ARBITRATION:
IF YOU WANT IT DONE RIGHT, DO IT YOURSELF

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State Bar of Texas
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CHAPTER 21
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I. INTRODUCTION

“Increasingly, our civil disputes are submitted to the private sector rather than a judge or jury. The trend is neither intrinsically good nor bad, but there are consequences. When a case is tried in open court, rules of evidence inherited from Britain and modified by American courts dictate what facts a jury may properly consider. The proceeding is recorded, and dispositive rulings are subject to principles of error preservation. When the facts are established and the law applied, the State of Texas enforces the trial court's judgment. Journalists report the facts, editorial writers critique the law, and legislators file bills to alter future outcomes. When the facts are established and the law applied, the State of Texas enforces the trial court's judgment. Journalists report the facts, editorial writers critique the law, and legislators file bills to alter future outcomes. The proceeding is recorded, and dispositive rulings are subject to principles of error preservation. When the facts are established and the law applied, the State of Texas enforces the trial court's judgment. Journalists report the facts, editorial writers critique the law, and legislators file bills to alter future outcomes. The proceeding is recorded, and dispositive rulings are subject to principles of error preservation.

An arbitration is different. It is said to be speedier, often less costly, and overseen by experts in the relevant subject matter. But it is conducted in private. The rules of evidence do not apply. There may be no official transcript of the proceedings. The award is usually final, even when an identical judgment appealed to a state court would be reversed on procedural or substantive grounds. Courts are generally required to confirm an arbitral award because trial judges have little power to reverse it for factual insufficiency or, with certain exceptions, to prevent a miscarriage of justice.

* * *

Our system is failing if parties are compelled to arbitrate because they believe our courts do not adequately serve their needs. If litigation is leaving because lawsuits are too expensive, the bench and the bar must rethink the crippling burdens oppressive discovery imposes. If courts have yet to embrace modern case-management practices, the Legislature should ensure that the justice system has resources to improve technology and to hire qualified personnel—two sure ways to improve efficiency.

And it is unlikely, given a choice, that parties to an arbitration would choose, as their arbitrator, a person whose only qualification is the possession of a law license, and who need not have significant experience as an advocate or as a judge. They seek instead a pool of qualified professionals rather than individuals who are swept in and out of office based not on considerations of merit, but on the vagaries of partisan election…. They will, increasingly, select their own specialized tribunal and seek to retain a contractual right to meaningful appellate review in our state courts…. [W]e must, in the future, address those aspects of our justice system that compel litigants to circumvent the courts and opt for private adjudication.”

question, one looks to the contract. In re D. Wilson Const. Co., 196 S.W.3d 774 (Tex. 2006) dealt with construction contracts that referred disputes to arbitration but made no reference to either the FAA or the TAA. The contracts merely noted that they would be “governed by the law of the place where the Project is located.” Inasmuch as both state and federal law apply at Brownsville, the location of the Project, the Texas Supreme Court concluded that both acts applied and the FAA is supreme. Similarly, in Pedcor Management Co., Inc. Welfare Benefit Plan v. Nations Personnel of Texas, Inc., 343 F.3d 355 (5th Cir. 2003), the choice of law provision in reinsurance contracts stated that arbitration was to be governed by the “laws of the State of Texas” and did not specifically exclude the TAA. The contracts merely noted that they would be “governed by the law of the place where the Project is located.” Inasmuch as both state and federal law apply at Brownsville, the location of the Project, the Texas Supreme Court concluded that both acts applied and the FAA is supreme. Similarly, in Pedcor Management Co., Inc. Welfare Benefit Plan v. Nations Personnel of Texas, Inc., 343 F.3d 355 (5th Cir. 2003), the choice of law provision in reinsurance contracts stated that arbitration was to be governed by the “laws of the State of Texas” and did not specifically exclude the application of federal law. Relying upon the notion that the FAA is part of the substantive law of Texas, supra, the court held that the FAA applied and could supplant the TAA.

Conversely, specific and exclusive reference to state law is construed to invoke the TAA alone. In re Olshan Foundation Repair Co., L.L.C., 328 S.W.3d 883 (Tex. 2010) is an elaborate opinion focusing upon the difference. Olshan concerned four separate contracts for residential foundation repair services. Three of the contracts had arbitration agreements stating that disputes arising out of the contract “shall be resolved by mandatory and binding arbitration administered … pursuant to the arbitration laws in your state…” Id at 890. In contrast, one of the contracts provided that disputes “shall be resolved by mandatory and binding arbitration. … pursuant to the Texas General Arbitration Act….” This latter provision more clearly stated the preference of the parties for the state substantive law of arbitration as distinguished from federal law. “The FAA is part of the arbitration law of Texas and can be applied to arbitrations administered pursuant to the laws of Texas. However, the FAA is not part of the TAA, at least to the extent the two are in conflict.” Id. See also Texas Commerce Bank v. Universal Technical Institute of Texas, Inc., 985 S.W.2d 678 (Tex. App. – Houston [1st Dist.] 1999, pet. dism’d w.o.j.).

The Fifth Circuit has likewise interpreted an arbitration clause specifically invoking the TAA as designating the TAA to govern all aspects of arbitration under the agreement, to the exclusion of the FAA. Ford v. NYLCare Health Plans of the Gulf Coast, Inc. 141 F.3d 243, 246 (5th Cir. 1998).

In 2011, the Texas Supreme Court found itself at odds with the FAA on the question whether the parties can, by agreement, expand the scope of judicial review of arbitral awards beyond those specifically provided in the FAA and the TAA. In 2008, the U.S. Supreme Court decided in Hall Street Associates, L.L.C. v. Mattel, Inc., 552 U.S. 576, 578, 128 S.Ct. 1396, 170 L.Ed.2d 254 (2008) that an arbitration agreement allowing a court to set aside an award on the basis of an error of law was unenforceable as inconsistent with the limitations upon the scope of judicial review contained in the FAA.

Then, in NAFTA Traders, Inc. v. Quinn, 339 S.W.3d 84 (Tex. 2011), the Texas Supreme Court addressed an employee manual arbitration provision saying that the arbitrator did not have the authority to render an award that was wrong on the law. The Court focused on the power of a court to set aside an award where the arbitrator exceeds its powers pursuant to TAA §171.088(a), and held that an agreement limiting the authority of the arbitrator to awards that are free of legal error is enforceable under the TAA. This set up the conflict between the FAA and the TAA, which normally resolves in favor of the supremacy of the FAA. The Texas Supreme Court, however, is concerned about the effect encouraging parties to arbitrate has upon the growth and evolution of the law governing commercial disputes that are frequently arbitrated in private. Consequently, in NAFTA Traders, the court articulated a narrow view of FAA supremacy:

“The FAA only preempts the TAA if: (1) the agreement is in writing, (2) it involves interstate commerce, (3) it can withstand scrutiny under traditional contract defenses under state law, and (4) state law affects the enforceability of the agreement…. The mere fact that a contract affects interstate commerce, thus triggering the FAA, does not preclude enforcement under the TAA as well. For the FAA to preempt the TAA, state law must refuse to enforce an arbitration agreement that the FAA would enforce, either because (1) the TAA has expressly exempted the agreement from coverage, or (2) the TAA has imposed an enforceability requirement not found in the FAA.”

399 S.W.3d at 98 (quoting In re D. Wilson Constr. Co., 196 S.W.3d 774, 780 (Tex. 2006)).

What difference does it make? There are a number of differences between the FAA and the TAA. Some important differences are:

(a) The TAA does not apply to:

- a collective bargaining agreement between an employer and a labor union;
- an agreement for the acquisition by one or more individuals of property, services, money, or credit in which the total consideration to be furnished by the
individual is not more than $50,000, except where the parties to the agreement agree in writing to arbitrate and the agreement is signed by each party and each party’s attorney;

- a claim for personal injury, except where each party to the claim, on the advice of counsel, agrees in writing to arbitrate and the agreement is signed by each party and each party’s attorney.

(b) The TAA contains more detailed provisions prescribing the arbitration procedure. One example is a provision specifically authorizing discovery by deposition in certain instances. TEX. CIV. PRAC. & REM. CODE § 171.050.

III. PARTIES TO THE ARBITRATION: NONSIGNATORIES

A. Enforcement of Arbitration Agreements - Nonsignatories.

Arbitration is a matter of contract, and generally people who have not signed the contract cannot be compelled to arbitrate except in “rare circumstances.” In re Rubiola, 334 S.W.3d 220 (Tex. 2011) (permitting a nonsignatory the right to compel arbitration against a signatory because the contract’s definition of “party” was broad enough to encompass the nonsignatory). Nonsignatories to an arbitration agreement may be bound to adhere to an arbitration clause “when rules of law or equity would bind them to the contract generally.” In re Labatt Food Service, L.P., 279 S.W.3d 640 (Tex. 2009); In re Weekly Homes, L.P., 180 S.W.3d 127, 130 (Tex. 2005). The circumstances and “rules of law and equity” which may permit arbitration with a nonsignatory include: (1) estoppel, (2) agency, (3) alter ego, (4) assumption, (5) incorporation by reference and (6) third party beneficiary. In re Kellogg Brown & Root, Inc., 166 S.W.3d 732 (Tex. 2005); Bridas S.A.P.I.C. v. Government of Turkmenistan, 345 F.3d 347, 355-56 (5th Cir. 2003); see also In re Labatt Food Service, L.P., 279 S.W.3d 640 (Tex. 2009) (wrongful death beneficiaries held to be bound by decedent’s agreement to arbitrate); In re Kaplan Higher Ed. Corp., 235 S.W.3d 206 (Tex. 2007) (signatory plaintiff bound to arbitrate disputes with company’s nonsignatory agents and employees acting within the scope of employment because claims against the employees are “in substance” claims against the company); In re Kellogg Brown & Root, 166 S.W.3d 732, 739 (Tex. 2005) (nonsignatories may be bound to an arbitration agreement under “direct benefits estoppel); In re FirstMerit Bank, N.A., 52 S.W.3d 749, 753-54 (Tex. 2001) (nonsignatory that sues based on a contract is subject to all the contract’s terms, including the arbitration agreement); Roe v. Ladymon, 318 S.W.3d 502, 516 (Tex. App. – Dallas 2010, no pet.) (individual signing for entity not bound by arbitration agreement for claims against him individually because an agent contracting for a disclosed principal is not individually liable on the contract); see also In re Vesta Ins. Group, Inc., 192 S.W.3d 759, 762-63 (Tex. 2006) (signatory cannot escape arbitration simply because he files a tortious interference claim against non-signatory officers and agents of the other signing party – “When contracting parties agree to arbitrate all disputes … they generally intend to include disputes about their agents’ actions because ‘as a general rule, the actions of a corporate agent on behalf of the corporation are deemed to corporations’ acts.”).

B. Who Decides?

Absent a clear agreement to arbitrate the dispute, whether the arbitration agreement binds a person who did not sign the contract is a “gateway” matter to be determined by the Court. In re Weekly Homes, L.P., 180 S.W.3d 127, 130 (Tex. 2005); Roe v. Ladymon, 318 S.W.3d 502, 515 (Tex. App. – Dallas 2010, no pet.) (a contract signed in a representative, not individual, capacity was not a clear agreement by the individual to arbitrate so the court, not the arbitrator, had to decide the issue) (citing Howsam v. Dean Witter Reynolds, Inc., 537 U.S. 79, 83, 123 S.Ct. 588, 154 L.Ed.2d 491 (2002)).

C. What Law Applies?

The Texas Supreme Court has stated that, given the uncertainty about whether federal or state law governs the question of whether a nonsignatory is bound by an arbitration agreement, “we have determined to apply state substantive law and endeavor to keep it consistent with federal law.” In re Labatt Food Serv., L.P., 279 S.W.3d 640, 643 (Tex. 2009) (citing In re Weekley Homes, 180 S.W.3d 127, 130-31 (Tex. 2005)).

D. When can Nonsignatories be Compelled to Arbitrate Claims?

The linchpin issue is “whether the party resisting arbitration is a signatory or not.” DK Joint Venture I v. Weyand, 649 F.3d 310 (5th Cir. 2011). Where nonsignatories seek to compel resistant signatory defendants to arbitrate their claims, arbitration has been compelled. For instance, in LDF Const., Inc. v. Bryan, 324 S.W.3d 137 (Tex. App. – Waco 2010, no pet.), an orthodontist filed suit against his builder, architect and interior designer relating to defective construction of his dental office. The contracts with the builder and designer contained arbitration clauses, but the architect contract did not. All the defendants filed
motions to compel arbitration. In determining that the architect (the nonsignatory) could compel arbitration against the signatory owner based upon principles of equitable estoppel, the Court observed: “In this instance, the claims against [the architect] are so intertwined and interdependent with the claims against [the builder and designer], both of which have arbitration provisions in their contracts with [the owner], that it would be impractical to resolve the disputes against them in arbitration without simultaneously resolving the claims against [the architect].” See also In re Rubiola, 334 S.W.3d 220 (Tex. 2011) (permitting a nonsignatory to compel arbitration against a signatory because the contract’s definition of “party” was broad enough to encompass the nonsignatory); Grigson v. Creative Artists Agency, 210 F.3d 524, 528 (5th Cir. 2000) (equitable estoppel allows a nonsignatory to compel arbitration against a resisting signatory); In re Vesta Ins. Group, Inc., 192 S.W.3d 759, 762-63 (Tex. 2006) (signatory plaintiff resisting arbitration against nonsignatory compelled to arbitrate); McMillan v. Computer Translation Sys. & Support, Inc., 66 S.W.3d 477 (Tex. App. – Dallas 2001, no pet.) (plaintiff signatory compelled to arbitrate claims against nonsignatories). But see In re Merrill Lynch Trust Co. FSB, 235 S.W.3d 185 (Tex. 2007) (resisting signatory not compelled to arbitration with nonsignatory).

It is much more difficult for a signatory to compel a resisting nonsignatory to arbitrate claims. Moses H. Cone Memorial Hosp. v. Mercury Construction Corp., 460 U.S. 1, 103 S.Ct. 927, 74 L.Ed.2d 765 (1983) (requiring arbitration of the dispute with a signatory contractor but not with a nonsignatory architect); In re Kaplan Higher Ed. Corp., 235 S.W.3d 206 (Tex. 2007) (“interdependent and concerted misconduct” by separate, albeit affiliated, entities is not a basis to compel nonsignatories to arbitration); Roe v. Ladymon, 318 S.W.3d at 520-21 (recognizing that it is easier for a nonsignatory to compel a signatory to arbitrate than visa-versa); Bridas S.A.P.I.C. v. Government of Turkmenistan, 345 F.3d 347, 355-56 (5th Cir. 2003) (rejecting application of estoppel asserted by signatory to require nonsignatory to arbitrate claims asserted by signatory); In re Kellogg Brown & Root, Inc., 166 S.W.3d 732, 741 (Tex. 2005) (denying arbitration by signatory against nonsignatory because nonsignatory received no “direct benefits” under the contract containing the arbitration provision: “a non-signatory should be compelled to arbitrate a claim only if it seeks, through the claim, to derive direct benefit from the contract containing the arbitration provision.”); DK Joint Venture 1 v. Weyand, 649 F.3d 310 (5th Cir. 2011) (resisting nonsignatory officers not bound to arbitration agreement under general principles of contract and agency); Covington v. Aban Offshore Lmtd., 650 F.3d 556 (5th Cir. 2011) (same). But see In re Weekley Homes, L.P., 180 S.W.3d 127 (Tex. 2005) (resisting nonsignatory compelled to arbitrate claims since she was seeking to enforce rights and benefits under the same contract).

IV. PROCEDURAL RULES – SPECIFIED BY THE PARTIES; DETERMINED BY THE ARBITRATORS

Arbitration is a matter of consent, and the parties are generally free to structure their arbitration agreements as they see fit, including specification of the rules under which the arbitration will be conducted. J.D. Edwards World Solutions Co. v. Estes, Inc., 91 S.W.3d 836 (Tex. App. – Fort Worth 2002, pet. denied). The choice of particular arbitration rules by the parties in an agreement to arbitrate binds the parties to the provisions of those rules. In re Neutral Posture, Inc., 135 S.W.3d 725 (Tex. App. – Houston [1st Dist.] 2003, no pet.)

Austin Commercial Contractors, L.P. v. Carter & Burgess, Inc., 347 S.W.3d 897 (Tex. App. – Dallas 2011, no pet.) involved a contract for the construction of a new building at the Los Alamos National Laboratory in New Mexico. The contract contained a provision submitting disputes to arbitration before the Civilian Board of Contract Appeals (“CBCA”). On a motion to compel arbitration, the trial court ordered the parties to arbitration before the American Arbitration Association. This was found to be error for which there was no adequate remedy by appeal. “Parties may specify by contract the rules under which their arbitration will be conducted, and enforcing those rules according to the terms of the agreement is fully consistent with the goals of the FAA.” Id. at 901. Having contracted for arbitration before the CBCA, a party cannot be compelled to accept another agency.

In Crossmark, Inc. v. Hazar, 124 S.W.3d 422 (Tex. App. – Dallas 2004, pet. denied), the court rejected an argument that the arbitrators failed to join an indispensable party pursuant to TEX. R. CIV. P. 39. The Texas Rules of Civil Procedure do not apply in arbitration proceedings unless they are specified in the arbitration agreement.

Also, it is the arbitrators who determine the rules in effect to govern the arbitration proceeding. In re Wood, 140 S.W.3d 367 (Tex. 2004) (the arbitrators, not the court, decide class certification issues). The court must give substantial deference to the arbitral tribunal’s application of its own rules of procedure. Roehrs v. FSI Holdings, Inc., 246 S.W.3d 796 (Tex. App. – Dallas 2008, pet. denied).
V. DISCOVERY

A. Pre-arbitration

Texas law permits arbitration-related discovery before the arbitration begins generally in three circumstances: (1) to perpetuate testimony needed in the arbitration; (2) to insure that the arbitration is organized and conducted according to the arbitration agreement: and (3) to resolve fact issues regarding the existence or scope of the arbitration agreement in determining whether to compel the arbitration proceeding.

Statutory authorization for pre-arbitration discovery is found in TEX. CIV. PRAC. & REM. CODE §171.086, which provides:

(a) Before arbitration proceedings begin, in support of arbitration a party may file an application for a court order, including an order to:

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(4) obtain from the court in its discretion an order for a deposition for discovery, perpetuation of testimony, or evidence needed before the arbitration proceedings begin;

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(6) obtain other relief, which the court can grant in its discretion, needed to permit the arbitration to be conducted in an orderly manner and to prevent improper interference or delay of the arbitration.

Pre-arbitration discovery is expressly authorized under the Texas Arbitration Act when a trial court cannot fairly and properly make its decision on the motion to compel because it lacks sufficient information regarding the scope of an arbitration provision or other issues of arbitrability. TEX. CIV. PRAC. & REM. CODE §171.086(a)(4),(6). This, however, is not an authorization to order discovery as to the merits of the underlying controversy. Motions to compel arbitration and any reasonably needed discovery should be resolved without delay. In re Houston Pipe Line Co., 311 S.W.3d 449 (Tex. 2009). In this suit alleging natural gas price manipulation, the trial court ordered discovery to determine additional defendants, whether the plaintiff’s claims fell within the scope of the arbitration clause and if the time limitations imposed by the arbitration clause were jurisdictional. Recognizing the statutory authorization for pre-arbitration discovery, the Supreme Court nevertheless held the discovery order in question was too broad and encroached on the merits of the case as distinguished from the arbitrability. Although the court directed that the trial court vacate the present discovery order, it reiterated that the trial court retained jurisdiction to order limited discovery on issues of scope or arbitrability.

Parties having the power to make a contract have the power to modify their contract, including the power to agree upon certain discovery to take place before a hearing on a motion to compel arbitration. In re F.C. Holdings, Inc., 349 S.W.3d 811 (Tex. App. – Tyler 2011, mand. den.). It is the duty of the court to enforce such agreements before determining the motion to compel arbitration. Nevertheless, the power of the court, either by statute or by agreement, to order discovery does not exist once the arbitration has commenced. The arbitration begins when the arbitrators are appointed. Once appointed, discovery is a matter for the arbitrators and a court discovery order after the arbitrators have been appointed is improper. Transwestern Pipeline Co. v. Blackburn, 831 S.W.2d 72 (Tex. App. – Amarillo 1992, no writ).

Also, there is a fairly bright line between discovery regarding defenses related directly to the arbitration agreement and defenses related more generally to the contract containing the arbitration agreement. Whether a party has repudiated a contract is a question for the arbitrators to decide once the arbitration has convened. Decisions regarding discovery on that issue are reserved to the arbitrators. Mewbourne Oil Co. v. Blackburn, 793 S.W.2d 735 (Tex. App. – Amarillo 1990, mand. overruled). In this situation, a court’s authority is limited to making discovery decisions pertaining to whether the agreement to arbitrate is valid. Once that is resolved and the arbitration is convened, the court’s authority ceases.

B. During the Arbitration

 Arbitrators have almost unbridled discretion regarding discovery once the arbitration commences. Perry Homes v. Cull, 258 S.W.3d 580 (Tex. 2008). Typically, the scope and limits of discovery are addressed during the initial meeting or conference between the panel and parties and then memorialized in a Scheduling Order.

Discovery practices typically balance the desire for information against the overriding objectives of speed, efficiency and cost effectiveness. These practices are prescribed, in greater or lesser degrees, in rules published by the various agencies that promote arbitration. For example, in the AAA Commercial Arbitration Rules, discovery, called “Exchange of Information,” is governed by R-21 which provides:

(a) At the request of any party or at the discretion of the arbitrator, consistent with the expedited nature of arbitration, the arbitrator may direct
i) the production of documents and other information, and
ii) the identification of any witnesses to be called.

(b) At least five business days prior to the hearing, the parties shall exchange copies of all exhibits they intend to submit at the hearing.

(c) The arbitrator is authorized to resolve any disputes concerning the exchange of information.

The AAA Procedures for Large, Complex Commercial Disputes addresses discovery in certain of its rules including portions of L-4 as follows:

(b) Parties shall cooperate in the exchange of documents, exhibits and information within such party's control if the arbitrator(s) consider such production to be consistent with the goal of achieving a just, speedy and cost-effective resolution of a Large, Complex Commercial Case.

(c) The parties may conduct such discovery as may be agreed to by all the parties provided, however, that the arbitrator(s) may place such limitations on the conduct of such discovery as the arbitrator(s) shall deem appropriate. If the parties cannot agree on production of documents and other information, the arbitrator(s), consistent with the expedited nature of arbitration, may establish the extent of the discovery.

(d) At the discretion of the arbitrator(s), upon good cause shown and consistent with the expedited nature of arbitration, the arbitrator(s) may order depositions of, or the propounding of interrogatories to, such persons who may possess information determined by the arbitrator(s) to be necessary to determination of the matter.

(e) The parties shall exchange copies of all exhibits they intend to submit at the hearing 10 business days prior to the hearing unless the arbitrator(s) determine otherwise.

(f) The exchange of information pursuant to this rule, as agreed by the parties and/or directed by the arbitrator(s), shall be included within the Scheduling and Procedure Order.

(g) The arbitrator is authorized to resolve any disputes concerning the exchange of information.


(a) The Parties shall cooperate in good faith in the voluntary and informal exchange of all non-privileged documents and other information (including electronically stored information (“ESI”)) relevant to the dispute or claim immediately after commencement of the Arbitration. They shall complete an initial exchange of all relevant, non-privileged documents, including, without limitation, copies of all documents in their possession or control on which they rely in support of their positions, and names of individuals whom they may call as witnesses at the Arbitration Hearing, within twenty-one (21) calendar days after all pleadings or notices of claims have been received. The Arbitrator may modify these obligations at the Preliminary Conference.

(b) Each Party may take one deposition of an opposing Party or of one individual under the control of the opposing Party. The Parties shall attempt to agree on the time, location and duration of the deposition. If the Parties do not agree, these issues shall be determined by the Arbitrator. The necessity of additional depositions shall be determined by the Arbitrator based upon the reasonable need for the requested information, the availability of other discovery options and the burdensomeness of the request on the opposing Parties and the witness.

(c) As they become aware of new documents or information, including experts who may be called upon to testify, all Parties continue to be obligated to provide relevant, non-privileged documents to supplement their identification of witnesses and experts and to honor any informal agreements or understandings between the Parties regarding documents or information to be exchanged. Documents that were not previously exchanged, or witnesses and experts that were not previously identified, may not be considered by the Arbitrator at the Hearing, unless agreed by the Parties or upon a showing of good cause.

(d) The Parties shall promptly notify JAMS when a dispute exists regarding discovery issues. A conference shall be arranged with the Arbitrator, either by telephone or in person, and the Arbitrator shall decide the dispute. With the written consent of all Parties, and in accordance with an agreed written procedure, the Arbitrator may appoint a special master to assist in resolving a discovery dispute.

The Texas Arbitration Act specifically authorizes depositions for stated purposes:
(a) The arbitrators may authorize a deposition:

(1) for use as evidence to be taken of a witness who cannot be required by subpoena to appear before the arbitrators or who is unable to attend the hearing; or

(2) for discovery or evidentiary purposes to be taken of an adverse witness.

(b) A deposition under this section shall be taken in the manner provided by law for a deposition in a civil action pending in a district court.

**TEX. CIV. PRAC. & REM. CODE §171.050.**

In self-administered arbitrations not burdened by prescribed rules outside the language of the arbitration agreement itself, arbitrators typically exercise their broad discretionary discovery powers in line with administered arbitrations keeping in mind the need for flexibility, the amount in controversy, and the necessity to minimize costs and burdens while ensuring a just result. The courts follow the agreement and rules prescribed for the arbitration to determine the scope and limits of discovery. *Structured Capital Resources Corp. v. Arctic Cold Storage, LLCC, 237 S.W.3d 890* (Tex. App. – Tyler 2007, no pet.); *Lennox-Investment Corp. v. Bank America, N.A., 2002 WL 979563* (Tex. App. – Dallas 2002, no pet.).

**VI. EVIDENCE DURING AND AFTER THE HEARING**

Although generally based upon arbitrator discretion, the nature, type and amount of evidence to be taken in arbitration proceeding varies according to the rules selected to apply. It is important to select carefully from among the many sets available. The parties can even agree to apply rules they make up themselves, or rules and procedures adopted by the arbitrators. Arbitration always depends upon the agreement of the parties.

American Arbitration Association rules are very permissive for evidence adduced at the arbitration hearing:

(a) The parties may offer such evidence as is relevant and material to the dispute and shall produce such evidence as the arbitrator may deem necessary to an understanding and determination of the dispute. Conformity to legal rules of evidence shall not be necessary. All evidence shall be taken in the presence of all of the arbitrators and all of the parties, except where any of the parties is absent, in default or has waived the right to be present.

(b) The arbitrator shall determine the admissibility, relevance, and materiality of the evidence offered and may exclude evidence deemed by the arbitrator to be cumulative or irrelevant.

(c) The arbitrator shall take into account applicable principles of legal privilege, such as those involving the confidentiality of communications between a lawyer and client.”

American Arbitration Association Commercial Arbitration Rules and Mediation Procedures, Rule 31 (June 1, 2009).

The AAA also authorizes evidence after the hearing:

“If the parties agree or the arbitrator directs that documents or other evidence be submitted to the arbitrator after the hearing, the documents or other evidence shall be filed with the AAA for transmission to the arbitrator. All parties shall be afforded an opportunity to examine and respond to such documents or other evidence.”

American Arbitration Association Commercial Arbitration Rules and Mediation Procedures, Rule 32(b) (June 1, 2009).

Rules from Judicial Arbitration & Mediation Services (JAMS) are similar:

“If the parties agree or the arbitrator directs that documents or other evidence be submitted to the arbitrator after the hearing, the documents or other evidence shall be filed with the AAA for transmission to the arbitrator. All parties shall be afforded an opportunity to examine and respond to such documents or other evidence.”

JAMS Comprehensive Arbitration Rules & Procedures, Rule 22(d) (October 1, 2010).

The International Institute for Conflict Prevention and Resolution (CPR) has published a specific set of rules for non-administered arbitration:
12.1 The Tribunal shall determine the manner in which the parties shall present their cases. Unless otherwise determined by the Tribunal or agreed by the parties, the presentation of a party’s case shall include the submission of a pre-hearing memorandum including the following elements:

a. A statement of facts;
b. A statement of each claim being asserted;
c. A statement of the applicable law and authorities upon which the party relies;
d. A statement of the relief requested, including the basis for any damages claimed; and
e. A statement of the nature and manner of presentation of the evidence, including the name, capacity and subject of testimony of any witnesses to be called and an estimate of the amount of time required for each witness’s direct testimony.

12.2 If either party so requests or the Tribunal so directs, a hearing shall be held for the presentation of evidence and oral argument. Testimony may be presented in written and/or oral form as the Tribunal may determine is appropriate. The Tribunal is not required to apply the rules of evidence used in judicial proceedings, provided, however, that the Tribunal shall apply the lawyer-client privilege and the work product immunity. The Tribunal shall determine the applicability of any privilege or immunity and the admissibility, relevance, materiality and weight of the evidence offered.

12.3 The Tribunal, in its discretion, may require the parties to produce evidence in addition to that initially offered. It may also appoint neutral experts whose testimony shall be subject to cross-examination and rebuttal.

12.4 The Tribunal shall determine the manner in which witnesses are to be examined. The Tribunal shall have the right to exclude witnesses from hearings during the testimony of other witnesses.

Both the Federal Arbitration Act and the Texas Arbitration Act provide grounds for vacating an award based upon the failure of the arbitrators to hear evidence material to the controversy. 9 U.S.C.A. §10(a)(3) (2002); TEX. CIV. PRAC. & REM. CODE §171.088(a)(3)(C). However, the courts defer to the arbitrators to decide the rules of evidence and procedure. Consequently, decisions overturning an award based on failure to consider evidence correctly are exceedingly rare.

An arbitrator is not bound to hear all of the evidence tendered by the parties as long as he gives each of the parties an adequate opportunity to present their evidence and arguments. Kosty v. South Shore Harbour Community Ass’n, Inc., 226 S.W.3d 459 (Tex. App. – Houston [1st Dist. 2006, pet. denied]). A party is not entitled to insist upon a particular sequence of evidence, and the award is not reversible simply because the arbitrator declined to hear particular evidence. Fogal v. Stature Const., Inc., 294 S.W.3d 708, 720 (Tex. App. – Houston [1st Dist.] 2009, pet. denied). When courts consider vacating an award, the normal standard for review – whether the failure to consider certain evidence probably caused the rendition of an improper judgment – does not apply. Instead, the test is whether the error so adversely affected the rights of the complaining party that it could be said that the party was denied a fair hearing. Babcock & Wilcox Co. v. PMAC, Ltd. 863 S.W.2d 225 (Tex. App. – Houston [14th Dist.] 1993, writ denied); Forsythe Intern., S.A. v. Gibbs Oil Co. of Texas, 915 F.2d 1017 (5th Cir. 1990). The rules of civil procedure and evidence, absent a provision in the arbitration agreement, do not apply in arbitration proceedings. Crossmark, Inc. v. Hazar, 124 S.W.3d 422 (Tex. App. – Dallas 2004, pet. denied).

An argument that the arbitrator based its decision only upon certain evidence is the same as an argument that the evidence is insufficient to support the arbitration award, which is not a proper ground for a court to vacate the award. Cooper v. Bushong, 10 S.W.3d 20 (Tex. App. – Austin 1999, pet. denied).

In IPCO-G.&C. Joint Venture v. A.B. Chance Co., 65 S.W.3d 252 (Tex. App. – Houston [1st Dist] 2001, pet. denied), the arbitrator’s decision not to allow a contractor to present further evidence regarding possible causes of pipelines' floating to canal surfaces, in an action against manufacturer of pipeline anchor systems, was not sufficient to vacate the arbitration award. The arbitration agreement gave the arbitrator broad discretion in determining whether evidence was relevant to the dispute.

Johnson v. Korn, 117 S.W.2d 514, 521 (Tex. Civ. App. – El Paso 1938, writ ref’d.) was an arbitration to
fix rentals due under theatre leases. It was said that the arbitrators had considered a particular comparable offer without considering the financial standing of the offeror, the cost of construction, and other improper comparables. The court held, “[i]t was not stipulated in the contract that the arbitrators should follow legal rules of procedure. Therefore, the courts have no jurisdiction to set aside the award upon technical grounds, or upon the ground that evidence was received that might not be admissible in a court of justice if proper objections were made. [Citation]…. The parties selected the court to try these issues. The possibility of an erroneous award was a risk assumed. All assignments of error attacking the award upon this and similar grounds and challenging the action of the court in excluding testimony of the character mentioned are overruled.”

VII. CLASS ARBITRATION – WHO DECIDES WHAT AND WHY?

In 2003, the U.S. Supreme Court addressed class arbitrations in *Green Tree Fin. Co. v. Bazzle*, 539 U.S. 444, 123 S.Ct. 2402, 2407, 156 L.Ed.2d 414 (2003) (plurality opinion). Two groups of homeowners sued a lender. Their contracts provided that all disputes relating to the contract would be resolved by binding arbitration and included an FAA choice-of-law provision. A state trial court certified one class, ordering it to arbitration; another state trial court ordered the second case to arbitration, where the arbitrator certified a class. The South Carolina Supreme Court consolidated the appeals and held that the contracts authorized class arbitration. *Bazzle v. Green Tree Fin. Corp.*, 351 S.C. 244, 569 S.E.2d 349, 354 (2002). The U.S. Supreme Court did not decide whether the contract authorized class arbitration. Instead, the Court held that, as a question of contract interpretation, the issue of class arbitrability had been committed to the arbitrator. “[T]he dispute about what the arbitration contract in each case means (i.e., whether it forbids the use of class arbitration procedures) is a dispute ‘relating to this contract’.…. [T]he parties seem to have agreed that an arbitrator, not a judge, would answer the relevant question.” The Supreme Court remanded the case so that the arbitrator could decide the class issue. Where parties agreed to submit all disputes to an arbitrator under the Federal Arbitration Act, issues of class arbitration are for the arbitrator to decide.

The Texas Supreme Court followed a year later. *In re Wood*, 140 S.W.3d 367 (Tex. 2004). A lawyer’s former clients in breast implant litigation brought a class action to challenge a 1.5% deduction from settlement proceeds to cover common expenses. The trial court ordered arbitration and authorized the arbitrator to decide the class action issue. The court of appeals directed the trial court to vacate the second order and to determine whether the parties’ agreement permitted class arbitration and, if so, whether to certify the class. The Texas Supreme Court reversed, holding that the issue whether the arbitration agreement permits class arbitration is for the arbitrators to decide and the court of appeals abused its discretion by directing the trial court to decide it. The arbitrator determines the rules in effect governing the arbitration. This includes the authority to determine the rules governing class arbitration.

In *Pedcor Management Co., Inc. Welfare Benefit Plan v. Nations Personnel of Texas, Inc.*, 343 F.3d 355 (5th Cir. 2003), the Fifth Circuit also held that it is for the arbitrators and not the courts to decide whether class arbitrations are permitted in the arbitration agreement. *Pedcor Management* concerned separate reinsurance contracts covering 408 employee benefit plans. The arbitration provision of each contract required that (1) “any dispute between the parties hereto in connection with the Agreement” be submitted to arbitration; and (2) “[a]rbitration shall be governed by the laws of the State of Texas.” There was no express provision regarding consolidation or class treatment of claims in arbitration. The district court entered an order certifying a class for arbitration of the proceedings. The Court of Appeals vacated that order, holding that the agreement to submit to arbitration “any dispute between the parties hereto” was a broad grant of authority for the arbitrators to determine the issues in the case, including whether class arbitration was permitted.

These cases seemed to establish the authority of the arbitrator to determine whether the arbitration agreement permits class arbitration and the procedures to administer it. Taking it a step farther, the U.S. District Court in *Trumper v. Travelers Indem. Co.*, 2006 WL 6553086 (S.D. Tex. 2006) proposed a broad platform for class arbitrations, holding that a class arbitration is permissible whenever the arbitration agreement does not expressly prohibit it. In this case, the arbitration agreement contained no provision authorizing class arbitration. The court observed, however, that the Federal Arbitration Act and the decisions construing it are the substantive law of Texas. *Capital Income Props.—LXXX vv. Blackmon*, 843 S.W.2d 22, 23 (Tex. 1992). Under *Pedcor Mgmt. Co.*, 343 F.3d at 360, one looks to see whether the arbitration agreement “clearly forbid[s] class arbitration,” not whether it expressly permits it. Also, *Green Tree* holds that the decision whether the contract permits arbitration is to be made by the arbitrators. 539 U.S. at 451-2.

By 2010, however, the U.S. Supreme Court backtracked, holding that a party cannot be compelled to participate in a class action without his agreement, and
a contract that refers all disputes to arbitration cannot be interpreted to imply a license to conduct a class action. *Stolt-Nielsen S.A. v. AnimalFeeds International Corp.*, ___ U.S. ___, 130 S.Ct. 1758, 176 L.Ed.2d 605 (2010) concerned arbitration of anti-trust claims brought by customers of shipping companies. The arbitration clause was silent as to class arbitration. The parties agreed to submit the question whether their arbitration agreement allowed for class arbitration to a panel of arbitrators, which held that class arbitration was permitted. However, rather than grounding its decision in the contract, the panel relied upon policy determinations as to the most feasible remedy. This practice exceeded the authority of the tribunal which was limited to an interpretation of the contract before it. Arbitration grows out of an agreement and a party may not be compelled to submit to class arbitration unless there is a contractual basis for concluding that the party agreed to do so. It may be appropriate to presume that parties to an arbitration agreement implicitly authorize the arbitrator to adopt those procedures necessary to give effect to the parties’ agreement. *Howsam v. Dean Witter Reynolds, Inc.*, 537 U.S. 79, 84, 123 S.Ct. 588, 154 L.Ed.2d 491 (2002). However, an agreement to authorize class action arbitration is not a term that the arbitrator may infer solely from an agreement to arbitrate disputes. 130 S.Ct. at 1776.

The reverse fact pattern occurred in *NCP Finance Ltd. Partnership v. Escatiola*, 350 S.W.3d 152 (Tex. App. – San Antonio 2011, no pet.). This consumer loan arbitration agreement expressly prohibited class arbitration. The agreement also provided, “Any dispute about the validity, effect or enforceability of the prohibitions against class proceedings … shall be resolved by a court and not by an arbitrator or arbitration administrator.” Based on this provision, the San Antonio Court of Appeals distinguished *In re Wood*, which did not concern a contract referring the class decision to the court rather than an arbitrator. The court relied upon *Stolt-Nielsen’s* conclusion that a party cannot be compelled to submit to class arbitration absent its express consent. Accordingly, the Court reversed the trial court’s order denying the defendant’s motion to compel individual arbitration proceedings.

We can say that it is normally for the arbitrators to interpret the agreement between the parties, including the decision whether the contract authorizes class arbitration. However, there must be some contractual basis for the view that the parties intended to permit class arbitration. Such intent may not be presumed from a contract that is silent because a party may not be compelled to arbitrate a class action unless it has consented to do so.

VIII. **UNCONSCIONABILITY.**

A. Overview.

Arbitration agreements, like contracts generally, are invalid and unenforceable if they are unconscionable, procured by fraud or contravene public policy. Under Texas law, unconscionability includes two aspects: (1) procedural unconscionability, which focuses on the circumstances surrounding the adoption of the arbitration provision; and (2) substantive unconscionability, which focuses on the terms of the arbitration provision itself. *In re Media Arts Group, Inc.*, 116 S.W.3d 900, 910 (Tex. App. – Houston [14th Dist.] 2003, orig. proceeding).

Substantive unconscionability deals with the overall fairness of the arbitration provision. *In re Halliburton Co.*, 80 S.W.3d 566, 571 (Tex. 2002). If, considering a variety of factors having to do with commercial oppression and unfair surprise, a contract is found to be grossly one-sided, it will be held unconscionable. 2 Dobbs, LAW OF REMEDIES 703, 706 (2nd ed. 1993); RESTATEMENT (SECOND) OF CONTRACTS §208, CMT. A (1979) (“The determination that a contract or term is or is not unconscionable is made in the light of its setting, purpose, and effect. Relevant factors include weaknesses in the contracting process like those involved in more specific rules as to contractual capacity, fraud, and other invalidating causes; the policy also overlaps with rules which render particular bargains or terms unenforceable on grounds of public policy.”). If, given the parties’ general commercial background and the commercial needs of the particular trade or case, the clause involved is so one-sided as to be unconscionable under the circumstances existing at the time the contract was made, the provision is unenforceable. *In re FirstMerit Bank, N.A.*, 52 S.W.3d 749, 757 (Tex. 2001). Whether a contract is unconscionable at the time it was formed is a question of law. *HooverSlovacek LLP v. Walton*, 206 S.W.3d 557, 562 (Tex. 2006).

B. Consideration.

Texas law does not require that an arbitration agreement be supported by separate consideration attributable specifically to that agreement. *Emerald Tex., Inc. v. Peel*, 920 S.W.2d 398, 402 (Tex. App. – Houston [1st Dist.] 1996, no writ); *In re FirstMerit Bank, N.A.*, 52 S.W.3d 749, 757-58 (Tex. 2001). (“[A]n arbitration clause does not require mutuality of obligation, so long as the underlying contract is supported by adequate consideration.”). Reciprocal promises to arbitrate are sufficient consideration for the arbitration agreement. *In re Odyssey Healthcare, Inc.*, 310 S.W.3d 419 (Tex. 2010)(Per Curiam) (Mutual promises to submit all employment disputes to arbitration is sufficient consideration for such
agreements); J.M. Davidson, Inc. v. Webster, 128 S.W.3d 223, 228 (Tex. 2003); In re Palm Harbor Homes, Inc., 195 S.W.3d 672, 676-77 (Tex. 2006) (orig. proceeding); Abdel Hakim Labidi, M.D., Ph.D v. Sydow, 287 S.W.3d 922, 927 (Tex. App. – Houston [14th Dist.] 2009, no pet.).

C. Attempts to Limit Relief.

Arbitration clauses sometimes seek to limit the relief that a party may seek. In re Poly-America, L.P., 262 S.W.3d 337 (Tex. 2008) was a retaliatory discharge case in which the employee sought exemplary damages under the Workers’ Compensation Act, claiming that he had been discharged for filing a workers’ compensation claim. The employee had signed an agreement to arbitrate employment disputes that prohibited claims for exemplary damages. The Workers’ Compensation Act allows punitive damages as part of the legislative policy to deter retaliatory employment actions. The employee had signed an agreement to arbitrate employment disputes that prohibited claims for exemplary damages. The Workers’ Compensation Act allows punitive damages as part of the legislative policy to deter retaliatory termination. TEX. LAB. CODE §451.002; Azar Nut Co. v. Caille, 734 S.W.2d 667 (Tex. 1987). Permitting an employer to contractually absolve itself of this statutory remedy would undermine the purpose of the anti-retaliation provisions and should not be enforceable. Arbitration agreements covering statutory claims are valid so long as the arbitration agreement does not waive the substantive rights and remedies the statute affords and the arbitration procedures are fair, such that the employee may effectively vindicate his statutory rights. In re Halliburton Co., 80 S.W.3d 566, 572 (Tex. 2002).

Federal courts, analyzing the enforceability of arbitration provisions relating to federal statutory claims, have noted that such contracts are not enforceable when a party is forced to “forgo the substantive rights afforded by the statute,” as opposed to merely “submit[ting] to resolution in an arbitral, rather than a judicial, forum.” Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc., 473 U.S. 614, 628, 105 S.Ct. 3346, 87 L.Ed2d 444 (1985).

D. Arbitration Fees and Costs

Arbitration involves expenses that don’t appear in litigation. The most common are the fees of the arbitrators, fees and costs of administering agencies and costs of the facilities for the arbitration hearing. One or more of the parties may not be able to front these costs and the amount in controversy may not be enough to attract a contingent fee engagement. Examples are arbitrations of employment, home construction, and franchise disputes. Costs and fees may deter parties from engaging in arbitration. Conversely, because of the propensity of the courts to prefer arbitration, a party may find itself forced into arbitration without the means to afford it. Arbitration is intended to provide a means to resolve disputes at lower cost. Where this imperative is vanquished by excessive arbitration costs, at least to the extent that they become prohibitive, an agreement to arbitrate may be unconscionable. Green Tree Fin. Corp. – Ala. V. Randolph, 531 U.S. 79, 90, 121 S.Ct. 513, 148 L.Ed.2d 373 (2000); In re Poly-America, L.P., 262 S.W.3d at 355-57.

Arbitration agreements attempt to address the cost imbalance by fee splitting provisions. For example, In re Poly-America, L.P., 262 S.W.3d 337 (Tex. 2008) concerned an agreement that split all fees related to the arbitration including mediation fees, arbitrators’ fees, location expenses and court reporter fees. However, the employee’s contribution was capped at an amount equal to the gross compensation earned by the employee in the highest earning month during the twelve months prior to the issuance of the arbitral award. Id. at 353. Also, in In re Halliburton Co., 80 S.W.3d 566, 572 (Tex. 2002), the company agreed to pay all the expenses of the arbitration except a $50 filing fee, and allowed its employees up to $2,500 to consult an attorney. In addition, any arbitrator could award reasonable attorney’s fees to an employee receiving a favorable award regardless of whether attorney’s fees would have been available in court. Id. at 572.

Courts easily hold fee-splitting provisions that operate to prohibit a party from fully and effectively vindicating its rights unconscionable and unenforceable. See, Poly-America, 262 S.W.3d at 356; Halliburton, 80 S.W.3d at 572. The majority of courts, however, are not willing to sustain a challenge to arbitration on this basis without an evidentiary showing to sustain it.

“We do not doubt that arbitration costs might be so high in a given case as to preclude access to the forum. But ‘the “risk” that [a claimant] will be saddled with prohibitive costs is too speculative to justify the invalidation of an arbitration agreement.’ [Citation]. [The employee] has not demonstrated that the ability to pursue his claim in the arbitral forum hinges upon his payment of the estimated costs; to the contrary, depending upon the circumstances, [he] may not have to bear any cost at all, and Poly-America has presented some evidence that the capped cost-splitting arrangement may even benefit [him].”

Poly-America, L.P., 262 S.W. 3d at 356.

Basing the fee-splitting determination on an evidentiary showing also moves the courts away from finding that the arbitration agreement is unconscionable per se. Instead, courts are likely to
leave it to the arbitrators to decide whether the costs of the arbitration operate to hinder effective protection of a party’s rights and to adjust the costs appropriately. Haliburton, 80 S.W.3d at 572; Poly America, L.P. 262 S.W.3d at 357. See also In re U.S. Home Corp., 236 S.W.2d 761, 764 (Tex. 2007); In re FirstMerit Bank, N.A. 52 S.W.3d 749, 756-57 (Tex. 2001).

E. Discovery Limitations

In re Poly-America, L.P. was the Supreme Court’s first opportunity to consider discovery limitations in arbitration agreements. The agreement in that case limited the parties to 25 interrogatories, 25 requests for production, 1 six-hour deposition, no requests for admissions, a ban on inquiry into Poly-America’s finances, and a confidentiality provision covering the parties and their attorneys regarding all aspects of the arbitration.

Like fee-splitting provisions, discovery limitations can be overcome where adequate evidence is presented that a party’s ability to fairly present its claims in the arbitral forum is impaired. See Hulett v. Capitol Auto Group, Inc., 2007 WL 3232283, at *4 – 5 (D. Or. 2007) (restrictions on discovery that serve to unreasonably withhold information that should be available in discovery, thus hindering the presentation of claims); Ostroff v. Alterra Healthcare Corp., 433 F.Supp.2d 538, 547 (E.D.Pa. 2006). Each case is evaluated on its own merits and evidence must be presented to show that the complaining party is denied a fair opportunity to present its claims. Gilmer v. Interstate/Johnson Lane Corp., 500 U.S. 20, 31, 111 S.Ct. 1647, 114 L.Ed 2d 26 (1991); In re Cotton Yarn Antitrust Litig., 505 F.3d 274, 286-87 (4th Cir. 2007); Amisil Holdings, Ltd. v. Clarium Capital Mgmt., 2007 WL 2768995, at 4 (N.D. Cal. 2007).

The Supreme Court also found danger in speculation early in the life of the dispute about the practical impact of particular discovery limitations upon the presentation of the case:

“We agree that if the discovery limitations the arbitration agreement imposes operate to prevent effective presentation of Luna's claim they would be unenforceable. But at this point in the proceedings, without knowing what the particular claims and defenses—and the evidence needed to prove them—will be, discerning the discovery limitations potential preclusive effect is largely speculative. The assessment of particular discovery needs in a given case and, in turn, the enforceability of limitations thereon, is a determination we believe best suited to the arbitrator as the case unfolds.”

Poly-America, L.P., 262 S.W.3d at 358.

F. Severability

An unconscionable provision of a contract may be severed so long as it does not constitute the essential purpose of the agreement. Williams v. Williams, 569 S.W.2d 867, 871 (Tex. 1978); RESTATEMENT (SECOND) OF CONTRACTS § 208 (1981). Whether or not the invalidity of a particular provision affects the rest of the contract depends upon whether the remaining provisions are independent or mutually dependent promises, which courts determine by looking to the language of the contract itself. John R. Ray & Sons, Inc. v. Stroman, 923 S.W.2d 80, 86 (Tex. App. – Houston [14th Dist.] 1996, writ denied). The principal question is whether or not parties would have entered into the agreement absent the unenforceable provisions. Patrizi v. McNinch, 153 Tex. 389, 269 S.W.2d 343, 348 (1954); City of Beaumont v. Int’l Ass’n of Firefighters, Local Union No. 399, 241 S.W.3d 208, 215 (Tex. App. – Beaumont 2007, no pet). Where a feature of an arbitration clause is only a part of the various reciprocal promises in the agreement and does not constitute the main or essential purpose of the agreement, the offending feature will be severable. Either the arbitration can proceed without the offending provision or the arbitral tribunal can cure it during the arbitration. Williams, 569 S.W.2d at 871.

IX. JUDICIAL REVIEW

The United States Supreme Court famously held in Hall Street Associates, L.L.C. v. Mattel, Inc., 552 U.S. 576, 578, 128 S.Ct. 1396, 170 L.Ed.2d 254 (2008) that the grounds for vacating or modifying an arbitration award under the Federal Arbitration Act are exclusive and cannot be supplemented by contract. Mattel and a former landlord agreed to arbitrate the landlord’s claim for clean-up costs at the lease site. The arbitration agreement required the court to vacate, modify, or correct any award if the arbitrator’s conclusions of law were erroneous. The arbitrator decided for Mattel but the award was vacated for legal error. On remand, the arbitrator ruled for Hall Street. The Supreme Court held that the previous award favoring Mattel was improperly reviewed for error of law because the grounds for review of an award under the FAA are limited to those specified in §§ 10 and 11, and cannot be expanded by agreement of the parties.

In 2011, the Texas Supreme Court addressed a similar question in NAFTA Traders, Inc. v. Quinn, 339 S.W.3d 84 (Tex. 2011). Margaret Quinn alleged that her reduction-in-force discharge from Nafra Traders, Inc. resulted from sex discrimination. The Nafra Traders employee handbook provided for arbitration of disputes and said:
“The arbitrator does not have authority (i) to render a decision which contains a reversible error of state or federal law, or (ii) apply a cause of action or remedy not expressly provided for under existing state or federal law.”

NAFTA Traders, 339 S.W.2d at 88. The agreement required that the arbitration be conducted by the AAA in Dallas, Texas, but there was no choice of law provision. In a lengthy opinion, the Texas Supreme Court declined to follow the Hall Street reasoning. Instead, the court focused on TEX. CIV. PRAC. & REM. CODE §171.088(a)(3)(A), which requires a court to vacate an award if the arbitrators exceeded their powers. Since under the Nafta Traders employee handbook, the arbitrator did not have authority to render a decision that was wrong on the law, the Supreme Court held that a review of the award for legal error was not inconsistent with the Texas Arbitration Act. Accordingly, under the TAA, the parties may, by agreement, expand the scope of judicial review of arbitral awards.

X. TOWARDS A BETTER ARBITRATION

To be successful, arbitration requires (1) good arbitrators; and (2) competent arbitration counsel. Arbitration is different from litigation. It does not work well if it is approached like litigation. Arbitration requires specialized negotiation skills as well as advocacy. A strength of arbitration is the ability of the parties, with the guidance of the arbitrators, to control every phase of the process. If properly done, arbitration is quicker, cheaper and more likely to produce an acceptable result than litigation.

Although there are a number of agencies offering administrative services and panels of arbitrators for a fee, arbitration can also be self-administered. Self-administered arbitration avoids unnecessary agency fees and administrative expenses, which can be significant, and it also eliminates the middle-man whose participation often complicates and delays scheduling and execution.

Arbitrators should be persons experienced in the subject matter of the dispute. One of the major advantages of arbitration lies in the focus and attention skilled arbitrators can bring to the matter, generally far in excess of the capacity of a busy trial judge. Presiding or neutral arbitrators should be attorneys, former judges, or other professionals experienced in conducting hearings, ruling on evidence, etc. Selecting arbitrators from the canned list of an arbitration agency can produce unsatisfactory results. Similarly, allowing an arbitration agency or provider to select the arbitrators is not the best method. Counsel should do their own thorough investigation of potential arbitrators and select only those who most likely have the time and the work ethic to perform capably, impartially and professionally. This is not hard. There are many capable people who work in arbitration either part-time or full-time.

Good arbitration results from careful planning and recognition that efficiency and cost-effectiveness are necessary ingredients. A good Case Management Order (“CMO”) is the key. A self-administered CMO should contain at least the following elements:

1. The CMO should be prepared in consultation among counsel for the parties and the arbitrators, focused on the major issues in controversy and the actual need of the parties for pre-hearing discovery, interim orders, etc. The CMO should provide for every phase of the arbitration from beginning to end. The parties should be required to commit to timely execution of the CMO and it should be clearly understood, and set out in writing, that deadlines are firm and must be kept absent agreement of the parties or a showing of compelling need.

2. The CMO should require detailed, complete, non-argumentative statements of claims and defenses to be submitted as early as possible. Comprehensive and plainly crafted pleadings that completely summarize the positions of the parties clarify the issues and eliminate unnecessary discovery. They force counsel to think through and organize the positions of fact and law, clearly and completely. They also make it easier for the arbitrators to understand the case and to be more effective in conducting the arbitration.

3. The CMO should include a complete discovery plan, setting out the times by which major events will be accomplished. Counsel should be prepared to discuss candidly the sources, type and quantities of information that pertain to the contested issues and to identify the persons with knowledge of relevant facts. Each party should bear the burden to demonstrate the need for oral depositions. The number and duration of depositions should be prescribed and limited as much as possible.

4. The CMO should address electronic discovery and data management. The parties should identify the sources and types of documentary material bearing on the issues in the case. The parties should be required to produce immediately all documents intended to be offered as evidence and to supplement on a rolling basis. An electronic document
search, retrieval and production protocol should be implemented. The CMO should contain agreed limits on the scope of electronic discovery, the search protocols, number of custodians, etc.

5. The CMO should provide an efficient means to identify and rule upon claims of privilege during discovery.

6. The CMO should state the manner of service of papers among the parties. Service by email should be permitted in addition to electronic document transfer and regular mail. Consideration should be given to posting documents on a website in appropriate cases.

7. The CMO should prescribe common third-party vendors, such as court reporters, imaging and document management services, etc. whenever possible to avoid unnecessary duplication and to minimize expenses.

8. The CMO should address the need and manner of acquisition of expert testimony, particularly the desirability of retaining one or more common expert witnesses.

9. The CMO should prescribe the types, content and limitations upon prehearing briefs and other papers to be submitted to the arbitrators. A preliminary schedule of motions for interim relief, dispositive motions, and pretrial briefs should be developed.

10. The CMO should provide for regular status conferences with the arbitrators to monitor the proceeding, to insure that it is kept on schedule and to address problems quickly as they arise.

11. The CMO should prescribe the times and procedures for any evidentiary hearings.

12. The CMO should specify the type of award to be rendered and the time period within which it will be completed.

13. The CMO should prescribe the time by which the arbitration should be completed, at least as an inspirational goal.

During the course of the arbitration, counsel should communicate periodically about the progress of the arbitration and to resolve disagreements as they arise. The job of counsel is to prevail for their clients if possible. The job also includes awareness that the client’s interest is best served if the matter is handled efficiently and cost-effectively. Counsel should be cooperative with each other at all times and avoid unnecessary posturing, pettiness and adversity.
APPENDIX A
Self-Administered Arbitration Agreement

Any claim or controversy arising out of or relating to this Agreement, the breach of this Agreement, or the commercial or economic relationship of the Parties to this Agreement will be settled by arbitration according to the procedures described in this Section, and a judgment may be entered upon the award rendered by the arbitrator(s) in any court of proper jurisdiction.

[A dispute has arisen between ____________________ and ____________________ (collectively the “Parties”). The subject of the dispute is________________________________.]

The Parties agree to submit the dispute to arbitration according to the procedures described in this Agreement. A judgment may be entered upon the award rendered by the arbitrator(s) in any court of proper jurisdiction.]

Commencement of the Arbitration. A Party may begin arbitration by serving the other party with a written notice to commence arbitration by certified mail or electronic document transfer at the addresses set forth below. The written notice will provide a brief statement of the nature and subject of the claim, the amount of damages claimed, or the type of non-monetary relief sought.

Arbitrators. If a dispute involves an amount in controversy less than $100,000.00, there shall be one arbitrator. If a dispute involves an amount in controversy equal to or greater than $100,000.00 or a request for non-monetary relief, there shall be three arbitrators. A single arbitrator will be selected by agreement of the Parties, or if no agreement is reached by application to a court of competent jurisdiction. When three arbitrators are indicated, each Party will designate its party-appointed arbitrator in a writing to be served upon the other Party within fifteen days after service of the notice to commence the arbitration. The party-appointed arbitrators will select the third arbitrator within ten days after the appointment of the last party-appointed arbitrator. Each party-appointed arbitrator must be experienced in the subject matter of the dispute and must be fully active in his or her profession or occupation. The third arbitrator must be a lawyer experienced in arbitrating disputes and shall act as chair of the panel. Each arbitrator will disclose any actual or apparent conflicts of interest or other circumstances reasonably believed to affect the arbitrator’s impartiality within ten days of selection. A challenge to a party-appointed arbitrator will be determined by the third arbitrator. A challenge to the third arbitrator will be determined by the party-appointed arbitrators and if they cannot agree the third arbitrator will be disqualified. If a challenge to a party-appointed arbitrator is sustained, a replacement will be selected by the Party that appointed the challenged arbitrator. If a challenge to the third arbitrator is sustained, a replacement will be selected by the party-appointed arbitrators. Prior to the selection of the third arbitrator, the party-appointed arbitrators may communicate with the selecting Party regarding the general subject of the dispute and selection of the third arbitrator. The third arbitrator shall be a neutral arbitrator at all times. After the third arbitrator is selected, all arbitrators will be neutral and will have no ex parte communications with any Party regarding the arbitration proceeding or the subject of the arbitration. The arbitrators will be fully compensated in accordance with their normal hourly or per diem rates for all time spent by them in connection with the arbitration proceeding. All costs of the arbitration will be shared equally among the Parties and will be paid not less than quarterly. Administration of fees, costs and related matters will be undertaken by the third arbitrator.

Location of the Arbitration. The arbitration will be conducted in the city of ________ or such other location as the Parties may agree.

Governing Law. The arbitration will be governed by the Texas Arbitration Act, Chapter 171 of the Texas Civil Practice and Remedies Code. Discovery and other procedural matters may generally follow
Arbitration: If You Want It Done Right, Do It Yourself

Chapter 21

the Texas Rules of Civil Procedure; provided, however, that the Parties will be free to agree upon, and the arbitrators will be free to prescribe such discovery and other procedures as shall facilitate the fair, impartial and expeditious completion of the arbitration and strict compliance with the Texas Rules of Civil Procedure will not be required.

**Preliminary Hearing.** Within 20 days after all three arbitrators have been appointed, an initial meeting among the arbitrators and counsel for the parties shall be held for the purpose of preparing a plan for the management of the arbitration. The management plan will be memorialized in an appropriate order. The plan and order may address any appropriate subject, including but not necessarily limited to the following:

(a) Specification of the issues to be decided;

(b) Filing of detailed statements of claim and defense and prehearing and other memoranda.

(c) Timetable for the conduct of the arbitration.

(d) The scope, timing and types of discovery, if any;

(e) Exchange of documents and other evidence related to the claims and defenses;

(f) Inspection of premises or other subjects of the dispute;

(g) Schedule and location of hearings;

(h) Authentication of documents and other evidence;

(i) The extent to which expert testimony will be required, utilization of neutral experts, and efficient management of expert witnesses;

(j) Any other matters that promote the efficient, expeditious and cost-effective management of the proceeding.

**Discovery.** The arbitral tribunal shall permit and facilitate such discovery as it determines to be appropriate, taking into account the needs of the parties and the desirability of making discovery expeditious and cost-effective. Discovery may include oral depositions upon a showing of a substantial, demonstrated need. The tribunal may issue orders to protect the confidentiality of trade secrets and other confidential or proprietary information disclosed in discovery.

**Addresses for Service and Notice.** The notice to commence arbitration and all other notices related to the arbitration will be served upon the Parties by regular mail, email, or electronic document transfer at the addresses set forth below:

____________________________  _____________________________  
____________________________  _____________________________

**Service of Communications.** After designation of the arbitrators, all papers, documents, and written communications will be served by the Parties directly upon each other and the arbitrators simultaneously.

**Time Limits and Schedules.** The proceedings will be conducted in an expeditious manner and, to the extent possible, with a view to having the final award rendered within six months after the selection of
arbitrators has been completed. The tribunal may impose time limits it considers reasonable on each phase of the proceeding, including without limitation the time allotted to each party for presentation of its case and for rebuttal.

**Evidentiary Proceedings.** Evidentiary hearings will be conducted with reference to the Texas Rules of Evidence; provided, however, that the arbitral tribunal will have broad discretion in the admission and consideration of evidence and no evidentiary ruling of the tribunal may constitute grounds for setting aside the arbitration award except upon a showing of clear error and substantial harm. The tribunal will actively manage the proceeding as it deems best in order to make it fair, expeditious, economical and less burdensome and adversarial than litigation. The tribunal may limit the presentation time allotted to each Party and it may exclude testimony and other evidence that it deems irrelevant, cumulative or inadmissible.

**Transcripts.** There shall be a stenographic transcript of the proceedings the cost of which will be borne equally by the parties pending the final award.

**Self-Authentication of Documents.** All documents that a party proposes to offer in evidence shall be considered authentic unless specifically objected to by the opposing Party stating the grounds for the objection.

**Neutral Experts.** Whenever expert testimony is required, the arbitral tribunal shall freely use its power to designate a neutral expert or experts in consultation with the Parties and shall explore with the Parties whether the retention of one or more neutral experts may obviate the need for expert testimony proffered by the Parties.

**Interest, Attorney’s Fees, Exemplary Damages.** The arbitral tribunal may grant pre-award and post-award interest at commercial rates existing during the relevant period of time. The tribunal may also award all or part of a Party’s reasonable attorney’s fees, taking into account the final result of the arbitration, the conduct of the Parties and their counsel during the course of the arbitration and other factors that the tribunal may deem to be relevant. The tribunal may not award exemplary damages except upon a showing by clear and convincing evidence that the offending conduct was committed deliberately with the subjective intent of causing substantial and irreparable harm.

**Draft of Proposed Award.** Unless otherwise agreed by the Parties, the arbitrators will prepare a reasoned award. Prior to rendering a final award, the tribunal will submit to the Parties an unsigned draft of the proposed award. Within 15 days after receipt of the draft, each Party may submit to the tribunal and serve upon the other Party a written statement asserting that the proposed award contains errors of fact, law, computation, or other errors. The tribunal may in its discretion disregard the written statement of a Party perceived in substance to be merely an application for re-argument. Within 20 days after receipt of such Party statements, the tribunal shall issue its final award. The decision of the tribunal shall be by a majority of the arbitrators.

Agreed this ______ day of ________________________.
APPENDIX B

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ARBITRATION MANAGEMENT ORDER

A conference was held on _____________, 20__ before Arbitrators ____________________, ____________________, ____________________. Appearing at the hearing were _________________, representing ________________ (“Claimant”), and ______________________, representing ______________________ (“Respondent”).

By Agreement of the parties and Order of the Arbitrators, the following is now in effect:

**Statements of Claim and Response:** The Claimant will submit a detailed statement of claims by _______________. The Respondent will submit a detailed response by _______________. If the response includes counterclaims, the Claimant will respond to the counterclaims by _______________. Each party stating a claim for affirmative relief (damages or equitable relief) shall separately identify each element of damages sought and the approximate amount thereof or, in the case of a demand for equitable relief, the specific relief requested.

**Issues for Discovery:** The parties will identify the issues for discovery by general topic area by _______________.

**Exchange of Documents:** Each party will exchange initial document requests by _______________ with reasonable subsequent discovery requests permitted based upon information developed during the discovery period. Each party will provide written responses to discovery requests within 21 days. Each party will commence the production of (or make available for inspection, when appropriate) any requested documents in their possession within 30 days from receipt of the requests. After the parties have attempted to resolve any objections, the requesting party may seek a ruling from the Arbitrators as to whether the requested documents should be produced. The request must be specific as to the documents sought. Each party will complete production of the requested documents in their possession no later than _______________, except insofar as the parties are obligated to supplement the production.

**Depositions:** Each party may take ________ depositions of adverse parties and persons who cannot be present at the evidentiary hearing.

**Site Inspection:** Claimant will make the site available to the parties for inspection upon reasonable request.

**Witness List:** Each party shall separately list those persons who may be called by that party to testify during the proceedings, either live or by deposition, except for witnesses who may be called in rebuttal.

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1 Adapted in part from AAA Report of Preliminary Hearing and Scheduling Order.
The list should be divided between those who may be called solely as “fact witnesses” and those who may be called as expert witnesses. For each listed expert witness the witness’ area of expertise should be identified. A summary of facts to be presented by each fact witness shall follow each listed fact witness and a summary of expert opinions shall follow each expert witness listed. Except upon showing good cause, a party will not be permitted to call a witness who is not listed by that party. Witness lists should be exchanged between the parties and delivered to the Arbitrators by ________________.

**Exhibit List:** Each party should separately list, by number and description, each exhibit that may be offered into evidence by that party, except those exhibits used solely for impeachment. Except upon showing good cause, exhibits that are not listed will not be admitted. All exhibits should be pre-marked, exchanged between the parties and delivered to the Arbitrators by ________________. Listed exhibits must be in existence, and must be available for inspection by the opposing party upon request. All exhibits on an exhibit list shall be considered authentic unless specifically objected to by a party.

**Opening statement and closing argument:** There will be an opening statement and closing argument at the hearing. Each party will be allowed _____ minutes for opening statement and _______ minutes for closing argument.

**Communications with the Arbitrators:** There will be no substantive *ex-parte* communications with the Arbitrators. If either party desires to convene a conference with the Arbitrators, that party shall submit a written request to the Arbitrators, by email or electronic document transfer, and provide a copy to the other party by the same means. Any and all documents to be filed with or submitted to the Arbitrators outside the hearing shall be transmitted to the Arbitrators by email, mail or electronic document transfer, and copies shall be delivered to the other party by the same means.

**Evidentiary Hearing:** An evidentiary hearing in this matter will commence before the Arbitrators at a place to be determined on ______________ at _:00 a.m. The parties estimate that this case will require _____ days of hearing time, inclusive of arguments.

**Prehearing briefs:** On or before ______________ each party shall submit to the Arbitrators and the other party a prehearing brief on all significant disputed issues, setting forth briefly the party’s position and the supporting arguments and authorities. On or before ______________, each party may submit a response to the other party’s prehearing brief. Both the prehearing brief and the response shall each be no more than ________ pages long.

**Form of Award:** The Arbitrators shall prepare a reasoned award.

**Court Reporter:** All evidentiary hearings shall be reported by a certified court reporter.

**Pre-hearing Conference Calls:** Pre-hearing conference calls shall be held on ______________ and ______________ unless cancelled by mutual agreement of the parties.

**Discovery Period:** Discovery shall begin on ______________ and shall close on ________________

**Rules Governing Arbitration:** This Arbitration will proceed generally according to the Texas Rules of Civil Procedure; provided that the Arbitrators shall have broad discretion to vary from such rules or to establish other procedures in order to effect an arbitration that is efficient, fair to all parties, and cost effective.

**Deadlines:** All deadlines stated herein will be strictly enforced. No deadline for action by a party shall be exceeded except with the permission of the Arbitrators, good cause having been shown.
Amendment: This order shall continue in effect unless and until amended by subsequent written order of the Arbitrators.

Dated: _____________________

__________________________________
Arbitrator’s Signature

AGREED:

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