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Alternative Dispute Resolution

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ALTERNATIVE DISPUTE RESOLUTION

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THOUGH mediation remains, and will remain, relatively noncontroversial, arbitration is under attack. More and more criticism is being leveled at dispute resolution alternatives that have evolved in far different ways than anyone could have imagined twenty or thirty years ago.

The criticism is especially evident on two fronts: the arbitration of consumer and employment-related claims imposed on unwilling product purchasers and employees by fine-print arbitration clauses, and the arbitration of "big ticket," commercial disputes.

In Congress the proposed Arbitration Fairness Act, though unlikely to be passed into law, has become a symbol of widespread concern that arbitration should be a process of contract and consensus, not something imposed on the unknowing and unwilling by those with superior knowledge and leverage.[1] The Act's "findings" clauses highlight the tension between the venerable Federal Arbitration Act, relatively unchanged since its passage in 1925, and a rapidly advancing practice of manufacturers, financial service providers, and employers, which began in the 1970s and 1980s, to insert binding arbitration clauses into every conceivable type of contract.[2] Initially, courts everywhere viewed these "fine print" clauses with skepticism, if not hostility. But as recent annual surveys have demonstrated, courts in Texas and throughout the United States eventually became "arbitration friendly," making it far less likely in any jurisdiction, including Texas, that a court would fail to enforce an arbitration clause on the

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1. *See* Arbitration Fairness Act of 2009, H.R. 1020, 111th Cong. (2009).
2. *Id.* § 2.

grounds that it amounted to a "contract of adhesion," violated public policy, or was unconscionable for any reason.

But concerns over due process, unconscionability, and fundamental fairness persist in the public realm, further evidenced by the announcements of the American Arbitration Association (AAA) and the National Arbitration Forum (NAF) in July of 2009, leading into our survey year, that they were suspending all participation in the arbitration of credit card and cell phone consumer disputes.[3] Soon thereafter, Bank of America, reacting to growing public concerns with fairness, announced that it would immediately end the practice of requiring that disputes with its banking customers and credit card holders be resolved by binding arbitration.[4]

On the commercial front, a "summit" was convened in October of 2009 in Washington, D.C., of major players in the arbitration industry, including the AAA, Judicial Arbitration & Mediation Services (JAMS), the International Institute for Conflict Prevention & Resolution (CPR), the College of Commercial Arbitrators (CCA), and the Straus Institute for Dispute Resolution at Pepperdine School of Law. At issue was the fear that arbitration has become "the New Litigation," and the reality that many Fortune 500 general counsels and others have begun to favor litigation over arbitration.[5] Those becoming disenchanted with arbitration argue that because commercial arbitration is now often manipulated and misused, we have reached a point at which litigation, astonishing as this seems, can be cheaper, faster, and more efficient than arbitration, with the inherent advantage of a right of appeal.[6]

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3. The NAF decision was actually part of a settlement agreement with the Minnesota Attorney General, whose investigation revealed that NAF appeared to be owned "by a New York hedge fund that owns one of the nation's largest debt collection agencies" and that in 2006, despite facilitating the arbitration of over 214,000 debt collection matters, the conflict of interest was "actively kept a secret" by the NAF. *All Things Considered: Top Arbitration Firms Exit Business* (National Public Radio broadcast Jul. 22, 2009), available at http://www.npr.org/player/v2/mediaPlayer.html?action=1&t=1&islist=false&id=106894662&m=106894641. "The NAF saga is one of the more colorful (and troubling) episodes in the recent history of consumer arbitration." JAY FOLBERG, DWIGHT GOLANN, THOMAS J. STIPANOWICH & LISA KLOPPENBERG, RESOLVING DISPUTES: THEORY, PRACTICE, AND LAW 703 (2d ed. 2010). The fallout of the NAF debacle includes cases in which arbitration clauses are arguably moot if they specify the NAF as the forum. *See* Ranzy v. Tijerina, 393 F. App'x 174, 176 (5th Cir. 2010) (because the arbitration clause specified NAF as the forum, the intervening impossibility of utilizing the NAF mooted the arbitration agreement); *see also* Zimmerli v. Ocwen Loan Servicing, LLC, 432 B.R. 238, 241 (N.D. Tex. 2010) (noting the plaintiff's argument that the arbitration agreement lacks an integral part because the specified arbitrator, NAF, is no longer in existence; stating that, although this argument is "appealing," the court does not need to address the argument because the claims must be adjudicated in bankruptcy court).

4. *See* Robin Sidel, *Bank of America Ends Arbitration Practice: Consumer Disputes Can Now Go to Courts; Rivals Like Citigroup Continue to 'Monitor Events*, WALL ST. J., Aug. 14, 2009, at C3.

5. *See* Thomas J. Stipanowich, *Arbitration: The New Litigation*, 2010 U. ILL. L. REV. 1 (2010).

6. *See id.*; *see also* Thomas J. Stipanowich, *Arbitration and Choice: Taking Charge of the "New Litigation"*, 7 DEPAUL BUS. & COM. L.J. 383 (2009).

Where did the use of commercial arbitration go wrong? How did the practice of commercial arbitration evolve into the "New Litigation"? "The Protocols," a set of "action steps" designed to repair the failures of current arbitration practices, published in 2010 as a product of the summit, may be aspirational, but they herald a new level of scrutiny, concern, and—one hopes—reform of the practice of commercial arbitration in the years to come.[7]

While the survey year witnessed dynamic change in the practice and public perception of arbitration, the swinging pendulum will be barely noticed in reported appellate decisions discussed in this survey. But appellate courts did provide us with something rare, indeed: a published opinion addressing mediation, and even rarer, a case of first impression discussing an interesting twist on the still infant practice of collaborative law.

I. MEDIATION

Ever since the passage of the Texas Alternative Dispute Resolution Procedures Act in 1987, it has been generally considered that Texas has one of the broadest and clearest schemes among all states for preserving the confidentiality of ADR communications, particularly the communication that occurs between clients, attorneys, and the neutral in mediation.[8] While other states have created general rules regarding privileges and confidentiality in the mediation setting, with protection from disclosure being the result only when numerous requirements are met, Texas has blanket declarations of confidentiality, making the effort to later require disclosure of such communication an uphill challenge, at best.[9] To negotiators and adversaries who hammer out an agreement, or the outline of an agreement, at a mediation, but then subsequently disagree on whether an agreement was reached or, if so, what the terms were, the inability to secure evidence of communication pertaining to the mediated negotiation, the views and recollection of the neutral mediator, and so forth, often amounts to an inconvenient truth: in Texas such information is protected.

The opinion in *In re Empire Pipeline Corp.*,[10] is further indication that courts in Texas are not likely to begin breaching the strict rules protecting

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7. *See* COLL. OF COMMERCIAL ARBITRATORS, PROTOCOLS FOR EXPECTATIONS, COST-EFFECTIVE COMMERCIAL ARBITRATION vi-vii (Thomas J. Stipanowich et al. eds., 2010), *available at* http://www.thecca.net/CCA_protocols.PDF.

8. *See* Edward F. Sherman, *Confidentiality in ADR Proceedings: Policy Issues Arising from the Texas Experience*, 38 S. TEX. L. REV. 541, 542 (1997) (the Texas statute has "perhaps the broadest ADR confidentiality provisions in the country").

9. For an example of a scheme with very narrow confidentiality protections, see the Revised Uniform Mediation Act, published by the National Conference of Commissioners on Uniform State Laws in 2001 and amended in 2003; the Revised Act has been adopted since 2001 in only 11 states (not including Texas), and is currently under consideration in only three other state legislatures. *See* UNIF. MEDIATION ACT § 8 (2001) (rev. 2003).

10. 323 S.W.3d 308 (Tex. App.—Dallas 2010, pet. denied).

mediation communication anytime soon.[11] In *Empire Pipeline*, a Dallas trial court granted a motion to compel discovery relating to a mediation.[12] What the compelling party sought was evidence pertaining to a fundamental point: "[W]as an agreement actually reached at the mediation, and, if so, what were its terms?"[13] After a lengthy citation of confidentiality and privilege provisions in the Civil Practice & Remedies Code (the "Texas ADR statute"), the Dallas Court of Appeals found a part of the trial court's order to be an abuse of discretion—specifically, the order compelling discovery of "any notes or drafts of documents given . . . to the mediator or Plaintiff or his representatives, in connection with the mediation or the preparation of documents relating to the alleged mediated settlement agreement."[14]

But judicial interaction with the practice of mediation is rare. As always, this is as it should be.

II. ARBITRATION

By comparison, judicial involvement with arbitration is extensive. Courts tend to interact with arbitration issues in two general categories: (a) the "front end," resolving disputes about whether an arbitration clause is enforceable, whether particular issues are covered by the arbitration agreement ("arbitrability"), and whether the court, or the arbitrator, is the proper decision-maker on these threshold issues; and (b) the "back end," whether an arbitration award should be enforced ("confirmed") or set aside ("vacated"). But in this survey year, we will first look at two cases decided by the United States Supreme Court.

Rent-A-Center, West, Inc. v. Jackson,[15] arose out of an arbitration agreement in an employment contract, and a subsequent claim of discrimination by the employee against the employer.[16] The arbitration agreement was unusually clear: it covered, among other things, "all past, present, or future disputes arising out of [the] employment," and provided that "[t]he Arbitrator, and not any federal, state, or local court or agency, shall have exclusive authority to resolve any dispute relating to the interpretation, applicability, enforceability or formation of this Agreement including, but not limited to, any claim that all or any part of this Agreement is void or voidable."[17] At issue was "who decides" whether an arbitration agreement is enforceable. The Ninth Circuit reversed the District Court's determination that the arbitration agreement unequivocally granted authority to the arbitrator to decide whether the Agreement is enforceable. The U.S. Supreme Court, in turn, reversed the appellate court: the test is whether a party specifically challenges a

11. *Id.* at 315–16.
12. *Id.*
13. *Id.* at 310.
14. *Id.* at 316.
15. 130 S. Ct. 2772 (2010).
16. *Id.* at 2775.
17. *Id.*

particular portion of the contract (court decides), or whether the challenge is to the validity of the contract as a whole (arbitrator decides).[18] As a result, an arbitrator, not a court, decides whether the very agreement itself might be illegal, fraudulent, or otherwise unenforceable. Justice Stevens's dissenting opinion, joined by three other Justices, strongly disagreed with the Court's reasoning and outcome, calling it "fantastic" for reasons akin to those once outlined by Justice Black.[19]

In *Stolt-Nielsen S.A. v. AnimalFeeds International Corp.*,[20] the Supreme Court clarified the circumstances in which the claims of a class can be arbitrated. The parties in *Stolt-Nielsen* agreed to arbitrate the price-fixing antitrust claims brought by a customer of the defendant's parcel tanker transportation services and agreed to submit the question of whether their arbitration agreement allowed for class arbitration to the arbitration panel. Expressly incorporating the Class Rules of the American Arbitration Association, "[t]he parties selected a panel," agreed upon New York City as the arbitration site, "*and stipulated that the arbitration clause was 'silent' with respect to class arbitration.*"[21] This stipulation proved to be outcome determinative in the Court's reversal of the arbitration panel's decision that the matter could proceed as a class action:

> [I]t follows that a party may not be compelled under the FAA to submit to class arbitration unless there is a contractual basis for concluding that the party agreed to do so. In this case, however, the arbitration panel imposed class arbitration even though the parties concurred that they had reached 'no agreement' on that issue. . . . The panel's conclusion is fundamentally at war with the foundational

18. *Id.* at 2779 (holding that a challenge to the validity of the agreement as a whole is a decision for the arbitrator. *See* Roicki v. Lamarre, Nos. 04-09-00572-CV, 04-09-00667-CV, 2010 WL 724379, at *2 (Tex. Civ. App.—San Antonio Mar. 3, 2010, no pet.) (mem. op., not designated for publication) (noting that the claimant "does not allege she was fraudulently induced into agreeing to the contract as whole and does not challenge any of the other provisions in the purchase agreement"); Saxa Inc. v. DFD Architecture Inc., 312 S.W.3d 224, 228–229 (Tex. App.—Dallas, 2010, pet. denied) (holding that an agreement which incorporated the Construction Industry Arbitration Rules of AAA, providing that the arbitrator has broad authority to determine threshold issues, such as the scope of the issues subject to the arbitration, was a valid delegation of authority and the trial court had no authority to rule on a threshold motion).

19. *Rent-A-Center*, 130 S. Ct. at 2788 (Stevens, J., dissenting) (citing Prima Paint Corp. v. Flood & Conklin Mfg. Co., 388 U.S. 395 (1967) (Black, J., dissenting). Justice Stevens cites Justice Black's dissent in *Prima Paint Corp. v. Flood & Conklin Mfg. Co.*, which held that a federal court may consider only issues relating to the making and performance of the agreement to arbitrate, and not the making and performance of the contract as a whole. As Justice Black stated: "The Court here holds that the [FAA] . . . compels a party to a contract containing a written arbitration provision to carry out his 'arbitration agreement' even though a court might, after a fair trial, hold the entire contract—including the arbitration agreement—void because of fraud in the inducement. The Court holds, *what is to me fantastic*, that the legal issue of a contract's voidness because of fraud is to be decided by persons designated to arbitrate factual controversies arising of a valid contract between the parties. And the arbitrators who the Court holds are to adjudicate the legal validity of the contract need not even be lawyers . . . " *Id.* at 407 (emphasis added).

20. 130 S. Ct. 1758 (2010).

21. *Id.* at 1766 (emphasis added).

FAA principle that arbitration is a matter of consent.[22]

The Court did not address what some might characterize as irony that the Court seems far less concerned with the "foundational principle" of consent when reviewing adhesive contracts in retail, consumer, and employment contexts, than when reviewing arbitration of class actions due to consent concerns. The path to class action of such claims in the future will probably require both an expression in the arbitration clause that class claims are allowable and some type of privity of contract among members of the purported class.[23]

Before moving on to the collections of cases where arbitration clauses were, or were not, enforced, we join the Fifth Circuit in revisiting a case featured in last year's survey, *Positive Software Solutions, Inc. v. New Century Mortgage Corp.*[24] In this Survey year, the case was back on appeal following the monetary sanction ($10,000.00) of counsel for New Century, Ophelia Camiña of Susman Godfrey LLP, by the trial court judge, the Honorable David Godbey of Dallas. The District Court imposed the sanction for Camiña's conduct during the arbitration proceedings, assuming an inherent authority because the arbitration was an "annex" to litigation.[25] The Fifth Circuit disagreed with the district court: "That approach is puzzling. To begin with, arbitration is not an annex to litigation, but an alternative method for dispute resolution. . . . Parties agree to arbitration to avoid litigation; they voluntarily surrender judicial remedies in favor of an extrajudicial process."[26] The Fifth Circuit concluded that the district court lacked inherent authority or any other authority to sanction the attorney for her conduct in the arbitration proceedings.[27]

In another example of a procedural twist and turn in connection with a threshold arbitration matter, the Texas Supreme Court found that a "trial court abused its discretion by refusing to stay the litigation related to one corporation, MetroPCS Communications, Inc., . . . until the identical claims of its corporate affiliate, MetroPCS Wireless, Inc. . . . , are decided by arbitration . . . ."[28] The two corporate entities were "assert[ing] identical claims with virtually identical facts;" the only meaningful difference was that the contract of one with Merrill Lynch contained an arbitration agreement, and the other did not.[29] The Court's conclusion seems intui-

22. *Id.* at 1775.

23. *See* Green Tree Fin. Corp. v. Bazzle, 539 U.S. 444, 453–54 (2003).

24. 619 F.3d 458 (5th Cir. 2010). For a discussion of the Fifth Circuit's *en banc* reversal of a three-judge panel and the District Court's findings regarding arbitrator disclosures, and when a failure to disclose may give rise to vacatur of an award, *see also* Will Pryor, *Alternative Dispute Resolution*, 61 SMU L. REV. 519, 527–28 (2008) The opinion is so significant that it has been excerpted and discussed in at least one prominent textbook. *See* FOLBERG, *supra* note 3, at 664–73.

25. *Positive Software*, 619 F.3d at 461.

26. *Id.*

27. *Id.*

28. *In re* Merrill Lynch & Co., Inc., 315 S.W.3d 888, 889 (Tex. 2010) (orig. proceeding).

29. *Id.* at 889–90.

tive, logical and rational, and comports with the notion that one purpose of arbitration, among other purposes, is to reduce the amount of unnecessary litigation.

A. Enforcing the Arbitration Clause

In the real world of modern arbitration, especially in a time of economic stress, it is not uncommon for one party to an arbitration to take the position that the party does not have the means or resources to pay its share of the arbitration fees. What result?

This situation arose in *Dealer Computer Services, Inc. v. Old Colony Motors, Inc.*,[30] in which the parties agreed to arbitrate with the AAA under the AAA's Commercial Arbitration Rules.[31] Old Colony, when invoiced by the AAA for $26,900.00 for the final hearing, claimed it did not have the funds to pay. The panel requested that Dealer Computer Services pay both shares of the total fee, and Dealer Computer Services refused. The panel's response was to suspend the proceedings indefinitely. Dealer Computer Services sought, and obtained, a District Court order that Old Colony pay up; Old Colony appealed.[32] The Fifth Circuit determined that the trial court erred when it ordered Old Colony to pay the deposit: "Payment of fees is a procedural condition precedent that the trial court should not review," but instead should leave to the discretion of the arbitrators.[33]

In the author's experience, the awkward situation presented in *Dealer Computer Services* is normally addressed with a bit more finesse. The panel's indefinite suspension of the proceedings effectively resulted in a "win" for the non-paying party seeking to avoid liability and penalized the moving, paying party which had been ready, willing, and able to fulfill all of its contractual arbitration obligations. Perhaps more often than suggesting or encouraging the moving/paying party to fund both shares of the total fee, arbitrators will sometimes use their discretion to, essentially, strike the pleadings of the non-paying party, allowing the paying party to proceed to hearing and, presumably, an award.

Finding reported decisions in which arbitration clauses are enforced by appellate courts in Texas is not difficult. Challenges to arbitration clauses on the grounds that they are unconscionable or illusory are routinely dismissed, but in one Texas Supreme Court case, a claim of negligence by an employee against her nonsubscriber employer, the Court also rejected arguments that (a) the employer's arbitration agreement violated the non-waiver provision of the Texas Workers' Compensation Act (the cause of action is not "waived," the parties are only agreeing that the cause of action be resolved in a different forum), and (b) the Federal Arbitration Act violates the Tenth Amendment by encroaching on a state power to

30. 588 F.3d 884 (5th Cir. 2009).
31. *Id.* at 886.
32. *Id.*
33. *Id.* at 887.

enact and regulate its own workers compensation system.[34]

Underlying facts make the path to enforcement of an arbitration clause unique from time to time, as was the case in *Energy Transfer Fuel, LP v. Estate of Souter*.[35] In *Souter*, the trial court refused to compel arbitration in the face of this "arbitration" clause:

> Said damages, if not mutually agreed upon[,] to be ascertained and determined by three disinterested persons, one thereof to be appointed by the said GRANTOR, one by the said GRANTEE, and the third by the two so appointed, and the written award of such three persons shall be final and conclusive.[36]

The court of appeals reversed the trial court's denial of the motion to compel arbitration.[37] Notwithstanding the absence of any reference to rules, procedures, scope, or other standard arbitration clause features, or even the mention of "arbitration," the court concluded that [t]he provision at issue is an arbitration agreement" and found that it required the arbitration of liability as well as damages issues between the parties.[38]

In employment-related disputes, counsel for aggrieved employees continue to attempt to find ways to avoid binding arbitration agreements inserted into employment manuals and injury benefit plans. In *Nexion Health at Omaha, Inc. v. Martin*,[39] the Texarkana Court of Appeals followed a long and clear line of authority in concluding that such a provision was not fraudulently induced, was not unconscionable, and was supported by adequate, consideration.[40] The claimant in this matter argued that the language of the Employee-Accident Plan was "misleading 'on its face,'" and that she had believed she would be ineligible for benefits and have no other remedies if she rejected the Plan.[41] As to the unconscionability argument, the Court noted that successful procedural unconscionability challenges in Texas cases "involve situations in which one of the parties appears to have been incapable of understanding the agreement."[42] Finally, recognizing that employee benefit plans seeking to impose arbitration have been found to be illusory in circumstances when one party has the unilateral right to amend or terminate the arbitration provision, the *Nexion Health* court distinguished the provision at issue because, in case of amendment or termination of benefits under the plan, the employee was allowed to elect to revoke her benefits election,

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34. *In re* Odyssey Healthcare, Inc., 310 S.W.3d 419, 423–24 (Tex. 2010), *cert. denied*, 131 S. Ct. 319 (2010).

35. No. 10-09-00361-CV, 2010 WL 1611082 (Tex. App.—Waco Apr. 21, 2010, no pet.) (mem. op.).

36. *Id.* at *1.

37. *Id.* at *3.

38. *Id.* at *2–3.

39. No. 06-10-00017-CV, 2010 WL 2690562 (Tex. App.—Texarkana Jul. 7, 2010, no pet.) (mem. op.)

40. *Id.* at *1.

41. *Id.* at *3.

42. *Id.* at *5 (citing Fleetwood Enters, Inc. v. Gaskamp, 280 F.3d 1069, 1077 (5th Cir. 2002)).

"leav[ing] the employee[ ] with all . . . common-law rights against [the employer] as a non-subscriber."[43]

Lack of consent was the basis of the employee's challenge to his employer's Employee Injury and Benefit Plan's arbitration clause in *Paramount Rehab & Health/PHCC v. Matthews*.[44] The Plan documents appeared to lack the signatures of the parties, creating a question as to whether the employee consented to the terms of the arbitration agreement.[45] At the hearing on a Motion to Compel Arbitration before the trial court, the employer's representative testified that she personally discussed the arbitration agreement with the employee and that she personally witnessed the signing of the acknowledgement of receipt of the Plan documents by the employee. The appellate court found that this was sufficient to find the arbitration agreement binding, overruling the trial court's view to the contrary.[46]

Must a trial court hold an evidentiary hearing on a motion to compel arbitration? The Texas Supreme Court has stated that such a hearing is required only "if the material facts necessary to determine the issue are controverted, by an opposing affidavit or otherwise admissible evidence."[47] The underlying defenses to enforcement of the arbitration agreement were found to be the subject of controverting affidavits before the trial court in *Cabellero v. Contreras*, requiring an evidentiary hearing.[48]

B. Arbitration Agreement Not Enforced

The theory of "direct benefits estoppel" precludes a party from claiming the benefits of a contract while simultaneously attempting to avoid the obligations imposed by the contract.[49] Relevant for our purposes, direct benefits estoppel is sometimes used in circumstances where (a) a party to an arbitration agreement seeks to compel arbitration with a non-signatory, or (b) it is the non-signatory seeking to compel arbitration.[50]

A case presenting the first scenario is *Noble Drilling Services, Inc. v. Certex USA, Inc.*, in which the Fifth Circuit determined that Noble was not required to arbitrate its claim.[51] Noble was a purchaser of wire mooring rope manufactured by Certex and had a claim regarding the quality of

43. *Id.* at *8.

44. No. 04-10-00194-CV, 2010 WL 2935787, at *3 (Tex. App.—San Antonio Jul. 28, 2010, no pet.) (mem. op.).

45. *Id.* at *3.

46. *Id.* at *3. By contrast, in *In re* Astro Air, L.P., No. 12-10-00108-CV, 2010 WL 3582657 (Tex. Civ. App.—Tyler Sept. 15, 2010, orig. proceeding [mand. denied]) (mem. op.), the employer could not even find a copy of the written agreement; it was not an abuse of discretion for the trial court to overrule the employer's motion to compel arbitration.

47. Jack B. Anglin Co. v. Tipps, 842 S.W.2d 266, 269 (Tex. 1992) (orig. proceeding).

48. Nos. 13-10-00125-CV, 13-10-00150-CV, 2010 WL 3420527, at *11 (Tex. App.—Corpus Christi Aug. 31, 2010, no pet.) (mem. op.).

49. Noble Drilling Servs., Inc. v. Certex USA, Inc., 620 F.3d 469, 473 (5th Cir. 2010).

50. *See id.*

51. *Id.* at 475.

the product it had purchased. Noble dealt directly with Bridon, the authorized distributor of Certex's product. Bridon, in turn, facilitated the transaction through a Purchase Order Agreement with Certex, which included an arbitration agreement. Noble argued that the "district court erred in finding that [Noble] was obligated to arbitrate its claims against Bridon and Certex under the doctrine of 'direct benefits estoppels.'"[52] As the Fifth Circuit explained, the doctrine of direct benefits estoppel applies to "non-signatories who, during the life of the contract, have embraced the contract despite their non-signatory status but then, during litigation, attempt to repudiate the arbitration clause in the contract."[53] The court held that, because no evidence showed that Noble knew of the terms of the purchase order agreements, "Noble could not have the knowledge necessary to support the 'knowingly exploited' theory of direct benefits estoppel."[54] Had Noble been specifically aware of the details of the distributor/manufacturer agreement, the outcome would have, presumably, been different, even though Noble was not a signatory or a party to the arbitration provision.

The second scenario was presented in *Van Zanten v. Energy Transfer Partners, L.P.*,[55] in which the plaintiff sought to compel arbitration based on an arbitration agreement to which it was not a signatory.[56] The plaintiff "Owners" in Zanten sold products to defendant "Energy Companies" through an intermediary named Encon. Encon's gas purchase agreements with the Energy Companies stated that Encon acted as "agent" for the Owners; the agreement also contained an arbitration clause.[57] The Owners claimed that Energy Companies had engaged in an intentional scheme to manipulate natural gas prices and sought arbitration of this claim, which the Energy Companies opposed. The Owners invoked the doctrine of direct benefits estoppels, arguing that the doctrine "should be extended to enable a plaintiff who claims to have received direct benefits from a contract containing an arbitration clause, to which the plaintiff is not a signatory, to compel arbitration of claims arising from that contract against a defendant who is a signatory to the agreement."[58] The court held that "the Owners [did] not identify any conduct of the Energy Companies on which the Owners relied in deciding to file their claims in arbitration rather than in court."[59] Thus, lacking "some conduct on the part of the Energy Companies that can form the basis of an estoppel, the Owners cannot prevail on this theory."[60]

52. *Id.* at 473.
53. *Id.*
54. *Id.* at 474.
55. 320 S.W.3d 845 (Tex. App.—Houston [1st Dist.] 2010, no pet.).
56. *Id.* at 846–47.
57. *Id.* at 846.
58. *Id.* at 847.
59. *Id.* at 849.
60. *Id.*

C. Confirming or Vacating the Arbitration Award

In light of the efforts of appellate courts in recent years to affirm and reaffirm support of arbitration, it is not surprising that in every survey year the stack of appellate decisions in which arbitration awards are confirmed is high, and the stack of decisions in which awards are vacated is miniscule. If you are among those who still perceive "finality" to be an advantage of arbitration over litigation, then Texas is the place for you. There is not space or time to touch on all the appellate court decisions that confirmed arbitration awards in the survey year, so only a few of particular interest will receive our attention.

In *Rio Grande Xarin, II, Ltd. v. Wolverine Robstown, L.P.*,[61] in an agreement to purchase a commercial shopping center, one party objected to the possibility of arbitrating the dispute, objected to the arbitration after it was filed, and filed an objection and Motion to Dismiss the arbitration as it was about to proceed to hearing.[62] When the hearing convened, "Wolverine's counsel and witness (the objecting party), 'though initially appearing, refused to participate and walked out.'"[63] The arbitration clause incorporated the AAA's Commercial Arbitration Rules, which expressly delegate broad authority to the arbitrator to determine the proper scope of the proceedings, a circumstance fatal to Wolverine's objection: "Because Rio Grande and Wolverine were parties to a valid arbitration agreement and the claims that were resolved by the arbitrator were within the scope of the parties' arbitration agreement, the claims were properly arbitrated."[64]

Once confirmation of an arbitration award is denied, and the parties are ordered to arbitrate a second time, does the Texas General Arbitration Act allow an appeal? The Texas Supreme Court answered this question in the affirmative in *East Texas Salt Water Disposal Co. v. Werline*.[65] Though the result was dictated by specific language in the statute, the outcome should be reassuring to practitioners increasingly concerned that our "arbitration friendly" courts may be tempted to place too much reliance on the notion of arbitration finality. The outcome is intuitive and practical.

In *Roe v. Ladymon*,[66] an arbitration award was confirmed as to one

61. Nos. 13-10-00115-CV, 13-10-00116-CV, 2010 WL 2697145 (Tex. App.—Corpus Christi Jul. 6, 2010, pet. dism'd) (mem. op.).

62. *Id.* at *1–2.

63. *Id.* at *3.

64. *Id.* at *10. Practitioners should be aware of a requirement of the AAA's Commercial Arbitration Rules in the event of a "default" (the Respondent fails to file an answer, appear, walks out of the hearing, etc.). R-29, Arbitration in the Absence of a Party or Representative states: "An award shall not be made solely on the default of a party. The arbitrator shall require the party who is present to submit such evidence as the arbitrator may require for the making of an award." In other words, the party participating and seeking relief must put on evidence; there is no such thing as a "default judgment" in the AAA's Rules. Commercial Arbitration Rules & Mediation Procedures § 12–29 (Am. Arbitration Assoc. 2009).

65. 307 S.W.3d 267, 268–70 (Tex. 2010).

66. 318 S.W.3d 502 (Tex. App.—Dallas 2010, no pet.).

party, and vacated as to another.[67] The fundamental issue was "who—the arbitrator or the court—has the primary responsibility to decide whether a party to the dispute is bound by an arbitration provision in a contract between other parties."[68] As has been discussed, that issue depends on the specific language of the arbitration agreement itself, or the rules, if any, incorporated into the agreement by the parties. In *Roe*, the Claimant (Roe) contracted with the Respondent (Metro LLP) to renovate her home and sought to arbitrate a claim against Respondent and one of the individual partners of the Respondent (Ladymon). The arbitrator's award was in favor of Roe and held Metro LLP as well as Ladymon jointly and severally liable.[69] In assessing Ladymon's objection to the award against it, the court held "that whether Roe can require Ladymon to arbitrate her claims against him individually is an 'issue of arbitrability.'"[70] Moreover, when arbitrability is in question as to non-signatories, "the courts are primarily responsible for deciding [the relevant issues]-not the arbitrator."[71] Further, "only if the non-signatory has 'clearly and unmistakably agreed' to submit that issue to arbitration will courts be [required to defer to] the arbitrator's decision that the non-signatory is bound by the arbitration agreement."[72] Because Ladymon, even though signing the contract as representative of Metro LLP, did not sign in his individual capacity, the Court found that Ladymon did not personally agree to the arbitration provision, and so could not have consented to the incorporated AAA rules, which delegated authority to the arbitrator to make the decision.[73] The Court affirmed the award as to Metro LLP, and vacated the award as to Ladymon.[74]

Does the *Roe* result, though rational and intuitive, violate the arbitrator decides arbitrability when the incorporated rules say so holding of *Rent-a-Center*?[75] Did the *Roe* panel want to avoid a result that Justice Black once characterized as "fantastic":[76] a party to an arbitration agreement can be compelled to arbitrate, and eventually found liable by an arbitrator, when the arbitration agreement specifies that the arbitrator decides all issues of arbitrability? In a word, yes.

Finally, practitioners should take note of one common sense consideration underlying all matters of judicial review of arbitration awards. In *Age Industries, Ltd. v. Edwards*,[77] an employer on the losing side of an arbitration claim brought by a former employee sought to have the award

67. *Id.* at 506.
68. *Id.*
69. *Id.* at 509.
70. *Id.* at 514 (citation omitted).
71. *Id.* at 515.
72. *Id.*
73. *Id.* at 515–17.
74. *Id.* at 523.
75. Rent-A-Center, West, Inc. v. Jackson, 130 S. Ct. 2772, 2779 (2010).
76. Prima Paint Corp. v. Flood & Conklin Mfg. Co., 388 U.S. 395, 407 (1967) (Black, J., dissenting).
77. 318 S.W.3d 461 (Tex. App.—El Paso 2010, pet. denied).

vacated on the grounds that the arbitrator made a gross mistake and misinterpreted the law.[78] The Court did not engage in a great deal of analysis in confirming the award:

> [N]o record of the arbitration proceedings was presented to the trial court and none is before us now. . . . because we do not know what evidence or law the arbitrator did or did not have before it . . . and because we do not know what law the arbitrator did or did not apply . . . we are ultimately unable to judge whether the alleged mistake of law and gross mistake occurred . . .[79]

Obtaining vacature of an arbitration awards is a challenge, indeed. Advocates who want to preserve even the faint possibility of challenging an award will want to consider incurring the expense of a court reporter for the proceedings, as well as formally requesting the preparation of a "reasoned award" from the arbitrator.

III. COLLABORATIVE LAW

Not every survey year will witness a reported decision in the infant area of collaborative law, but this year is an exception. A brief history of collaborative law and its introduction in Texas, principally in family law matters, was included in a prior survey.[80] Collaborative law became codified in the Texas Family Code in 2001.[81] In general, "collaborative 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 . . . ."[82] 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."[83] Though still a creature primarily of family law matters, there is growing interest in collaborative law practice in various kinds of civil disputes, evidenced by the recent creation by the Dallas Bar Association of a Collaborative Law Section,[84] and the Spring 2011 course offering at the Dedman School of Law at SMU in Collaborative Law, being taught by Sherrie Abney and Lawrence Maxwell of Dallas.[85]

In re Mabray[86] is a case of first impression, testing a 2009 "Cooperative

78. *Id.* at 462.
79. *Id.* at 464.
80. *See* Pryor, *supra* note 24, at 528–29.
81. TEX. FAM. CODE ANN. § 6.603 (West 2011).
82. *Id.* § 6.603(b).
83. *Id.* § 6.603(c)(4).
84. *Collaborative Law Section*, DALLAS BAR ASS'N, http://www.dallasbar.org/content/collaborative-law-section (last visited Feb. 23, 2011).
85. *See* Course description, SMU Dedman Sch. of Law, http://www.law.smu.edu/apps/registrar/courselist.aspx?Term=spring-2011 (last visited Mar. 25, 2011).
86. No. 01-09-01099-CV, 2010 WL 3448198 (Tex. App.—Houston [1st Dist.] Aug. 31, 2010, orig. proceeding [man. pending]).

Law Dispute Resolution Agreement" between Petitioner and Respondent in a divorce action.[87] Under the Agreement, the parties agreed that should the case not settle before April 30, 2009, the parties would submit the divorce action to binding arbitration. When the parties failed to reach a settlement, the wife sought withdrew her consent to arbitration and sought the recusal of her husband's counsel. She argued that the agreement was "an illegitimate aberration of collaborative law,"[88] and that the agreement improperly "sought to contract around Texas's collaborative law statute."[89]

Finding that "nothing in the statute or in its legislative history leads us to the conclusion that the collaborative law statute forbids parties in Texas from entering into cooperative law agreements," the Houston Court of Appeals First District, overruled the challenge, and Respondent's counsel was not required to withdraw.[90]

IV. CONCLUSION

We revisit the strange saga of Robert and Jane Cull, a Mansfield couple with a claim against their homebuilder, Perry Homes. It is no coincidence that a significant number of reported decisions each year regarding arbitration involve homebuilders because homebuilders are among the companies at the forefront of encouraging the arbitration of consumer claims in recent years.[91] After filing their lawsuit and after various legal skirmishes, the Culls eventually arbitrated their claim and in 2002 were awarded $800,000.00 by the arbitrator. This, apparently, was not the kind of arbitration that Perry Homes had in mind. Arguing that the Culls had "substantially invoked the litigation process" thus waiving their right to arbitrate, Perry Homes successfully persuaded the Texas Supreme Court in 2008 to vacate the arbitration award and order that the case be tried.[92]

Off to trial they went, and perhaps in a lesson to the homebuilder of be careful what you ask for, in this survey year a jury in Fort Worth awarded the Culls more than fifty-eight million dollars.[93] Appeals are inevitable.

So in a claim by homebuyers against their builder, ten years have gone by since the claim was initiated, the litigants are still at it, there is no end

87. *Id.* at *1.
88. *Id.* at *6.
89. *Id.* at *15.
90. *Id.* The dissent sheds light on what is meant by "cooperative law," citing an academic definition as "a process which incorporates many of the hallmarks of Collaborative Law but does not require the lawyer to enter into a contract with the opposing party providing for the lawyer's disqualification." *Id.* at *8, 19 (citing Janet Martinez and Stephanie Smith, *An Analytic Framework for Dispute Systems Design*, 14 HARV. NEGOT. L. REV. 123, 166 (2009)).
91. *See* Will Pryor, *Alternative Dispute Resolution*, 62 SMU L. REV. 843, 845–46, 846 n.16 (2009).
92. *Perry Homes v. Cull*, 258 S.W.3d 580, 595 (Tex. 2008).
93. *See* Mary Alice Robbins, Plaintiffs in Suit Against Perry Homes, Warranty Company Win $58 Million, TEXAS LAWYER BLOG (Mar. 1, 2010, 7:57 PM), http://texaslawyer.typepad.com/texas_lawyer_blog/2010/03/plaintiffs-in-suit-against-perry-homes-warranty-company-win-58-million-.html.

in sight, and the stakes are higher than ever. So is alternative dispute resolution effective? Do the time-honored virtues of arbitration—that it is quicker, less costly, and more informal than litigation, with the added virtue of finality—seem to be virtues that are more theoretical than real? Though the Cull-Perry Homes debacle is aberrational, to say the least, there is evidence throughout their dispute of failures in our civil justice system, and failures in the current practice of alternative dispute resolution.