. when it is communicated by the transmitting party to a third party free of any obligation of confidence; or,

iii. in any event, ____ years after termination of the ADR.
4. Disqualification of Neutral as Witness

The Neutral and his/her agents, employees, and experts shall be disqualified as witnesses, consultants or experts in any pending or future action relating to the subject matter of the ADR, including actions between persons not parties to the ADR.

5. Third Party Requests for Disclosure.

Whenever a party or the Neutral, or their agents, employees, experts or attorneys, is requested, pursuant to a subpoena, a request for production of documents or things, a civil investigative demand, or other legal process, to disclose to persons or entities not party to this ADR, any information regarding the process, including all offers, promises, conduct and statement, whether oral or written, or any transcripts, documents, things or testimony in the ADR, prior to responding thereto such party or Neutral shall, within five days after receipt of the request, notify the other party, or in the case of the Neutral, both parties, of the existence and terms of such request. If a response to such request is due in ten days or less, such notice shall be given within 24 hours after service of such request.

6. Return of Materials

Within 30 days after termination of the ADR, each party and the Neutral shall, at the election of the party furnishing the same, destroy or return all documents, transcripts or other things, and any copies thereof, as well as all summaries or other materials containing or disclosing information contained in, or directly related to, such documents, transcripts or things. Each party and the Neutral shall so certify under oath.

7. Survival

This confidentiality agreement shall survive the termination of the ADR, whether by breach, unilateral withdrawal, mutual agreement of the parties or settlement, subject to the provisions of paragraph 2 hereof.

8. Enforcement

The parties, the Neutral and the other participants to the ADR agree that damages are not adequate, and no adequate remedy at law exists for any threatened or actual disclosure or use of information in violation of the provisions of this confidentiality agreement. Accordingly, each consents to the entry of an injunction against threatened or actual disclosure or use of the information in violation of any provision of this agreement.
F. CPR Sample Agreement to Arbitrate Patent Dispute

1. Parties

1:1 _________ in a corporation of _____ with its principal place of business at ___________.

1:2 _________ in a corporation of _____ with its principal place of business at ___________.

2. Background

2:1 _________ alleges, and ___________ does not contest for purposes of this arbitration, that _____________ is the owner of the following United States Patents ______________.

2:2 __________ alleges that ___________ infringes some valid scope of some claim of those patents with product models as follows:

_______ model _________ as disclosed in the attached Appendix I, alleged to infringe claim ________ of patent ______________.

2:3 ___________ denies that it has infringed or is infringing any valid, enforceable scope of any of the identified patents and explicitly denies validity and enforceability of the patent.

3. Agreement to arbitrate:

3:1 The parties agree to arbitrate the issues of whether there is any enforceable, not invalid scope of the designated patent claims, and whether the above designated . . . models infringe any enforceable, not invalid scope of the designated patent claims.

3:2 [In this form we spell out nothing that is explicitly not to be arbitrated. In some contracts, however, there will be no contest about enforceability if valid, or the contest will be focused on infringement and not validity, and whatever is not to be arbitrated should be set forth explicitly in this paragraph.]

3:3 This agreement to arbitrate shall be binding and may be exercised by either party even after it may have initiated litigation involving the arbitrable subject matter, up until 120 days after the filing of both the Complaint/Petition and Answer or the settling of the case for trial on the merits, which ever is earlier upon which event the right to compel arbitration under this agreement is waived.

4. Judgment may be entered on the award

4:1 Each party agrees to abide by the award rendered in this arbitration, and agrees that a judgment of the court having jurisdiction may be entered upon the award.

5. Time and place of arbitration; personal jurisdiction of courts

5:1 The arbitration shall be held at (city)(state) and the parties consent to the personal jurisdiction of the state and federal courts there, for any cause arising out of or otherwise related to this arbitration, its conduct and its enforcement.

5:2 If the parties do not agree on the site within such city for the arbitration, the arbitrator(s) shall choose the site after receiving such advice as the parties wish to provide.

6. The arbitration shall be ad hoc, not administered
6:1 Any Rules which may be adopted notwithstanding the parties agree that the arbitration shall be ad hoc and administered solely by the arbitrator.

7. License agreements

7:1 The parties have reached agreements as to a different license agreement (copies attached as Appendix ...) each covering one patent. If the award should be that any given patent is not invalid, is enforceable and infringed, then the subject license agreement shall become effective.

8. Law applicable

8:1 The case shall be arbitrated solely under Title 35 United States Code, as interpreted by the United States Court of Appeals for the Federal Circuit, and pursuant to the Title 9, U.S.C., the Federal Arbitration Act.

9. Rules adopted

9:1 The Arbitration Rules of the Center for Public Resources, New York, NY, as they existed on the date of this contract, are adopted as the rules governing this arbitration, provided however, that no rule shall be applied in a manner inconsistent with any recitation in this agreement. A copy of those Rules is attached to Appendix ...

10. Number of arbitrators

10:1 The number of arbitrators shall be one.

11. How the arbitrators are chosen

11:1 Unless the parties agree on an individual by name, the arbitrator shall meet these qualifications:

(a) Shall be neutral, impartial, independent of the parties and others having any known interest in the outcome, shall abide by the ABA and AAA Canons of Ethics for neutral arbitrators, and shall have no ex parte communications about the case (or about the appointment of a third arbitrator, if the party-appointees are assigned that duty) or the person's view on matters of law with either party in the appointing process or otherwise during the pendency of the arbitration.

(b) Shall have a college or university degree in engineering.

(c) Shall have been a duly licensed lawyer for ten years.

(d) Shall have been admitted to practice before the Patent Office for ten years.

(e) Shall have participated actively (including witness examination) in the trial of at least eight lawsuits of some kind, at least four of which shall have been patent infringement suits.

(f) Shall have carried first chair responsibility for the trial of at least one patent infringement suit for the patentee and at least one for the accused infringer.

(g) Shall have spent more than have of his time in patent litigation work during five of the last ten years, wherein not more than 80% of his time was on either the patentee or infringer side of the docket.

(h) Shall have personally drafted and prosecuted to issue at least five patents.
(i) Shall certify that he has time to handle this arbitration expeditiously, and will give to this arbitration a priority of claim on this time to the end that it may be concluded within 270 days.

(j) Shall agree to charge fees and expenses that are reasonable under the circumstances, including no more than standard coach air fare and common or standard business travel hotel bills for his travel expenses.

(k) Shall agree that he will render his award within 30 days of the close of evidence or any post-evidence briefs or arguments that may be allowed.

11:2 If the parties fail to reach agreement on a single arbitrator by name within 45 days of the execution of this agreement, or otherwise determine to seek appointment by another.

Arbitration A: Each party shall appoint one arbitrator.

Arbitration A-1: fulfilling the above specification.

Arbitration A-2: from among the former Commissioners of Patents or patent-backgrounded past officers or Board members of the American Intellectual Property Law Association, National Council of Intellectual Property Law Associations or American Bar Section of Intellectual Property Law, or other Intellectual Property Law Association having more than 250 members and the two person so appointed shall appoint the sole arbitrator from among the persons meeting the above specifications.

Arbitration B: they shall ask the Center for Public Resources (of the ICC or American Arbitration Association) to appoint an arbitrator meeting these specifications.

Arbitration C: in accord with the AAA rules wherein the AAA provides a list of five persons to each party, the parties rank them in preference order, and the person with the highest joint ranking is the arbitrator.

12. Case management

12:1 Prompt disposal of this dispute is important to the parties; the resolution of this dispute shall be conducted expeditiously.

12:2 The arbitrator (or if there be three, the Chairman of the Arbitration Panel) is instructed, directed and commanded (redundancy for emphasis to arbitrators who tend to be procrastinators) to assume case management initiative and control of the dispute resolution process and to initiate early scheduling of all events whereby reasonably to assure disposal of this dispute as expeditiously as is practical but in all events in not over 270 days from the date his appointment is confirmed. The parties agree to be bound by his case management orders.

12:3 The arbitrator is also instructed to attend selected key depositions if any there be, so as to expedite them and to enable him to rule immediately on questions there arising and thereby to avoid delaying motion practice.

12:4 The arbitrator is empowered to proceed with any issue or hearing in the absence of a party who has been duly notified of the submission of the issue or the time and place of a hearing.

13. No reasons for the award

[Alt. A for a patent case]

13:1 The award as to each patent, shall be essentially in the form, Patent claims... invalid [or not invalid] and Infringement found. [or, Infringement not found.] There shall be no reasons for the award.
13:1 The award shall be in the nature of a naked judgment, without findings of fact, conclusions of law, opinion, or other reasons.

14. Discovery

14:1 The arbitrator [or if there be three, Chairman of the panel] shall give active, attentive case management to the scope, form, cost-effectiveness and scheduling of all discovery that may be needed in order that the lack of discovery not itself cause an injustice; but there shall be no discovery which the arbitrator does not find to be cost-effective and needed.

14:2 Subject to exceptions to be determined for good reason on timely motion, each party shall within 30 days following appointment of the arbitrator produce all nonprivileged documents in its custody or control which are not deemed irrelevant to the issues in dispute, and shall list not irrelevant documents on which privilege is claimed by date, author, addressee(s), custodian, and subjects treated. Any document categories potentially containing relevant documents but not searched for any reason (e.g., lack of cost-effectiveness), shall be identified as to location, approximate volume and why they were not searched.

14:3 The arbitrator may issue orders to protect the confidentiality of proprietary information, trade secrets and other sensitive information disclosed in discovery or the final hearing, and to protect against misuse of such information and secrets. The parties agree to abide by such orders.

15. Evidence Rules

15:1 This arbitration shall be conducted under the Federal Rules of Evidence.

16. Arbitrator jurisdiction

The arbitrator shall have jurisdiction to construe this contract and determine his own jurisdiction under it.

17. Arbitrator fees: sharing/allocation of arbitration costs and expenses

17:1 Whether by telephone or otherwise, all communications and negotiations between any party and any arbitrator with respect to fees of any arbitrator(s) and advance retainers of the arbitrator(s), shall be inter partes with the arbitrator(s) and parties represented.

17:2 The arbitrator(s) is instructed in the normal circumstance to award his costs, fees and expenses against the party losing the case. Or if there be what the arbitrator perceives to be a significantly split award he may divide his costs, fees and expenses accordingly in his sole discretion.

17:3 If as to any issue or patent-in-suit the arbitrator should determine under the applicable law that the position taken by a party is frivolous or otherwise irresponsible or that any wrong he finds was in callous disregard of law and equity or the rights of the other party, he shall also award an appropriate allocation

G. Other Sample Clauses

PROVISIONAL REMEDIES

The procedures specified in this Article ___ shall be the sole and exclusive procedures for the resolution of disputes between the parties arising out of or relating to this agreement; provided, however, that a party, without prejudice to the above procedures, may file a complaint [for statute of limitations or venue reasons,] [or to seek a preliminary injunction or other provisional judicial relief,] if in its sole judgment such action is necessary to avoid irreparable damage or to preserve the status quo. Despite such action the parties will continue to participate in good faith in the procedures specified in this Article ___.

17
TOLLING STATUTE OF LIMITATIONS

All applicable statutes of limitation and defenses based upon the passage of time shall be tolled while the procedures specified in this Article 00 are pending. The parties will take such action, if any, required to effectuate such tolling.

PERFORMANCE TO CONTINUE

Each party is required to continue to perform its obligations under this contract pending final resolution of any dispute arising out of or relating to this contract, [unless to do so would be impossible or impracticable under the circumstances].
H. Sample Arbitration Scheduling Order

H. Sample Arbitration Scheduling Order

American Arbitration Association
Claimant
v.
Respondent
Case #

SCHEDULING ORDER

Pursuant to the Commercial Arbitration Rules of the American Arbitration Association (AAA), a preliminary hearing was held on date, before Arbitrator, appearing on a telephone Hearing for the parties were the attorneys:__________.

1. MOTIONS. Claimant’s Motion to Strike Respondent’s Counterclaim for the Arbitration Hearing to consider a 1997 Agreement is granted, and the Hearing shall be limited to the 1994 Agreement between the Parties.

2. RULES. By agreement of the Parties, this Arbitration shall be controlled by the Federal Rules of Civil Procedure and Evidence, except as otherwise noted in this Order.

3. ELECTRONIC EXCHANGE. Except for marked Exhibits, all documents, pleadings, communications between the Parties and the AAA shall be communicated by electronic email, and/or disk, and/or CD, and/or other electronic media in Word, WordPerfect, HTML, and/or PDF formats.

4. DISCOVERY. In preparation for the Hearing, Discovery shall proceed on the following basis:

A. On or before April 14, 2000 the Parties shall exchange Requests for production of documents and things as Disclosures pursuant to Rule 34.

B. On or before April 24, 2000 the Parties shall exchange documents.

C. On or before July 14, 2000 the Parties shall each propound to one another Interrogatories pursuant to Rules 33.

D. On or before July 28, 2000 the Parties shall respond the Interrogatories of the other.

E. On or before August 1, 2000 the Parties shall exchange the names of expert witnesses.

F. All discovery shall end on or before August 31, 2000.

5. AMENDMENT TO PLEADINGS. The Pleadings may be amended without leave on or before July 31, 2000 to amend or specify claims, and/or counterclaims (monetary amounts) and file any motion to join additional parties.

6. PRE-HEARING MATTERS. No Later than the Hearing Exchange Date the Parties shall exchange with one another, and file with the AAA:

A. List of Hearing Exhibits by exhibit number, title, date, description, stipulations of admissibility, space for date offered, admitted, and rejected, and such other information as the Parties may find useful.

B. Stipulations of the Parties.

C. Hearing Briefs of less than 5 pages presenting issues to the Arbitrator.
D. Witness list with brief description of the subject matter of testimony, employer, and such other useful information as the Parties may wish to share with the Arbitrator.

E. "Cast of characters" that briefly describes the individuals in the case.

7. HEARING. The Hearing shall include the cases in chief and all rebuttal, and shall proceed on the following basis:

A. Be heard at the law offices of ______________ Texas, except as otherwise agreed by the Parties, at no cost to the Parties, except for out of pocket expenses that the Parties may incur.

B. The Hearing shall be held on September 18, 19, 20, and 21, 2000 unless the Parties notify the AAA on or before September 1, 2000; in which case the Hearing Exchange Date shall be September 11, 2000.

C. If the Parties notify the AAA by September 1, 2000 that the Hearing will not be held beginning on September 18, 2000, then the Hearing shall be held on October 9, 10, 11, and 12, 2000; in which case the Hearing Exchange Date shall be October 2, 2000.

D. Each day of the Hearing shall commence at 9:00 am and end at 5:00 pm.

E. Beginning the day before the Hearing at 5:00 pm, and at 5:00 pm each day of the Hearing, the Parties shall notify one another of the witnesses who may testify the following day.

D. The Parties shall share the costs of a Hearing transcript and shall agree and arrange for a Court Reporter to be present.

E. In lieu of any closing argument the Parties may file Post-Hearing Briefs based on a schedule to be Ordered at the conclusion of the Hearing.

8. POST HEARING. The parties shall file proposed Findings of Fact and Conclusions of Law based on a schedule to be Ordered at the conclusion of the Hearing.

9. AWARD. The Parties agree that the Arbitrator may file the Final Award and Findings of Fact and Conclusions of Law on or before 60 days following the final filings by the Parties.

10. COMMUNICATIONS. The Parties shall not communicate directly with the Arbitrator, and all communication shall be with the AAA.

11. OTHER MATTERS. Any matters not covered by this Order shall be presented to the Arbitrator by Motions and/or Requests for Hearing.

________________________

Arbitrator: