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ALTERNATIVE DISPUTE RESOLUTION

Will Pryor*

This article addresses developments during the Survey year in mediation and arbitration. It also discusses possible legislative activity in the newly evolving field referred to as “collaborative law,” and its future application in civil disputing beyond family law.

Alternative Dispute Resolution (ADR) is now a well-established field of academic study, and permanently engrained in our civil judicial system. Only fifty or so years ago, there were virtually no ADR course offerings at any law school in the United States. Today most law schools offer courses such as negotiation, mediation, and arbitration. These courses are often offered as “practice skills” courses in curricula that require students to complete a certain number of course hours in subjects that are distinguished from more academic and traditional course offerings. This new-found emphasis in American legal education on dispute resolution reflects an acknowledgement that resolving disputes is something that lawyers actually do in the daily practice of law. This emphasis is as it should be. All law students benefit from training and practice in negotiation skills, something they will do every day in their practice. Increasingly, it is fair to suggest to law students that, regardless of the nature of their practice—even if they will engage in professional pursuits outside the law—there is a better than even chance that they will attend a mediation, if not dozens or even hundreds of mediations, during their careers. More than a few students will become parties to arbitration agreements or participate in arbitration proceedings.

So ADR is now well-established in legal academia, but it is not an academic endeavor. The practice skills orientation of ADR course offerings is reflected in the annual brevity that characterizes the *SMU Annual Texas Survey, Alternative Dispute Resolution*. The dearth of appellate cases is understandable. Granted, a contract is often the fruit of a negotiation, and things said in a negotiation might someday be alleged to amount to a business tort, but there will never be an appellate case regarding the practice skill of negotiation. Nor will there ever be many appellate cases or other developments pertaining to mediation; in the prior Survey there were none.

Although there are a couple of mediation-related cases to highlight this year, the editors of future issues of the *SMU Annual Texas Survey* may wish to consider narrowing this topic to “Arbitration.” Let us begin.

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I. MEDIATION

A. AUTHORITY TO ENTER INTO AN MSA

Understandably, there are very few mediation issues that create controversy. Occasionally there is discussion at CLE programs about whether every case deserves to be mediated, or whether the “joint session,” where all participants are convened to engage in open dialogue, is a practice that we should discontinue.

One other area of persistent discussion is the importance of the physical presence at mediation of named parties and “all persons necessary to the decision to settle” and what “authority to settle” really means.¹ In Texas, a typical judicial mediation referral order includes this instruction: “Party representatives must have authority to settle and all persons necessary to the decision to settle shall be present.”²

If there is a “gray area” in the world of mediation, this is it. What is authority? Is even the CEO of a corporate entity fully authorized to enter into a mediated settlement agreement (MSA) and bind the company with his or her signature if, in fact, formal approval by a Board of Directors (none of whom are present) will be required? In mediations involving public entities (e.g., city councils, county commissioners, school boards, etc.), group participation is never expected, and indeed would probably create a violation of a state’s Open Meetings Act.³ Public entity mediations are almost always conducted with the understanding that any MSA will be “conditioned upon and subject to” formal approval by the governing authority in full, public session.⁴ In mediation of a personal injury claim, if an insurer sends a representative to a mediation with limited authority (e.g., authority to a cap of \$10,000.00) when an objective analysis of the value of the claim suggests that more authority will probably be necessary, has the insurance company complied with the court order, or not? After all, someone with “authority” was present.

Occasionally, judges will get fussy when they perceive that one or both parties are not taking their mediation order seriously. This appears to have occurred in *In re ProAssurance Insurance Co.*, where the Dallas Court of Appeals determined that the trial court judge had overstepped her authority in issuing a “show cause” order to an insurance company executive who lived in Alabama.⁵ The parties in *ProAssurance* mediated

1. See 7 TEXAS FORMS LEGAL & BUS. § 12:161 (2016); DALLAS COUNTY RULES FOR MEDIATION, <https://www.dallascounty.org/Assets/uploads/docs/adr/RULES-MEDIATION.pdf> [<https://perma.cc/XNA9-6VXB>].

2. See DALLAS COUNTY RULES FOR MEDIATION, *supra* note 1.

3. See Will Pryor & Robert M. O’Boyle, *Public Policy ADR: Confidentiality in Conflict?*, 46 SMU L. REV. 2207, 2218 (1993).

4. Suzanne M. McSorley, *Take Full Advantage of the Opportunity to Mediate: Prepare, Don’t Just Show Up!*, UNDER CONSTRUCTION: THE NEWSLETTER OF THE ABA FORUM ON CONSTRUCTION LAW (A.B.A. Forum on Construction Law, Chicago, IL), Sept., 2014, at 5, http://www.americanbar.org/publications/under_construction/2014/september_2014/preparing_for_mediation.html [<https://perma.cc/4WDY-HVSW>].

5. *In re ProAssurance Ins. Co.*, No. 05-15-01256-CV, 2016 WL 25645 (Tex. App.—Dallas Jan. 4, 2016, no pet.) (mem. op.).

unsuccessfully, by court order and with an insurance representative present, months before trial.⁶ Months later and after jury selection, *without being ordered to do so*, the parties mediated again, with a different insurance representative participating.⁷ The judge expressed her displeasure with the situation (“I delayed the entire trial for this”), instructed plaintiff’s counsel to file a motion for contempt, placed the insurance representative under oath, and questioned her about ProAssurance’s organizational structure.⁸ Based on the testimony, the court issued a “show cause” order to the Chief Claims Officer of ProAssurance, a resident of Alabama named Darryl Thomas.⁹ In doing so, the court of appeals held, the trial court judge overstepped her authority: “Because Thomas is a non-party who lives more than one hundred fifty miles from Dallas County, Thomas is beyond the trial court’s subpoena power.”¹⁰

The trial court judge’s aggressiveness is certainly intriguing. The offensive (to the judge) mediation behavior took place during a *voluntary* mediation, so the insurer unknowingly exposed itself to judicial sanction for mediating by agreement.¹¹ Of further interest is what the outcome would have been had poor Mr. Thomas been a resident of Dallas County, Texas, or if the “show cause” order had not been made personal as to Mr. Thomas, but instead directed to ProAssurance, the entity. The court of appeals had an easy out—the obvious lack of personal jurisdiction over Mr. Thomas.¹² How far would the judge have gone in her questioning of the witness? Would she have attempted to delve into the extent of the company’s willingness to settle, as if the company owed some sort of duty to settle?

The outcome of *Flores v. Medline Industries, Inc.*¹³ is less disturbing but posits a circumstance very similar to an ethical puzzler that mediators and other courts have mulled over for years. Here a brief chronology is important. Defendant’s motion for summary judgment was heard on April 6; apparently unbeknownst to either party, the trial court signed an order granting the motion for summary judgment on that date and filed it with the district clerk on April 11. Still oblivious to the court’s ruling, the parties proceeded to mediation on April 16, when they entered into an MSA that recited, “The parties acknowledge that bona fide disputes and controversies exist between them.”¹⁴ The Corpus Christi Court of Appeals determined that the record revealed fact issues as to mutual or unilateral mistake, and remanded the matter to the trial court for further

6. *Id.* at *1.

7. *Id.*

8. *Id.*

9. *Id.* at *2.

10. *Id.*

11. *Id.* at *1.

12. *Id.* at *2.

13. No. 13-14-00436-CV, 2015 WL 9257070 (Tex. App.—Corpus Christi Dec. 17, 2015, no pet.) (mem. op.).

14. *Id.* at *1.

proceedings.¹⁵

Is there anything wrong with this outcome? But for the recitation of the “acknowledgement” by the parties, a detail often not included in MSAs, would it be as apparent that counsel did not know what the trial court had done? Why is the trial court’s ruling deemed conclusive when motions for reconsideration or a new trial—and obviously the route of an appeal—were available to one of the parties? On the other hand, the outcome seems one of common sense and fairness. Had the parties known of the court’s ruling, the mediation would presumably not have occurred.

II. ARBITRATION

There have been survey years when one or more appellate court decisions dramatically shifted the arbitration landscape. In its 2008 decision in *Perry Homes v. Cull*, the Texas Supreme Court found, for the first time in the supreme court’s history, substantial invocation of the judicial process and, consequently, a waiver of an arbitration clause.¹⁶ In the same year, the U.S. Supreme Court shook the arbitration world in *Hall Street Associates, LLC v. Mattel, Inc.* with the pronouncement that the grounds for vacatur of arbitration awards listed in the Federal Arbitration Act were exclusive, and that long-existing common law grounds for vacatur, such as “manifest disregard of the law,” would no longer be recognized.¹⁷ In its 2012 decision in *Nafta Traders, Inc. v. Quinn*, the Texas Supreme Court seemed to resist the move in *Hall Street*, distinguishing arbitration clauses that invoked the Texas Arbitration Act when the parties had expressly reserved common law grounds for judicial review.¹⁸

So there are years of note, but this Survey year was not one of them. Few decisions qualified as important to the development of arbitration law and the practice of arbitration. Instead, this author made an effort to identify cases that explained an existing principle in a novel manner, or that addressed a fairly straightforward issue but in an interesting context.

The general issue presented by *Hall Street* and *Nafta Traders*—the validity of common law grounds for vacatur of arbitration awards—has been a central factor for decades in the growth and wide acceptance of arbitration.¹⁹ Participants in arbitrations for almost a century took advantage of the traditional benefits of arbitration (efficiency, cost savings, and so forth), but always with a security blanket.²⁰ The security blanket was that if something went askew, if something about the process in general

15. *Id.* at *8.

16. *Perry Homes v. Cull*, 258 S.W.3d 580, 592 (Tex. 2008).

17. *Hall St. Assocs., LLC v. Mattel, Inc.*, 552 U.S. 576, 581 (2008).

18. *Nafta Traders Inc. v. Quinn*, 339 S.W.3d 84, 99 (Tex. 2011).

19. *See Hall Street*, 52 U.S. at 581; *Nafta Traders*, 339 S.W.3d at 99.

20. *The Benefits of Arbitration in Texas*, ALTERNATIVE DISPUTE RESOLUTION SECTION, STATE BAR OF TEXAS, https://www.texasbar.com/AM/Template.cfm?Section=Jury_Information&Template=/CM/ContentDisplay.cfm&ContentID=27796 [https://perma.cc/2VNT-C6QH].

or the award in particular went awry, parties always had the opportunity to have a “court of competent jurisdiction” set the award aside.²¹ “Manifest disregard of the law” and other judicially created protections against the “arbitrariness” of the arbitration outcome were like a pressure valve to be released in the event of an emergency.²²

So when the *Hall Street* decision was announced, it shook the arbitration world. It was as if the U.S. Supreme Court was reaching to fix something that wasn’t broken, achieving an outcome that was as undesirable as it was unexpected. Suddenly, arbitration was less friendly and, in fact, threatening. Should a panel or even a single arbitrator hand down an award that was clearly beyond what the law would have allowed in the judicial system, the award would be binding, absent a finding of a very narrow list of grounds for vacatur.²³

This development, combined with a decade or two of judicial approval of consumer and employment arbitration clauses, no matter how “adhesive,” left some to wonder what kind of justice system we had created, where arbitration could be imposed on the unknowing and unwilling and, if the arbitrator ignored the law, so be it.²⁴

Nafta Traders provided some comfort to those distressed by *Hall Street*.²⁵ Just specify in your arbitration agreement that the Texas Arbitration Act and not the Federal Arbitration Act governs the agreement, and express the desire of the parties to preserve the right to ask a court for relief from an improper award, and your security blanket was safe from harm.²⁶

The outlier in this Survey year, the case that was significant in altering the arbitration landscape, was the Texas Supreme Court’s decision in *Hoskins v. Hoskins*.²⁷ *Hoskins* is a Texas adoption of *Hall Street*, where review of arbitration awards, even arbitrations expressly governed by the Texas Arbitration Act, are strictly limited to the enumerated grounds for vacatur in the Texas statute.²⁸ The supreme court distinguished the outcome of *Nafta Traders*: “In that case, the parties’ arbitration agreement stated that the ‘arbitrator does not have authority (i) to render a decision which contains a reversible error of state or federal law, or (ii) to apply a

21. See, e.g., Confirmation, Modification, or Vacation of Arbitration Award, Texas Trial Handbook § 5:30 (3d. ed.).

22. Jason P. Steed, *Appealing Arbitration Awards and the Circuit Split over “Manifest Disregard of the Law,”* A.B.A. SECTION OF LITIGATION, APPELLATE PRACTICE (May 10, 2016), <http://apps.americanbar.org/litigation/committees/appellate/articles/spring2016-0516-appealing-arbitration-awards-circuit-split-manifest-disregard-law.html> [https://perma.cc/D8R3-P4DZ].

23. See *Hall Street*, 552 U.S. at 590–91.

24. Jessica Silver-Greenberg & Michael Corkery, *In Arbitration, a “Privatization of the Justice System,”* N.Y. TIMES: DEALBOOK (Nov. 1, 2015), <https://www.nytimes.com/2015/11/02/business/dealbook/in-arbitration-a-privatization-of-the-justice-system.html> [https://perma.cc/G3MG-QC7H].

25. See *Nafta Traders, Inc. v. Quinn*, 339 S.W.3d 84 (Tex. 2011).

26. *Id.* at 99.

27. 497 S.W.3d 490 (Tex. 2016).

28. *Id.* at 495.

cause of action or remedy not expressly provided for under existing state or federal law.”²⁹ The lesson from *Hoskins* appears to be that, while preserving judicial review for mistakes in law is still possible, the arbitration contract must state that agreement and also must state that the Texas Arbitration Act governs the proceedings.³⁰

Within a month of the publication of the *Hoskins* decision, the Dallas Court of Appeals deemed it outcome determinative in *Elite Framing v. BBL Builders, L.P.*³¹ The court of appeals reversed a trial court’s vacatur of an arbitration award because the common law ground of “gross mistake” was no longer available.³² In the post-*Hall Street* and post-*Hoskins* world, resourceful lawyers seem to have adopted a new argument: if they originally had argued that a “manifest disregard of the law” had infected an award, what they really had meant was that arbitrators had “exceeded their powers,” a statutory ground for vacatur.³³ This argument does not work often, and in *Elite Framing*, when the appellant contended that the damages calculation of the arbitrator amounted to a disregard of the contract between the parties, the court of appeals disagreed.³⁴ The issue “is not whether the arbitrator decided an issue . . . correctly, but instead, whether the [arbitrator] has the authority to decide the issue at all.”³⁵

Unlike the world of mediation, judicial interaction with arbitration agreements and proceedings is routine. The most common intersection comes at two distinct points—the “front-end” of arbitration, and the “back-end.”³⁶ The back-end decisions are those like *Hoskins* and *Elite Framing*, when a court is asked to either confirm or set aside an arbitration award.³⁷ The front-end decisions are those that address issues such as arbitrability, the scope of the agreement, whether the agreement is valid or whether it is unconscionable or otherwise unenforceable, or whether certain parties can be bound by an agreement and obligated to arbitrate in the face of their desires otherwise.³⁸

Included in these front-end decisions are cases where a party who was not a party to the arbitration agreement or who never signed the agreement may still be bound by it, or may elect to be bound by it.³⁹ We have three of those cases to examine.

29. *Id.* at 494 (quoting *Nafta Traders*, 339 S.W.3d at 88).

30. *Id.* at 496.

31. No. 05-15-01430-CV, 2016 WL 3346041 (Tex. App.—Dallas June 15, 2016, pet. filed) (mem. op.).

32. *Id.* at *2.

33. See, e.g., Lawrence R. Mills & Thomas J. Brewer, ‘Exceeded Powers’: Exploring Recent Trends in Cases Challenging Tribunal Authority, AM. ARBITRATION ASSOC. (Mar. 20, 2014), <https://www.aaau.org/media/20038/supplemental%20materials.pdf> [https://perma.cc/M7QL-6EF7].

34. *Elite Framing*, 2016 WL 3346041 at *3.

35. *Id.*

36. Will Pryor, *Alternative Dispute Resolution*, 64 SMU L. REV. 3, 6 (2011).

37. *Id.*

38. *Id.*

39. *Id.* at 6, 11.

In *Hays v. HCA Holdings, Inc.*, the U.S. District Court for the Western District of Texas found, and the U.S. Court of Appeals for the Fifth Circuit affirmed, that applying “direct benefits estoppel” to the plaintiff’s tortious interference claim was proper.⁴⁰ Hays was an epileptic cardiologist with claims for wrongful termination of his at-will employment and tortious interference.⁴¹ Hays did not want to arbitrate his claims, but the Fifth Circuit applied “direct benefits estoppel[,]” which occurs “when the claim depends on the contract’s existence and would be ‘unable to “stand independently” without the contract.’”⁴² Here, Hays pled his tortious interference claim as an alternative theory, leaving HCA’s liability dependent on resolution of Hays’s contract claim.⁴³ The Fifth Circuit also approved the district court’s application of intertwined claims estoppel, which occurs when a “nonsignatory defendant has a ‘close relationship’ with one of the signatories and the claims are ‘intimately founded in and intertwined with the underlying contract obligations.’”⁴⁴ Noting that the Texas Supreme Court had not recognized “intertwined claims estoppel,” the Fifth Circuit had to make “an *Erie* guess and determine as best we can what the Supreme Court of Texas would decide.”⁴⁵ In applying the theory to Hays’s contentions against several entities that were “virtually indistinguishable[,]” Hays was compelled to arbitrate all of his claims.⁴⁶

Direct benefits estoppel was also invoked in a different context, to require the surviving family members of deceased former residents of an assisted living center in San Antonio to arbitrate their claims. In *Specialty Select Care Center of San Antonio, L.L.C. v. Owen*,⁴⁷ the family members had signed admission agreements of behalf of their family members about to become residents of the facility. In doing so, the family members “directly benefited” from the agreements, and so were obligated to arbitrate their subsequent claims.⁴⁸

There are two issues worthy of note in the U.S. Court of Appeals for the Fifth Circuit’s opinion in *Nelson v. Watch House International, L.L.C.*⁴⁹ The first is the ease with which the Fifth Circuit determined that Nelson, employed by Watch House, was subject to an arbitration agreement in an electronic version of the employment manual which Nelson never signed, even though the Plan definition of “employee” was “the individual whose signature is affixed hereto.”⁵⁰ The opinion mentions this

40. *Hays v. HCA Holdings, Inc.*, 838 F.3d 605, 613 (5th Cir. 2016).

41. *Id.* at 608.

42. *Id.* at 609 (citing *G.T. Leach Builders v. Sapphire V.P., L.P.*, 458 S.W.3d 502, 528 (Tex. 2015)).

43. *Id.*

44. *Id.* at 610 (citing *In re Merrill Lynch Trust Co.*, 235 S.W.3d 185, 193–94 (Tex. 2007)).

45. *Id.* at 611.

46. *Id.* at 612–13.

47. 499 S.W.3d 37, 41 (Tex. App.—San Antonio 2016, no pet.).

48. *Id.* at 42.

49. 815 F.3d 190 (5th Cir. 2016).

50. *Id.* at 192.

fact but then glosses over it.⁵¹ This writer thought the issue deserved more attention. But, the substance of the opinion has to do with whether the arbitration agreement was “illusory,” and consequently unenforceable.⁵² “Illusory” in this context means that one party (the employer) has the “unrestrained unilateral authority to terminate” the arbitration agreement.⁵³ When an arbitration agreement is “illusory,” it is unenforceable.⁵⁴

To appreciate the *Watch House* decision, it might be helpful to review a bit of the development of the “illusory” defense to arbitration agreements. In *In re Halliburton*, the Texas Supreme Court relied on two provisions in an arbitration agreement to determine that it was *not* illusory:

no amendment [to the arbitration agreement] shall apply to a Dispute of which . . . [employer] had actual notice on the date of amendment . . . and that termination shall not be effective until 10 days after reasonable notice of termination is given to Employees or as to Disputes which arose prior to the date of termination.⁵⁵

This is often referred to as a “savings” clause.⁵⁶ In *Lizalde v. Vista Quality Markets*, the Fifth Circuit in 2014 stated a three-pronged, rather than two-pronged test for determining whether an agreement is illusory: the agreement is not illusory so long as the power to terminate “(1) extends only to prospective claims, (2) applies equally to both the employer’s and employee’s claims, and (3) so long as advance notice to the employee is required before termination is effective.”⁵⁷ Applying the *Lizalde* test to the *Watch House* arbitration agreement, the Fifth Circuit held that “*Watch House*’s retention of this unilateral power to terminate the Plan without advance notice render[ed] the Plan illusory[.]”⁵⁸

In the last of our “front-end” judicial encounters with arbitration agreements, we find the rare determination that a clause was unconscionable, and consequently unenforceable.⁵⁹ In *AOF Services, LLC v. Santorsola*, the Corpus Christi Court of Appeals found that an eighty/twenty arbitration fee-splitting arrangement was substantively unconscionable.⁶⁰ Unlike prior decisions involving fee-splitting arrangements, here the Claimant’s exposure for fees was not capped.⁶¹ The claimant’s affidavit that he could not reasonably afford the costs of arbitration if they exceeded \$5,000.00, and his arbitration-experienced lawyer’s affidavit stat-

51. *Id.* at 193.

52. *Id.*

53. *Id.*

54. *Id.* at 196.

55. *Id.* at 193 (alterations in original) (quoting *In re Halliburton Co.*, 80 S.W.3d 566, 569–70 (Tex. 2002)).

56. *Id.*

57. *Id.* at 194 (quoting *Lizalde v. Vista Quality Mkts.*, 746 F.3d 222, 226 (5th Cir. 2014)).

58. *Id.* at 196.

59. See Pryor, *supra* note 36, at 9.

60. *AOF Servs., LLC v. Santorsola*, No. 13-14-00641-CV, 2016 WL 1165829 (Tex. App.—Corpus Christi Mar. 24, 2016, no pet.) (mem. op.).

61. *Id.* at *3.

ing that based on his experience, arbitration for his client would not be economically feasible, satisfied the claimant's burden of demonstrating prohibitive expense and "of showing the likelihood of incurring such costs."⁶²

Scrutiny was applied to published arbitration awards in two cases reviewed here.⁶³ The first, *Wright vs. Menta*, is replete with expressions of concern by the Dallas Court of Appeals over the arbitration proceedings and the conduct of the arbitrator in reviewing the evidence submitted regarding attorneys' fees.⁶⁴ The evidence of attorneys' fees was supported in the record by affidavits from the attorneys; the detailed billing records were submitted for *in camera* inspection.⁶⁵ The Respondent objected and argued an entitlement to review the billing records, which objection drew a half-hearted denial by the court of appeals: "[A]ny alleged misconduct did not rise to the level of depriving the Wrights of a fair hearing."⁶⁶ Reading between the lines, the court of appeals implies that there were better ways for the arbitrator to have handled this issue.⁶⁷ Also at issue was whether the arbitrator exceeded his authority by awarding attorneys' fees for claims outside of his jurisdiction, the issue of inventorship of patents having been expressly reserved by a federal court.⁶⁸ Because the arbitrator specifically stated in the award that he did not address the invention of the patents, "[w]e presume the arbitrator's award of attorneys' fees was for claims properly submitted to him to decide, and nothing in the record rebuts that presumption."⁶⁹ The amended final arbitration award was affirmed.⁷⁰

Finally, we turn to *Eaton Commercial, L.P. v. Paradigm Hotel SA Riverwalk, LP*.⁷¹ Although vagueness of an arbitration award is not considered a basis for vacatur,⁷² vagueness or ambiguity can result in the proceedings being remanded to the arbitrator for clarification.⁷³ It is not necessary to delve into the complicated arithmetic performed by the arbitrator in calculating the damage award; needless to say, it involved an "adjustment" and a "change order": "[T]he award is unclear regarding

62. *Id.* (quoting *Green Tree Fin. Corp. v. Randolph*, 531 U.S. 79, 92 (2000)).

63. *See Eaton Commercial, L.P. v. Paradigm Hotel SA Riverwalk, LP*, No. 04-15-00705-CV, 2016 WL 5795195 (Tex. App.—San Antonio Oct. 5, 2016, no pet.) (mem. op.); *Wright v. Menta*, No. 05-15-00272-CV, 2016 WL 3141578, at *2 (Tex. App.—Dallas June 6, 2016, pet. denied) (mem. op.).

64. *Wright*, 2016 WL 3141578, at *2. Disclosure: this author was the arbitrator in this case.

65. *Id.* at *3.

66. *Id.* at *4.

67. *See id.* at *3–6.

68. *Id.* at *5.

69. *Id.* at *6.

70. *Id.* at *7.

71. No. 04-15-00705-CV, 2016 WL 5795195 (Tex. App.—San Antonio Oct. 5, 2016, no pet.) (mem. op.).

72. *See Wright*, 2016 WL 3141578, at *5 (citing TEX. CIV. PRAC. & REM. CODE § 171.088 (West 2011)) ("[W]e have not found any authority stating that vagueness is a basis upon which to vacate an arbitration award . . .").

73. *Eaton Commercial*, 2016 WL 5795195, at *2.

the total amount Eaton was owed after the \$769,553.33 adjustment.”⁷⁴ The matter was remanded to the trial court for further remand to the arbitrator.⁷⁵

III. COLLABORATIVE LAW

The *SMU Annual Texas Survey* has twice before given attention to an ADR method known as collaborative dispute resolution, more often referred to as Collaborative Law.⁷⁶ The relatively recent (1990) brainchild of a small group of lawyers in Minnesota, Collaborative Law has taken root in Texas somewhat exclusively in the arena of marriage dissolution, validated by amendment to the Texas Family Code in 2011.⁷⁷ As previously noted,

[C]ollaborative law is a procedure in which the parties and their counsel agree in writing to use their best efforts and make a good faith attempt to resolve their dissolution of marriage dispute on an agreed basis without resorting to judicial intervention. Perhaps the most distinctive feature of the collaborative process is the requirement that all counsel be parties to the agreement and that the agreement requires “withdrawal of all counsel involved in the collaborative law procedure if the collaborative law procedure does not result in settlement of the dispute.”⁷⁸

The looming issue is whether collaborative law will ever jump the fence and become a practice in the world of general, civil disputing. In 2011, this author suggested that there was a “growing interest” in such an expansion.⁷⁹ Now, six years later, it is fair to say that while little actual expansion into general, civil disputing has occurred,⁸⁰ there is still a growing interest! In July 2009, the Uniform Law Commission (the promulgating body of the Uniform Commercial Code, the Uniform Arbitration Act, and roughly 250 other uniform laws that are put forward for consideration by state legislatures), approved a Uniform Collaborative Law Act.⁸¹ A Texas Uniform Collaborative Law Act will be before the Texas legislature in 2017.⁸²

Whether the time is right for the advancement of collaborative law, this author believes that the evolution is inevitable. Litigation and jury trials

74. *Id.* at *3.

75. *Id.* at *4.

76. See Pryor, *supra* note 36, at 15; Will Pryor, *Alternative Dispute Resolution*, 61 SMU L. REV. 519, 528 (2008).

77. For an excellent history of the invention of collaborative law and its transportation to Texas, see Lawrence R. Maxwell, Jr., *The Development of Collaborative Law*, ALTERNATIVE RESOLUTIONS, Summer/Fall 2007, at 22.

78. Pryor, *supra* note 36, at 15 (reciting from TEX. FAM. CODE ANN. § 6.603(c)(4)).

79. *Id.*

80. See Lawrence R. Maxwell, Jr. & Sherrie R. Abney, *Civil Collaborative Law is on the Move: But, it Needs Your Help*, ALTERNATIVE RESOLUTIONS, Spring 2012, at 5–8.

81. Lawrence R. Maxwell, Jr., *The Proposed Texas Uniform Collaborative Law Act: An Executive Summary*, ALTERNATIVE RESOLUTIONS, Summer 2016, at 30–42.

82. *Id.* at 35.

have their virtues, but they remain the most grossly inefficient mechanisms for resolving disputes ever created. Just as mediation endured years of controversy and slow growth, collaborative law will eventually gain a foothold in business-to-business dispute resolution before it becomes even more widespread. It is not hard to foresee, in ten to twenty years, the development of boutique firms that will specialize in collaborative representation in business disputes. Some view this development as unlikely.⁸³ This view usually begins with the argument that the disqualification of counsel feature in the collaborative law “participation agreement” will add to the delay and expense of disputing for businesses who have ongoing relationships with their lawyers and law firms.⁸⁴ But a process that eliminates the incentive for counsel to engage in a strategy that perpetuates disputing and that only rewards resolution is a process that will eventually be too attractive to ignore for in-house counsel and corporate executives overwhelmed by their litigation costs and expenses. Litigation is too expensive, time consuming, distracting, inefficient, and unpredictable. The legal profession may have to be dragged along into the future, but a society that needed and wanted alternatives, and turned to arbitration and then mediation, will continue to explore new alternatives.

83. See Anna Sapountsis, *Challenges of Collaborative Practice and the Commercial Context*, COLLABORATIVE LAW at 1 (2013).

84. See *id.* at 5–7.