

**ARBITRATION PRIMER: AN ALTERNATIVE DISPUTE
RESOLUTION TOOL FOR YOUR PROFESSIONAL
RESPONSIBILITY REPERTOIRE OR AN ETHICAL
RESPONSE TO DISAGREEMENTS IN A TRUST CONTEXT**

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THE USE OF ARBITRATION IN ESTATES AND TRUSTS

I. OVERVIEW AND HISTORY

Arbitration is here to stay. Driven by what parties perceive as fundamental deficiencies of the formal judicial system, including expense, protracted length, gamesmanship, belligerency, and wastefulness, arbitration has grown exponentially in the last ten years. Because of its confidentiality, empirical statistics are difficult to come by. Nonetheless, the American Arbitration Association ("AAA"), probably the largest administrator in the world, notes a 34% increase in commercial case filings alone from 1993 to 2002—i.e., from 12,713 to 17,105 cases per year.¹ The National Association of Securities Dealers ("NASD"), where arbitration is mandated in customer agreements, notes a 64% increase in securities claims filings from 1994 to 2003—i.e., from 5,500 to 8,500 cases per year. See <http://www.nasdaq.com/statistics.asp>. And courts and legislatures—both federal and state—continue wholeheartedly to sanction this trend. Arbitration's dramatic increase must be viewed as a seismic shift in the notions of justice in this America. Given the \$200 to \$300 billion annual cost of civil litigation, studies seem to confirm general public acceptance of the process. For an empirical study, see generally *Dispute-Wise Management: Improving Economic and Non-Economic Outcomes in Managing Business Conflicts* American Arbitration Association (2003) for an interesting but non-empirical survey of attorneys and *Survey of Arbitration* ABA Section of Litigation, Task Force on ADR Effectiveness (August 2003) <http://www.abanet.org/litigation/taskforces/adr/surveyreport.pdfstudy>.

But contrary to its being perceived as a new process, arbitration has been on the scene for centuries. Long before courts were organized and formal law enacted, there had to be principles of law to govern a variety of disputes. Conflict is a part of human experience. Arbitration and mediation were regularly used to resolve a variety of conflicts involving boundaries, trade, general business, personal transactions, international transactions, and even family relationships.

While arbitration may not be as old as Methuselah, the Bible does record that Moses established an "alternative" system of dispute resolution for use during

Israel's forty-year journey in the wilderness. *Exodus* 18:13-21. Arguably, Paul's exhortation for the Christian community to resolve disputes without using the courts of the pagans was an appeal to the arbitral process. I *Corinthians* 6:1-6. The Greeks and Phoenicians regularly used arbitration to settle trading disputes, as did Marco Polo. *The Use of Arbitration in Wills and Trusts*, Vol. 17, No. 3, ACTEC NOTES at 177 (Winter 1991) [hereinafter "ACTEC NOTES"].

Arbitration has also been used extensively throughout America's history to resolve issues such as the ownership of colonies, the ownership of particular pieces of territory, the recovery of money owed by one state to another, and all sorts of religious matters. I *Arbitration in Action*, Nos. 4 and 5, at 5 (April-May 1943), cited in *Manual for Commercial Arbitrators* American Arbitration Association at 11 (1999). In the specific context of wills, no less a personage than the father of our country, George Washington, included an arbitration clause in his will:

My will and direction expressly is, that all disputes (if unhappily should any arise) shall be decided by three impartial and intelligent men, known for their probity and good understanding; two to be chosen by the disputants—each having the choice of one and the third by these two. Which three men thus chosen shall, unfettered by Law, or legal constructions, declare their Sense of the Testators intention—and such decision is, to all intents and purposes to be as binding on the parties as if it had been given by the Supreme Court of the United States.

Perhaps because of the inchoate development of the judicial system in the 19th Century, arbitration appears to be a favored mechanism for resolving disputes. Nonetheless, the process had its deficiencies because of the common-law doctrine of the reversibility of an arbitrator's decision established by Lord Edward Coke's decision in *Vynior's case* (1608). An arbitrator was seen not as a judge whose purpose was to decide on the merits of the controversy but, rather, as an agent trying to affect compromise, somewhat akin to the modern notion of a moderated settlement conference or mini-trial.

The early part of the 20th Century saw two competing trends affecting arbitration. First, the judicial system, suspicious of the power of arbitrators to encroach on its jurisdiction, attempted to limit the power of the process. The court's rationale in *Robert Grace*

¹ The AAA's total caseload in 2003 was 174,000 cases, which includes all non-commercial areas such as insurance no-fault cases, etc.

Contracting Co. v. Chesapeake & O.N. Ry., 281 F. 904 (6th Cir. 1922), is typical:

The attack upon the [arbitration clause] is by reason of its universality . . . , [which] provides for vesting an arbitrator with the exclusive right to decide all questions that may arise between the parties on the subject matter, thereby ousting the courts from all power to hear and decide those questions.

Id. at 905.

Second, the explosive economic growth of the United States after the First World War induced businessmen to seek an alternative way of resolving their inevitable but often increasingly sophisticated disputes accompanying that growth. In 1920, New York became the first state to enact a modern arbitration statute. It differed significantly from the earlier common-law arbitration in that it encouraged the use of binding arbitration for *future* as well as existing disputes. In 1926, Congress passed the Federal Arbitration Act. Prompted by Congress and legislatures, judicial disapproval waned, and eventually courts actually began to encourage the process, no doubt reflecting the courts' awareness of the merits of arbitration as well as to give effect to the parties intent. At present, endorsement of arbitration at federal and state levels continues unabated despite objections. (*See* Part III, *infra.*) If arbitration can continue to deliver faster, less expensive, and less problematic results, this trend will accelerate.

The author anticipates that arbitration will become more utilized in the estate and trust context as well. The number of non-traditional and multiple-marriage family arrangements with their conflicting loyalties and confusing expectations is fertile ground for disputes to germinate. Even changing law seems to promote controversy. For example, the Uniform Prudent Investor Act (UPIA), Tex. Prop. Code §§ 117.001-117.012 (2004), which became law in Texas effective January 1, 2004, dramatically alters standards for investment management from prior law. It adopts the so-called "total asset management" approach. *Id.* § 117.004. Similarly, the UPIA's sister Act, the Uniform Principal and Income Act, *id.* §§ 116.001-116.173, allows trustees broad discretion to reallocate between principal and interest to protect the relative rights of income versus remainder beneficiaries. *Id.* §116.105. With the spiraling of wealth in managed accounts, these Acts, given their breadth and ambiguity, are certain to spawn litigation on investment performance and trustee discretion in making

adjustments. Arbitration is the perfect vehicle to provide relatively inexpensive and expeditious resolution of these sophisticated controversies with a minimum of public scrutiny.²

In a nutshell, arbitration is the process whereby a dispute is submitted to one umpire or a panel of three umpires—the arbitrators—for a final and binding determination, known as the award. The panel conducts itself similarly to a judge. That is, it conducts an evidentiary hearing, hears opening and closing arguments, rules on evidence, reviews the testimony and evidence presented by the parties, and renders an award enforceable in court. Typically, to maintain the integrity of the process and to handle the numerous administrative details that inevitably come up, a neutral administrator such as the AAA, Judicial Arbitration and Mediation Services ("JAMS"), or the National Arbitration Forum ("NAF") is used, although not required by law. Arbitration does not replace the formal litigation system but, rather, coexists with it as an alternative; hence, it is one of the alternative dispute resolution ("ADR") procedures, along with mediation, mini-trials, summary jury trial, and moderated settlement conference. It is often repeated that arbitration is not viewed as a diminution of the rights of the parties but merely as a change in the venue.

Normally, arbitration takes place only in the context of a consensual relationship between the parties, i.e., an arbitration clause in a contract. Thus, arbitration law is governed by classic principles of contract law. As such, courts construe arbitration clauses just like they construe any other contract clause to give effect to the parties' intent. Although parties may enter into such an arrangement either at the beginning of their contractual relationship or at some later date after the controversy has arisen, the former is more common. Wills and trust instruments that include an arbitration clause represent a departure from this "consensual" arrangement since the dispute will likely involve non-signatory parties, such as beneficiaries.

In comparing arbitration to formal litigation, it is helpful to note these major features of arbitration:

² The UPIA allows a trustee to delegate investment and management functions to an agent, such as a professional investment advisor, and *not* be liable to the beneficiaries for the agent's performance. *Id.* § 117.011. Interestingly, an exception to avoidance of liability is if the trustee or beneficiary is required to arbitrate disputes with the agent. *Id.* § 117.011(c)(2).

A written clause for resolving disputes by the use of arbitration.

As noted, an exception this general rule is the inclusion of an arbitration clause in a will or trust.

Informal procedures.

Procedural rules relative to court procedure are simple: strict rules of evidence are not applicable, and there are no requirements for transcripts of the proceedings or for written opinions of arbitrators unless the parties agree otherwise. See AAA Estate & Trust Rules 19, 31, 37 [hereinafter "AAA E&T Rule ___"] (Appendix A). although there is no formal discovery, AAA E&T Rule 16 allow the arbitrator to require the "production of relevant documents and other relevant information." While frowned upon, depositions are permissible, particularly if the parties are in agreement.

Objective and knowledgeable neutrals serve as arbitrators.

Arbitrators are selected by the parties for the specific cases because of their knowledge of the subject matter. Based on that experience and expertise, arbitrators can render an award based on thoughtful and thorough analysis. Thus, the selection of an appropriate arbitrator is critical, and studies show that an arbitrator's knowledge of a specific type of case is the most important qualification for his or her effectiveness, not whether the arbitrator has litigation or judicial experience. Typically, most arbitrators are practicing attorneys who, unlike judges, do not maintain "dockets" of hundreds of seemingly anonymous cases like judges; hence, they have a comprehensive grasp of each individual case.

Arbitration is confidential.

Hearings are closed, and proceedings are not a matter of public record. In sensitive estate, trust, or other family matters, this keeps the "dirty laundry" from being hung out to dry on the front page of the newspaper.

Economy.

The costs of arbitration proceedings are generally less, even including the not insubstantial fees to the administrator and panel, than formal litigation, primarily because of the absence of formal discovery, extensive motion practice, rescheduling, or interlocutory and post-award appeals.

Speed.

The AAA reports that the vast majority of cases are disposed of within twelve months from the date of filing, with 90% of all arbitration hearings concluded in two days or less; the National Arbitration Forum notes the median time of an arbitration from filing to award at two-thirds that of a formal lawsuit.

Final and binding awards are enforceable in court.

Arbitrators have broad discretion in rendering awards. AAA E& T Rule 37 provides that an arbitrator "may grant any remedy or relief that the arbitrator deems just and equitable within the scope of claims or counterclaims being arbitrated." Court intervention and review are limited by applicable state and federal law, and award enforcement is facilitated by these same laws. Judicial review is generally limited to egregious defects in the arbitration procedure, *not* with the merits of the case. Arbitration laws draw narrow limits around the court's authority to review awards.

The Federal Arbitration Act (FAA), 9 U.S.C.A. §§ 1 et seq., is a *substantive* (as opposed to procedural) statute which encourages arbitration and makes arbitration awards binding and enforceable in federal court. Each state has its own act, , the Texas Arbitration Act, Tex. Civ. Prac. & Rem Code §§171.001 et seq. (2004).

II. ANATOMY OF AN ARBITRATION

The beauty of arbitration is derived in its flexibility to customize each individual arbitration to the needs of the parties. *It is designed to be user friendly.* While the parties' knowledge of the minimal rules is indispensable, arbitration is not designed to be a trap for the unwary. For example, there are no default procedures in arbitration for parties who do not answer by a certain date.

Once the parties have selected the panel by reviewing a list of candidates and striking the conflicts from a list provided by the institutional provider, the parties have a preliminary conference. Most of the time this is done by telephone, but in complex arbitrations it is done in person with all parties or attorneys in attendance. This conference is a frank but informal discussion tool to resolve issues, identify the scope of the dispute, address the future conduct of the case, such as clarifying issues and claims, setting deadlines to exchange witness lists and documents and to engage in discovery, scheduling the hearings, and any other preliminary matters. In the author's experience, the importance of this meeting

cannot be underestimated in setting the tenor of the case and the respect to be accorded the panel as well as the process. Other issues that may be addressed in a preliminary hearing include (1) the very issue of the arbitrability of the dispute; (2) whether the parties are subject to the arbitration clause; (3) determination of the status of any collateral arbitration or pending litigation and whether to sever or consolidate if appropriate; (4) and ruling on any question of waiver by either party. Preliminary hearings may last fifteen minutes, fifty minutes, or two hours.

After the preliminary hearing has been held, the panel typically issues a scheduling order which sums up all that was decided during the preliminary hearing. In larger cases, it is drafted by the parties and approved by the panel. The scheduling order serves as the governing document for the case. Scheduling orders can be as short and to the point or as long and creative as the case and the attorneys can conceive. Generally, the panel does as much as possible to encourage the parties to agree to the order, particularly as to reasonable discovery, since it is the parties and their attorneys who presumably have the best grasp of the case.

During the next phase of the process, the parties engage in discovery usually without a great deal of involvement from the panel. If the panel has done a good job during the preliminary hearing, the discovery controversy will be kept at a minimum. On the other hand, the efficiency of the process is such that when and if a discovery controversy comes up a hearing can be held promptly, often by telephone with the panel, and an order issued directly. This remedies the complaint heard about many lawsuits that discovery motions either simply drag on for months without any resolution or force the case to settle on terms that might have been different had discovery been forthcoming due to the parties having grown weary of the process.

Generally, the parties have to make a stronger showing than in formal litigation for the need of depositions, and the question of depositions will usually be specifically addressed at the preliminary hearing. It avoids the "Rambo" type tactics of burying the other side in expensive, wasteful, time-consuming discovery. Once again, panels try to encourage agreement.

The hearing proceeds several months down the line much like any formal trial. Oaths are administered to witnesses, there is often a stenographic record of these hearings, attorneys ask questions, and so forth. Attorneys advocate their clients' position similar to court proceedings. The panel has broad discretion on the conduct of the proceedings. AAA E&T Rule 30. Absent specific direction in an arbitration clause (such as

a directive that the panel use the Federal Rules of Evidence), it is up to the panel to determine the admissibility, relevance, and materiality of evidence, and the panel should take into account the applicable principles of privilege, such as attorney-client confidentiality. Given the informality of the process and the specialized knowledge of the panel, a great deal of evidence—i.e., hearsay—that comes in at the hearing probably would not be allowed in court. Even affidavits are permissible. Arbitration otherwise is very similar to the judicial trial with opening arguments, evidence, resting, more evidence, closing arguments, etc.

After the hearing is over, the panel will sometimes schedule post-hearing briefing and even oral arguments before the panel. This is particularly true in complex cases. Once the hearing is "closed," the arbitrators have thirty days to render their decision ("the award"), much like a court's judgment. Arbitrators may grant any remedy or relief that is deemed just and equitable and within the scope of the agreement of the parties. AAA E&T Rule 43. Once the award is delivered to the parties, they may seek to reduce it to judgment by a court.

Courts have generally held that an arbitrator is *not* bound to apply the strict letter of the law, and courts will not second guess an arbitrator's interpretation of the law even if it is "mistaken." *In re Nestle USA Beverage Division, Inc.*, 82 S.W.3d 767, 777 (Tex. App.—Corpus Christi 2002, orig. proceeding); *Anzilotti v. Gene D. Liggin, Inc.*, 899 S.W.2d 264, 266 (Tex. App.—Houston [14th Dist.] 1995, no writ). The standard to reverse or "vacate" an arbitrator's award on its substantive merits is that of "manifest disregard of the law," perhaps the most stringent existing. There is nothing resembling the factual or legal sufficiency inquiries found in the record of a formal appellate court.

State and federal statutes spell out the narrow grounds for reversing an arbitration award on procedural grounds. Under Section 10(a) of the FAA, the court may enforce an arbitration award unless one or more of the following statutory grounds are proven:

1. Where the award was procured by corruption, fraud, or undue means;
2. Where there was evident partiality or corruption of the arbitrators;
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

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."

III. CASE LAW DEVELOPMENT

A. Arbitration Law Generally

"Arbitration is a contractual proceeding by which the parties, in order to obtain a speedy and inexpensive final disposition of disputed matters, consent to submit the controversy to arbitrators for determination." *J.M. Davidson, Inc. v. Webster*, 49 S.W.3d 507, 512 (Tex. App.—Corpus Christi 2001), *rev'd on other grounds*, 128 S.W.3d 223 (Tex. 2003); *see also In re John M. O'Quinn, P.C.*, 2003 WL 11468619, at *3 (Tex. App.—Tyler June 25, 2003, orig. proceeding), *vacated as moot*, 2003 WL 21571427 (Tex. App.—Tyler July 10, 2003) (mem. op.); 6 C.J.S. *Arbitration* § 2 (2003). Like a lawsuit, arbitration is a mechanism that allows parties to reach a binding resolution of their disputes, *Porter & Clements, L.L.P. v. Stone*, 935 S.W.2d 217, 221 (Tex. App.—Houston [1st Dist.] 1996, orig. proceeding), in an arbitral rather than a judicial forum. *In re Burton, McCumber & Cortez, L.L.P.*, 115 S.W.3d 235, 237 (Tex. App.—Corpus Christi 2003, orig. proceeding); *see also In re American Homestar of Lancaster, Inc.*, 50 S.W.3d 480, 485 (Tex. 2001) (orig. proceeding) (arbitration does not result in a party forgoing substantive rights but merely results in the submission of the claim to an arbitral forum rather than a judicial one). As is the case with other alternative dispute resolution proceedings, the overarching purpose of arbitration is to keep parties out of the courtroom. *Cayan v. Cayan*, 38 S.W.3d 161, 165 (Tex. App.—Houston [14th Dist.] 2000, pet. denied). In fact, "the very purpose of arbitration is to avoid the time and expense of a trial." *In re Bruce Terminex Co.*, 988 S.W.2d 702, 704 (Tex. 1998) (orig. proceeding); *see also In re MHI Partnership, Ltd.*, 7 S.W.3d 918, 921-22 (Tex. App.—Houston [1st Dist.] 1999, orig. proceeding) (same).

The perceived benefits of arbitration clauses are more than just avoiding a trip to the courthouse. In addition to allowing parties to pick the forum where the dispute is resolved, parties may also (depending on the language of the arbitration agreement) (1) have the right to pick their own arbitrators, *Porter & Clements*, 935 S.W.2d at 221; (2) determine the rules under which the arbitration is to be conducted, *J.D. Edwards World Solutions Co. v. Estes, Inc.*, 91 SW.3d 836, 842 (Tex. App.—Fort Worth 2002, pet. denied); and (3) keep matters that they want to remain private out of the public eye because an arbitration (unlike a lawsuit) is not a

public proceeding. Additionally, the consensual nature of arbitration means that it is perceived as being (and in fact usually is) far less expensive than a lawsuit. *Porter & Hedges*, 935 S.W.2d at 221. In short, the ability to agree to arbitrate allows parties to either craft their own unique arbitral jurisdiction that will settle any disputes that arise between them or, if they do not want to go through the trouble of creating their own jurisdiction from scratch, to choose from the array of "pre-packaged" arbitral jurisdictions that are available.

For all these reasons, "[t]he law strongly favors arbitration." *New Concept Constr. Co. v. Kirbyville Consolidated Indep. Sch. Dist.*, 119 S.W.3d 468, 471 (Tex. App.—Beaumont 2003, pet. denied). Arbitration agreements are favored by federal law. The United States Supreme Court has consistently held:

The [Federal] Arbitration Act thus establishes a "federal policy favoring arbitration," *Moses H. Cone Memorial Hospital v. Mercury Construction Corp.*, 460 U.S. 1, 24, 103 S. Ct. 927, 941, 74 L. Ed.2d 765 (1983), requiring that "we rigorously enforce agreements to arbitrate." *Dean Witter Reynolds Inc. v. Byrd*, *supra*, 470 U.S., at 221, 105 S. Ct., at 1242. . . .

As we observed in *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, [473 U.S. 614, 105 S.Ct. 3346, 87 L.Ed.2d 444 (1985),] "we are well past the time when judicial suspicion of the desirability of arbitration and of the competence of arbitral tribunals" should inhibit enforcement of the Act. . . . " *Shearson/ American Express, Inc. v. McMahon*, 482 U.S. 220, 226, 107 S. Ct. 2332, __ (1987).

Accord Cantella & Co. v. Goodwin, 924 S.W.2d 943, 944 (Tex. 1996) (orig. proceeding) (per curiam); *In re Sun Communications, Inc.*, 86 S.W.3d 313, 317 (Tex. App.—Austin 2002, orig. proceeding); *City of Lubbock v. Hancock*, 940 S.W.2d 123, 125 (Tex. App.—Amarillo 1996, orig. proceeding). They are likewise favored by Texas law. *Cantella & Co.*, 924 S.W.2d at 944; *Blue Cross Blue Shield of Texas v. Juneau*, 114 S.W.3d 126, 134 (Tex. App.—Austin 2003, no pet.); *Hancock*, 940 S.W.2d at 125. Although many practitioners see arbitration as the "new kid on the block," this view is mistaken: Agreements to resolve disputes privately, through arbitration, have not only been around but have been the objects of judicial favor for a long time. *See*,

e.g., *Brazoria County v. Knutson*, 176 S.W.2d 740, 743 (Tex. 1944).

Because arbitration is so favored, once it has been shown that two parties have entered into an agreement to arbitrate their differences, it is presumed that any difference that may arise is subject to being arbitrated. *Burton, McCumber & Cortez*, 115 S.W.3d at 237; *In re Rolland*, 96 S.W.3d 339, 345 (Tex. App.—Austin 2001, orig. proceeding). If there is any doubt as to whether a dispute is subject to being arbitrated, these doubts are resolved in favor of arbitration, *In re First Texas Homes, Inc.*, 120 S.W.3d 868, 870 (Tex. 2003) (orig. proceeding) (per curiam); *Brown v. Anderson*, 102 S.W.3d 245, 247-48 (Tex. App.—Beaumont 2003, no pet.), unless it can be said with "positive assurance" that the agreement to arbitrate cannot be interpreted to encompass the dispute in question. *Sun Communications*, 86 S.W.3d at 317.

However, no matter how favored it may be, an agreement to arbitrate is, at its heart, an agreement, and a court cannot force a party to arbitrate in the absence of its agreement to do so. *Freis v. Canales*, 877 S.W.2d 283, 284 (Tex. 1994) (orig. proceeding) (per curiam); see also *Rolland*, 96 S.W.3d at 345; *In re EGL Eagle Global Logistics, L.P.*, 89 S.W.3d 761, 764 (Tex. App.—Houston [1st Dist.] 2002, orig. proceeding) (mand. denied). In the words of the Dallas Court of Appeals:

Although arbitration is encouraged, it is a contractual matter and, in the absence of an agreement to arbitrate, a party cannot be forced to forfeit the constitutional protections of the judicial system and submit its dispute to arbitration.

Jenkins & Gilchrist v. Riggs, 87 S.W.3d 198, 201 (Tex. App.—Dallas 2002, no pet.).

B. Arbitration Clauses in Wills, Trusts, and Family Limited Partnerships

Arbitration provisions are becoming common, even ubiquitous, in certain kinds of business contracts, in construction contracts, and even in employment agreements, but they still are not widely used in wills or inter vivos trusts. To understand why this is, it is necessary to look at the cases involving these instruments.

1. Quasi-Arbitration Provisions

The interest in avoiding litigation is not a new one, and over the years many testators and trust settlors have included provisions in their wills and trusts that attempt to

make litigation unnecessary. Because people have not changed either, these quasi-arbitration provisions were often challenged.

One of the most interesting cases challenging one of these provisions is *Pray v. Belt*, 26 U.S. 670 (1828). The case required the interpretation of the terms of a very prolix will left by one James P. Heath, which appointed a number of executors to handle his affairs post-mortem and left detailed instructions regarding the disposition of bonds, the construction of "fire-proof buildings" on lots he owed, etc. *Id.* at 671-72. Recognizing that his will was "lengthy" and that it was "possible that I have committed some error or errors," Mr. Heath empowered his executors to decide disputes regarding the will by majority vote and provided that these determinations would be "*final and conclusive*, without any resort to a Court of Justice." *Id.* at 672-73 (emphasis in original).

A dispute arose regarding the disposition of Mr. Heath's estate, and a suit was filed. *Id.* at 673. The executors contended that because Mr. Heath had given them the authority to construe the will any decisions they made were final and were not subject to judicial review. *Id.* at 676. In rejecting this assertion, Chief Justice Marshall noted that, while provisions empowering executors to make decisions regarding the estate are proper, they are subject to being interpreted in order to determine what the testator reasonably intended. *Id.* at 679-80. Finding that a reasonable testator would not have intended to allow his executors to make decisions contrary to the plain language of the will—such as "paying to A, a legacy bequeathed to B"—the Supreme Court held that the executors' decisions could not be final and binding in all respects and that the only entity that could determine whether such a "gross misconstruction of the will" had occurred was the court. *Id.* at 680. Over the years, other cases from other jurisdictions have reached similar results. See, e.g., *Taylor v. McClave*, 15 A.2d 213, 112 (N.J. Ch. 1940); *Nations v. Ulmer*, 122 S.W.2d 700, 703 (Tex. Civ. App.—El Paso 1938, writ dism'd); see also 96 C.J.S. *Wills* § 828 (2003).³

³ One Texas case, *Couts v. Holland*, 107 S.W. 913, 915 (Tex. Civ. App. 1908, writ ref'd), contains language appearing to give such appointed arbitrators the absolute authority to make decisions regarding wills—i.e. not subject to judicial review. However, as the subsequent decision in *Nations* indicates, this is likely not the case. A careful review of the decision in *Couts* shows that the appellant argued not that the decision of the executors was subject to judicial review but, rather, that the decision of the executors on a particular issue did

In essence, these cases recognize that a testator can make the determination of named individuals regarding the estate, claims against it, etc., but these decisions are nevertheless still subject to judicial oversight and review. For example, the El Paso Court of Civil Appeals cited with approval cases holding that, although the decisions of an appointed arbitrator may be "final and binding on all the parties interested," these decisions are binding only if they were "fairly and honestly made," and therefore decisions that "evidenced a gross departure from the manifest intent of the testator as disclosed in the will" are subject to judicial review. *Nations*, 122 S.W.2d at 703; see also *Coffee v. William Marsh Rice Univ.*, 408 SW.2d 269, 284 (Tex. Civ. App.—Houston 1966, writ ref'd n.r.e.) (citing *Nations* for the proposition that the court cannot interfere with the exercise of a trustee's discretion except "in a case of fraud, misconduct, or clear abuse of discretion"). In another case, the Michigan Supreme Court held that an agreement to submit the question of a testator's mental competence to "a leading Detroit attorney" for determination did not affect the probate court's right to make the same determination on its own, without reference to the decision of the agreed-upon arbitrator. *In re Meredith's Estate*, 266 N.W. 351, 352-53, 356-57 (Mich. 1936). A few years later, in a case involving a testamentary trust, the same court held that a provision empowering two trustees to interpret the will, which required them to seek the opinion of a third if they could not agree, did not mean that their decisions could not be reviewed by the court. *Matter of Estate of Jones*, 99 N.W.2d 365, 367 (Mich. 1959).

I have characterized such provisions as "quasi-arbitration provisions" because, although they somewhat resemble an agreement to arbitrate disputes, they also differ from arbitration agreements in many important respects. First, although quasi-arbitration provisions empower someone to make a binding decision without reference to the courts, the decisions are often being made not by a third-party arbitrator but instead by an individual with some interest in or connection with the estate or trust, such as the executor or the trustee. Therefore, unlike "true" arbitration provisions, the decisions are not being made by a neutral decisionmaker, but instead by someone whose own interest may color

not fall within the ambit of the authority granted to them by the will. *Id.* at 915. Accordingly, it is possible to square *Couts* with *Nations* because the *Couts* court was not asked to decide whether it had the authority to review the decisions of an executor, and therefore its statements regarding the binding nature of these decisions are *dicta*.

the result, a fact that may explain why courts are more willing to review the determinations of these quasi-arbitrators. Additionally, because these quasi-arbitration provisions are subject to broader review by the courts, they do not remove a dispute from the jurisdiction of the courts in the same way a "true" arbitration agreement does; ultimately, there is still a judge lurking in the background, perhaps even Chief Justice Marshall.

2. True Arbitration Provisions

The question then becomes how to include a valid and binding "true" arbitration provision in a will, trust, or family limited partnership. In this respect, the primary hurdle is also one of the central elements of any arbitration agreement: the element of consent. As set forth above, Texas courts will not send parties to arbitrate their differences unless they have all agreed to do so in a binding manner, and beneficiaries under a will, trust, or similar instrument are almost never parties to the agreement and therefore are almost never in a position to have agreed to arbitration before a dispute arises. I believe that this is the reason we have not seen arbitration clauses used more widely in connection with wills and the like, despite the fact that the advantages arbitration offers are the same in a dispute arising under a trust as they are in a dispute arising under a contract, and despite the fact that these advantages are widely recognized. See, e.g., Stanard T. Kleinfelter & Sandra P. Gohn, *Alternative Dispute Resolution: Its Value to Estate Planners*, 22 Est. Plan. 147, 147-48 (May/June 1995).⁴ In an attempt to address this consent issue, I have come up with three possible ways to make an arbitration provision in a will, trust, or family limited partnership binding.

The first is far and away the most direct and obvious and consists simply of having those who will be

⁴ The author of this article observe that arbitration provisions in wills and trusts are often not enforced, citing a number of the same quasi-arbitration cases already discussed. However, they ultimately make the prudential recommendation to include an arbitration provision in wills and trusts on the theory that it can do no harm. If the provision is challenged the court may refuse to order an arbitration, but even if this happens the parties are in the same place they would have been in if the provision had not been included, i.e., on their way to court. *Id.* at 150-51. I am not sure I agree with this conclusion, because the challenge itself will require the expenditure of money and resources, and so as a practical matter may not end up being the zero-sum game they suggest.

affected by the document sign the document, i.e., have the beneficiaries sign off on the will or trust. However, for all of its simplicity, there are several disadvantages to such an approach. The first is that it is somewhat cumbersome, requiring potentially dozens of beneficiaries that are possibly scattered all over the country sign a single document. Additionally, it will result in the beneficiaries knowing in advance what it is they will receive, with all the potential for trouble and hurt feelings that can be created. It may also restrict the right of the testator or settlor to change the terms of the instrument at a later date, at least without getting everyone to sign again. Finally, such a regime would be very far at odds with current practice, which means that it is less likely that lawyers and clients would be willing to adopt it.⁵

The second possibility is if all of the affected parties agree to arbitrate a dispute after it has arisen. Of course,

⁵ In the context of an agency/custodial agreement with a trust department, non-signatory parties are not an issue because all parties typically sign the agreement. This arrangement fits the traditional mold for arbitration where there are consenting parties to a contract. An agency or custodial agreement is, after all, no more than a contract with fiduciary implications.

The same consensual arrangement is true where all general/limited partners sign a family limited partnership, itself just a specialized type of limited partnership vehicle used for years in an investment context, where arbitration clauses are commonly inserted. The issue arises when non-signatory parties have a beneficial interest in an inter vivos or testamentary trust or a donee receives a gift of a limited partnership interest as a part of estate tax planning. While research discloses no Twentieth Century case on whether non-signatory parties to these types of instruments may be bound by an arbitration clause, the prior century saw three theories to uphold at least testamentary arbitration clauses: (1) "contract": a will was enough like a contract to justify contract principals to uphold these clauses, *Phillip's Estate*, 10 County Court (Pa.) Rep. 374, 378 (1891); (2) "agency": the arbitrator appointed by the testator as his agent, *Wait v. Huntington*, 40 Conn. 9, 11 (1873); and (3) "intent": the courts are bound to carry out the testator's intent in requesting arbitration, *American Bd. of Comm. of Foreign Missions v. Ferry*, 15 Fed. 696, 699 (W.D. Mich. 1883). For an interesting study of these theories, see generally ACTEC NOTES, *supra*, at 178-9.

the downside to this approach is obvious: It requires two or more people who are already at odds with each other to agree on something. While many clients are reasonable and rational, even during a dispute, many are not, and so it will never be certain whether such an agreement can be reached until a dispute has arisen. Also, if one of the central purposes of arbitration is to confer certain benefits, any method that leaves the question of whether these benefits will be realized up in the air is less than optimal.

The third, and in my opinion the most interesting, option is to use an arbitration provision that is coupled with an *in terrorem* clause. Broadly, an *in terrorem* clause is a clause in a contract or will that is designed to frighten someone into compliance with the wishes of another, such as when a will provides that if anyone brings a will contest they will receive only a nominal bequest, even if the challenge is successful. Black's Law Dictionary (6th ed. 1990). Although Texas law does not favor *in terrorem* clauses, they will be enforced if they apply. *Marion v. Davis*, 106 S.W.3d 860, 865-67 (Tex. App.—Dallas 2003, pet. denied). Accordingly, it might be possible to insert into a will, trust, or family limited partnership a provision stating that if a dispute arises regarding the instrument the dispute will be referred to arbitration, and if any of the interested parties refuse to consent to arbitrate then he or she will be cut out of the will, forfeit his or her interest in the trust, etc. Although coercive, such a provision is no more coercive than a similar provision in a will, and, while it cannot be certain that an aggrieved beneficiary might not still choose to litigate (thereby cutting off his nose to spite his face), such a provision would provide a powerful incentive to arbitrate rather than to litigate.

C. Arbitration Provisions in the Attorney's Engagement Agreement

Finally, estate planning and probate practitioners should not neglect to consider using arbitration provisions to protect themselves by including them in their contracts with their clients.

Despite some authority to the contrary, it is becoming increasingly well settled that an arbitration provision in an attorney's contract with a client is enforceable as long as it does not run afoul of a particular provision of the Professional Rules of Disciplinary Conduct, such as by prospectively limiting the attorney's liability for malpractice. *Compare In re Hartigan*, 107 S.W.3d 684, 688-91 (Tex. App.—San Antonio 2003, orig. proceeding) (mand. denied) (arbitration permitted), and *Henry v. Gonzales*, 18 S.W.3d 684, 688-92 (Tex. App.—San Antonio 2000, pet. dis'd by agr.) (same), *with*

In re Godt, 28 S.W.3d 732, 738-40 (Tex. App.—Corpus Christi 2000, orig. proceeding) (refusing to order arbitration, finding that legal malpractice claim was personal injury claim and therefore aggrieved client must have had independent counsel sign off on agreement to arbitrate to make it enforceable); *see also Miller v. Brewer*, 118 S.W.3d 896, 898-99 (Tex. App.—Amarillo 2003, no pet.) (per curiam) (affirming dismissal of client's suit against attorney for failing to comply with order directing the case be arbitrated). This conclusion, that arbitration agreements in contracts between attorneys and their clients should not be treated differently than such agreements in other contracts, is also in keeping with the ABA Committee on Ethics and Professional Responsibility. *ABA Ethics Committee Opines that Legal Malpractice Claims Are Arbitrable*, 13 World Arb. & Med. Report 147 (June 2002).

Finally, for an excellent, in-depth discussion regarding the inclusion of arbitration clauses in attorneys' contracts, see the paper presented by Patrick J. Pacheco, Esquire, at the State Bar of Texas, 28th Annual Advanced Estate Planning and Probate Course, *The Engagement Agreement: One Knee and a Diamond Ring—Lawyer Style* (2003). Not only is the question of the propriety of including arbitration provisions in an employment contract discussed in detail, but the author has provided numerous samples of suggested clauses that may be used and which have been tailored to many different cases. After a review of the literature, one has to ask not why arbitration clauses are ethical but why would they not be.

IV. CONCLUSION

The use of arbitration in estates and trusts may be a case of “back to the future.” What was once accepted but fell out of vogue—perhaps because of lingering doubts about its ability to bind non-signatory parties—is coming around to be understood in a new light. Certainly unqualified judicial endorsement has played a role. The rising costs of formal litigation with its perceived deficiencies, the proliferation of controversies inherent in the alternate family situations of today, and the confusing legal standards of investment management all bode well for the use of arbitration. It is common in virtually every other area of law. If arbitration can indeed deliver “better, faster, cheaper” results it will become an integral part of dispute resolution in estates and trusts as well.

APPENDIX A

Arbitration Rules for Wills and Trusts

Effective July 1, 2003

Introduction

Every year billions of dollars are administered by executors and trustees. Occasionally disputes arise about whether those funds are being properly administered and whether the governing will or trust is being interpreted correctly by the fiduciary. Many of these disputes can be resolved by the use of arbitration, the voluntary submission of a dispute to a disinterested lawyer or lawyers with substantial experience in the area of trusts and estates for final and binding determination. Arbitration is an effective way to resolve these disputes privately, promptly, and economically.

The American Arbitration Association (AAA) is a public service, not-for-profit organization offering a broad range of dispute resolution services to business executives, attorneys, individuals, trade associations, unions, management, consumers, families, communities, and all levels of government. Services are available through AAA headquarters in New York City and through offices located in major cities throughout the United States. Hearings may be held at locations convenient for the parties and are not limited to cities with AAA offices. In addition, the AAA serves as a center for education and training, issues specialized publications, and conducts research on all forms of out-of-court dispute settlement.

Executors and trustees, and beneficiaries of estates and trusts, can voluntarily agree to arbitrate an existing dispute under these rules. However, they should review state law to determine whether a guardian *ad litem* is necessary to represent any minor, incapacitated, or unborn beneficiary. Testators or settlors can require that future disputes be arbitrated by inserting the following clause into their wills and trusts.

Standard Arbitration Clause

In order to save the cost of court proceedings and promote the prompt and final resolution of any dispute regarding the interpretation of my will (or my trust) or the administration of my estate or any trust under my will (or my trust), I direct that any such dispute shall be settled by arbitration administered by the American Arbitration Association under its Arbitration Rules for Wills and Trusts then in effect. Nevertheless the following matters shall not be arbitrable—questions regarding my competency, attempts to remove a fiduciary, or questions concerning the amount of bond of a fiduciary. In addition, arbitration may be waived by all *sui juris* parties in interest.

The arbitrator(s) shall be a practicing lawyer licensed to practice law in the state whose laws govern my will (or my trust) and whose practice has been devoted primarily to wills and trusts for at least ten years. The arbitrator(s) shall apply the substantive law (and the law of remedies, if applicable) of the state whose laws govern my will (or my trust). The arbitrator's decision shall not be appealable to any court, but shall be final and binding on any and all persons who have or may have an interest in my estate or any trust under my will (or my trust), including unborn or incapacitated persons, such as minors or incompetents. Judgment on the arbitrator's award may be entered in any court having jurisdiction thereof.

Administrative Fees

The AAA's administrative fees are based on service charges. The fees cover AAA administrative services; they do not cover arbitrator compensation or expenses, if any, reporting services, or any post-award charges incurred by the parties in enforcing the award.

There is no additional administrative fee where parties to a pending arbitration attempt to mediate their dispute under the AAA's auspices.

Mediation

The parties might wish to submit their dispute to mediation prior to arbitration. In mediation, the neutral mediator assists the parties in reaching a settlement but does not have the authority to make a binding decision or award. Mediation is administered by the AAA in accordance with its Commercial Mediation Rules.

If the parties want to use a mediator to resolve an existing dispute, they can enter into the following submission.

The parties hereby submit the following dispute to mediation administered by the American Arbitration Association under its Commercial Mediation Rules. (The clause may also provide for the qualifications of the mediator(s), the method of payment, locale of meetings, and any other item of concern to the parties.)

The services of the AAA are generally concluded with the transmittal of the award. Although there is voluntary compliance with the majority of awards, judgment on the award can be entered in a court having appropriate jurisdiction if necessary.

Arbitration Rules for Wills and Trusts

1. Incorporation of These Rules into a Will or Trust *

A testator or settlor shall be deemed to have made these rules a part of the will or trust whenever the will or trust has provided for arbitration by the American Arbitration Association (hereinafter AAA) or under its Arbitration Rules for Wills and Trusts. These rules and any amendment of them shall apply in the form obtaining when the demand for arbitration or submission agreement is received by the AAA. The parties, by written agreement, may vary the procedures set forth in these Rules.

* The AAA applies the *Supplementary Procedures for Consumer-Related Disputes* to arbitration clauses in agreements between individual consumers and businesses where the business has a standardized, systematic application of arbitration clauses with customers and where the terms and conditions of the purchase of standardized, consumable goods or services are non-negotiable or primarily non-negotiable in most or all of its terms, conditions, features, or choices. The product or service must be for personal or household use. The AAA will have the discretion to apply or not to apply the Supplementary Procedures and the parties will be able to bring any disputes concerning the application or non-application to the attention of the arbitrator. Consumers are not prohibited from seeking relief in a small claims court for disputes or claims within the scope of its jurisdiction, even in consumer arbitration cases filed by the business.

2. Administrator and Delegation of Duties

When a will or trust provides for arbitration under these rules, the AAA is authorized to administer the arbitration. The authority and duties of the AAA are established in the will or trust and in these rules, and may be carried out through such of the AAA's representatives as it may direct. The AAA may, in its discretion, assign the administration of an arbitration to any of its regional offices.

3. National Panel of Arbitrators

The AAA shall establish and maintain a state-by-state panel of will and trust arbitrators, who shall be attorneys whose practice has been primarily devoted to estate and trust matters for at least ten years, and shall appoint arbitrators from this panel as provided in these rules.

4. Initiation under a Submission

Parties to any existing dispute may start an arbitration under these rules by filing at any regional office of the AAA three copies of a written submission to arbitrate under these rules, signed by the parties. It shall contain a statement of the matter in dispute, the amount involved, if any, the remedy sought, and the hearing locale requested, together with the appropriate filing fee.

5. Initiation under an Arbitration Provision in a Will or Trust

Arbitration under an arbitration provision in a will or trust shall be initiated by the claimant in the following manner.

The initiating party shall give written notice to all other parties (hereinafter respondent) of its intention to arbitrate (demand), which notice shall contain a statement setting forth the nature of the dispute, the amount involved, if any, the remedy sought, and the hearing locale requested, and shall file at any regional office of the AAA three copies of

the notice and three copies of the arbitration provisions of the will or trust, together with the appropriate filing fee. The AAA shall give notice of such filing to the respondents named by the claimant.

6. Answer

A respondent may file an answering statement in duplicate with the AAA within ten days after notice from the AAA, in which event the respondent shall at the same time send a copy of the answering statement to the claimant. If a counterclaim is asserted, it shall contain a statement setting forth the nature of the counterclaim, the amount involved, if any, and the remedy sought. If a counterclaim is made, the appropriate fee shall be forwarded to the AAA with the answering statement. If no answering statement is filed within the stated time, it will be treated as a denial of the claim. Failure to file an answering statement shall not operate to delay the arbitration.

7. Changes of Claims

After filing of a claim, if either party desires to make any new or different claim or counterclaim, it shall be made in writing and filed with the AAA. Simultaneously, a copy must be sent to the other party, who shall have a period of ten days from the date of such transmittal within which to file an answer with the AAA. After the arbitrator is appointed, however, no new or different claim may be submitted except with the arbitrator's consent.

8. Procedures for Large, Complex Disputes

The AAA's Supplementary Procedures for Large, Complex Disputes shall apply where (1) the parties agree to have those procedures apply or (2) where the disclosed claim or counterclaim exceeds \$1 million, one party has requested that those procedures apply, and the AAA in its discretion determines that those procedures will apply.

9. Administrative Conferences and Mediation

At the request of any party or at the discretion of the AAA, an administrative conference with the AAA and the parties and/or their representatives will be scheduled in appropriate cases to expedite the arbitration proceedings. There is no administrative fee for this service.

Unless the parties agree otherwise, the AAA at any stage of the proceeding may arrange a mediation conference under the Commercial Mediation Rules, in order to facilitate settlement. The mediator shall not be an arbitrator appointed to the case. Where the parties to a pending arbitration agree to mediate under the AAA's rules, no additional administrative fee is required to initiate the mediation.

10. Fixing of Locale

The parties may agree on the locale where the arbitration is to be held. If any party requests that the hearing be held in a specific locale and the other party files no objection thereto within ten days after notice of the request has been sent to it by the AAA, the locale shall be the one requested. If a party objects to the locale requested by the other party, the AAA shall have the power to determine the locale in the state whose law governs the will or trust, and its decision shall be final and binding.

11. Appointment from the Panel

If the parties have not appointed an arbitrator and have not provided any other method of appointment, the arbitrator shall be appointed in the following manner: immediately after the filing of the demand or submission, the AAA shall send simultaneously to each party to the dispute an identical list of names of persons chosen by the AAA from its will and trust panel.

Each party to the dispute shall have ten days from the transmittal date in which to strike any names objected to, number the remaining names in order of preference, and return the list to the AAA. In a single-arbitrator case, each party may strike three names on a peremptory basis. In a multi-arbitrator case, each party may strike five names on a peremptory basis. If a party does not return the list within the time specified, all persons named therein shall be deemed acceptable. From among the persons who have been approved on both lists, and in accordance with the designated order of mutual preference, the AAA shall invite the acceptance of an arbitrator to serve. If the parties fail to agree on any of the persons named, or if acceptable arbitrators are unable to act, or if for any other reason the

appointment cannot be made from the submitted lists, the AAA shall have the power to make the appointment from among other members of the panel without the submission of additional lists.

12. The Number of Arbitrators

If the will or trust has not specified the number of arbitrators or if the parties have not agreed to the number of arbitrators, the dispute shall be heard and determined by one arbitrator, unless the AAA, in its discretion, directs that a greater number of arbitrators be appointed.

13. Notice to Arbitrator of Appointment

Notice of the appointment of the arbitrator, whether appointed mutually by the parties or by the AAA, shall be sent to the arbitrator by the AAA, together with a copy of these rules. The signed acceptance of the arbitrator shall be filed with the AAA prior to the opening of the first hearing.

14. Disclosure and Challenge Procedure

Any person appointed as arbitrator shall disclose to the AAA any circumstance likely to affect impartiality, including any bias or any financial or personal interest in the result of the arbitration or any past or present relationship with the parties or their representatives. Upon receipt of such information from the arbitrator or another source, the AAA shall communicate the information to the parties and, if it deems it appropriate to do so, to the arbitrator and others. Upon objection of a party to the continued service of a arbitrator, the AAA shall determine whether the arbitrator should be disqualified and shall inform the parties of its decision, which shall be conclusive.

15. Vacancies

If for any reason an arbitrator is unable to perform the duties of the office, the AAA may, on proof satisfactory to it, declare the office vacant. Vacancies shall be filled by the AAA.

In the event of a vacancy in a panel of arbitrators after the hearings have commenced, unless the parties agree otherwise, the vacancy shall be filled as provided above, and the newly constituted panel shall determine whether all or part of any prior hearing shall be repeated.

16. Preliminary Hearing

At the request of any party or at the discretion of the arbitrator or the AAA, a preliminary hearing with the parties and/or their representatives and the arbitrator may be scheduled by the arbitrator to specify issues to be resolved, to stipulate uncontested facts, to schedule hearings to resolve the dispute, and to consider other matters that will expedite the arbitration proceedings. There is no administrative fee for the first preliminary hearing.

Consistent with the expedited nature of arbitration, the arbitrator may establish (i) the extent of and schedule for production of documents and other information, (ii) identification of any witnesses to be called, and (iii) a schedule for further hearings to resolve the dispute. The arbitrator is authorized to resolve any dispute over this information exchange.

17. Date, Time, and Place of Hearing

The arbitrator shall set the date, time, and place for each hearing. The AAA shall send a notice of hearing to the parties at least ten days in advance of the hearing date, unless otherwise agreed by the parties.

18. Representation

Any party may be represented by counsel or other authorized representative. A party intending to be represented shall notify the other party and the AAA of the name, address and telephone number of the representative at least three days prior to the date set for the hearing at which that person is first to appear. When a representative initiates an arbitration or responds for a party, notice of representation is deemed to have been given.

19. Stenographic Records

Any party desiring a stenographic record shall make arrangements directly with a stenographer and shall notify the other parties of these arrangements 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 to be, or determined by the arbitrator to be, the official record of the proceeding, it must be made available to the arbitrator and to the other parties for inspection, at a date, time and place determined by the arbitrator.

20. Interpreters

Any party wishing an interpreter shall make all arrangements directly with the interpreter and shall assume the costs of the service.

21. Attendance at Hearings; Experts

The arbitrator shall maintain the privacy of the hearings unless the law provides to the contrary. Any person having a direct interest in the arbitration is entitled to attend hearings. Although expert witnesses are generally permitted to attend the hearing, the arbitrator shall have the power to require the exclusion of any witness, other than a party or other essential person, during the testimony of any other witness. It shall be discretionary with the arbitrator to determine the propriety of the attendance of any other person.

22. Postponements

The arbitrator for good cause shown may postpone any hearing upon the request of a party or upon the arbitrator's own initiative, and shall grant a postponement when all of the parties agree.

23. Oaths

Before proceeding with the first hearing, each arbitrator may take an oath of office and, if required by law, shall do so. The arbitrator may require witnesses to testify under oath administered by any duly qualified person and, if it is required by law or requested by any party, shall do so.

24. Majority Decision

All decisions of the arbitrators, including the award, shall be by a majority.

25. Order of Proceedings and Communication with the Arbitrator

A hearing shall be opened by the filing of the oath of the arbitrator, where required; by the recording of the date, time and place of the hearing, and the presence of the arbitrator, the parties and their representatives, if any; and by the receipt by the arbitrator of the statement of the claim and the answering statement, if any.

The arbitrator may, at the beginning of the hearing, ask for statements clarifying the issues involved. In some cases, part or all of the above will have been accomplished at the preliminary hearing conducted by the arbitrator pursuant to Section 16.

The complaining party shall then present evidence to support its claim. The defending party shall then present evidence supporting its defense. Witnesses for each party shall submit to questions or other examination. The arbitrator has the discretion to vary this procedure but shall afford a full and equal opportunity to all parties for the presentation of any material and relevant evidence.

Exhibits, when offered by either party, may be received in evidence by the arbitrator.

The names and addresses of all witnesses and a description of the exhibits in the order received shall be made a part of the record.

There shall be no direct communication between the parties and the arbitrator other than at oral hearing, unless the parties and the arbitrator agree otherwise. Any other oral or written communication from the parties to the arbitrator shall be directed to the AAA for transmittal to the arbitrator.

26. Arbitration in the Absence of a Party or Representative

Unless the law provides to the contrary, the arbitration may proceed in the absence of any party or representative who, after due notice, fails to be present or fails to obtain a postponement. 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.

27. Evidence

The parties may offer evidence that is relevant and material to the dispute, and shall produce such evidence as the arbitrator deems necessary to an understanding and determination of the dispute. An arbitrator or other person authorized by law to subpoena witnesses or documents may do so upon the request of any party or independently.

The arbitrator shall be the judge of the relevance and materiality of the evidence offered, and conformity to legal rules of evidence shall not be necessary. All evidence shall be taken in the presence of all the arbitrators and all the parties, except where any of the parties is absent in default or has waived the right to be present.

28. Evidence by Affidavit and Posthearing Filing of Documents or Other Evidence

The arbitrator may receive and consider the evidence of witnesses by affidavit, but shall give it only such weight as the arbitrator deems it entitled to after consideration of any objection made to its admission.

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

29. Inspection or Investigation

An arbitrator finding it necessary to make an inspection or investigation in connection with the arbitration shall direct the AAA to so advise the parties. The arbitrator shall set the date and time and the AAA shall notify the parties. Any party who so desires may be present at such an inspection or investigation. In the event that one or all parties are not present at the inspection or investigation, the arbitrator shall make a verbal or written report to the parties and afford them an opportunity to comment.

30. Interim Measures

The arbitrator may direct whatever interim measures are deemed necessary with respect to the dispute, including measures for the conservation of property, without prejudice to the rights of the parties or to the final determination of the dispute. Such interim measures may be taken in the form of an interim award and the arbitrator may require security for the costs of such measures.

31. Closing of Hearing

The arbitrator shall specifically inquire of all parties whether they have any further proofs to offer or witnesses to be heard. Upon receiving negative replies or if satisfied that the record is complete, the arbitrator shall declare the hearing closed.

If briefs are to be filed, the hearing shall be declared closed as of the final date set by the arbitrator for the receipt of briefs. If documents are to be filed as provided in Section 28 and the date set for their receipt is later than that set for the receipt of briefs, the later date shall be the date of closing the hearing. The time limit within which the arbitrator shall endeavor to make the award shall start to run, in the absence of other agreements by the parties, upon the closing of the hearing.

32. Reopening of Hearing

The hearing may be reopened on the arbitrator's initiative, or upon application of a party, at any time before the award is made.

33. Waiver of Oral Hearing

The parties may provide, by written agreement, for the waiver of oral hearings in any case. If the parties are unable to agree as to the procedure, the AAA shall specify a fair and equitable procedure.

34. Waiver of Rules

Any party who proceeds with the arbitration after knowledge that any provision or requirement of these rules has not been complied with and who fails to state an objection in writing shall be deemed to have waived the right to object.

35. Extensions of Time

The parties may modify any period of time by mutual agreement. The AAA or the arbitrator may for good cause extend any period of time established by these rules, except the time for making the award. The AAA shall notify the parties of any extension.

36. Serving of Notice

Each party shall be deemed to have consented that any papers, notices, or process necessary or proper for the initiation or continuation of an arbitration under these rules; for any court action in connection therewith; or for the entry of judgment on any award made under these rules may be served on a party by mail addressed to the party or its representative at the last known address or by personal service, in or outside the state where the arbitration is to be held, provided that reasonable opportunity to be heard with regard thereto has been granted to the party.

The AAA and the parties may also use facsimile transmission, telex, telegram or other written forms of electronic communication to give the notices required by these rules.

37. The Award

- a. The arbitrator shall endeavor to issue the award within thirty days from the date of closing of the hearing or, if oral hearings have been waived, from the date of the AAA's transmittal of the final statements and proofs to the arbitrator.
- b. The award shall be in writing, shall be signed by a majority of the arbitrators, and shall be executed in the manner required by law. The award shall contain the names of the parties and representatives, if any, a summary of the issues, the damages and/or other relief requested and awarded, a statement of any other issues resolved, a statement regarding the disposition of any statutory claim, the names of arbitrators, the date when the case was filed, the date of the award, the number and dates of hearings, the location of the hearings, and the signatures of the arbitrators concurring in or dissenting from the award.
- c. The arbitrator may grant any remedy or relief that the arbitrator deems just and equitable within the scope of the claims or counterclaims being arbitrated including, but not limited to, specific performance. The arbitrator shall, in the award, assess arbitration fees, expenses, and compensation as provided in Sections 41, 42, and 43 in favor of any party and, in the event that any administrative fees or expenses are due the AAA, in favor of the AAA.
- d. If the parties settle their dispute during the course of the arbitration, the arbitrator may, upon the written agreement of those parties, set forth the terms of the agreed settlement in an award. Such an award is called a consent award.
- e. Parties shall accept as legal delivery of the award the placing of the award or a true copy thereof in the mail addressed to a party or its representative at the last known address, personal service of the award, or the filing of the award in any other manner that is permitted by law.

38. Correction of the Award

Within twenty days after the transmittal of an award, any party, upon notice to the other parties, may request that the arbitrator correct any clerical, typographical, technical, or computational error in the award. The arbitrator is not empowered to redetermine the merits of any claim already decided.

The other parties shall be given 10 days to respond to the request. The arbitrator shall dispose of the request within twenty days after transmittal by the AAA to the arbitrator of the request and any response thereto.

39. Release of Documents for Judicial Proceedings

The AAA shall, upon the written request of a party, furnish to the party, at its expense, certified copies of any papers in the AAA's possession that may be required in judicial proceedings relating to the arbitration.

40. Applications to Court and Exclusion of Liability

- a. No judicial proceeding by a party relating to the subject matter of the arbitration shall be deemed a waiver of the party's right to arbitrate.
- b. Neither the AAA nor any arbitrator in a proceeding under these rules is a necessary party in judicial proceedings relating to the arbitration.
- c. Parties to these rules shall be deemed to have consented that judgment upon the arbitration award may be entered in any federal or state court having jurisdiction thereof.
- d. Neither the AAA nor any arbitrator shall be liable to any party for any act or omission in connection with any arbitration conducted under these rules.

41. Administrative Fees

As a not-for-profit organization, the AAA shall prescribe filing and other administrative fees to compensate it for the cost of providing administrative services. The fees in effect when the fee or charge is incurred shall be applicable.

The filing fee shall be advanced by the initiating party or parties, subject to final apportionment by the arbitrator in the award.

The AAA may, in the event of extreme hardship on the part of any party, defer or reduce the administrative fees.

42. Expenses

The fees and expenses of witnesses shall be paid by the party producing the witnesses. Unless the parties agree otherwise, all other expenses of the arbitration not specifically provided for in these Rules, including required travel and other expenses of the arbitrator, and AAA representatives and the cost of any proof produced at the direct request of the arbitrator, shall be borne equally by the parties, subject to final allocation by the arbitrator as provided in Section 37(c).

43. Arbitrator's Compensation

Unless the parties agree otherwise, an arbitrator will receive compensation at his or her customary hourly rate, advanced equally by the parties.

44. Deposits

The AAA may require the parties to deposit at any time or times such sums of money as it deems necessary to cover the expense of the arbitration, including the arbitrator's fee, if any, and shall render an accounting to the parties and return any unexpended balance at the conclusion of the case.

45. Interpretation and Application of Rules

The arbitrator shall interpret and apply these rules insofar as they relate to the arbitrator's powers and duties. When there is more than one arbitrator and a difference arises among them concerning the meaning or application of these rules, it shall be decided by a majority vote. If that is not possible, either an arbitrator or a party may refer the question to the AAA for final decision. All other rules shall be interpreted and applied by the AAA.

Large, Complex Disputes

46. Applicability

- a. The Supplementary Procedures for Large, Complex Disputes shall apply to the Arbitration Rules for Wills and Trusts as provided in Section 8 thereof. The procedures are designed to complement the Wills and Trusts rules selected by the parties to govern their dispute. To the extent that there is any variance between such rules and the procedures, the procedures shall control. Any such cases are herein referred to as "Large, Complex Cases."
- b. The parties to any arbitration proceeding that is to be subject to the procedures may, by consent of all parties, agree to eliminate, modify or alter any of the procedures, and, in such case, the procedures as so modified or altered shall apply to that particular case.

47. Administrative Conferences

Prior to the dissemination of a list of potential arbitrators, the AAA shall, unless it determines the same to be unnecessary, conduct an administrative conference with the parties or their attorneys or other representatives, either in person or by conference call, at the discretion of the AAA. The administrative conference shall be conducted for the following purposes and for such additional purposes as the parties or the AAA may deem appropriate:

- a. to obtain additional information about the nature and magnitude of the dispute and the anticipated length of hearing and scheduling;
- b. to discuss the views of the parties about the technical and other qualifications of the arbitrators;
- c. to consider, with the parties, whether mediation or other nonadjudicative methods of dispute resolution might be appropriate.

48. Arbitrators

- a. Large, Complex Disputes shall be heard and determined by three arbitrators, or as may be otherwise agreed upon by the parties. If the parties are unable to agree upon the number of arbitrators, then three arbitrators shall hear and determine the case unless the AAA shall determine otherwise.

49. Management of Proceedings

- b. Arbitrators shall take such steps as they may deem necessary or desirable to avoid delay and to achieve a just, speedy and cost-effective resolution of Large, Complex Disputes.
- c. Parties shall cooperate in the exchange of documents, exhibits, and information within their control if the arbitrators consider such production to be consistent with the goal of achieving a just, speedy, and cost-effective resolution of a Large, Complex Dispute.
- d. At the request of a party, the arbitrators may order the conduct of the deposition of, or the propounding of interrogatories to, such persons who may possess information determined by the arbitrators to be necessary to a determination of a Large, Complex Dispute and who will not be available to testify at the hearings.

50. Form of Award

If requested by all parties, the award of the arbitrators shall be accompanied by a statement of the reasons upon which such award is based. If requested by one party the arbitrators may, in their discretion, issue such a statement.

51. Interest, Fees and Costs

The award of the arbitrators may include: (a) interest at such rate and from such date as the arbitrators may deem appropriate; (b) an apportionment between the parties of all or part of the fees and expenses of the AAA and the compensation and expenses of the arbitrators; and (c) an award of attorneys' fees if all parties have requested or authorized such an award.

ADMINISTRATIVE FEES

The administrative fees of the AAA are based on the amount of the claim or counterclaim. Arbitrator compensation is not included in this schedule. Unless the parties agree otherwise, arbitrator compensation and administrative fees are subject to allocation by the arbitrator in the award.

In an effort to make arbitration costs reasonable for consumers, the AAA has a separate fee schedule for consumer-related disputes. Please refer to Section C-8 of the *Supplementary Procedures for Consumer-Related Disputes* when filing a consumer-related claim.

The AAA applies the *Supplementary Procedures for Consumer-Related Disputes* to arbitration clauses in agreements between individual consumers and businesses where the business has a standardized, systematic application of arbitration clauses with customers and where the terms and conditions of the purchase of standardized, consumable goods or services are non-negotiable or primarily non-negotiable in most or all of its terms, conditions, features, or choices. The product or service must be for personal or household use. The AAA will have the discretion to apply or not to apply the Supplementary Procedures and the parties will be able to bring any disputes concerning the application or non-application to the attention of the arbitrator. Consumers are not prohibited from seeking relief in a small claims court for disputes or claims within the scope of its jurisdiction, even in consumer arbitration cases filed by the business.

Fees

An initial filing fee is payable in full by a filing party when a claim, counterclaim or additional claim is filed.

A case service fee will be incurred for all cases that proceed to their first hearing. This fee will be payable in advance at the time that the first hearing is scheduled. This fee will be refunded at the conclusion of the case if no hearings have occurred.

However, if the Association is not notified at least 24 hours before the time of the scheduled hearing, the case service fee will remain due and will not be refunded.

These fees will be billed in accordance with the following schedule:

| Amount of Claim | Initial Filing Fee | Case Service Fee |
|-----------------------------------|--------------------|------------------|
| Above \$0 to \$10,000 | \$500 | \$200 |
| Above \$10,000 to \$75,000 | \$750 | \$300 |
| Above \$75,000 to \$150,000 | \$1,500 | \$750 |
| Above \$150,000 to \$300,000 | \$2,750 | \$1,250 |
| Above \$300,000 to \$500,000 | \$4,250 | \$1,750 |
| Above \$500,000 to \$1,000,000 | \$6,000 | \$2,500 |
| Above \$1,000,000 to \$5,000,000 | \$8,000 | \$3,250 |
| Above \$5,000,000 to \$10,000,000 | \$10,000 | \$4,000 |
| Above \$10,000,000 | * | * |
| Nonmonetary Claims ** | \$3,250 | \$1,250 |

*Contact your local AAA office for fees for claims in excess of \$10 million.

** This fee is applicable when a claim or counterclaim is not for a monetary amount. Where a monetary claim is not known, parties will be required to state a range of claims or be subject to the highest possible filing fee.

Fees are subject to increase if the amount of a claim or counterclaim is modified after the initial filing date. Fees are subject to decrease if the amount of a claim or counterclaim is modified before the first hearing.

The minimum fees for any case having three or more arbitrators are \$2,750 for the filing fee, plus a \$1,250 case service fee.

Parties on cases held in abeyance for one year by agreement, will be assessed an annual abeyance fee of \$300. If a party refuses to pay the assessed fee, the other party or parties may pay the entire fee on behalf of all parties, otherwise the matter will be closed.

Refund Schedule

The AAA offers a refund schedule on filing fees. For cases with claims up to \$75,000, a minimum filing fee of \$300 will not be refunded. For all other cases, a minimum fee of \$500 will not be refunded. Subject to the minimum fee requirements, refunds will be calculated as follows:

- 100% of the filing fee, above the minimum fee, will be refunded if the case is settled or withdrawn within five calendar days of filing.
- 50% of the filing fee, in any case with filing fees in excess of \$500, will be refunded if the case is settled or withdrawn between six and 30 calendar days of filing. Where the filing fee is \$500, the refund will be \$200.
- 25% of the filing fee will be refunded if the case is settled or withdrawn between 31 and 60 calendar days of filing.

No refund will be made once an arbitrator has been appointed (this includes one arbitrator on a three arbitrator panel). No refunds will be granted on awarded cases.

Note: the date of receipt of the demand for arbitration with the AAA will be used to calculate refunds of filing fees for both claims and counterclaims.

Hearing Room Rental

The fees described above do not cover the rental of hearing rooms, which are available on a rental basis. Check with the AAA for availability and rates.

Rules forms, procedures and guidelines, as well as information about applying for a fee reduction or deferral, are subject to periodic change and updating. To ensure that you have the most current information, see our Web Site at www.adr.org.

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APPENDIX B

American Arbitration Association

Standard Arbitration Clause:

In order to save the cost of court proceedings and promote the prompt and final resolution of any dispute regarding the interpretation of my will (or my trust), or the administration of my estate or any trust under my will (or my trust), I direct that any such dispute shall be settled by arbitration administered by the American Arbitration Association under its Arbitration Rules for Wills and Trusts then in effect. Nevertheless the following matters shall not be arbitrable-questions regarding my competency, attempts to remove a fiduciary, or questions concerning the amount of bond of a fiduciary. In addition, arbitration may be waived by all *sui juris* parties in interest.

The arbitrator(s) shall be a practicing lawyer licensed to practice law in the state whose laws govern my will (or my trust) and whose practice has been devoted primarily to wills and trusts for at least ten (10) years. The arbitrator(s) shall apply the substantive law (and the law of remedies, if applicable) of the state whose laws govern my will (or my trust). The arbitrator's decision shall not be appealable to any court, but shall be final and binding on any and all persons who have or may have an interest in my estate or any trust under my will (or my trust), including unborn or incapacitated persons, such as minors or incompetents. Judgment on the arbitrator's award may be entered in any court having jurisdiction thereof.

American Arbitration Association (reprinted with permission).

from the trust department of a large "money center" bank:

Arbitration:

Any controversy or claim between Owner and Manager (or their heirs, successors and assigns) relating to this account or Agreement shall be resolved by binding arbitration under the Federal Arbitration Act (or if not applicable, under local law), the Rules of Practice and Procedure for the Arbitration of Commercial Disputes of Judicial Arbitration and Mediation Services, Inc. ("JAMS"), and its successors by merger or acquisition, and this paragraph. Arbitration shall be conducted in the State of Texas and shall be administered by J.A.M.S. who shall appoint an arbitrator. If J.A.M.S. or its successor is unable or legally precluded from serving, then the American Arbitration Association shall serve. Judgment upon the award so rendered may be entered in any court having jurisdiction. Except as otherwise provided herein, this paragraph does not waive any defenses or rights of the parties hereto.

Governing Law:

All questions relating to the validity, interpretation, construction, operation or effect of this Agreement shall be governed by the law of the State of Texas.

from the trust department of a large regional bank:

In order to facilitate an efficient and economical resolution of any disputed matter arising under this agency agreement; Grantor and Trustee agree that prior to the instigation of litigation by either of the parties, they will use their best efforts to resolve such dispute by first mediating the dispute in good faith and second, by using other alternative dispute resolution procedures as may be selected by the Trustee (including but not limited to, binding arbitration) as are provided in "Alternate Methods of Dispute Resolution," Texas Civil Practice and Remedies Code, or such other similar statutory means of alternative dispute resolution as may be hereafter adopted.

from a family limited partnership:

X.

ARBITRATION

Arbitration:

Any controversy or claim arising out of or relating to this Agreement, or the breach or default hereof, shall be settled by arbitration in Amarillo, Texas, in accordance with the Commercial Arbitration Rules of the American Arbitration Association, and judgment upon the award rendered by the arbitrator(s) may be entered into any court having jurisdiction thereof.

from a GST trust:

ARTICLE S

NO CONTEST REQUIREMENTS

Settlor vests the trustee of the trust with the authority to construe the trust instrument and to resolve all matters pertaining to disputed issues or controverted claims. Settlor does not want to burden the trust with the cost of a litigated proceeding to resolve questions of law or fact.

As an exception to these rules, the trustee may originate a proceeding (including mediation and binding arbitration) to construe the trust instrument or to resolve any disputed claim or contest. The trustee may give written consent to any trust beneficiary or to any third party to originate a proceeding (including mediation and binding arbitration) to construe the trust instrument or to resolve any disputed claim or contest.

from a dynastic trust for a large well known family of 135 beneficiaries spread over 4 generations:

SIXTH: Any dispute arising out of or relating to the construction, interpretation or validity¹ of this Indenture or Trust or the administration of any trust estate created herein or any matter related thereto, whether such dispute is between the Trustee and one or more of the beneficiaries or is between or among the beneficiaries (a "Dispute"), shall be submitted to mediation and, if mediation is unsuccessful, finally resolved by binding arbitration, as provided in this Paragraph SIXTH. Any mediation or arbitration under this Paragraph SIXTH shall be administered by the American Arbitration Association ("AAA") or its successor organization(s). If neither AAA nor any successor to it is then in existence, the mediation shall be administered by another national arbitration organization or service provider mutually agreed to by the Trustee and qualified beneficiaries as hereinafter defined (individually an "interested party" or collectively the "interested parties"), or if the interested parties fail to reach such an agreement within thirty (30) days after an interested party request mediation or arbitration of any such Dispute, by another national arbitration organization or service provider selected by the then acting Judge of the Probate Division of the Circuit Court of Jackson County, Missouri. The following provisions shall apply to any such mediation or arbitration proceeding:

(1) Prior to instituting an arbitration proceeding, the parties to the Dispute must first attempt in good faith to settle the Dispute by mediation using a neutral, independent mediator. The following provisions shall apply to such mediation proceeding:

(a) The mediation shall be conducted in accordance with the AAA Commercial Rules of Mediation to the extent those rules do not conflict with the provisions of this Paragraph SIXTH.

(b) The mediation shall be selected from a roster of neutrals provided by the AAA; provided that the mediator may be any person agreed upon by all interested parties. If the parties fail to agree, within 20 days after submission of a roster from the AAA, on who the mediator should be, the mediator shall be appointed in accordance with the AAA Commercial Rules of Mediation.

(c) The mediation may be attended by all interested parties. If an interested party refuses to participate in the mediation when requested to do so by the mediator, such interested party shall not have the right (but may nevertheless be compelled) to participate in any arbitration or other proceedings relating to the Dispute. The Dispute shall not proceed to arbitration unless and until the mediation is concluded in accordance with subparagraph (d) below.

(d) The mediation will be concluded upon the first to occur of the following events: (i) the Dispute is resolved by an agreement in writing signed by all parties to the mediation; (ii) the mediator declares in writing that the parties are at an impasse and that all efforts to amicably resolve the Dispute have been exhausted; (iii) the mediator states in writing, or all parties agree, that further efforts to resolve the Dispute through mediation would be futile; or (iv) six (6) months have passed since the matter was referred to the mediator.

(e) Any statute of limitations that may apply to a claim asserted in the Dispute under mediation shall be tolled from time the request for mediation is made to the AAA until 30 days after the time the mediation is concluded pursuant to subparagraph (d) above.

(f) The administrative costs of the mediation, including the mediator's fee, but excluding attorney's fees incurred by the parties other than the Trustee, shall be paid from the trust estate unless otherwise agreed by all interested parties.

¹ The reference to the "validity" of the trust will only be inserted in irrevocable trusts that are modified in a variation proceeding in the Jackson County Circuit Court. The reference will not be included in other trusts because issues such as capacity and undue influence must be decided by the Court.

(g) The mediation proceedings shall be confidential and may not be disclosed by the Trustee, any beneficiary, mediator, or the representatives of any of them, without the prior written consent of the Trustee and all of the adult and otherwise legally competent beneficiaries. Neither a beneficiary nor the Trustee nor the mediator shall be subject to subpoena for testimony or otherwise questioned regarding statements made during the course of mediation and no such statement shall be admissible in any subsequent arbitration.

(2) Except as otherwise provided below, if the Dispute is not resolved by mediation in accordance with subparagraph (1) above, any interested party may file a request for arbitration of the Dispute with the AAA. The following provisions shall apply to any such arbitration proceeding:

(a) If the Trustee and all of the adult and otherwise legally competent qualified beneficiaries consent, the Dispute may be resolved in a court having jurisdiction thereof rather than by arbitration.

(b) The terms of this Paragraph SIXTH shall not preclude the Trustee or any beneficiary or beneficiaries from filing an action to modify, amend or vary the terms of this Indenture of Trust in a court having jurisdiction thereof.

(c) The arbitration shall be conducted in accordance with the Federal Arbitration Act set forth in Title 9 of the U.S. Code and the arbitration rules of the AAA determines should apply based on the issues raised in the Dispute (the "AAA Rules"), as modified by this Paragraph SIXTH.

(d) The arbitration shall be conducted by a single arbitrator, unless any party to the arbitration requests three arbitrators, in which event the arbitration shall be conducted by a panel of three neutral arbitrators (in either event, the "Tribunal"). At least one arbitrator shall be a practicing lawyer or retired judge whose practice has been devoted substantially to wills or trusts for at least ten years prior to the arbitration. The Tribunal shall be selected in accordance with the AAA Rules unless otherwise agreed by all parties to the arbitration.

(e) The administrative costs of the arbitration, including the fees of the Tribunal and the attorney's fees of the Trustee, shall be paid from the trust estate unless otherwise agreed by all interested parties. However, the additional administrative costs incurred for a panel of three arbitrators, including the additional arbitrator's fees, shall be paid by the interested party or parties that requested such a panel, unless all parties agreed that there should be three arbitrators.

(f) The Tribunal shall apply the substantive laws, the law governing the attorney-client privilege and work product immunity and, if applicable, the law of remedies of the State of Missouri. The Tribunal is expressly granted the power to determine its jurisdiction and to rule on the arbitrability of any Dispute. The Tribunal may, if the interest of justice and economy would thereby be served, order the consolidation of two or more arbitration proceedings brought under this Paragraph SIXTH.

(g) The Tribunal shall have no power to make any decision that would cause the trust estate to be subject to a gift, estate or generation-skipping transfer ("GST") taxes. Any decision by the Tribunal may be conditioned upon one or more interested parties obtaining a ruling from the Internal Revenue Service that the decision will not cause the trust estate to be subject to gift, estate or GST taxes, and the Tribunal may require one or more interested parties to request such a ruling from the Internal Revenue Service. Notwithstanding the foregoing, if the Tribunal determines that a Dispute that would otherwise be subject to arbitration under this Paragraph SIXTH would have adverse tax consequences to the trust estate and there would be no such adverse tax consequences solely if the Dispute were resolved by a court having jurisdiction thereof, then the Tribunal shall enter an award stating that it has reached the limits of its jurisdiction, and the Trustee or any interested party may then submit the Dispute to be resolved by such a court.

(h) Judgment upon the award rendered by the Tribunal may be entered in any court having jurisdiction thereof, provided, however, that if an appeal from an award is taken in accordance with subparagraph (j) below, judgment may be entered only upon the award of the Appeal Tribunal.

(i) The Tribunal shall issue a reasoned opinion in conjunction with its award; provided, however, that the reasoned opinion shall be physically separate from the award in such a manner that the filing of the award in a court of competent jurisdiction for enforcement or other purposes may be done without the public disclosure through filing of the reasoned opinion. The reasoned opinion shall be delivered only to the parties to the arbitration and, if the Trustee is not a party, to Trustee. The reasoned opinion may be filed with a court only if the court ordered it to be filed under seal.

(j) The award of the Tribunal shall be final and binding on the Trustee and all beneficiaries of the trust estate (including all unavailable beneficiaries), subject to the provisions of this subparagraph. If the arbitration is conducted by a single arbitrator, no party shall seek to enter the award in any court until 30 days after the award is issued. Within 30 days after such award is issued by a single arbitrator, any interested party may appeal an adverse award to an Appeal Panel of three neutral arbitrators, by delivering a notice of appeal to the AAA and all parties to the arbitration, in which event the award of the Tribunal shall immediately be considered to be an interim award. The Appeal Panel shall be appointed in accordance with the AAA rules and shall include at least one arbitrator with the same qualifications as required in subparagraph (e) above. The Appeal Panel shall, pursuant to such procedures as the Appeal Panel may establish, conduct a review of the award and accompanying reasoned opinion of the Tribunal for errors of law, based on the record as it existed when the hearing was closed by the Tribunal. The Appeal Panel shall then issue an award, which will be the final award for purposes of the Federal Arbitration Act, that may either affirm, modify, or supersede the award of the Tribunal. The Appeal Panel shall explain its decision in a reasoned opinion, physically separate from its award, as provided with respect to and subject to the same restrictions as the award of the Tribunal.

(3) The following rules shall apply in determining who has the right to participate in mediation and/or arbitration proceedings under this Paragraph SIXTH:

(a) The Trustee shall have the right to participate in the proceedings.

(b) Each qualified beneficiary shall the right to participate in the proceedings. The term "qualified beneficiary" means:

(i) A person or entity who is entitled or eligible to receive distributions of income or principal from the trust estate on the date the proceedings are commenced;

(ii) A person or entity who would be entitled or eligible to receive distributions of income or principal from the trust estate on the date the proceedings are commenced if the trust terminated on that date; and

(iii) Any other person or entity that the mediator or Tribunal determines should have the right to participate in the proceedings to protect the interests of such person or entity.

(c) If a specified charitable organization is a qualified beneficiary, then such specific charitable organization shall have the right to participate in the proceedings. If no specific charitable organization is a qualified beneficiary but a class of charitable organizations are qualified beneficiaries, then only the Attorney General of Missouri (or, at the option of the Trustee, only The Greater Kansas City Community Foundation) shall have the right to participate in the proceedings on behalf of such class and the arbitration shall be binding on each member of the class.

(d) The parties shall have the right to rely on virtual representation in the proceedings to the same extent that the parties would have the right to rely on virtual representation if the Dispute were liquidated in a Missouri state court. The Tribunal shall determine with respect to each Dispute if the adult or otherwise legally competent individual qualified beneficiaries adequately represent the interests of the minor, legally incompetent, unborn and unascertained beneficiaries who are qualified beneficiaries (the "unavailable beneficiaries"). If the Tribunal determines that there is adequate representation of the interest of the unavailable beneficiaries, the Tribunal shall not appoint a guardian ad litem to represent those interest. If the Tribunal determines that there is not adequate representation of the interests of the unavailable beneficiaries, the Tribunal shall appoint a person to serve as if he or she were a guardian ad litem appointed by a Missouri court to represent those interests, whose expenses shall be paid from the trust estate. The person appointed to serve as he or she were a guardian ad litem shall be a practicing lawyer licensed to practice law in the State of Missouri whose practice has been devoted substantially to wills and trusts for at least ten years prior to his or her appointment.

(4) The place of the arbitration and/or mediation proceedings shall be in Kansas City, Missouri, unless otherwise agreed by all participants.

(5) Except as may be required by law, the existence, content or results of any mediation or arbitration hereunder shall not be disclosed by the Trustee, any beneficiary, mediator or arbitrator, or the representatives of any of them, without the prior written consent of the Trustee and all of the adult and otherwise legally competent beneficiaries. The Tribunal shall have continuing jurisdiction and authority for one (1) year from the date of the award to enter such sanctions as the Tribunal deems appropriate against any party who violates, or whose representative violates, the provisions of this subparagraph (5), including the rendering of a decision against such party on any or all issues in the arbitration proceeding or revocation of a decision favoring such party. Notwithstanding the above, nothing shall prevent any interested party from invoking remedies otherwise available at law with respect to an award hereunder, but no application for any such remedy shall attach the reasoned opinion of the Tribunal or the Appeal Panel unless the court orders it to be filed under seal. Any interested party may initiate a new proceeding under this Paragraph SIXTH to address any violation of the provisions of this subparagraph (5).

(6) If any provision herein is ruled unlawful or unenforceable by a court of competent jurisdiction, other than the restriction regarding tax consequences contained in subparagraph (2)(g) above, the provisions shall be deemed severable and shall not restrict the enforcement of any and all other provisions regarding dispute resolution contained herein.

from a law firm engagement agreement:

2.03 Arbitration. Should a party to this Agreement have a dispute or claim against the other party or anyone employed pursuant to this Agreement, and said dispute or claim arises out of, is related to, or concerns any aspect of this Agreement or services performed or not performed pursuant to this contract, then all such disputes or claims shall be submitted to binding arbitration in accordance with the Commercial Arbitration Rules of the American Arbitration Association, with any hearing to be located in San Antonio, Texas, and judgment upon the award rendered by the arbitrator(s) may be entered in any court having jurisdiction thereof.

from a law firm engagement agreement:

"Binding Arbitration. CLIENT AND LAW FIRM AGREE THAT ALL CLAIMS, DISPUTED AND CONTROVERSIES ARISING OUT OF, RELATED TO, OR IN CONNECTION WITH OUR ENGAGEMENT AND LAW FIRM'S REPRESENTATION OF CLIENT SHALL NOT BE RESOLVED IN COURT, BUT SHALL BE RESOLVED SOLELY AND EXCLUSIVELY BY BINDING ARBITRATION CONDUCTED IN ACCORDANCE WITH THE COMMERCIAL RULES OF THE AMERICAN ARBITRATION ASSOCIATION THEN IN EFFECT."