

Alternative Dispute Resolution: Pros and Cons

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I. Binding Arbitration

In avoiding the filing of a lawsuit, arbitration is the primary avenue of alternative dispute resolution. Courts have readily allowed arbitration of virtually all non-criminal aspects of litigation. For example:

Securities and Exchange Act of 1934: (*Scherk v. Alberto-Culver Co.*, 417 U.S. 506, 510, 510-11 (1974).

State statutes: *Doctor's Assoc., Inc. v. Casarotto*, 517 U.S. 681, 686-89 (1996).

Antitrust laws: *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614, 640 (1985). *But see id.* at 666 (Stevens, J., dissenting)(“Consideration of a fully developed record by a jury, instructed in the law by a federal judge, and subject to appellate review, is a surer guide to the competitive character of a commercial practice than the practically unreviewable judgment of a private arbitrator.”).

RICO: *Shearson/Am. Express, Inc. v. McMahon*, 482 U.S. 220, 239 (1987).

Securities Act of 1933: *Rodriguez de Quijas v. Shearson/A. Express, Inc.*, 490 U.S. 477, 479-83 (1989)(affirming, over the dissent of Justice Stevens, Brennan, Marshall and Blackmun, the enforcement of an arbitration clause in a case arising under the Securities Exchange Act of 1933 and 1934). The Court expressly overruled *Wilko v. Swan*, 436 U.S. 427 (1953) pointing to a shift in judicial attitudes tending to favor arbitration clauses as a necessary and beneficial alternative to litigation.

Age discrimination: *Gilmer v. Interstate/Johnson Lane Corp.*, 500 U.S. 20, 26 (1991).

Truth in Lending Act and Equal Credit Opportunity Act: *Green Tree Fin. Corp. v. Randolph*, 531 U.S. 79, 90-91 (2000).

All employment laws: *Circuit City Stores, Inc. v. Adams*, 532 U.S. 105, 121-124 (2001)(applying preemptive power of the FAA to state employment statute). The attorneys general from twenty-one states submitted amicus briefs complaining that

allowing such encroachment by the FAA into state employment law would upset the balance of the federal-state system. *Id.* at 121. The Court was not convinced. *Id.* at 124.

All consumer laws: *Green Tree Fin. Corp. v Bazzle*, 539 U.S. 444, 452-53 (2003).

Royal Furgeson, *Civil Jury trials R.I.P? Can it actually happen in America?*, 40 ST. MARY'S L.J. 795, 864-65 (2009).

II. Reasons Not to Agree to Binding Arbitration

A. Limited ability to object to the arbitrator

Positive Software sued New Century in arbitration before the American Arbitration Association for patent infringement. Positive Software lost the arbitration and conducted an investigation of the arbitrator and learned that he previously acted as co-counsel with New Century's attorney's firm in a patent infringement case. The district court vacated the arbitration award for failure to disclose "a significant prior relationship with New Century's counsel," thus creating an appearance of impartiality. *Positive Software Solutions, Inc. v. New Century Mortgage Corp.*, 337 F. Supp. 2d 862, 856 (N.D. Tex. 2004). A panel of the 5th circuit agreed. *Positive Software Solutions, Inc. v. New Century Mortgage Corp.*, 436 F.3d 495, 504 (5th Cir. 2006).

The 5th Circuit en banc reversed and held that requiring vacature in this circumstance would "rob arbitration of one of its most attractive features.... Arbitration would lose the benefit of specialized knowledge, because the best lawyers and professionals, who normally have the longest lists of potential connections to disclose, have no need to risk blemishes on their reputations from post-arbitration lawsuits attacking them on bias." *Positive Software Solutions, Inc. v. New Century Mortgage Corp.*, 469 F.3d 278, 285-86 (5th Cir. 2007).

The dissent says the majority ignores Supreme Court precedent requiring vacature for failure to disclose such a relationship. The dissent, in looking at the "pluses" and "minuses" of arbitrations, states:

These "pluses," however, are not without offsetting "minuses." The informalities attendant on proceedings in arbitration come at the cost of the protections automatically afforded to parties in court, which reside in such venerable institutions as the rules of evidence and civil procedure. Likewise sacrificed at the altar of quick and economical finality is virtually the entire system of appellate review, as largely embodied for the federal courts in rules of appellate procedure and the constantly

growing body of trial, appellate, and Supreme Court precedent interpreting and applying such rules. By dispensing with such basic standards of review as clearly erroneous, *de novo*, and abuse of discretion, there remain to parties in arbitration only the narrowest of appellate recourse.

Id. at 292. The dissent then outlines all of the disclosures and protections afforded litigants as it relates to judges, then states:

Consequently, except for such background checks that the parties might be able to conduct, the only shield available to the parties against favoritism, prejudice, and bias is full and frank disclosure, “up front,” by each potential arbitrator. And even that is far less efficacious than the safeguards that are afforded to parties in litigation through the elaborate rules of professional conduct, disqualification, and recusal, and the body of law and procedure thereon developed in the crucible of the very formal and extensive judicial system.

Id.

B. Because you lose the full benefits of the rules of procedure/evidence

The rules of civil procedure and evidence provide a level certainly and protection which can be relied upon and benefit a litigant.

There are no real rules of procedure for mediators. Typically, arbitration rules provide lip service to a modicum of procedural and evidentiary protections but, just as typically, allow the arbitrator to mold the rules “as necessary.” You are at their mercy.

JAMS Comprehensive Arbitration Rules & Procedures: Rule 11. Interpretation of Rules

(a) Once appointed, the Arbitrator shall resolve disputes about the interpretation and applicability of these Rules and conduct of the Arbitration Hearing.

The resolution of the issue by the Arbitrator shall be final.

...

- (d) Disputes concerning the appointment of the Arbitrator shall be resolved by JAMS.
- (e) The Arbitrator may upon a showing of good cause or *sua sponte*, when necessary to facilitate the Arbitration, extend any deadlines established in these Rules....

JAMS Comprehensive Arbitration Rules & Procedures.

JAMS Recommended Arbitration Discovery Protocols For Domestic, Commercial Cases: The Key Element — Good Judgment of the Arbitrator

- JAMS arbitrators understand that while some commercial arbitrations may have similarities, for the most part each case involves unique facts and circumstances. As a result, JAMS arbitrators adapt arbitration discovery to meet the unique characteristics of the particular case, understanding that there is no set of objective rules which, if followed, would result in one "correct" approach for all commercial cases.
- JAMS appreciates that the experience, talent and preferences brought to arbitration will vary with the arbitrator. It follows that the framework of arbitration discovery will always be based on the judgment of the arbitrator, brought to bear in the context of variables such as the applicable rules, the custom and practice for arbitrations in the industry in, and the expectations and preferences of the parties and their counsel.

JAMS Recommended Arbitration Discovery Protocols for Domestic Commercial Cases.

**London Court of International Arbitration
("LCIA") Rules:**

Article 14.1. ...[T]he Arbitral Tribunal's general duties at all time ... (ii) to adopt procedures suitable to the circumstances of the arbitration.

Article 22. Additional Powers of Arbitral Tribunal: permits arbitrators to (a) allow changes to complaints at any time (or not), (b) conduct the arbitration in a fashion which extends or abbreviates the time otherwise set forth in the rules or to conduct the arbitration on its "own orders," (c) take the initiative in establishing the issues and pertinent facts, (d) order any property or thing subject to inspection, (e) order any party to produce any documents in its possession or control, (f) **whether to apply rules of evidence or not....**

London Court of International Arbitration Rules (emphasis added)

C. Because you may lose the full benefits of *Daubert* and *Robinson*

Mediators are less likely to follow the strictures of these case law protections and there is little you can do about it if they do not.

Daubert v. Merrell Dow Pharms., Inc., 509 U.S. 579 (1993)(the trial court "must ensure that any and all scientific testimony or evidence admitted is not only relevant, but reliable").

E.I. du Pont de Nemours & Co. v. Robinson, 923 S.W.2d 549 (Tex. 1995)(an expert's testimony must be based upon a reliable foundation and be relevant).

Kumho Tire Co. v. Carmichael, 526 U.S. 137 (1999). The court must determine, pursuant to Federal Rule of Evidence 702, whether the expert opinion is "scientifically valid," based on factors

such as: (1) whether the theory or technique has been subjected to peer review and publication; (2) the known or potential rate of error of the technique; and (3) whether the theory or technique is “generally accepted” in the scientific community.

Use of experts in summary judgment practice requires meeting these standards for experts through summary judgment evidence. Many *Daubert/Robinson* battles are causation battles fought at the summary judgment stage. They are a unique mixture of trial and summary judgment practice. Generally, the defendant does one of two things: (1) moves for summary judgment on the grounds that its own expert testimony conclusively disproves causation and the plaintiff's expert testimony does not raise a fact issue on causation because he or she does not pass the *Daubert/Robinson* test; or more simply, (2) moves for summary judgment on the grounds that there is no evidence of causation because the plaintiff's causation expert testimony does not pass *Daubert/Robinson*. If the movant objects to expert evidence relied upon by the nonmovant based on reliability, the evidence must be both admissible and legally sufficient to withstand a no-evidence challenge. Judge David Hittner and Lynne Liberato, *Summary Judgments in Texas: State and Federal Practice*, 46 HOUS. L. REV. 1379 (2010).

The ability to successfully attack expert testimony impacts all but the most routine cases. For example, see:

Maxine D. Goodman, *Slipping Through the Gate: Trusting Daubert and Trial Procedures to Reveal the ‘Pseudo-Historian’ Expert Witnesses and to Enable the Reliable Historian Expert Witness -- Troubling Lessons from Holocaust – Related Trials*, 60 BAYLOR L. REV. (2008).

Kevin W. Murphy, *Closing Argument: Addressing Damages in Aviation Wrongful Death Cases*, 73 J. AIR L. & COM. 463 (2008).

Matthew W. Swinehart, *Remedying Daubert’s Inadequacy in Evaluating the Admissibility of*

Scientific Models Used in Environmental – Tort Litigation, 86 TEX. L. REV. 1281 (2008).

Heather P. Scribner, *Rigorous Analysis of the Class Certification Expert: The Roles of Daubert and the Defendant’s Proof*, 28 REV. LITIG. 71 (2008).

John P. Vincent, Scott A. Lemond and Tonya Inman, *Evaluating Claims for Emotional Damages in Ciivl Litigation: Not all Mental Health Experts Are Created Equal*, 45 APR HOUS. LAW 10 (2008).

Jane Stapleton, *Liability for Drugs in the U.S. and EU: Rhetoric and Reality*, 26 REV. LITIG. 991 (2007).

M. Craig Tyler, Jose C. Villarreal, *Working With Experts in Patent Cases*, 45 THE ADVOC. (TEXAS) 103 (2008).

Anthony R. Benedetto, *Not Just “X-Rays” Today: Recommendations for Admissibility of Modern Radiology Images*, 49 S. TEX. L. REV. 113 (2007).

Steven Goode, *The Admissibility of Electronic Evidence*, 29 REV. LITIG. 1 (2009).

George Parker Young, Layne Keele, Josh Borsellino, “A Rough Sense of Justice” or “Practical Politics”? *Recent Texas Supreme Court Opinions and Causation*, 46 THE ADVOC. (TEXAS) 1 (2009).

D. Because you lose the benefits of recent developments in dismissal practice

Recent Supreme Court case provides new opportunities for success at the trial court level – and before significant expense is incurred.

Bell Atlantic Corp. v. Twombly, 550 U.S. 544, 554-59 (2007) revised the *Conley v. Gibson*, 355 U.S. 41 (1957) “no set of facts” standard in deciding to dismiss a complaint. **A complaint**

now must be plausible on its face. When pleading conspiracy, before plausible possibilities and parallel conduct would suffice, now the evidence must tend to rule out possibility of independent action. Courts are not bound to accept legal conclusions couched as factual allegations. Pleadings must state facts supporting that an illegal agreement was entered into:

“It is no answer to say that a claim just shy of a plausible entitlement to relief can, if groundless, be weeded out early in the discovery process through ‘careful case management’ given the common lament that the success of judicial supervision in checking discovery abuse has been on the modest side.”

Id. at 559 (Justice Souter). Justices Stevens and Ginsburg’s dissent points out the significance of the majority decision:

“If Conley’s ‘no set of facts’ language’ is to be interred, let it not be without a eulogy. That exact language, which the majority says has puzzl[ed] the profession for 50 years,’ has been cited as authority in a dozen opinions of this Court to express *any* doubt as to the adequacy of the *Conley* formulation. Taking their cues from the federal courts, 26 States and the District of Columbia utilize as their standard for dismissal of a complaint the very language the majority repudiates: whether it appears ‘beyond doubt’ that ‘no set of facts’ in support of the claim would entitle the plaintiff to relief.”

“This case is a poor vehicle for the Court’s new pleading rule, for we have observed that ‘in antitrust cases, where the proof is largely in the hands of the alleged conspirators,’ ... dismissals prior to giving the plaintiff ample opportunity for discovery should be granted very sparingly.”

Id. at 577-78, 586-87.

Some predict *Twombly* will have the same fundamental change in dismissal practice that occurred with *Celotex*. Royal Furgeson, *Civil Jury trials R.I.P? Can it actually happen in*

America?, 40 ST. MARY'S L.J. 795, 855-56 (2009); Marc Galanter, *A World Without Trials?*, 2006 J. DISP. RESOL. 7, 7-9 (2006).

“What is certain, even at this early date, is that this case is receiving a great deal of attention in the lower courts. Consider, as one important barometer, that in its first nine months on the job courts cited *Twombly* more than 4000 times. This astonishing figure can be contrasted with the number of times courts cited *Celotex Corp. v. Catrett*, the second most cited case of all time, in its first nine months roughly 400 times.” Lonny S. Hoffman, *Burn Up the Chaff with Unquenchable Fire: What Two Doctrinal Intersections Can teach Us About Judicial Power over Pleadings*, 88 B.U.L. REV. 1217, 1218-22 (2008).

On the other hand, arbitration organizations rarely consider a motion to dismiss, many do not even have such a procedure and, in fact, those that do have such procedures have very narrow grounds for the same. While courts have held that arbitrators have the inherent power to grant dispositive motions, the lack of explicit rules on the issue reflects the hesitance that most arbitrators feel in granting dispositive motions without a fact hearing. Indeed, at the beginning of 2009, the Financial Industry Regulatory Authority (FINRA), the largest non-governmental regulator for securities firms, announced new rules "narrowing significantly" the grounds for granting motions to dismiss in its arbitrations.

These rules do not distinguish between "motions to dismiss complaints" and "summary judgment motions," but apply to any pre-hearing motion to dispose of the case.

Under the new rules, a FINRA arbitration panel can only grant a motion to dismiss for one or more of these three reasons: (1) the parties have a written settlement; (2) the complaint involves a "factual impossibility"—for example, the claimant sued the wrong company or person; or (3) the six-year eligibility rule for claims has expired. The new rule also requires that the arbitrators conduct an in-person or telephonic prehearing conference on the motion, and that a decision to grant the dispositive motion be unanimous. The panel also is required to issue a written explanation of a decision to grant dismissal. Finally, a losing movant is responsible for the forum fees for the review of the motion, and if the panel finds that a motion under this rule was frivolous, it must award reasonable costs and attorney's fees to any party that opposed the motion.

While the FINRA rule has struck some attorneys who are not familiar with arbitrations as severe, those with experience litigating claims at FINRA—and, more generally, in arbitration—have recognized that "the rule change may just institutionalize an already accepted practice." After the rule was finalized, FINRA Dispute Resolution President Linda Fienberg issued the following statement:

"Although arbitrators rarely grant such motions, it is costly and time-consuming for parties to defend motions to dismiss."

According to the College of Commercial Arbitrators, a national professional association of individuals who primarily conduct arbitrations of business-related disputes, "Commercial arbitration generally reflects a strong proclivity to avoid court-like motion practice to refine pleadings or to dismiss a matter for failure to state a claim properly." Quoting from Michael D. Young, a full time mediator and arbitrator with JAMS, based in its New York Resolution Center and Brian Lehman arbitration associate with JAMS in New York.

E. Because you lose the benefits of summary judgment practice/directed verdicts

Practically speaking, there are no summary judgments in arbitration.

You lose the benefits of:

Matsushita Electric Industrial Co. v. Zenith Radio Corp., 475 U.S. 574 (1986): Changed federal courts view of Rule 56(e). [predatory pricing case] A plaintiff raising doubt about a defendant's factual basis for summary judgment is not enough. Plaintiff must present more than "metaphysical doubt" that there is a material issue. Instead of following the rule that the more complex the case the less likely summary judgment should be granted, said this actually increases plaintiff's obligation to come forward with persuasive evidence.

Anderson v. Liberty Lobby, Inc., 477 U.S. 242 (1986): [libel suit] Concluded that a party resisting summary judgment in a motive case must present affirmative evidence regarding the

defendant's alleged state of mind in order to survive summary judgment. Before, generally view the province of the jury.

Celotex Corp. v. Catrett, 477 U.S. 317 (1986): [asbestos case] Lower court denied summary judgment because defendant's motion did not prove there was no causation. Supreme Court decided movant is under no obligation to support its motion with affidavits or similar materials but may merely point out movant does not have a trial worthy claim.

Federal courts have not been reluctant to grant summary judgments. See Paul W. Mollica, *Federal Summary Judgment at High Tide*, 84 MARQ. L. REV. 141, 143-44 (2000)(from 1973 to 1998 a 246% increase in published summary judgments).

In Texas state court civil cases, in 1996 juries rendered 2,971 verdicts but only 1,428 in 2006 – a 52% drop. In 1996 only 253 directed verdicts but 473 times in 2006. Royal Furgeson, *Civil Jury trials R.I.P? Can it actually happen in America?*, 40 ST. MARY'S L.J. 795, fn. 275 (2009)

In, 2001 each United States District Court Judge presided over an average of only 14 jury/bench trials – over half lasted three days or less in length and 94% lasted less than 10 days. Patrick E. Higginbotham, *So Why Do We Call Them Trial Courts*, 55 SMU L. REV. 1405 (2002) citing Administrative Office of the United States Courts, Director's Annual Report, 2001.

In a national empirical study of employment cases conducted in the later 1990's on data for the American Arbitration Association ("AAA"), 0% were dismissed on summary judgment while 25% of filed employment cases were dismissed on summary judgment. www.workrights.org/current/ed_arbitration.html.

F. Lose the benefits of *mandamus* relief

A rogue judge you can corral but not a rogue arbitrator.

G. Because you lose the benefits of appeal

The grounds for a successful appeal of an arbitration decision are so limited as to provide no substantive, legal or factual, protection. The only grounds for appeal under the Federal Arbitration Act are:

(1) where the award was procured by corruption, fraud or undue means;

(2) where there was evident partiality or corruption in the arbitrators, or either of them;

(3) where the arbitrators were guilty of misconduct in refusing to postpone the hearing, upon sufficient cause shown, or in refusing to hear evidence pertinent and material to the controversy; or of any other misbehavior by which the rights of any party have been prejudiced; or

(4) where the arbitrators exceeded their powers, or so imperfectly executed them that a mutual, final, and definite award upon the subject matter submitted was not made.

9 U.S.C. §10(a).

The case law acknowledges the lack of meaningful appeal:

It is tempting to think that courts are engaged in judicial review of arbitration awards under the Federal Arbitration Act, but they are not. [cites omitted] When the parties agree to arbitrate their disputes they opt out of the court system, and when one of them challenges the resulting arbitration award he perforce does not on the ground that the arbitrators made a mistake but that

they violated the agreement to arbitrate, as by corruption, evident partiality, exceeding their powers, etc.-conduct to which the parties did not consent when they included an arbitration clause in their contract. **That is why in the typical arbitration, which unlike the one in this case is concerned with interpreting a contract, the issue for the court is not whether the contract interpretation is incorrect or even whacky, but whether the arbitrators had failed to interpret the contract at all.** [cites omitted]

Wise v. Wachovia Securities, LLC, 450 F.3d 265 (7th Cir. 2006)(emphasis added).

Judicial review of arbitrator awards is narrowly limited and arbitration award will not be set aside unless it is completely irrational or evidences manifest disregard for the law. *Lee v. Chica*, 983 F.2d 883 (8th Cir. 1993); *Barbier v. Shearson Lehman Hutton, Inc.*, 948 F.2d 117 (2nd Cir. 1991); *Todd Shipyards Corp. v. Cunard Line, Ltd.* 943 F.2d 1056 (9th Cir. 1991); *General Tele. Co. v. Communications Workers of America*, 648 F.2d 452 (6th Cir. 1981).

The standard on review is often referred to as requiring the appealing party to demonstrate a “manifest disregard for the law.” Even this daunting phrase has typically been interpreted as requiring a showing that the arbitrator exceeded his power or, in other words, the arbitrator decided an issue not covered by the arbitration clause. *Todd Shipyards Corp. v. Cunard Line, Ltd.*, 943 F.2d 1056, 1059-60 (9th Cir. 1991). Ian R. Macneil, et al., *Federal Arbitration Law* §40.1.3.2 (3rd ed. 1999). An even more extreme definition of “manifest disregard for the law” is **a showing that the arbitrator actually “direct[s] the parties to violate the law.”** *George Watts & Son, Inc. v. Tiffany & Co.*, 248 F.3d 577, 580 (7th Cir. 2001)(emphasis added).

Do not lose your right to appeal where jury verdicts (but not arbitrator decisions) can be corrected. “The Texas Supreme Court in recent years has not hesitated to reverse jury verdicts based on its view of the ‘causation’ evidence; according to Professor Dorsaneo it has not appeared constrained or even much

bothered by limitations in the Texas Constitution on the permissible scope of its evidentiary review, or by decades of tort formulations calculated to make ‘causation’ findings largely the province of the jury.” Royal Furgeson, *Civil Jury trials R.I.P? Can it actually happen in America?*, 40 ST. MARY’S L.J. 795, 850 (2009) (citing George Parker Young, Layne Keele & Josh Borsellino, “A Rough Sense of Justice” or “Practical Politics?”: *Recent Texas Supreme Court opinions on Causation*, in *Tex. Bar CLE 25th Annual Litig. Update Inst.*, ch. 3 at 60-9-70 (2009).

“[w]hen one considers that in the twenty-nine causation opinions the Court has issued since *Allbritton*, only nine decided the causation issue in favor of the plaintiff. The rest managed to find a way to benefit the defendant, most overturning jury verdicts, and many overturning courts of appeal decisions finding *sufficient evidence* of causation. And almost as startling (at least to those who learned that Texas common law highly valued *stare decisis* and that the Texas Supreme Court was an appellate court of limited jurisdiction with no ability to weigh sufficiency of evidence), the Court in the last few years has repeatedly resorted to causation grounds to reverse jury verdicts in ways that sometimes seem to ignore the Texas Constitution's limitation precluding the Court from simply re-weighing evidence to reverse. If Dean Green thought jury trials “lost their significance” in 1956, fifty years later he would conclude they have all but been eliminated in this state. “Causation” grounds have been a favored culprit the last few years.” George Parker Young, Layne Keele, Josh Borsellino, “A Rough Sense of Justice” or “Practical Politics”? *Recent Texas Supreme Court Opinions*, 46 THE ADVOC. (TEXAS) 1 (2009)(internal footnotes omitted).

There is, in fact, a sense that juries are being marginalized, not only by federal appellate courts and Texas appellate courts, but by appellate courts across America. Royal Furgeson, *Civil Jury trials R.I.P? Can it actually happen in America?*, 40 ST. MARY’S L.J. 795, 851 (2009) (citing David A. Anderson, *Judicial Tort reform in Texas*, 26 Rev. Litig. 1, 5-6 (2007).

Arbitrations organizations offer appeal services but, unfortunately, they typically apply the same appeal standards as offered by the court which means, again, there is no meaningful

appeal – except using the arbitration route you get the added pleasure of paying for it.

JAMS Optional Arbitration Appeal Procedure

(D) The Appeal Panel will apply the same standard of review that the first-level appellate court in the jurisdiction would apply to an appeal from the trial court decision.

H. Agreeing to binding arbitration to avoid claims for punitive damages may not be worth the trade off

Punitive damage awards are rare, there are procedural safeguards, statutory caps and extremely difficult jury instructions to overcome.

In addition, the United States Supreme Court and the Texas Supreme Court have shown no reluctance to overturn such awards and trial courts have followed suit. *See, e.g., BMW of North America, Inc. v. Gore*, 517 U.S. 559 (1996)(punitive damage awards must bear a relationship to actual damages).

I. Agreeing to binding arbitration to avoid a jury may not be worth the trade off

After reviewing research spanning decades, Hans and Vidmar state:

“The American jury is a sound decision maker in the vast majority of both civil and criminal trials.”

Very significant to us were the findings from empirical studies that show that the strength of the evidence presented at the trial is the major determinant of jury verdicts. Similarly, civil jury damage awards are strongly correlated with the degree of injury in a case. These reasonable patterns in jury decisions go a long way toward

reassuring us that juries, by and large, listen to the judge and decide cases on the merits of the evidence rather than on biases and prejudice.

Furthermore, in systematic studies spanning five decades, we find that judges agree with jury verdicts in most cases.

We have explored the claims of doctors and business and corporate executives about unfair treatment by juries, but the empirical evidence does not back them up. The notion of the pro-plaintiff jury is contradicted by many studies that show both actual and mock jurors subject plaintiffs' evidence to strict scrutiny."

Valerie P. Hans & Neil Vidmar, *The Verdict on Juries*, 91 JUDICATURE 226 (2008).

Empirical studies cast doubt on the contention that jury decisions in complex cases differ substantially from the decisions that judges would make in those cases. *Developments in the Law—The Civil Jury Trial*, 110 HARV. L. REV. 1408, 1433-35 (1997).

The National Workrights Institute cited an empirical study showing that in employment cases the employee success rate in arbitration was 73% yet was only 43% in cases which proceeded in court. www.workrights.org/current/ed_arbitration.html.

In Texas, the appellate courts are viewed as activist in overturning jury awards. See, e.g., TR. Jack Ayres, Jr. *Judicial Nullification of the Right to Trial by Jury by "Evolving" Standards of Appellate Review*, 60 BAYLOR L. REV. 337 (2008): "The American Board of Trial Advocates (ABOTA) is a non-profit, non-political group of attorneys whose members represent both plaintiffs and defendants. ABOTA membership is by invitation only and is limited to those who have proven track records of ethical integrity and high professional ability. ABOTA's stated mission is to "preserve the constitutional vision of equal justice for all Americans and preserve [the] civil justice system for future generations." The Texas branch of ABOTA has now found it necessary to form a Seventh Amendment Committee, the purpose

of which is to monitor the Texas Supreme Court and the Fifth Circuit calling attention to cases where appellate judges substitute their preferred resolution of disputed fact issues for those made by juries. The committee is co-chaired by one prominent plaintiff's attorney and one prominent defense attorney and has academic support from prestigious law schools within the State of Texas.

J. Arbitration is not always substantially quicker or less expensive than litigation

February 1, 2010 In-House Lawyer section of the Texas Lawyer reports “[L]awyers complain that the [arbitration process, at its worst, can be as costly and time-consuming as litigation.”

Corporate Counsel International Arbitration Group (CCIAG) was formed to address serious complaints about arbitration beyond the common complaint of “split the baby.” Ronald Schroeder, CCIAG’s steering committee chairperson, says “no one he knows who uses arbitration regularly is happy with it.” *See* February 1, 2010 In-House Lawyer section of the Texas.

Arbitration fees can be very high. AAA and JAMS, like most arbitration organizations do not publish the hourly rates of the arbitrators. However, a phone call will reveal typical rates of \$500 to \$600 an hour. If your agreement or choice is three arbitrators (to temper the gamble of just one arbitrator), the costs then triple.

Many arbitration organizations also charge a fee for the selection of an arbitrator, administrative fees, fees for challenging the appointment of an arbitrator, review of award fees (for clerical and computational errors) and conference room fees. *See, i.e.,* International Institute for Conflict Prevention & Resolution, case fees and charges at www.cpradr.org/CPRNeutrals/FeesandCharges.

You have to incur the expense of the record. Typical provision:

Commercial Arbitration Rules and Mediation Procedures

R-26. Stenographic Record

Any party desiring a stenographic record shall make arrangements directly with a stenographer and shall notify the other parties of these arrangements at least three days in advance of the hearing. The requesting party or parties shall pay the cost of the record. If the transcript is agreed by the parties, or determined by the arbitrator to be the official record of the proceeding, it must be provided to the arbitrator and made available to the other parties for inspection, at a date, time, and place determined by the arbitrator.

JAMS Comprehensive Arbitration Rules & Procedures: Rule 6: Preliminary and Administrative Matters

d) JAMS does not maintain an official record of documents filed in the Arbitration. If the Parties wish to have any documents returned to them, they must advise JAMS in writing within 30 days of the conclusion of the Arbitration. If special arrangements are required regarding file maintenance or document retention, they must be agreed to in writing and JAMS reserves the right to impose an additional fee for such special arrangements. Documents that are submitted for e-filing are retained for 30 days following the conclusion of the Arbitration.

LCIA Arbitration Rules: Article 28: The parties shall be jointly and severally liable for arbitration costs.

K. Arbitration is less transparent

Statistics on arbitration decisions are difficult to come by – JAMS and AAA provide no statistical information – while courts are completely transparent.

L. Widespread binding arbitration agreements can have negative effects on society and the profession

U.S. Judge William Young: “Like all government institutions, our courts draw their authority from the will of the people to be governed. The law that emerges from these courts provides the threads from which all our freedoms are woven. It is through the rule of law that liberty flourishes. Yet there can be no universal respect for law unless all Americans feel it is their law. Through the jury, citizenry takes part in the execution of the nation’s laws, and, in that way, each citizen can rightly claim that the law belongs partly to him or her.” William G. Young, *An Open Letter to U.S. District Judges*, 50 FED. LAW 30 (2003).

Diminishing public participation in the justice system allows courts/arbitration panels to be depicted as elitist and undemocratic.

“We need trials, and a steady stream of them, to ground our normative standards—to make them sufficiently clear that persons can abide by them in planning their affairs—and never face the courthouse—the ultimate settlement. Trials reduce disputes, and it is a profound mistake to view a trial as a failure of the system.” Royal Furgeson, *Civil Jury trials R.I.P? Can it actually happen in America?*, 40 ST. MARY’S L.J. 795, 804 (2009) (citing Patrick E. Higginbotham, *So Why Do We Call Them Trial Courts?*, 55 SMU L. REV. 1405, 1423 (2002).

Trial strategy and refinement of jury skills are quickly becoming relics of a bygone era. The atrophy of trial advocacy skills among experienced trial lawyers and the inability of inexperienced lawyers to gain invaluable trial experience virtually ensures that there will be no next generation of trial lawyers to gain invaluable trial experience virtually ensures that there will be no

next generation of trial lawyers as we know them. Mark W. Bennett, *Judge's Views of Vanishing Civil Trials*, 88 JUDICATURE 306 (2005)

An ABA study recently found that “a growing number of lawyers who describe themselves as “litigators” have scant, if any, actual trial experience.” Mark W. Bennett, *Judge's Views of Vanishing Civil Trials*, 88 JUDICATURE 306 (2005) citing Stephanie Francis Ward, *No Place Like Court, Shrinking Trial Dockets Reduce Learning Opportunities for Young Litigators*, 89 A.B.A J. 62 (2003).

III. Reasons to Agree to Binding Arbitration

A. Quicker

B. Cheaper

C. Avoids juries

“The general-verdict jury-trial, in practice, negates that which dogma of precise legal predictability maintains to be the nature of the law. A better instrument could scarcely be imagined for achieving uncertainty, capriciousness, lack of uniformity, disregard of former decisions—utter unpredictability.” Royal Furgeson, *Civil Jury trials R.I.P? Can it actually happen in America?*, 40 ST. MARY’S L.J. 795, 804 (2009)(citing Jerome Frank, *Law and Modern Mind* 172 (spec. ed. 1985)(1930)).

“[J]urors are not infallible guardians of the public good.... Arbitrariness, caprice, passion, bias, and even malice can replace reasoned judgment and law as the basis for jury decision making. *TXO Prod. Corp. v. Alliance Res. Corp.*, 509 U.S. 443, 474 (1993)(O’Connor, J., dissenting).

IV. Developments in Arbitration

A. The Arbitration Fairness Act of 2009

Jamie Leigh Jones was a 20-year old Halliburton employee in 2005 when she went not work in Iraq. She had been there four days when she joined a group of Halliburton firefighters outside her barracks at the end of the day. One of them gave her a drink and the next thing she remembers was waking up inside her barracks. She had been severely beaten and repeatedly raped.

Ms. Jones sued and KBR, a subsidiary of Halliburton, denied liability and said Ms. Jones must go to arbitration. For many in Congress this is the poster child for necessary arbitration reform.

However, ultimately, most of Ms. Jones most serious claims were found not to be covered by the arbitration clause. In *Jones v. Halliburton Co.*, 583 F.3d 228 (5th Cir. 2009), the arbitration language involved read:

You ... agree that you will be bound by and accept as a condition of your employment the terms of the Halliburton Dispute Resolution Program which are herein incorporated by reference. You understand that the Dispute Resolution Program requires, as its last step, that any and all claims that you might have against Employer *related to your employment*, including your termination, and any and all *personal injury claim[s] arising in the workplace*, you have against other parent or affiliate of Employer, must be submitted to binding arbitration instead of to the court system.

(Emphasis added.) “Dispute” was defined as follows:

“Dispute” means all legal and equitable claims, demands, and controversies, of whatever nature or kind, whether in contract, tort, under statute or regulation, or some other law, between persons bound by the Plan or by an agreement to resolve Disputes under the Plan ... including, but not limited to, any matters with respect to ... any

personal injury allegedly incurred in or about a Company workplace.

(Emphasis added.)

The 5th Circuit applied the two-step analysis employed to determine whether a party may be compelled to arbitrate. First, whether the party has agreed to arbitrate the dispute is examined. This question itself is further subdivided; to determine whether the party has agreed to arbitrate a dispute, our court must ask: “(1) is there a valid agreement to arbitrate the claims and (2) does the dispute in question fall within the scope of that arbitration agreement.” citing *JP Morgan Chase & Co. v. Conegie ex rel. Lee*, 492 F.3d 596, 598 (5th Cir.2007).

In interpreting the arbitration provision at issue, and in the light of the above-discussed precedent, we conclude that the provision's scope certainly stops at Jones' bedroom door, as further discussed *infra*. As such, it was not contradictory for Jones to receive workers' compensation under a standard that allows recovery solely because her employment created the “zone of special danger” which led to her injuries, yet claim, in the context of arbitration, that the allegations the district court deemed non-arbitrable did not have a “significant relationship” to her employment contract.

The one consensus emerging from this analysis is that it is fact-specific, and concerns an issue about which courts disagree. When deciding whether a claim falls within the scope of an arbitration agreement, courts “focus on factual allegations in the complaint rather than the legal causes of action asserted”. *Waste Mgmt., Inc. v. Residuos Industriales Multiquim, S.A. de C.V.*, 372 F.3d 339, 344 (5th Cir.2004).

The dissent reasoned as follows:

The arbitration clause states, in relevant part, that “any and all claims [Jones] might have against the company related to [her] employment ... and any and all personal injury claims arising in the workplace” are subject to binding arbitration. Arbitration clauses purporting to cover all disputes “related to” an employee's employment are

interpreted to cover “all disputes between the parties having a significant relationship to the contract regardless of the label attached to the dispute.” *Pers. Sec. & Safety Systems Inc. v. Motorola Inc.*, 297 F.3d 388, 393 (5th Cir.2002) (quotation omitted). When faced with such a broad arbitration clause “it is only necessary that the dispute ‘touch’ matters covered by the [contract] to be arbitrable.” *Pennzoil Exploration & Prod. Co. v. Ramco Energy Ltd.*, 139 F.3d 1061, 1068 (5th Cir.1998). This court has held that when the scope of an arbitration clause “is fairly debatable or reasonably in doubt, the court should decide the question of construction in favor of arbitration.” *In re Hornbeck Offshore (1984) Corp.*, 981 F.2d 752, 755 (5th Cir.1993) (quotation omitted); *see also Banc One Acceptance Corp. v. Hill*, 367 F.3d 426, 429 (5th Cir.2004)(courts “must resolve all ambiguities in favor of arbitration”). In my view, the issue before this court is debatable and therefore should be resolved in favor of arbitration.

An attempt to preclude pre-claim arbitration agreement in employment, consumer and employment matters currently pending in Congress.

B. Case law

(i) Arbitrability

Preston v. Ferrer, 128 U.S. 978, 983 (2008), after deciding that the parties have a valid agreement to arbitrate and that the subject matter of the dispute is covered by the arbitration clause, the court is required to compel arbitration by a strong “national policy favoring arbitration when the parties contract for that mode of dispute resolution.”

Galey v. World Mktg. Alliance, 510 F.3d 529 (5th Cir. 2007), parties chose National Association of Securities Dealers, Inc. (“NASD”) as its forum for arbitration and that the arbitration be controlled by NASD rules and, given defendant was no longer a

member of NASD and the rules did not permit non-members to utilize the NASD forum, the 5th Circuit upheld the district court's denial of a motion to compel arbitration.

Binding Non-signatories

Several rules of law and equity have been applied to bind non-signatories to contractual arbitration provisions. For example, principles of equitable estoppel and agency have been utilized as a basis for binding non-signatories to contractual arbitration provisions. *In re Weekly Homes, L.P.*, 180 S.W.3d 127, 131-135 (Tex. 2005). Likewise, a party seeking to obtain directly or indirectly the benefits of a contract can be bound to the contract's arbitration provisions. *In re First Merit Bank, N.A.*, 52 S.W.3d 749, 755-56 (Tex. 2001). Under this logic, parties to a contract suing the agents or affiliates of other parties to the contract for tortious interference with that contract have been compelled to arbitrate the claim. *See In re Vesta Ins. Group, Inc.*, 192 S.W.3d 759, 762 (Tex. 2006). Also, regardless of the choice of law provision in the Partnership Agreement, Texas procedural rules will determine whether non-signatories are bound by arbitration provisions. *In re Weekly Homes, L.P.*, 180 S.W.3d at 130.

(ii) Class actions – a step back

Stolt-Nielsen v. AnimalFeeds International, __ U.S. __, 2010 WL 1655826 (April 27, 2010). AnimalFeeds brought a class action antitrust suit against Petitioners for price fixing. District Court ruled the claims were not subject to an arbitration clause. The Second Circuit reversed and the parties agreed to submit the question of whether their arbitration agreement covered class actions to a panel of arbitrators who would be bound by the AAA Class Rules. The arbitrators decided that the contract did permit class actions and entered an award. The District Court vacated the award as being made in “manifest disregard” of the law because of an erroneous application of a choice of law analysis. The Second Circuit reversed the District Court and upheld the award.

The Supreme Court determined that an implicit agreement to authorize class action arbitration is not a term that the arbitrator

may infer solely from the fact of an agreement to arbitrate.
[majority: Alito, Roberts, Scalia, Kennedy, Thomas]

The dissent points out that this opinion is contrary to the *Bazze* decision which had been required “clear language [in the arbitration clause] that forbids class arbitration in order to bar a class action.” *Id.* [dissent: Ginsburg, Stevens, Breyer] See *Green Tree Financial Corp. v. Bazze*, 539 U.S. 444, 123 S. Ct. 2402, 156 L. Ed.2d 414 (2003).

**(iii) Waiver of arbitration provisions by
substantially invoking the judicial process**

Texas law includes a strong presumption against the waiver of arbitrations rights. *Transwestern Pipeline Co. v. Horizon Oil & Gas Co.*, 809 S.W.2d 589, 592 (Tex. App.—Dallas 1991, writ dis’d w.o.j.).

When presented with a question of waiver, the courts are to resolve any dispute in favor of arbitration. *In re Oakwood Mobile Homes*, 987 S.W.2d 571, 574 (Tex. 1999)(orig. proceeding)(*per curiam*), abrogated in part on other grounds by, *In re Halliburton Co.*, 80 S.W.3d 566, 572 (Tex. 2002)(orig. proceeding).

The following factors standing alone do not constitute waiver: moving to dismiss for lack of standing; moving to set aside a default judgment and requesting a new trial; opposing a trial setting and seeking to remove to federal court; moving to strike an intervention and opposing discovery; sending multiple discovery requests; requesting initial discovery, noticing but not taking a deposition and agreeing to a continuance; and seeking initial discovery, taking four depositions and moving for dismissal based on standing. *Perry Homes v. Cull*, 258 S.W.3d 580, 590 (Tex. 2008). The Court also emphasized what would constitute waiver: “allowing a party to conduct full discovery, file motions going to the merits, and seek arbitration on the eve of trial.” *Id.*

In addition to demonstrating waiver by substantially invoking the judicial process, “waiver of arbitration requires a showing of prejudice.” *Perry Homes*, 258 S.W.3d at 597 (“inherent unfairness in terms of delay, expense, or damage to a

party's legal position that occurs when the opponent forces it to litigate an issue and later seeks to arbitrate that same issue").

In the most recent Texas case on this issue, *Small v. Specialty Contractors, Inc.*, __S.W.3d__, 2010 WL 1582231, Tex. App.—Dallas, April 21, 2010 no pet., the parties exchanged discovery and defendants filed traditional and no evidence summary judgment motions. After the motions were denied, defendants moved to compel arbitration. The court held there was no waiver.

Be aware, if the trial court grants a motion for arbitration, the ability to argue waiver on appeal may be limited. The Texas Supreme Court has recently disapproved dismissal of a case rather than staying it pending the outcome of arbitration. *See In re Gulf Exploration*, 289 S.W.3d 836, 841 (Tex. 2009). If a trial court stays litigation pending arbitration, no interlocutory appeal is available. *See* TEX. CIV. PRAC. & REM. CODE §§ 51.014(a)(Vernon 2008)(listing appealable interlocutory order); 171.098 (Vernon 2005)(authorizing interlocutory appeal only from orders denying application to compel arbitration and orders granting application to stay arbitration).

(iv) Appeal of arbitration award

East Texas Salt Water Disposal Company, Inc. v. Werline, __ S.W.3d __, 2010 WL 850161 (Tex. March 12, 2010). Trial court denied confirmation of the arbitration award and remanded the matter back to arbitration to begin anew. The Supreme Court viewed this action as different from action correcting obvious error. Further, the Court states: because Texas law favors arbitration, judicial review of an arbitration award is extraordinarily narrow. The right of appeal provided by section 171.098(a) assures that a trial court does not exceed the limitations on its authority to review an arbitration award. Those limitations would be circumvented if re-arbitration could be ordered for reasons that would not justify denying confirmation, and appeal thereby delayed. As the United States Court of Appeals for the Fifth Circuit has observed: "Such a result would disserve the policies that promote arbitration and restrict judicial review of

awards.” *Forsythe Int’l, S.A. v. Gibbs Oil Co.*, 915 F.2d 1017, 1020 (5th Cir. 1990).

The majority asserts that of the 34 states that have considered this issues, there is essentially an even split among the decisions. The dissent points out that, in fact, the majority has accepted the minority view.

(v) Arbitration clauses in attorney fee agreements

Pham v. Letney, __ S.W.3d __, 2010 WL 727550 (Tex. App.—Hous. [14th Dist.] March 4, 2010, orig. proceeding). Letney sued Pham for legal malpractice and Pham moved to compel arbitration. Pham appealed and sought mandamus review of the trial court’s denial of such motion. The arbitration clause stated as follows:

Any and all disputes, controversies, claims or demands arising out of or relating to this Agreement or any provision hereof, whether in contract, tort or otherwise, at law or in equity, for damages or any other relief, shall be resolved by binding arbitration pursuant to the Federal Arbitration Act in accordance with the Commercial Arbitration Rules then in effect with the American Arbitration Association. Any such arbitration proceeding shall be conducted in Harris County, Texas pursuant to the substantive federal laws established by the Federal Arbitration Act. Any party to any ward [sic] rendered in such arbitration proceeding may seek a judgment upon the award and that judgment may be entered by any federal or state court in Montgomery County, Texas [sic] having jurisdiction.

The appellate court held:

1. Mandamus was the proper vehicle for appellate review of denial of a motion to compel arbitration under the Federal Arbitration Act (had it been under the Texas Arbitration

Act, the appeal would have been interlocutory).

2. Trial court apparently denied arbitration based on a personal injury exception under the TAA. The appellate court held that even though Letney's underlying claim for which she hired Pham was for a personal injury, her claim against Pham was for legal malpractice and, therefore the exception was not applicable. [Note, at least one appellate court has held that legal malpractice claims are subject to the personal injury limitations of the TAA. *See In re Godt*, 28 S.W.3d 732, 738-39 (Tex. App.—Corpus Christi 2000, no pet.)].

3. In any event, the appellate court also held the FAA applied not the TAA because the provision called for the FAA – without any analysis of any impact on interstate commerce.

4. Arbitration provisions between attorney and client are not inherently unconscionable.

5. Letney cites to an opinion rendered by the Texas Ethics Commission in which the Commission suggested that it would be permissible under the Texas Disciplinary Rules of Professional Conduct to include an arbitration clause in an attorney-client contract only if the client was made aware of the advantages and disadvantages of arbitration and had sufficient information to make an informed decision as to whether to include the clause. *See* OP. TEX. ETHICS COMM'N NO. 586 (2008). The appellate court states: “we decline to impose a requirement that attorneys must in all cases fully inform prospective clients regarding the implications of an arbitration clause in an attorney-client contract. This argument is best preserved for the legislature.”

6. Letney's final argument in response to the motion to compel was based on TEXAS DISCIPLINARY RULE OF PROFESSIONAL CONDUCT §1.08(g), which provides that “[a] lawyer shall not make an agreement prospectively limiting the lawyer's liability to a client for malpractice unless permitted by law and the client is independently represented in making the agreement...” TEX.R. PROF. COND. 1.08(g), *reprinted in* TEX. GOV'T CODE ANN. TIT. 2, subtit. G app. A (Vernon 1998). The appellate court held that an agreement to arbitrate does not, in fact, limit a party's

liability; it merely denominates a procedure for determining that liability.

(vi) Collective bargaining agreements

14 Penn Plaza LLC v. Pyett, 129 U.S. 1456, 1474 (2009). The Supreme Court established that a collective bargaining agreement (CBA) provision that “clearly and unmistakably” requires arbitration of age discrimination claims is enforceable.

(vii) Unconscionability

Jackson v. Rent-A-Center West, 581 F.3d 912 (9th Cir. 2008). The Court, not an arbitrator, determines whether an arbitration provision is unconscionable. This case was recently argued before the Supreme Court. [Rent-A-Car represented by Robert Friedman of Littler Mendelson’s Dallas office.]

There are differing views on the impact of this decision:

"If corporations can place their arbitration systems beyond the reach of any substantive judicial evaluation of their fairness, there will be nothing to prevent the arbitration system from devolving into a wild, wild west state of lawlessness," said F. Paul Bland of Public Justice.

But Donald Falk, partner in the Palo Alto, Calif., office of Mayer Brown, who filed an amicus brief for the U.S. Chamber of Commerce, said, "Unconscionability claims are being increasingly used in court to thwart agreed-upon arbitration procedures where they once were reserved for impositions of outrageous terms."

(viii) Parties to the arbitration

Saxa, Inc. v. DFD Architecture, __ S.W.3d __, 2010 WL 1714447 (April 29, 2010, no pet.). Condominium association attempted to intervene in arbitration between Saxa and DFD. The arbitration provision provided:

No arbitration arising out of or relating to this Agreement shall include, by consolidation or

joinder or in any other manner, an additional person
or entity not a party to this Agreement

Arbitrator permitted the joinder. 134th District Court granted summary judgment denying joinder, determining this was a “gateway issue” to be decided by the courts. *In re Labatt Food Serv., L.P.*, 279 S.W.3d 640, 643 (Tex. 2009). 5th Court of Appeals relied on broad arbitration language allowing all disputes to be resolved through the arbitration as well as the rules of arbitration chosen by the parties to determine that this was an issue to be determined by the arbitrator.

V. Discussion of Arbitration Provisions

A. Prevailing parties' definition

B. Attorneys' fees

C. You cannot change the standard of review of arbitrator's decision

Given the virtual non-existence of a meaningful right to correct arbitration decisions on appeal, inclusion of a provision in the arbitration clause to allow appeal and reversal of clearly erroneous decisions was once thought to be a solution:

The First, Third, Fourth, Fifth and Sixth Circuits held that parties may contract for expanded judicial review. *See Puerto Rico Tel. Co. v. U.S. Phone Mtg. Corp.*, 427 F.3d 21, 31 (1st Cir. 2005); *Jacada (Europe) Ltd. v. International Marketing Strategies, Inc.*, 401 F.3d 701, 710 (6th Cir. 2005); *Roadway Package System, Inc. v. Kayser*, 257 F.3d 287, 288 (3rd Cir. 2001); *Syncor Int'l Corp. v. McLeland*, 120 F.3d 262 (1997); *Gateway Technologies, Inc. v. MCI Telecommunications Corp.*, 64 F.3d 993, 997. The Eighth, Ninth and Tenth held that parties may not contract for expanded judicial review. *See Kyocera Corp. v. Prudential-Bache Trade Servs., Inc.*, 341 F.3d 987, 1000 (9th Cir. 2003); *Bowen v. Amoco Pipeline Co.*, 254 F.3d 925, 936 (10th Cir. 2001); *UHC Management Co. v. Computer Sciences Corp.*, 148 F.3d 992, 997-998 (1998).

The Supreme Court resolved this split among the circuits in *Hall Street Associates, L.L.C. v. Mattel, Inc.*, 522 U.S. 576, 128 S. Ct. 1396, 170 L.Ed.2d 254 (2008) holding that under the Federal Arbitration Act the parties **cannot** expand the scope of judicial review. *Id.* (emphasis added).

While *Hall* only applies to arbitration agreements subject to the Federal Arbitration Act, given the broad scope of the act there is little comfort to be had should a state court otherwise enforce provisions expanding the scope of review. The scope of the Federal Arbitration Act is to any arbitration agreement in any

contract involving interstate commerce, to the full extent of the Commerce Clause of the United States Constitution. 9 U.S.C §2 (1999); *Allied-Bruce Terminex Co. v. Dobson*, 513 U.S. 265, 277-81, (1995); *In re L & L Kempwood Assocs.*, 9 S.W.3d 125, 127 (Tex. 1999).

Revealingly, *amici* briefs filed in *Hall* point out how the conclusion ultimately reached makes arbitration a substantially less desirable method of alternative dispute resolution. *Hall Street Assoc.*, 522 U.S. at 588-89 (“Hall Street and its *amici* say parties will flee from arbitration if expanded review is not open to them.”).

The Fifth Court of Appeals (Dallas) applied the reasoning in *Hall Street* to the Texas Arbitration Act (“TAA”) finding that the TAA has grounds for modification and vacation of awards that are extremely narrow, with no express authority for expanded judicial review. *Quinn v. NAFTA Traders*, 257 S.W.3d 795 (Tex. App.—Dallas 2008, pet. granted).

D. Consumer Due Process provisions

E. Unconscionability

F. Should you specify the court to which an appeal or action to enforce an arbitration award may be had?

It is not necessary. “If no court is specified in the agreement of the parties, then such application may be made to the United States court in and for the district within which such award was made.” 9 U.S.C. §9 (2009).

Nonetheless, a party may seek confirmation of an arbitration award in federal court only if there is an independent basis for federal jurisdiction. *Specialty Healthcare Mgt., Inc. v. St. Mary’s Parish Hosp.*, 220 F.3d 650, 653 n. 5 (5th Cir. 2000).

In sum, the Federal Act is enforced by both state and federal courts. *Moses H. Cone Mem'l Hosp.*, 460 U.S. 1, 25-26 (1983). *See also, Palisades Acquisition XVI, LLC v. Chatman*, 288 S.W.3d 552 (Tex. App.—Houston [14th Dist.] 2009, no pet.)(recent Texas case holding Federal Arbitration Act did not deprive state court of subject matter jurisdiction for enforcement of arbitrator's award.).

G. E-discovery

H. Scope of discovery

I. Mediation in advance of arbitration

J. Choice of law

K. Executed by as many parties as may possibly be involved in a dispute

L. Choose the arbitration organization and the rules to be followed or customize procedures

VI. Alternatives to Arbitration

- A. Pre-litigation non-binding mediation**
- B. Magistrate**
- C. Binding arbitration proposed by the Court and subject to Court review**
- D. Waiver of jury trial**
- E. Conciliation**

Conciliation involves building a positive relationship between the parties to a dispute. A third party or conciliator (who may or may not be totally neutral to the interests of the parties) may be used by the parties to help build such relationships.

A conciliator may assist parties by helping to establish communication, clarifying misperceptions, dealing with strong emotions, and building the trust necessary for cooperative problem-solving. Some of the techniques used by conciliators include providing for a neutral meeting place, carrying initial messages between/among the parties, reality testing regarding perceptions or misperceptions, and affirming the parties' abilities to work together. Since a general objective of conciliation is often to promote openness by the parties (to take the risk to begin negotiations), this method allows parties to begin dialogues, get to know each other better, build positive perceptions, and enhance trust. The conciliation method is often used in conjunction with other methods such as facilitation or mediation. *See U.S. Office of Personnel Management, Alternative Dispute Resolution: A Resource Guide.*

F. Cooperative problem-solving

Cooperative problem-solving is one of the most basic methods of dispute resolution. This informal process usually does not use the services of a third party and typically takes place when the concerned parties agree to resolve a question or issue of mutual concern. It is a positive effort by the parties to collaborate rather than compete to resolve a dispute.

Cooperative problem-solving may be the procedure of first resort when the parties recognize that a problem or dispute exists and that they may be affected negatively if the matter is not resolved. It is most commonly used when a conflict is not highly polarized and prior to the parties forming "hard line" positions. This method is a key element of labor-management cooperation programs. *See* U.S. Office of Personnel Management, *Alternative Dispute Resolution: A Resource Guide*.

G. Dispute panels

Dispute panels use one or more neutral or impartial individuals who are available to the parties as a means to clarify misperceptions, fill in information gaps, or resolve differences over data or facts. The panel reviews conflicting data or facts and suggests ways for the parties to reconcile their differences. These recommendations may be procedural in nature or they may involve specific substantive recommendations, depending on the authority of the panel and the needs or desires of the parties. Information analyses and suggestions made by the panel may be used by the parties in other processes such as negotiations.

This method is generally an informal process and the parties have considerable latitude about how the panel is used. It is particularly useful in those organizations where the panel is non-threatening and has established a reputation for helping parties work through and resolve their own disputes short of using some formal dispute resolution process. *See* U.S. Office of Personnel Management, *Alternative Dispute Resolution: A Resource Guide*.

H. Early neutral evaluation

Early neutral evaluation uses a neutral or impartial third party to provide a non-binding evaluation, sometimes in writing, which gives the parties to a dispute an objective perspective on the strengths and weaknesses of their cases. Under this method, the parties will usually make informal presentations to the neutral to highlight the parties' cases or positions. The process is used in a number of courts across the country, including U.S. District Courts.

Early neutral evaluation is appropriate when the dispute involves technical or factual issues that lend themselves to expert evaluation. It is also used when the parties disagree significantly about the value of their cases and when the top decision makers of one or more of the parties could be better informed about the real strengths and weaknesses of their cases. Finally, it is used when the parties are seeking an alternative to the expensive and time-consuming process of following discovery procedures. *See* U.S. Office of Personnel Management, *Alternative Dispute Resolution: A Resource Guide*.

I. Facilitation

Facilitation involves the use of techniques to improve the flow of information in a meeting between parties to a dispute. The techniques may also be applied to decision-making meetings where a specific outcome is desired (e.g., resolution of a conflict or dispute). The term "facilitator" is often used interchangeably with the term "mediator," but a facilitator does not typically become as involved in the substantive issues as does a mediator. The facilitator focuses more on the process involved in resolving a matter.

The facilitator generally works with all of the meeting's participants at once and provides procedural directions as to how the group can move efficiently through the problem-solving steps of the meeting and arrive at the jointly agreed upon goal. The facilitator may be a member of one of the parties to the dispute or may be an external consultant. Facilitators focus on procedural

assistance and remain impartial to the topics or issues under discussion.

The method of facilitating is most appropriate when: (1) the intensity of the parties' emotions about the issues in dispute are low to moderate; (2) the parties or issues are not extremely polarized; (3) the parties have enough trust in each other that they can work together to develop a mutually acceptable solution; or (4) the parties are in a common predicament and they need or will benefit from a jointly-acceptable outcome. *See* U.S. Office of Personnel Management, *Alternative Dispute Resolution: A Resource Guide*.

J. Factfinding

Factfinding is the use of an impartial expert (or group) selected by the parties, an agency, or by an individual with the authority to appoint a factfinder in order to determine what the "facts" are in a dispute. The rationale behind the efficacy of factfinding is the expectation that the opinion of a trusted and impartial neutral will carry weight with the parties. Factfinding was originally used in the attempt to resolve labor disputes, but variations of the procedure have been applied to a wide variety of problems in other areas as well.

Factfinders generally are not permitted to resolve or decide policy issues. The factfinder may be authorized only to investigate or evaluate the matter presented and file a report establishing the facts in the matter. In some cases, he or she may be authorized to issue either a situation assessment or a specific non-binding procedural or substantive recommendation as to how a dispute might be resolved. In cases where such recommendations are not accepted, the data (or facts) will have been collected and organized in a fashion that will facilitate further negotiations or be available for use in later adversarial procedures. *See* U.S. Office of Personnel Management, *Alternative Dispute Resolution: A Resource Guide*.

K. Interest-based problem-solving

Interest-based problem-solving is a technique that creates effective solutions while improving the relationship between the parties. The process separates the person from the problem, explores all interests to define issues clearly, brainstorms possibilities and opportunities, and uses some mutually agreed upon standard to reach a solution. Trust in the process is a common theme in successful interest-based problem-solving.

Interest-based problem-solving is often used in collective bargaining between labor and management in place of traditional, position-based bargaining. However, as a technique, it can be effectively applied in many contexts where two or more parties are seeking to reach agreement. *See* U.S. Office of Personnel Management, *Alternative Dispute Resolution: A Resource Guide*.

L. Minitrials

Minitrials involve a structured settlement process in which each side to a dispute presents abbreviated summaries of its cases before the major decision makers for the parties who have authority to settle the dispute. The summaries contain explicit data about the legal basis and the merits of a case. The rationale behind a minitrial is that if the decision makers are fully informed as to the merits of their cases and that of the opposing parties, they will be better prepared to successfully engage in settlement discussions. The process generally follows more relaxed rules for discovery and case presentation than might be found in the court or other proceeding and usually the parties agree on specific limited periods of time for presentations and arguments.

A third party who is often a former judge or individual versed in the relevant law is the individual who oversees a minitrial. That individual is responsible for explaining and maintaining an orderly process of case presentation and usually makes an advisory ruling regarding a settlement range, rather than offering a specific solution for the parties to consider. The parties can use such an advisory opinion to narrow the range of their discussions and to focus in on acceptable settlement options—settlement being the ultimate objective of a minitrial.

The minitrial method is a particularly efficient and cost effective means for settling contract disputes and can be used in other cases where some or all of the following characteristics are present: (1) it is important to get facts and positions before high-level decision makers; (2) the parties are looking for a substantial level of control over the resolution of the dispute; (3) some or all of the issues are of a technical nature; and (4) a trial on the merits of the case would be very long and/or complex. *See* U.S. Office of Personnel Management, *Alternative Dispute Resolution: A Resource Guide*.

M. Mediated arbitration

Mediated arbitration is commonly known as "med-arb," and is a variation of the arbitration procedure in which an impartial or neutral third party is authorized by the disputing parties to mediate their dispute until such time as they reach an impasse. As part of the process, when impasse is reached, the third party is authorized by the parties to issue a binding opinion on the cause of the impasse or the remaining issue(s) in dispute.

In some cases, med-arb utilizes two outside parties--one to mediate the dispute and another to arbitrate any remaining issues after the mediation process is completed. This is done to address some parties' concerns that the process, if handled by one third party, mixes and confuses procedural assistance (a characteristic of mediation) with binding decision making (a characteristic of arbitration). The concern is that parties might be less likely to disclose necessary information for a settlement or are more likely to present extreme arguments during the mediation stage if they know that the same third party will ultimately make a decision on the dispute.

Mediated arbitration is useful in narrowing issues more quickly than under arbitration alone and helps parties focus their resources on the truly difficult issues involved in a dispute in a more efficient and effective manner. *See* U.S. Office of Personnel Management, *Alternative Dispute Resolution: A Resource Guide*.