PRIVATE JUSTICE:
ARBITRATION AS AN ALTERNATIVE
TO THE COURTHOUSE

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State Bar of Texas *Gene Cavin Award for Excellence in Continuing Legal Education* (1996)
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---*Obligations of the Trial Lawyer Under Texas Law Toward the Client Relating to an Appeal,* 41 SOUTH TEXAS LAW REVIEW 111 (1999)
---*Asserting Claims for Intentionally or Recklessly Causing Severe Emotional Distress, in Connection With a Divorce*, 25 ST. MARY'S L.J. 1253 (1994), republished in the AMERICAN JOURNAL OF FAMILY LAW (Fall 1994) and Texas Family Law Service *NewsAlert* (Oct. & Dec., 1994)
---Chapter 21 on *Business Interests* in Bancroft-Whitney's TEXAS FAMILY LAW SERVICE (Speer's 6th ed.)
---*Characterization of Marital Property*, 39 BAY. L. REV. 909 (1988) (co-authored)
---*Fitting a Round Peg Into A Square Hole: Section 3.63, Texas Family Code, and the Marriage that Crosses States Lines*, 13 ST. MARY'S L.J. 477 (1982)

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State Bar's Advanced Family Law Course: Intra and Inter Family Transactions (1983); Handling the Appeal: Procedures and Pitfalls (1984); Methods and Tools of Discovery (1985); Characterization and Reimbursement (1986); Trusts and Family Law (1986); The Family Law Case in the Appellate Court (1987); Post-Divorce Division of Property (1988); Marital Agreements: Enforcement and Defense (1989); Marital Liabilities (1990); Rules of Procedure (1991); Valuation Overview (1992); Deposition Use in Trial: Cassette Tapes, Video, Audio, Reading and Editing (1993); The Great Debate: Dividing Goodwill on Divorce (1994); Characterization (1995); Ordinary Reimbursement and Creative Theories of Reimbursement (1996); Qualifying and Rejecting Expert Witnesses (1997); New Developments in Civil Procedure and Evidence (1998); The Expert Witness Manual (1999); Reimbursement in the 21st Century (2000); Personal Goodwill vs. Commercial Goodwill: A Case Study (2000); What Representing the Judge or Contributing to Her Campaign Can Mean to Your Client: Proposed New Disqualification and Recusal Rules (2001); Tax Workshop: The Fundamentals (2001); Blue Sky or Book Value? Complex Issues in Business Valuation (2001)

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State Bar's Advanced Evidence & Discovery Course: Successful Mandamus Approaches in Discovery (1988); Mandamus (1989); Preservation of Privileges, Exemptions and Objections (1990); Business and Public Records (1993); Grab Bag: Evidence & Discovery (1993); Common Evidence Problems (1994); Managing Documents--The Technology (1996); Evidence Grab Bag (1997); Evidence Grab Bag (1998); Making and Meeting Objections (1998-99); Evidentiary Issues Surrounding Expert Witnesses (1999); Predicates and Objections (2000); Predicates and Objections (2001); Building Blocks of Evidence (2002); Strategies in Making a Daubert Attack (2002); Predicates and Objections (2002)

State Bar's Advanced Civil Appellate Practice Course: Handling the Appeal from a Bench Trial in a Civil Case (1989); Appeal of Non-Jury Trials (1990); Successful Challenges to Legal/Factual Sufficiency (1991); In the Sup. Ct.: Reversing the Court of Appeals (1992); Brief Writing: Creatively Crafting for the Reader (1993); Interlocutory and Accelerated Appeals (1994); Non-Jury Appeals (1995); Technology and the Courtroom of the Future (1996); Are Non-Jury Trials Ever "Appealing"? (1998); Enforcing the Judgment, Including While on Appeal (1998); Judges vs. Juries: A Debate (2000); Appellate Squares (2000); Texas Supreme Court Trends (2002)

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PRIVATE JUSTICE: ARBITRATION AS AN ALTERNATIVE TO THE COURTHOUSE?©

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I. INTRODUCTION. This article discusses arbitration as an alternative to litigation of family law cases.

II. A RUSH FOR THE EXITS. The justice system once had a monopoly over the resolution of civil disputes. Dissatisfaction with the delay, expense, and uncertainty of the court system caused many to turn to alternative dispute resolution procedures. Mediation has proven spectacularly successful as an alternative to litigation. But cases that do not settle in mediation still need a dispute resolution procedure, and people are increasingly turning to arbitration as an alternative to litigation at the courthouse. Arbitration is growing so fast that a significant number of appellate cases, both state and federal, are being issued on a regular basis addressing questions about the contours of the arbitration process.

III. STATUTORY BASES FOR ARBITRATION. The ability of the parties to opt out of the civil litigation system is established by federal statutes 9 U.S.C. § 1-ff, by the Texas Civil Practice & Remedies Code § ch. 171, and by the Texas Family Code § 6.601 (husband and wife issue) and § 153.071 (parent-child issues). Additionally, Chapter 154 of the Civil Practice & Remedies Code[TCP&RC] permits Texas courts to refer a pending case to arbitration, and the parties then decide whether the arbitration will be binding or non-binding. Other statutes provide for arbitration in other areas of commerce.

IV. ARBITRATION UNDER FEDERAL LAW. The general federal statutes regarding commercial arbitration start with Title 9, Section 1-ff. Section 2 is the main enforcement provision:

> **Title 9, § 2. Validity, irrevocability and enforcement of agreements to arbitrate**
>
> A written provision in any maritime transaction or a contract evidencing a transaction involving commerce to settle by arbitration a controversy thereafter arising out of such contract or transaction, or the refusal to perform the whole or any part thereof, or an agreement in writing to submit to arbitration an existing controversy arising out of such a contract, transaction, or refusal, shall be valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract.

Section 1 defines "commerce" to be "commerce among the several States or with foreign nations, or in any Territory of the United States or in the District of Columbia, or between any such Territory and another, or between any such Territory and any State or foreign nation, or between the District of Columbia and any State or Territory or foreign nation," but excluding workers engaged in interstate commerce. The federal statute applies even to litigation in state courts, where the matter touches upon interstate commerce. *Allied-Bruce Terminix Cos. v. Dobson*, 513 U.S. 265, 115 S.Ct. 834, 130 L.Ed.2d 753 (1995) (federal arbitration statute applies even to state-law claims in state court and pre-empts all contrary state statutes).

The Commerce Clause is the constitutional basis supporting the federal legislation regarding arbitration. *Prima Paint Corp. v. Flood & Conklin Mfg. Co.*, 304 U.S. 64 (1967). As noted in the case of *In re FirstMerit Bank*, N.A., 52 S.W.3d 749, 754 (Tex. 2001): "[T]he United States Supreme Court has construed the FAA to extend as far as the Commerce Clause of the United States Constitution will reach." The U.S. Supreme Court has determined that even intrastate activities that affect interstate commerce come within Congress's purview under the Commerce Clause. *United States v. Darby Lumber Co.*, 312 U.S. 100 (1941). However, since family law matters have not, for the most part,

been seen to fall under the Commerce Clause basis for federal jurisdiction, most likely the federal arbitration statute does not apply to Texas family law proceedings. This is especially likely after recent U.S. Supreme Court rulings that appear to have remembered that the powers of Congress in fact derive from the U.S. Constitution, and not the mere will to legislate. *See United States v. Morrison*, 529 U.S. 598, 120 S.Ct. 1740, 146 L.Ed.2d 658 (2000) (striking down portion of the federal Violence Against Women Act, because it could not be supported by Commerce Clause since regulation of this type of criminal conduct is traditionally non-commercial and is within the purview of the states).

The U.S. Supreme Court, in *Dean Witter Reynolds Inc. v. Byrd*, 470 U.S. 213, 219-220, 105 S.Ct. 1238, 1242, 84 L.Ed.2d 158 (1985), noted an historical antipathy by courts, dating back into English history, against arbitration agreements. The Court evaluated the federal arbitration statute in this way:

> The House Report accompanying the Act makes clear that its purpose was to place an arbitration agreement "upon the same footing as other contracts, where it belongs," H.R. Rep. No. 96, 68th Cong., 1st Sess., 1 (1924), and to overrule the judiciary's longstanding refusal to enforce agreements to arbitrate.

The Court went on to say that "[t]he preeminent concern of Congress in passing the Act was to enforce private agreements into which parties had entered, and that concern requires that we rigorously enforce agreements to arbitrate." *Dean Witter Reynolds Inc. v. Byrd*, 470 U.S. at 221.

Several decision uphold the right of the parties to choose what law will apply to their arbitration agreement. *See, e.g., Volt Info. Sciences, Inc. v. Bd. of Trs. of the Leland Stanford Junior Univ.*, 489 U.S. 468, 472, 109 S.Ct. 1248, 1252, 103 L.Ed.2d 488 (1988) (upholding choice of California law to govern arbitration although interstate commerce involved because applying federal law would have forced the parties to arbitrate in a manner contrary to their agreement); *D. Wilson Constr. Co. v. Cris Equip. Co.*, 988 S.W.2d 388, 392 (Tex. App.--Corpus Christi 1999, pet. granted by agr.) (applying Texas Arbitration Act on agreement of parties although interstate commerce involved), *rev'd and rem. for rendition of judgment in accordance with parties' agreement.*

V. ARBITRATION IN GENERAL LITIGATION IN TEXAS.

A. HISTORICAL ROOTS OF ARBITRATION. A student author described the history of arbitration in Texas in this manner:

> The origins of Texas arbitration laws have been attributed to Roman law and to Spanish and Mexican law. [FN57] Nonetheless, it is established that the legal right to arbitration is originally found in the 1827 Constitution of the Mexican State of Coahuila and Texas under the Mexican Federacy. [FN58] The Republic of Texas Constitution of 1836 makes no specific mention of the 1827 arbitration provision, but it specifically adopted the common law of England, which includes arbitration. [FN59] Every constitution of the State of Texas, however, has had a provision that requires the legislature to pass the laws necessary to settle disputes by arbitration. [FN60] In 1846, the first statutory arbitration provision enacted enabled parties to arbitrate a dispute in any manner they elected. [FN61] This statute remained in effect until 1965, when Texas adopted its first modern arbitration statute. [FN62] [Footnotes omitted]

Peter F. Gazda, Comment, *Arbitration: Making Court-Annexed Arbitration an Attractive Alternative in Texas*, 16 ST. MARY'S L.J. 409, 422-23 (1985). *See Cox v. Giddings*, 9 Tex. 44 (1852) (interpreting arbitration statute); *Carpenter v. North River Insurance Company*, 436 S.W.2d 549, 551 (Tex. Civ. App.--Houston [14th Dist.] 1969, writ ref'd n. r. e.) (discussing Texas' first arbitration statute).

B. CURRENT ARBITRATION GENERAL STATUTES. Arbitration in general civil litigation in Texas is now governed by the Texas Civil Practice and Remedies Code. The Texas Civil Practice & Remedies Code provisions relating to arbitration are set out in the Appendix to this article.

C. PUBLIC POLICY FAVORS ARBITRATION. The arbitration statutes are seen by Texas courts to reflect, as noted in *Certain Underwriters at Lloyd's of London v. Celebrity, Inc.*, 950 S.W.2d 375, 378 (Tex. App.--Tyler 1996, writ dism'd w.o.j.), that:

> there is a strong presumption in Texas public

policy favoring arbitration.

Accord, *Houston Lighting & Power Co. v. San Antonio*, 896 S.W.2d 366, 370 (Tex. App.-- Houston [1st Dist.] 1995, no writ).

D. ADR VS. MANDATORY ARBITRATION. The Civil Practice & Remedies Code has two types of arbitration: 1) as an alternate dispute resolution mechanism, and 2) as a mandatory requirement pursuant to an arbitration clause in an agreement.

1. Discretionary Referral to Arbitration. TCP&RC § 154.021 permits the court to refer a pending dispute to an alternate dispute resolution procedure, which includes arbitration. *See* TCP&RC 154.027 (Arbitration). The statute says that the court *may* refer the case to arbitration, on its own motion or the motion of a party. Once the case is referred to arbitration for ADR, the parties can elect whether the arbitration is binding or non-binding. TCP&RC § 154.027(b).

2. Mandatory Arbitration. Where the parties enter into a contract providing that a dispute will be resolved by arbitration, the court is required to stay any lawsuit filed on the subject and to refer the dispute to arbitration for resolution. The following Texas Civil Practice & Remedies Code section controls the court's discretion as far as referring such a case to arbitration:

> **§ 171.021. Proceeding to Compel Arbitration**
>
> (a) A court shall order the parties to arbitrate on application of a party showing:
> (1) an agreement to arbitrate; and
> (2) the opposing party's refusal to arbitrate.
>
> (b) If a party opposing an application made under Subsection (a) denies the existence of the agreement, the court shall summarily determine that issue. The court shall order the arbitration if it finds for the party that made the application. If the court does not find for that party, the court shall deny the application.
>
> (c) An order compelling arbitration must include a stay of any proceeding subject to Section 171.025.

The following Texas Civil Practice & Remedies Code section controls the court's discretion as far as staying litigation pending arbitration:

> **§ 171.025. Stay of Related Proceeding**
>
> (a) The court shall stay a proceeding that involves an issue subject to arbitration if an order for arbitration or an application for that order is made under this subchapter.
>
> (b) The stay applies only to the issue subject to arbitration if that issue is severable from the remainder of the proceeding.

An interlocutory appeal can be taken from a decision of the trial court refusing to refer a matter to arbitration or granting a stay of arbitration. Tex. Civ. Prac. & Rem. Code § 171.098(a)(1).

Certain defenses can be raised to enforcement of the arbitration clause. See Paragraph IX.D below.

VI. ARBITRATION UNDER THE TEXAS FAMILY CODE. There are two Family Code provisions relating to arbitrating family law cases. Both refer to discretionary referral of a pending case to arbitration as an alternate dispute resolution mechanism. The statutory sections themselves do not say whether they apply to a pre-existing agreement to arbitrate, such as is contemplated in Texas Civil Practice & Remedies Code ch. 171, or only to an assignment to ADR after a lawsuit is filed. However, Section 6.601 is under Family Code Chapter 6, Subchapter G, "Alternative Dispute Resolution." Section 153.0071 is itself titled "Alternate Dispute Resolution Procedures." This suggests that the Family Code provisions are akin to Chapter 154 of the Texas Civil Practice & Remedies Code, and reflect a post-filing referral of the case to an alternative dispute resolution process. Unless public policy precludes it, it appears that pre-litigation agreements containing arbitration clauses relating to family law matters would fall under the general arbitration provisions of Texas Civil Practice & Remedies Code ch. 171.

Here are the Texas Family Code provisions:

> **§ 6.601. Arbitration Procedures**
>
> (a) On written agreement of the parties, the court may refer a suit for dissolution of a marriage to arbitration. The agreement must

state whether the arbitration is binding or nonbinding.

(b) If the parties agree to binding arbitration, the court shall render an order reflecting the arbitrator's award.

§ 153.0071. Alternate Dispute Resolution Procedures

(a) On written agreement of the parties, the court may refer a suit affecting the parent-child relationship to arbitration. The agreement must state whether the arbitration is binding or non-binding.

(b) If the parties agree to binding arbitration, the court shall render an order reflecting the arbitrator's award unless the court determines at a non- jury hearing that the award is not in the best interest of the child. The burden of proof at a hearing under this subsection is on the party seeking to avoid rendition of an order based on the arbitrator's award.

(c) On the written agreement of the parties or on the court's own motion, the court may refer a suit affecting the parent-child relationship to mediation.

(d) A mediated settlement agreement is binding on the parties if the agreement:

> (1) provides, in a prominently displayed statement that is in boldfaced type or capital letters or underlined, that the agreement is not subject to revocation;
> (2) is signed by each party to the agreement; and
> (3) is signed by the party's attorney, if any, who is present at the time the agreement is signed.

(e) If a mediated settlement agreement meets the requirements of Subsection (d), a party is entitled to judgment on the mediated settlement agreement notwithstanding Rule 11, Texas Rules of Civil Procedure, or another rule of law.

(f) A party may at any time prior to the final mediation order file a written objection to the referral of a suit affecting the parent-child relationship to mediation on the basis of family violence having been committed by another party against the objecting party or a child who is the subject of the suit. After an objection is filed, the suit may not be referred to mediation unless, on the request of a party, a hearing is held and the court finds that a preponderance of the evidence does not support the objection. If the suit is referred to mediation, the court shall order appropriate measures be taken to ensure the physical and emotional safety of the party who filed the objection. The order shall provide that the parties not be required to have face-to-face contact and that the parties be placed in separate rooms during mediation. This subsection does not apply to suits filed under Chapter 262.

VII. WHY ARBITRATE? Here are some pros and cons.

A. ADVANTAGES TO ARBITRATION. Some of the recognized advantages of arbitration are:

- it's quick
- it's less formal
- it's probably cheaper
- it's private
- you can pick your "judge"
- you can have more than one judge
- you can have a non-lawyer judge (CPA or psychologist)
- you can arbitrate selected issues, then go back to negotiating
- you can avoid waiting at docket call
- you can more easily use telephone conferences
- you can pick your courtroom
- you can pick your trial date
- you can avoid interruptions
- the outcome could be more likely to be in the mainstream, depending
- the arbitrator's award more likely to be detailed, complete, and explanatory
- in post-divorce parent-child context, quick fix for sudden problems that are not complex but are difficult
- you can "trouble shoot" temporary impasses in collaborative law settings where a "ruling" is needed but the parties do not want to abandon the collaborative process

B. DISADVANTAGES TO ARBITRATION. Some of the recognized disadvantages of arbitration are:

- inferior pretrial discovery
- you must pay your "judge(s)"
- you must pay your court reporter
- arbitrators don't stand for election
- arbitrators may want to be hired again
- there may be a fight over enforcing the arbitration award
- in parent-child disputes, you may need second bench trial on best interest
- reduced effectiveness of appellate review

VIII. AGREEMENTS TO ARBITRATE. A right to binding arbitration grows out of an arbitration clause, providing that disputes between the parties must be resolved in arbitration and not litigation. The rules for arbitration can be agreed between the parties; absent agreement, default provisions in the Texas Civil Practice & Remedies Code will apply. The following topics can be included in an arbitration agreement:

- Agreement to arbitrate--"The parties agree to submit any disputes arising from this agreement to final and binding arbitration under the Arbitration Rules of the American Arbitration Association." Or, "All disputes arising out of or in connection with this agreement shall be finally settled under the Rules of Arbitration of the _____ by one or more arbitrators appointed in accordance with the said Rules." Or, "Any dispute, controversy or claim arising out of or relating to this contract, or the breach, termination or invalidity thereof, shall be decided by arbitration in accordance with the Rules for Arbitration of _____." Or, "The parties agree to binding arbitration to resolve all post-divorce issues relating to the parties' relationships to their minor child, except with regard to appointment as managing conservator or possessory conservator, the right to designate the child's primary residence, and whether the right to designate primary residence will be confined to a geographic area."

- Binding or Non-Binding–specify whether the parties are bound by the arbitrator(s)' award.

- Waivers–waive right to jury, right to trial before the court.

- Scope of arbitration–what issues will be submitted to arbitration, and what issues are reserved to negotiations, the litigation process, or a different arbitrator?

- Choice of forum–where must the arbitration occur, in the physical sense?

- Choice of law–if more than one state's law might apply, do you want to choose which one it will be?

- Expenses--who will pay what expenses incurred in arbitration, including arbitrator's fee, court reporter's fee, rental for the courtroom?

- Identify arbitrator(s) or the manner of selecting arbitrators–name your arbitrator(s), or describe the type of persons who will arbitrate, or the organizations they must be affiliated with, or the procedures by which arbitrator(s) will be selected. Will you use a retired judge, a lawyer, a CPA, a psychologist, etc.?

- Procedure–will the Texas Rules of Civil Procedure apply? Will only some of them apply, such as summary judgments?

- Interim relief–will the arbitrator(s) be able to grant interim relief? Can the parties go to court for that? Who enforces if, and how?

- Discovery and production of documents–what type and what degree of discovery will be allowed? Do you apply the Rules of Civil Procedure, or a modified version, or your own set of rules? More or less discovery than is allowed in the courts?

- Scheduling–will there be deadlines for when arbitration must occur, and when the abitrator(s) must rule?

- Confidentiality–of discovery, and of the proceedings and outcome.

- Pleadings–will parties file pleadings, or "position statements," with right to make rebuttal filings?

- Formality of proceeding–will the case be presented as a trial; will the arbitrator(s) be able to speak ex parte with lawyers or witnesses?

- Evidentiary rules–will the Texas Rules of Evidence apply? Can affidavits be used? Can hearsay be admitted and just go to the weight of the evidence? Experts' report instead of live testimony?

- What standards–will the substantive state law be applied, or will a fairness standard apply, or something else?
- Limits on power–what are the limits on the arbitrator(s)' authority? What issues are beyond the scope of arbitration?

- Arbitrator's Report–orally first, then in writing? How soon after the conclusion of the proceeding? Will there be a right to respond, akin to a motion to modify judgment? Will there be findings and conclusions of law?

- Appeal–is there an appeal to a second group of arbitrators? Is it de novo or a review of the record? Is there in appeal to the trial court? What about appeal to an appellate court? What is the standard of review (abuse of discretion, substantial evidence, sufficiency of the evidence)?

- Where will award be filed–Specify the court in which the arbitrator(s)'s award will be filed in order to be confirmed as a judgment of the court.

- Enforcement–will enforcement issues be presented to the arbitrator or the court? What enforcement remedies can the arbitrator(s) use?

IX. SOME PERCEPTIONS REGARDING FAMILY LAW ARBITRATIONS. The 1997 edition of the Journal of the American Academy of Matrimonial Lawyers reported the results of a survey among a small group of lawyers conducted around the USA regarding arbitration in family law matters. *See* Mary Kay Kisthardt, *The Use of Mediation and Arbitration for Resolving Family Conflicts: What Lawyers Think About Them*, 14 JOUR. AMER. ACAD. OF MATRIMONIAL LAWYERS 353 (1997). The following points were made:

- The survey indicated that arbitration is most often used to resolve economic issues. All the respondents stated it was used lower number of respondents noted its use for child custody or visitation matters. (35) The lower usage rate for child care issues no doubt reflects the uncertain state of the law with respect to the enforcement of an arbitrator's decision regarding issues that affect children. *Id.* at 390.

- Attorneys virtually always served as arbitrators (they were certified or approved by a court), with mental health professionals performing that function only when child care issues were to be decided. Among attorneys, several respondents noted that retired judicial officers were often used as arbitrators. *Id.* at 390.

- Most often the parties agreed in advance to be bound by the decision. In fact, it is the characteristic of finality that is seen as one of arbitration's greatest advantages. *Id.* at 391.

X. FAMILY LAW ISSUES THAT COULD BE ARBITRATED.

A. ABILITY TO ARBITRATE FAMILY LAW MATTERS. It appears that almost all family law issues can be subject to binding arbitration. One area of doubt would be enforcement proceedings where incarceration may be imposed. Family Code §§ 6.601 & 153.0071 clearly permit both binding and non-binding arbitration of family law issues as an alternate dispute resolution procedure in family law cases. Since the public policy of this state favors arbitration, there is no basis to argue that family law matters cannot be arbitrated in ADR. In an unpublished opinion, the Austin Court of Appeals upheld an ADR arbitration award dividing the property upon divorce. *Longton v. Longton*, No. 03-01-00093-CV (Tex. App.–Austin Nov. 15, 2001, pet. denied) (not for publication) [2001 WL 1422344]. The Austin Court of Appeals had previously upheld an ADR-related arbitration in a suit to establish paternity and terminate the parent-child relationship. *See Cooper v. Bushong*, 10 S.W.3d 20 (Tex. App.–-Austin 1999, pet. denied).

Mandatory binding arbitration based on a prior agreement does not have the express authority of the Texas Family Code, but the Texas Civil Practice and Remedies Code provisions by their terms would apply, and the Family Code clearly does not prohibit arbitration in such a circumstance. Again, the public policy of this state is to uphold arbitration agreements. Several Texas appellate cases uphold arbitration in such a situation.

The First Court of Appeals in Houston upheld non-binding arbitration in a family law matter, in the case of *In re Cartwright*, No. 01-01-00948-C, (Tex. App.--Houston [1st Dist.] April 4, 2002, n.p.h.) (to be pub-

lished) [2002 WL 501595]. The parties settled their divorce, and in the agreement incident to divorce they had agreed that any claim or controversy arising from the final decree of AID would first be mediated, and if not settled, then be submitted to arbitration. After the divorce, the former wife sued for breach of the AID and the former husband moved to modify possession and access of the child. The court of appeals upheld the arbitration agreement, based on the Texas Civil Practice & Remedies Code provisions for arbitration. In doing so, the Court examined an earlier Austin Court of Appeals case involving arbitration of paternity and termination of the parent-child relationship. The court said this about the earlier case:

> In Cooper v. Bushong, 10 S.W.3d 20 (Tex. App.--Austin 1999, pet. denied), the parties agreed to submit a paternity dispute and termination of parental rights to binding arbitration. Id. at 22-23. After the arbitrator made an award, one of the parties challenged the validity of the award. Id. at 23. The court of appeals cited the TAA for the requirements for setting aside an arbitration award, modifying an award, and confirming an award. [FN5] Id. at 24-26. We agree with the Cooper court that if, in a family law case, an arbitration is binding, as it was in Cooper, it is appropriate to follow the TAA.
>
> The TAA does not exclude family law claims from its coverage. See Tex. Civ. Prac. & Rem. Code Ann. § 171.002(a) (Vernon Supp. 2002). Therefore, the TAA applies to Family Code arbitration if the arbitration agreement specifies that the arbitration is binding. However, the TAA, by its own terms, cannot apply to non-binding Family Code arbitration. See, e.g., Tex. Civ. Prac. & Rem. Code Ann. §§ 171.053-.054, 171.081, 171.087-.092 (Vernon Supp. 2002) (pertaining to the award and its modification or correction, vacation, confirmation, and enforcement). The TAA necessarily contemplates that the arbitration award be binding and makes no provision for a non-binding arbitration procedure. Porter & Clements, L.L.P. v. Stone, 935 S.W.2d 217, 221 (Tex. App.--Houston [1st Dist.] 1996, no writ). At most, those provisions in the TAA that may be applied to non-binding arbitration should be used as guidelines for the arbitration, not as controlling law.

In re Cartwright, p. *4. The arbitration agreement in *Cooper v. Bushong* was signed during the pendency of the case and arbitration was conducted pursuant to Family Code § 153.0071. *Cooper v. Bushong*, 10 S.W.3d at 22.

In another unpublished opinion, the Austin Court of Appeals upheld mandatory binding arbitration pursuant to an arbitration clause contained in an agreed decree of divorce signed by the court. *Mitchell v. Mitchell*, No. 03-01-00361-CV (Tex. App.–Austin July 31, 2001, no pet.) (not for publication) [2001 WL 855583]. At the time of divorce the spouses agreed to joint managing conservatorship of the parties' child, and restricted the child's residency to Travis and Williamson Counties. The agreed decree provided that any attempt to alter the residency restriction would be resolved by binding arbitration. The agreed decree also provided that any disagreements relating to a jointly-shared right or duty, or periods of possession or access, would be resolved through binding arbitration. These were the only issues subject to binding arbitration. The father filed a motion to modify the JMC to sole custody, or alternatively to be allowed to determine the child's primary residence and for an alteration of possessory periods, further arguing that his change of custody request preempted arbitration of issues subsumed in the custody question. The trial court denied arbitration, and the Austin Court of Appeals ruled that while the joint-to-sole modification could not be arbitrated, the questions of modifying possessory periods and modifying the primary residence were to be arbitrated. The appellate court did not specify the sequence of the litigation, but common sense suggests that the judge or jury determine the custody question, and that any other issues that need to be resolved through arbitration.

In the case of *Koch v. Koch*, 27 S.W .3d 93, 95 (Tex. App.--San Antonio 2000, no pet.), the parties entered into a premarital agreement prior to marriage, renouncing claims in the other party's separate property and agreeing to a 50-50 split of community property. The premarital agreement also provided for arbitration. Upon divorce the parties did go to arbitration, but at the husband's request the trial court set aside the arbitrator's award, without explanation, and scheduled the case for trial. In an interlocutory appeal, the San Antonio Court of Appeals reversed the trial court, and remanded the matter back to the trial court for a determination of whether the award should be confirmed in a decree, or modified, or set aside and sent back to arbitration, pursuant to TCP&RC §§ 171.088 and

171.089. Setting the case for trial was not an option which the court of appeals gave to the trial court.

There is no statutory or case law basis to say that agreements to arbitrate family law disputes, whether husband-wife issues or parent-child issues, cannot be enforced on public policy grounds. The two published cases, *Cartright* and *Koch*, uphold binding arbitration agreements entered into before the dispute arises, confirm mandatory arbitration in both husband-wife and parent-child disputes.

An unanswered question is whether, in binding arbitration relating to a child and resulting from a pre-dispute binding arbitration clause, the arbitrator's award pertaining to a child is subject to review by the court of continuing jurisdiction to determine whether the award is in the child's best interest. Tex. Fam. Code § 153.007(b) provides that arbitration awards based on ADR referrals under that Section are subject to a post-arbitration non-jury hearing for the trial court to determine whether the award is *not* in the best interest of the child. The burden at that hearing is on the party seeking to avoid the award. No such provision for judicial "second guessing" applies to binding arbitration under TCP&RC §171.021, so such a procedure would have to be "read into the statute" or declared to be the case, despite the absence of statutory language, based on public policy. None of the Texas appellate cases on pre-dispute arbitration clauses have indicated a second post-arbitration phase such as the one described in Family Code § 153.007(b).

B. POSSIBLE ISSUES TO ARBITRATE.

1. Attorney-Client Disputes. The ABA Standing Committee on Ethics and Professional Responsibility, in April of 2002, issued Formal Opinion 02-425, in which it declared that "[i]t is permissible under the Model Rules to include in a retainer agreement . . . a provision that requires binding arbitration of disputes concerning fees and malpractice claims, provided that the client has been fully apprised of the advantages and disadvantages of arbitration and has given her informed consent." The proscription of Model Rule of Professional Conduct 1.8(h), against upfront agreements to limit malpractice exposure, does not apply because mandatory arbitration clauses do not prospectively limit liability but merely "prescribe a procedure for resolving such claims."

In Texas, an arbitration provision in an attorney-client employment agreement may run afoul of TCP&RC § 171.002, Scope of Chapter, which provides that:

> **§ 171.002. Scope of Chapter**
>
> (a) This chapter does not apply to:
>
> (1) . . . ;
> (2) an agreement for the acquisition by one or more individuals of property, services, money, or credit in which the total consideration to be furnished by the individual is not more than $50,000, except as provided by Subsection (b);
> (3) a claim for personal injury, except as provided by Subsection (c);
> (4). . . ;
> (5) . . . .
>
> (b) An agreement described by Subsection (a)(2) is subject to this chapter if:
> (1) the parties to the agreement agree in writing to arbitrate; and
> (2) the agreement is signed by each party and each party's attorney.
>
> (c) A claim described by Subsection (a)(3) is subject to this chapter if:
> (1) each party to the claim, on the advice of counsel, agrees in writing to arbitrate; and
> (2) the agreement is signed by each party and each party's attorney. [Emphasis added]

It could be argued that a fee dispute may fall under § 171.002(a)(2), and a malpractice claim may fall under § 171.002(a)(3), and that the potential client would have to have a lawyer advise him or her regarding entering into the employment agreement containing an arbitration clause.

2. Premarital Agreement. The *Koch* case demonstrates that a binding arbitration clause in a premarital agreement can result in arbitrating any dispute under the premarital agreement (such as enforceability), as well as any dispute in following through with the terms of the premarital agreement (such as dividing the community assets). Since one of the benefits of a premarital agreement is to avoid the cost of protracted litigation, people may wish to provide that dispute resolution involving the enforceability of a premarital agreement must be

through arbitration and not litigation. Even where there is no dispute over the enforceability of the premarital agreement, an agreement can provide that the property division and other issues will be resolved through arbitration and not litigation. This possibility should be disclosed, along with the pros and cons of arbitration, when consulting with the client before the premarital agreement is signed.

3. Particular Issues of Character or Value of Property. Either before or during a divorce court proceeding, the parties may wish to provide that any dispute as to the character or value of assets must be resolved through arbitration and not litigation. Arbitration of important issues may facilitate divorce in a way that litigation cannot. For example, if the settlement of a divorce is thwarted by an unresolved characterization question (such as the character of stock options, the character of funds distributed from a testamentary trust, tracing of commingled separate property, etc.), the parties can arbitrate that issue and based on the result go back to negotiation. A trial court ordinarily cannot make piecemeal rule on disputes. If a trial judge can't or won't grant a motion for summary judgment, then the arbitrator can try the issue "on the merits" and remove that impediment to settlement.

Furthermore, an impartial third party can be hired to conduct a "mini-trial," as described in TCP&RC § 154.024, or a moderated settlement conference, as described in TCP&RC § 154.025, to render an advisory opinion which can then serve as a basis for further negotiation. Or the parties can make the arbitration non-binding, so that negotiations can proceed with an awareness of how various arguments might play out in the courtroom.

4. Property Division. The parties may prefer to resolve the ultimate property division in the private and more convenient forum of arbitration, as opposed to a trial at the courthouse. The parties can pick an arbitrator(s) well-suited to the type of property in dispute, perhaps giving the parties a greater sense that the right result will be reached. Additionally, in some courts it may be possible to complete an arbitration far in advance of when the court will be able to complete a trial.

5. Conservatorship Issues. The parties may wish to resolve conservatorship disputes in the private forum of arbitration. The arbitrator(s) could include or consist exclusively of mental health professionals. If evidentiary rules are relaxed, the parties may be able to "put on their case" at much less cost than in litigation, even after paying the arbitrator's fee. Arbitration may make some custody disputes affordable to parties of modest means. Also, if children are going to testify, the informal atmosphere of arbitration versus testifying in the courtroom may cause some parents to favor arbitration.

6. Terms and Conditions of Conservatorship. If the parties wish to preserve the right to a jury trial on issues of conservatorship, they can agree that jury questions binding under Texas Family Code § 105.002(d) are excluded from the scope of arbitration, but that all other issues pertaining to the parent-child relationship will be arbitrated. Often, issues of terms and conditions of conservatorship do not warrant the cost of litigation.

7. Collaborative Law Cases. Texas Family Code § 6.603, regarding collaborative law, prohibits the parties from resorting to "judicial intervention" and prohibits the collaborative lawyers from serving as litigation counsel. If an impasse is reached in the collaborative law process, such as over discovery issues, the parties can turn to private arbitration of that dispute without "resorting to judicial intervention."

8. An "Appeal" From the District Court Ruling. After trial, and instead of conducting an ordinary appeal, the parties may instead decide to have an "appellate arbitration." This might give the parties more flexibility in how they present their arguments, and in the type of relief that can be fashioned if the trial court's ruling is to be "revised."

9. Post-Divorce Modification Relating to a Child. Arbitration may have its greatest value in resolving post-divorce disputes relating to children, such as sports, camp, trips, school issues, etc. Many of these problems arise on an unexpected basis, and need quick resolution. Additionally, some difficult problems are more susceptible to "tinkering" rather than having one definitive ruling from a court. An arbitrator can have some flexibility in trying out an arrangement, then trying another, then another, until the best solution is reached, at which point the arbitrator's award can be presented to the court of continuing jurisdiction as a basis on which to modify the decree.

XI. FORCING ARBITRATION. Federal courts operating under the Federal Arbitration Act (FAA) describe their role in requiring arbitration as a limited one:

> Our role in determining whether a court should compel arbitration is limited. We must determine simply whether the parties have entered a valid agreement to arbitrate and, if so, whether the existing dispute falls under the coverage of the agreement. Larry's United Super, Inc., v. Werries, 253 F.3d 1083, 1085 (8th Cir. 2001); Keymer v. Mgmt. Recruiters Int'l, Inc., 169 F.3d 501, 504 (8th Cir. 1999). Once we conclude that the parties have reached such an agreement, the FAA compels judicial enforcement of the arbitration agreement.

Gannon v. Circuit City Stores, Inc., 262 F.3d 677, 679 (8th Cir. 2001). The same approach is used to arbitration under the Texas Civil Practice & Remedies Code. *Dalton Contractors, Inc. v. Bryan Autumn Woods, Ltd.*, 60 S.W.3d 351 (Tex. App.--Houston [1st Dist.] 2001, no pet.) ("In determining whether to compel arbitration, the court must decide two issues: (1) whether a valid, enforceable arbitration agreement exists, and, if so, (2) whether the claims asserted fall within the scope of the agreement.").

This analysis is conducted with the knowledge that Texas public policy favors arbitration, and every reasonable presumption must be decided in favor of arbitration. *Dalton Contractors, Inc.*, 60 S.W.3d at 352.

A. IS THERE AN AGREEMENT TO ARBITRATE? Arbitration is a creature of contract and a clause requiring arbitration is interpreted under contract principles. *Tenet Healthcare Ltd. v. Cooper*, 960 S.W.2d 386, 388 (Tex. App.--Houston [14th Dist.] 1998, writ dism'd w.o.j.); *Belmont Constructors, Inc. v. Lyondell Petrochemical Co.*, 896 S.W.2d 352, 356-57 (Tex. App.--Houston [1st Dist.] 1995, no writ); *City of Alamo v. Garcia*, 878 S.W.2d 664, 665 (Tex. App.---Corpus Christi 1994, no writ). The Federal Arbitration Act and the Texas Arbitration Act both provide that a contract to submit to arbitration is valid and enforceable "save upon such grounds as exist at law or in equity for the revocation of any contract." 9 U.S.C. § 2 (2000); TCP&RC §171.001; *Tenet Healthcare*, 960 S.W.2d at 387-88. According to some decisions, when the facts are undisputed, t he issue of whether there is an enforceable agreement to arbitrate is a question of law and is therefore reviewed de novo by the appellate court. *See J.M. Davidson, Inc. v. Webster*, 49 S.W.3d 507, 511 (Tex. App.-Corps Christi 2001, no pet.); *Tenet Healthcare Ltd. v. Cooper*, 960 S.W.2d 386, 388 (Tex. App.- Houston [14th Dist.] 1998, pet. dism'd w.o.j.).

B. IS THE DISPUTE COVERED BY THE AGREEMENT? In determining whether the dispute is covered by the arbitration agreement, courts compared the terms of the arbitration clause to the assertions in the petition.

> To determine whether a claim falls within the scope of an arbitration agreement, we look at the terms of the agreement and the factual allegations in the petition. Id. Generally, if the facts alleged "touch matters," have a "significant relationship" to, are "inextricably enmeshed" with, or are "factually intertwined" with the contract that is subject to the arbitration agreement, the claim will be arbitrable. Id. However, if the facts alleged in support of the claim stand alone, are completely independent of the contract, and the claim could be maintained without reference to the contract, the claim is not subject to arbitration. Id. The FAA favors arbitration and any doubts as to whether a claim falls within the scope of an arbitration agreement must be resolved in favor of arbitration. Id. Thus, a court should not deny a motion to compel arbitration unless it can be said with positive assurance that an arbitration clause is not susceptible of an interpretation which would cover the dispute at issue. Id.

In re Medallion, Ltd., 70 S.W.3d 284, 28 (Tex. App.--San Antonio, orig. proceeding) (under the FAA).

The court looks at the complaint's factual allegations rather than the legal causes of action asserted. *In re FirstMerit Bank, N.A.*, 52 S.W.3d 749, 754 (Tex. 2001).

C. ABATEMENT AND REFERRAL TO ARBITRATION.

1. Plea in Abatement, Etc. When a lawsuit is initiated over a claim that should be referred to arbitration, the responding party typically files a plea in abatement or request for a stay, and a motion to refer the case to arbitration. This should lead to a summary proceeding in which the trial court determines whether there is an arbitration agreement and whether the claims raised in the lawsuit fall within the scope of the arbitration agreement. *See* TCP&RC §§ 171.043, 171.023(b). If

the answer is "yes" to both questions, then the court proceeding should be abated and the parties ordered to participate in arbitration.

2. Evidence. The trial court can consider affidavits, discovery, and stipulations in ruling on the issue. *Jack B. Anglin Co. v. Tipps*, 842 S.W.2d 266, 269-70 (Tex. 1992). Presumably the court could allow oral testimony as well.

D. DEFENSES. Arbitration agreements are subject to the same defenses as any other contract. *See City of Alamo v. Garcia*, 878 S.W.2d 664, 665-66 (Tex. App.--Corpus Christi 1994, no writ). Also, a party can defeat an obligation to arbitrate if the court finds that the agreement was unconscionable at the time the agreement was made. TCP&RC § 171.022. The Texas Supreme Court described unconscionability in this context as follows:

> [T]he basic test for unconscionability is whether, given the parties' general commercial background and the commercial needs of the particular trade or case, the clause involved is so one-sided that it is unconscionable under the circumstances existing when the parties made the contract. The principle is one of preventing oppression and unfair surprise and not of disturbing allocation of risks because of superior bargaining power. [Footnotes omitted]

In re FirstMerit Bank, N.A., 52 S.W.3d 749, 757 (Tex. 2001). Whether a contract as a whole is unconscionable is a question for the arbitrator to decide. See *Rojas v. TK Communications, Inc.*, 87 F.3d 745, 749 (5th Cir.1996) (decided under the FAA).

Fraud in the inducement of an arbitration agreement is a defense to arbitration, but the issue of whether a party made misrepresentations in the inducement of the underlying contract relates to the contract's validity, and that issue is subject to arbitration. *In re FirstMerit Bank, N.A.*, 52 S.W.3d 749, 759 (Tex. 2001); *Pepe Int'l Dev. Co. v. Pub Brewing Co.*, 915 S.W.2d 925, 930 (Tex. App.--Houston [1st Dist.] 1996, no writ) ("Allegations of fraud in the inducement of the underlying contract are matters for the arbitrator to decide, whereas fraud concerning the inducement of an arbitration clause in a contract must be decided by the trial court."); *see Miller v. Public Storage Management, Inc.*, 121 F.3d 215, 218-19 (5th Cir. 1997) (same rule under the FAA).

In deciding whether arbitration is required, the trial court may not consider the validity of the underlying claim. *See* TCP&RC § 171.026. "A dispute arising out of the parties' contract or a refusal to perform all or part of the contract does not affect the validity of the arbitration agreement." *Shearson Lehman Hutton, Inc. v. McKay*, 763 S.W.2d 934, 937 (Tex. App.--San Antonio 1989, orig. proceeding) (citing *Robert Lawrence Co. v. Devonshire Fabrics, Inc.*, 271 F.2d 402, 409-10 (2d Cir.1959), *cert. denied*, 364 U.S. 801, 81 S.Ct. 27, 5 L.Ed.2d 37 (1960)).

E. INTERLOCUTORY REVIEW OF REFERRAL TO ARBITRATION. If the trial court refuses to abate the litigation and refer the case to arbitration, that decision is subject to immediate review by the court of appeals, either by mandamus or interlocutory appeal.

1. Under the Federal Act. When a Texas court is asked to become involved in a dispute covered by the Federal Arbitration Act (FAA), there is a right to seek mandamus regarding a refusal to refer the case to arbitration. *In re FirstMerit Bank, N.A.*, 52 S.W.3d 749, 753 (Tex. 2001) ("When a trial court erroneously denies a party's motion to compel arbitration under the FAA, the movant has no adequate remedy at law and is entitled to a writ of mandamus."); *In re L & L Kempwood Assocs., L.P.*, 9 S.W.3d 125, 128 (Tex. 1999) (per curiam); *EZ Pawn Corp. v. Mancias*, 934 S.W.2d 87, 91 (Tex. 1996).

2. Under TCP&RC. Texas Civil Practice & Remedies Code § 171.098 provides that an appeal is available from an order denying an application to compel arbitration under TCP&RC § 171.021, as well as from an order granting a stay of arbitration under TCP&RC § 171.023. The Texas Supreme Court does not have jurisdiction to review the court of appeals' decision unless there is a dissent in the court of appeals on a question of law material to the decision, or unless the court of appeals holds differently from a prior decision of another court of appeals or the Supreme Court on a question of law material to the decision. TCP&RC § 22.001(b).

3. When Federal and State Statutes Apply. When a party seeks to compel arbitration under both the Texas Arbitration Act and the Federal Arbitration Act, the party must pursue parallel proceedings: an interlocutory appeal of the order denying arbitration under the Texas

act, and a request for a writ of mandamus from the denial under the federal act. *Jack B. Anglin Co., Inc. v. Tipps*, 842 S.W.2d 266, 272 (Tex. 1992).

XII. NON-SIGNING PARTIES. Ordinarily, it is only parties who sign an arbitration agreement that are bound by that agreement to arbitrate their disputes. There are, however, circumstances in which an arbitration clause binds parties who did not sign the agreement. This occurs when the nonsignatory is asserting claims that require reliance on the terms of the written agreement containing the arbitration provision. *See ANCO Ins. Services of Houston, Inc. v. Romero*, 27 S.W.3d 1, 4 (Tex. App.--San Antonio 2000, pet. denied) ; *Valero Energy Corp. v. Teco Pipe-line Co.*, 2 S.W.3d 576, 591-93 (Tex. App.-- Houston [14th Dist.] 1999, no pet.); *Carlin v. 3V Inc.*, 928 S.W.2d 291, 296 (Tex. App.--Houston [14th Dist.] 1996, no writ); *Merrill Lynch, Pierce, Fenner & Smith v. Eddings*, 838 S.W.2d 874, 878-79 (Tex. App.--Waco 1992, writ denied). In *Southwest Texas Pathology Associates, L.L.P. v. Roosth*, 27 S.W.3d 204 (Tex. App.--San Antonio 2000, pet. dism'd w.o.j.,), the principle was held not to apply to a former wife suing her ex-husband and his former business partners where she was attacking the amended partnership agreement containing the arbitration clause, and was not seeking any benefits under that amended agreement).

XIII. JUDICIAL REVIEW OF ARBITRATION AWARDS. A trial court can vacate, enforce, or modify and enforce an arbitrator's award.

A. VACATING THE AWARD. The grounds for vacating the award are set out in TCP&RC § 171.088. A party can show that the award was obtained by corruption, fraud or other undue means. Or the party can show that his or her rights were prejudiced by evident partiality, corruption, or misconduct or wilful behavior of the arbitrator. An award also can be vacated when the arbitrator exceeded his or her powers, refused to postpone the arbitration hearing despite sufficient cause, refused to hear material evidence, or conducted the hearing in violation of the statute and substantially prejudiced the party. And an award can be set aside if there was no agreement to arbitrate, that issue has not already been litigated in court, and an objection on those grounds was made at or before the hearing. *See* TCP&RC 171.088. The complaining party must apply to vacate the award within 90 days of receiving it. If the award is vacated, the matter is not referred to litigation. It is either sent back to the same arbitrator, or a new arbitrator, depending on the circumstance. *See* TCP&RC § 171.089.

A mere mistake of fact or law is insufficient to set aside the arbitration award. *J.J. Gregory Gourmet Servs., Inc. v. Antone's Import Co.*, 927 S.W.2d 31, 33 (Tex. App.--Houston [1st Dist.] 1994, writ denied). Likewise, a claim that the evidence does not support the award is not a basis to set aside the award. *See J.J. Gregory Gourmet Servs., Inc.*, 927 S.W.2d at 33 ("Absent a statutory or common law ground to vacate or modify an arbitration award, a reviewing court lacks jurisdiction to review other complaints, including the sufficiency of the evidence supporting the award").

B. MODIFYING THE AWARD. The court must modify or correct an award if there was an evident miscalculation of numbers, an evident mistake in describing a person, thing or property, or the award includes matters not subject arbitration and the deletion will not affect the merits of the decision as to matters properly in arbitration, and (3) the form of the award is imperfect in a manner that does not affect the merits of the award. *See* TCP&RC 171.091.

C. APPELLATE REVIEW OF THE AWARD.

1. Preserving Error. A+ party challenging an arbitration award on appeal must raise the grounds for modifying or vacating the award in the trial court in order to argue those grounds on appeal. *Kline v. O'Quinn*, 874 S.W.2d 776 (Tex. App.- Houston [14th Dist.] 1994, writ denied), *cert. denied*, 515 U.S. 1142, 115 S.Ct. 2579, 132 L.Ed.2d 829 (1995). Absent an allegation of a statutory or common law ground to vacate an arbitrator's award, a court of appeals is without jurisdiction to review it. *Powell v. Gulf Coast Carriers, Inc.*, 872 S.W.2d 22 (Tex. App.--Houston [14th Dist.] 1994, no writ).

2. Standard of Review. The court of appeals in *IPCO-G.& C. Joint Venture v. A.B. Chance Co.*, 65 S.W.3d 252, 255 (Tex. App.--Houston[1st Dist.] 2001, pet. denied), summarized the standard of appellate review of an arbitration award to be applied by the appellate court:

> Statutory arbitration is cumulative of the common law. J.J. Gregory Gourmet Servs. v. Antone's Import Co., 927 S.W.2d 31, 33 (Tex. App.--Houston [1st Dist.] 1995, no writ). Our review of an arbitration award is extremely

narrow. Common law allows a trial court to set aside an arbitration award "only if the decision is tainted with fraud, misconduct, or gross mistake as would imply bad faith and failure to exercise honest judgment." Teleometrics Internat'l, Inc. v. Hall, 922 S.W.2d 189, 193 (Tex. App.--Houston [1st Dist.] 1995, writ denied). Because arbitration is favored as a means of dispute resolution, courts indulge every reasonable presumption in favor of upholding the award. Id.; Wetzel v. Sullivan, King & Sabom, P.C., 745 S.W.2d 78, 81 (Tex. App.--Houston [1st Dist.] 1988, no writ).

An arbitration award has the same effect as a judgment of a court of last resort, and a court reviewing the award may not substitute its judgment for the arbitrator's merely because the court would have reached a different decision. City of Baytown v. C.L. Winter, Inc., 886 S.W.2d 515, 518 (Tex. App.---Houston [1st Dist.] 1994, writ denied). Every reasonable presumption must be indulged to uphold the arbitrator's decision, and none is indulged against it. Id. A mere mistake of fact or law is insufficient to set aside an arbitration award. J.J. Gregory Gourmet Servs., 927 S.W.2d at 33. In the absence of a statutory or common law ground to vacate or modify an arbitration award, a reviewing court lacks jurisdiction to review other complaints, including the sufficiency of the evidence to support the award. Id.

XIV. APPENDIX.

A. TEXAS CIVIL PRACTICE & REMEDIES CODE PROVISIONS RELATING TO ARBITRATION.

1. ADR Referral to Arbitration. The following provisions from the Tex. Civ. Prac. & Rem. Code relate to the trial court's assigning a pending case to an alternative dispute resolution process, including arbitration.

§ 154.002. Policy

It is the policy of this state to encourage the peaceable resolution of disputes, with special consideration given to disputes involving the parent-child relationship, including the mediation of issues involving conservatorship, possession, and support of children, and the early settlement of pending litigation through voluntary settlement procedures.

§ 154.021. Referral of Pending Disputes for Alternative Dispute Resolution Procedure

(a) A court may, on its own motion or the motion of a party, refer a pending dispute for resolution by an alternative dispute resolution procedure including:

(1) an alternative dispute resolution system established under Chapter 26, Acts of the 68th Legislature, Regular Session, 1983 (Article 2372aa, Vernon's Texas Civil Statutes [FN1]);

(2) a dispute resolution organization; or

(3) a nonjudicial and informally conducted forum for the voluntary settlement of citizens' disputes through the intervention of an impartial third party, including those alternative dispute resolution procedures described under this subchapter.

(b) The court shall confer with the parties in the determination of the most appropriate alternative dispute resolution procedure.

§ 154.024. Mini-Trial

(a) A mini-trial is conducted under an agreement of the parties.

(b) Each party and counsel for the party present the position of the party, either before selected representatives for each party or before an impartial third party, to define the issues and develop a basis for realistic settlement negotiations.

(c) The impartial third party may issue an advisory opinion regarding the merits of the case.

(d) The advisory opinion is not binding on the parties unless the parties agree that it is binding and enter into a written settlement agreement.

§ 154.025. Moderated Settlement Confer-

ence

(a) A moderated settlement conference is a forum for case evaluation and realistic settlement negotiations.

(b) Each party and counsel for the party present the position of the party before a panel of impartial third parties.

(c) The panel may issue an advisory opinion regarding the liability or damages of the parties or both.

(d) The advisory opinion is not binding on the parties.

§ 154.027. Arbitration

(a) Nonbinding arbitration is a forum in which each party and counsel for the party present the position of the party before an impartial third party, who renders a specific award.

(b) If the parties stipulate in advance, the award is binding and is enforceable in the same manner as any contract obligation. If the parties do not stipulate in advance that the award is binding, the award is not binding and serves only as a basis for the parties' further settlement negotiations.

§ 154.051. Appointment of Impartial Third Parties

(a) If a court refers a pending dispute for resolution by an alternative dispute resolution procedure under Section 154.021, the court may appoint an impartial third party to facilitate the procedure.

(b) The court may appoint a third party who is agreed on by the parties if the person qualifies for appointment under this subchapter.

(c) The court may appoint more than one third party under this section.

§ 154.052. Qualifications of Impartial Third Party

(a) Except as provided by Subsections (b) and (c), to qualify for an appointment as an impartial third party under this subchapter a person must have completed a minimum of 40 classroom hours of training in dispute resolution techniques in a course conducted by an alternative dispute resolution system or other dispute resolution organization approved by the court making the appointment.

(b) To qualify for an appointment as an impartial third party under this subchapter in a dispute relating to the parent-child relationship, a person must complete the training required by Subsection (a) and an additional 24 hours of training in the fields of family dynamics, child development, and family law.

(c) In appropriate circumstances, a court may in its discretion appoint a person as an impartial third party who does not qualify under Subsection (a) or (b) if the court bases its appointment on legal or other professional training or experience in particular dispute resolution processes.

§ 154.053. Standards and Duties of Impartial Third Parties

(a) A person appointed to facilitate an alternative dispute resolution procedure under this subchapter shall encourage and assist the parties in reaching a settlement of their dispute but may not compel or coerce the parties to enter into a settlement agreement.

(b) Unless expressly authorized by the disclosing party, the impartial third party may not disclose to either party information given in confidence by the other and shall at all times maintain confidentiality with respect to communications relating to the subject matter of the dispute.

(c) Unless the parties agree otherwise, all matters, including the conduct and demeanor of the parties and their counsel during the settlement process, are confidential and may never be disclosed to anyone, including the appointing court.

(d) Each participant, including the impartial third party, to an alternative dispute resolution

procedure is subject to the requirements of Subchapter B, Chapter 261, Family Code, and Subchapter C, Chapter 48, Human Resources Code.

§ 154.054. Compensation of Impartial Third Parties

(a) The court may set a reasonable fee for the services of an impartial third party appointed under this subchapter.

(b) Unless the parties agree to a method of payment, the court shall tax the fee for the services of an impartial third party as other costs of suit.

§ 154.055. Qualified Immunity of Impartial Third Parties

(a) A person appointed to facilitate an alternative dispute resolution procedure under this subchapter or under Chapter 152 relating to an alternative dispute resolution system established by counties, or appointed by the parties whether before or after the institution of formal judicial proceedings, who is a volunteer and who does not act with wanton and wilful disregard of the rights, safety, or property of another, is immune from civil liability for any act or omission within the course and scope of his or her duties or functions as an impartial third party. For purposes of this section, a volunteer impartial third party is a person who does not receive compensation in excess of reimbursement for expenses incurred or a stipend intended as reimbursement for expenses incurred.

(b) This section neither applies to nor is it intended to enlarge or diminish any rights or immunities enjoyed by an arbitrator participating in a binding arbitration pursuant to any applicable statute or treaty.

§ 154.073. Confidentiality of Certain Records And Communications

(a) Except as provided by Subsections (c), (d), (e), and (f), a communication relating to the subject matter of any civil or criminal dispute made by a participant in an alternative dispute resolution procedure, whether before or after the institution of formal judicial proceedings, is confidential, is not subject to disclosure, and may not be used as evidence against the participant in any judicial or administrative proceeding.

(b) Any record made at an alternative dispute resolution procedure is confidential, and the participants or the third party facilitating the procedure may not be required to testify in any proceedings relating to or arising out of the matter in dispute or be subject to process requiring disclosure of confidential information or data relating to or arising out of the matter in dispute.

(c) An oral communication or written material used in or made a part of an alternative dispute resolution procedure is admissible or discoverable if it is admissible or discoverable independent of the procedure.

(d) A final written agreement to which a governmental body, as defined by Section 552.003, Government Code, is a signatory that is reached as a result of a dispute resolution procedure conducted under this chapter is subject to or excepted from required disclosure in accordance with Chapter 552, Government Code.

(e) If this section conflicts with other legal requirements for disclosure of communications, records, or materials, the issue of confidentiality may be presented to the court having jurisdiction of the proceedings to determine, in camera, whether the facts, circumstances, and context of the communications or materials sought to be disclosed warrant a protective order of the court or whether the communications or materials are subject to disclosure.

(f) This section does not affect the duty to report abuse or neglect under Subchapter B, Chapter 261, Family Code, and abuse, exploitation, or neglect under Subchapter C, Chapter 48, Human Resources Code.

(g) This section applies to a victim-offender mediation by the Texas Department of Criminal Justice as described in Article 56.13, Code

of Criminal Procedure.

2. Mandatory Arbitration Pursuant to Agreement.

§ 171.001. Arbitration Agreements Valid

(a) A written agreement to arbitrate is valid and enforceable if the agreement is to arbitrate a controversy that:

(1) exists at the time of the agreement; or
(2) arises between the parties after the date of the agreement.

(b) A party may revoke the agreement only on a ground that exists at law or in equity for the revocation of a contract.

§ 171.002. Scope of Chapter

(a) This chapter does not apply to:

(1) a collective bargaining agreement between an employer and a labor union;
(2) an agreement for the acquisition by one or more individuals of property, services, money, or credit in which the total consideration to be furnished by the individual is not more than $50,000, except as provided by Subsection (b);
(3) a claim for personal injury, except as provided by Subsection (c);
(4) a claim for workers' compensation benefits; or
(5) an agreement made before January 1, 1966.

(b) An agreement described by Subsection (a)(2) is subject to this chapter if:
(1) the parties to the agreement agree in writing to arbitrate; and
(2) the agreement is signed by each party and each party's attorney.

(c) A claim described by Subsection (a)(3) is subject to this chapter if:
(1) each party to the claim, on the advice of counsel, agrees in writing to arbitrate; and
(2) the agreement is signed by each party and each party's attorney.

§ 171.003. Uniform Interpretation

This chapter shall be construed to effect its purpose and make uniform the construction of other states' law applicable to an arbitration.

§ 171.021. Proceeding to Compel Arbitration

(a) A court shall order the parties to arbitrate on application of a party showing:
(1) an agreement to arbitrate; and
(2) the opposing party's refusal to arbitrate.

(b) If a party opposing an application made under Subsection (a) denies the existence of the agreement, the court shall summarily determine that issue. The court shall order the arbitration if it finds for the party that made the application. If the court does not find for that party, the court shall deny the application.

(c) An order compelling arbitration must include a stay of any proceeding subject to Section 171.025.

§ 171.022. Unconscionable Agreements Unenforceable

A court may not enforce an agreement to arbitrate if the court finds the agreement was unconscionable at the time the agreement was made.

§ 171.023. Proceeding to Stay Arbitration

(a) A court may stay an arbitration commenced or threatened on application and a showing that there is not an agreement to arbitrate.

(b) If there is a substantial bona fide dispute as to whether an agreement to arbitrate exists, the court shall try the issue promptly and summarily.

(c) The court shall stay the arbitration if the court finds for the party moving for the stay. If the court finds for the party opposing the stay, the court shall order the parties to arbitrate.

§ 171.024. Place for Making Application

(a) If there is a proceeding pending in a court involving an issue referable to arbitration under an alleged agreement to arbitrate, a party may make an application under this subchapter only in that court.

(b) If Subsection (a) does not apply, a party may make an application in any court, subject to Section 171.096.

§ 171.025. Stay of Related Proceeding

(a) The court shall stay a proceeding that involves an issue subject to arbitration if an order for arbitration or an application for that order is made under this subchapter.

(b) The stay applies only to the issue subject to arbitration if that issue is severable from the remainder of the proceeding.

§ 171.026. Validity of Underlying Claim

A court may not refuse to order arbitration because:

(1) the claim lacks merit or bona fides; or

(2) the fault or ground for the claim is not shown.

§ 171.041. Appointment of Arbitrators

(a) The method of appointment of arbitrators is as specified in the agreement to arbitrate.

(b) The court, on application of a party stating the nature of the issues to be arbitrated and the qualifications of the proposed arbitrators, shall appoint one or more qualified arbitrators if:

(1) the agreement to arbitrate does not specify a method of appointment;

(2) the agreed method fails or cannot be followed; or

(3) an appointed arbitrator fails or is unable to act and a successor has not been appointed.

(c) An arbitrator appointed under Subsection (b) has the powers of an arbitrator named in the agreement to arbitrate.

§ 171.042. Majority Action by Arbitrators

The powers of the arbitrators are exercised by a majority unless otherwise provided by the agreement to arbitrate or this chapter.

§ 171.043. Hearing Conducted by Arbitrators

(a) Unless otherwise provided by the agreement to arbitrate, all the arbitrators shall conduct the hearing. A majority of the arbitrators may determine a question and render a final award.

(b) If, during the course of the hearing, an arbitrator ceases to act, one or more remaining arbitrators appointed to act as neutral arbitrators may hear and determine the controversy.

§ 171.044. Time and Place of Hearing; Notice

(a) Unless otherwise provided by the agreement to arbitrate, the arbitrators shall set a time and place for the hearing and notify each party.

(b) The notice must be served not later than the fifth day before the hearing either personally or by registered or certified mail with return receipt requested. Appearance at the hearing waives the notice.

(c) The court on application may direct the arbitrators to proceed promptly with the hearing and determination of the controversy.

§ 171.045. Adjournment or Postponement

Unless otherwise provided by the agreement to arbitrate, the arbitrators may:

(1) adjourn the hearing as necessary; and

(2) on request of a party and for good cause, or on their own motion, postpone the hearing to a time not later than:

(A) the date set by the agreement for making the award; or

(B) a later date agreed to by the parties.

§ 171.046. Failure of Party to Appear

Unless otherwise provided by the agreement to arbitrate, the arbitrators may hear and determine the controversy on the evidence produced without regard to whether a party who has been notified as provided by Section 171.044 fails to appear.

§ 171.047. Rights of Party at Hearing

Unless otherwise provided by the agreement to arbitrate, a party at the hearing is entitled to:

(1) be heard;

(2) present evidence material to the controversy; and

(3) cross-examine any witness.

§ 171.048. Representation by Attorney; Fees

(a) A party is entitled to representation by an attorney at a proceeding under this chapter.

(b) A waiver of the right described by Subsection (a) before the proceeding is ineffective.

(c) The arbitrators shall award attorney's fees as additional sums required to be paid under the award only if the fees are provided for:

(1) in the agreement to arbitrate; or

(2) by law for a recovery in a civil action in the district court on a cause of action on which any part of the award is based.

§ 171.049. Oath

The arbitrators, or an arbitrator at the direction of the arbitrators, may administer to each witness testifying before them the oath required of a witness in a civil action pending in a district court.

§ 171.050. Depositions

(a) The arbitrators may authorize a deposition:

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

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

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

§ 171.051. Subpoenas

(a) The arbitrators, or an arbitrator at the direction of the arbitrators, may issue a subpoena for:

(1) attendance of a witness; or

(2) production of books, records, documents, or other evidence.

(b) A witness required to appear by subpoena under this section may appear at the hearing before the arbitrators or at a deposition.

(c) A subpoena issued under this section shall be served in the manner provided by law for the service of a subpoena issued in a civil action pending in a district court.

(d) Each provision of law requiring a witness to appear, produce evidence, and testify under a subpoena issued in a civil action pending in a district court applies to a subpoena issued under this section.

§ 171.052. Witness Fee

The fee for a witness attending a hearing or a deposition under this subchapter is the same as the fee for a witness in a civil action in a district court.

§ 171.053. Arbitrators' Award

(a) The arbitrators' award must be in writing and signed by each arbitrator joining in the award.

(b) The arbitrators shall deliver a copy of the award to each party personally, by registered or certified mail, or as provided in the agreement.

(c) The arbitrators shall make the award:

(1) within the time established by the agreement to arbitrate; or

(2) if a time is not established by the agreement, within the time ordered by the court on application of a party.

(d) The parties may extend the time for making the award either before or after the time expires. The extension must be in writing.

(e) A party waives the objection that an award was not made within the time required unless the party notifies the arbitrators of the objection before the delivery of the award to that party.

§ 171.054. Modification or Correction to Award

(a) The arbitrators may modify or correct an award:

(1) on the grounds stated in Section 171.091; or

(2) to clarify the award.

(b) A modification or correction under Subsection (a) may be made only:

(1) on application of a party; or

(2) on submission to the arbitrators by a court, if an application to the court is pending under Sections 171.087, 171.088, 171.089, and 171.091, subject to any condition ordered by the court.

(c) A party may make an application under this section not later than the 20th day after the date the award is delivered to the applicant.

(d) An applicant shall give written notice of the application promptly to the opposing party. The notice must state that the opposing party must serve any objection to the application not later than the 10th day after the date of notice.

(e) An award modified or corrected under this section is subject to Sections 171.087, 171.088, 171.089, 171.090, and 171.091.

§ 171.055. Arbitrator's Fees and Expenses

Unless otherwise provided in the agreement to arbitrate, the arbitrators' expenses and fees, with other expenses incurred in conducting the arbitration, shall be paid as provided in the award.

§ 171.081. Jurisdiction

The making of an agreement described by Section 171.001 that provides for or authorizes an arbitration in this state and to which that section applies confers jurisdiction on the court to enforce the agreement and to render judgment on an award under this chapter.

§ 171.082. Application to Court; Fees

(a) The filing with the clerk of the court of an application for an order under this chapter, including a judgment or decree, invokes the jurisdiction of the court.

(b) On the filing of the initial application and the payment to the clerk of the fees of court required to be paid on the filing of a civil action in the court, the clerk shall docket the proceeding as a civil action pending in that court.

§ 171.083. Time for Filing

An applicant for a court order under this chapter may file the application:

(1) before arbitration proceedings begin in support of those proceedings;

(2) during the period the arbitration is pending before the arbitrators; or

(3) subject to this chapter, at or after the conclusion of the arbitration.

§ 171.084. Stay of Certain Proceedings

(a) After an initial application is filed, the court may stay:

(1) a proceeding under a later filed application in another court to:

(A) invoke the jurisdiction of that court; or

(B) obtain an order under this chapter; or

(2) a proceeding instituted after the initial application has been filed.

(b) A stay under this section affects only an issue subject to arbitration under an agreement in accordance with the terms of the initial application.

§ 171.085. Contents of Application

(a) A court may require that an application filed under this chapter:

(1) show the jurisdiction of the court;

(2) have attached a copy of the agreement to arbitrate;

(3) define the issue subject to arbitration between the parties under the agreement;

(4) specify the status of the arbitration before the arbitrators; and

(5) show the need for the court order sought by the applicant.

(b) A court may not find an application inadequate because of the absence of a requirement listed in Subsection (a) unless the court, in its discretion:

(1) requires that the applicant amend the application to meet the requirements of the court; and

(2) grants the applicant a 10-day period to comply.

§ 171.086. Orders That May be Rendered

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

(1) invoke the jurisdiction of the court over the adverse party and to effect that jurisdiction by service of process on the party before arbitration proceedings begin;

(2) invoke the jurisdiction of the court over an ancillary proceeding in rem, including by attachment, garnishment, or sequestration, in the manner and subject to the conditions under which the proceeding may be instituted and conducted ancillary to a civil action in a district court;

(3) restrain or enjoin:

(A) the destruction of all or an essential part of the subject matter of the controversy; or

(B) the destruction or alteration of books, records, documents, or other evidence needed for the arbitration;

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

(5) appoint one or more arbitrators so that an arbitration under the agreement to arbitrate may proceed; or

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

(b) During the period an arbitration is pending before the arbitrators or at or after the conclusion of the arbitration, a party may file an application for a court order, including an order:

(1) that was referred to or that would serve a purpose referred to in Subsection (a);

(2) to require compliance by an adverse party or any witness with an order made under this chapter by the arbitrators during the arbitration;

(3) to require the issuance and service under court order, rather than under the arbitrators' order, of a subpoena, notice, or other court process:

(A) in support of the arbitration; or

(B) in an ancillary proceeding in rem, including by attachment, garnishment, or sequestration, in the manner of and subject to the conditions under which the proceeding may be conducted ancillary to a civil action in a district court;

(4) to require security for the satisfaction of a court judgment that may be later entered under an award;

(5) to support the enforcement of a court order entered under this chapter; or

(6) to obtain relief under Section 171.087, 171.088, 171.089, or 171.091.

(c) A court may not require an applicant for an order under Subsection (a)(1) to show that the adverse party is about to, or may, leave the state if jurisdiction over that party is not effected by service of process before the arbitration proceedings begin.

§ 171.087. Confirmation of Award

Unless grounds are offered for vacating, modifying, or correcting an award under Section 171.088 or 171.091, the court, on application of a party, shall confirm the award.

§ 171.088. Vacating Award

(a) On application of a party, the court shall vacate an award if:

(1) the award was obtained by corruption, fraud, or other undue means;

(2) the rights of a party were prejudiced by:

(A) evident partiality by an arbitrator appointed as a neutral arbitrator;

(B) corruption in an arbitrator; or

(C) misconduct or wilful misbehavior of an arbitrator;

(3) the arbitrators:

(A) exceeded their powers;

(B) refused to postpone the hearing after a showing of sufficient cause for the postponement;

(C) refused to hear evidence material to the controversy; or

(D) conducted the hearing, contrary to Section 171.043, 171.044, 171.045, 171.046, or 171.047, in a manner that substantially prejudiced the rights of a party; or

(4) there was no agreement to arbitrate, the issue was not adversely determined in a proceeding under Subchapter B, and the party did not participate in the arbitration hearing without raising the objection.

(b) A party must make an application under this section not later than the 90th day after the date of delivery of a copy of the award to the applicant. A party must make an application under Subsection (a)(1) not later than the 90th day after the date the grounds for the application are known or should have been known.

(c) If the application to vacate is denied and a motion to modify or correct the award is not pending, the court shall confirm the award.

§ 171.089. Rehearing After Award Vacated

(a) On vacating an award on grounds other than the grounds stated in Section 171.088(a)(4), the court may order a rehearing before new arbitrators chosen:

(1) as provided in the agreement to arbitrate; or

(2) by the court under Section 171.041, if the agreement does not provide the manner for choosing the arbitrators.

(b) If the award is vacated under Section 171.088(a)(3), the court may order a rehearing before the arbitrators who made the award or their successors appointed under Section 171.041.

(c) The period within which the agreement to arbitrate requires the award to be made applies to a rehearing under this section and commences from the date of the order.

§ 171.090. Type of Relief Not Factor

The fact that the relief granted by the arbitrators could not or would not be granted by a court of law or equity is not a ground for vacating or refusing to confirm the award.

§ 171.091. Modifying or Correcting Award

(a) On application, the court shall modify or correct an award if:

(1) the award contains:

(A) an evident miscalculation of numbers; or

(B) an evident mistake in the description of a person, thing, or property referred to in the award;

(2) the arbitrators have made an award with respect to a matter not submitted to them and the award may be corrected without affecting the merits of the decision made with respect to the issues that were submitted; or

(3) the form of the award is imperfect in a manner not affecting the merits of the controversy.

(b) A party must make an application under this section not later than the 90th day after the date of delivery of a copy of the award to the applicant.

(c) If the application is granted, the court shall modify or correct the award to effect its intent and shall confirm the award as modified or corrected. If the application is not granted, the court shall confirm the award.

(d) An application to modify or correct an award may be joined in the alternative with an application to vacate the award.

§ 171.092. Judgment on Award

(a) On granting an order that confirms, modifies, or corrects an award, the court shall enter a judgment or decree conforming to the order. The judgment or decree may be enforced in the same manner as any other judgment or decree.

(b) The court may award:

(1) costs of the application and of the proceedings subsequent to the application; and

(2) disbursements.

§ 171.093. Hearing; Notice

The court shall hear each initial and subsequent application under this subchapter in the manner and with the notice required by law or court rule for making and hearing a motion filed in a pending civil action in a district court.

§ 171.094. Service of Process for Initial Application

(a) On the filing of an initial application under this subchapter, the clerk of the court shall:

(1) issue process for service on each adverse party named in the application; and

(2) attach a copy of the application to the process.

(b) To the extent applicable, the process and service and the return of service must be in the form and include the substance required for process and service on a defendant in a civil action in a district court.

(c) An authorized official may effect the service of process.

§ 171.095. Service of Process for Subsequent Applications

(a) After an initial application has been made, notice to an adverse party for each subsequent application shall be made in the same manner as is required for a motion filed in a pending civil action in a district court. This subsection applies only if:

(1) jurisdiction over the adverse party has been established by service of process on the party or in rem for the initial application; and

(2) the subsequent application relates to:

(A) the same arbitration or a prospective arbitration under the same agreement to arbitrate; and

(B) the same controversy or controversies.

(b) If Subsection (a) does not apply, service of process shall be made on the adverse party in the manner provided by Section 171.094.

§ 171.096. Place of Filing

(a) Except as otherwise provided by this section, a party must file the initial application:

(1) in the county in which an adverse party resides or has a place of business; or

(2) if an adverse party does not have a residence or place of business in this state, in any county.

(b) If the agreement to arbitrate provides that the hearing before the arbitrators is to be held in a county in this state, a party must file the initial application with the clerk of the court of that county.

(c) If a hearing before the arbitrators has been held, a party must file the initial application with the clerk of the court of the county in which the hearing was held.

(d) Consistent with Section 171.024, if a proceeding is pending in a court relating to arbitration of an issue subject to arbitration under an agreement before the filing of the initial application, a party must file the initial

application and any subsequent application relating to the arbitration in that court.

§ 171.097. Transfer

(a) On application of a party adverse to the party who filed the initial application, a court that has jurisdiction but that is located in a county other than as described by Section 171.096 shall transfer the application to a court of a county described by that section.

(b) The court shall transfer the application by an order comparable to an order sustaining a plea of privilege to be sued in a civil action in a district court of a county other than the county in which an action is filed.

(c) The party must file the application under this section:

(1) not later than the 20th day after the date of service of process on the adverse party; and

(2) before any other appearance in the court by that adverse party, other than an appearance to challenge the jurisdiction of the court.

§ 171.098. Appeal

(a) A party may appeal a judgment or decree entered under this chapter or an order:

(1) denying an application to compel arbitration made under Section 171.021;

(2) granting an application to stay arbitration made under Section 171.023;

(3) confirming or denying confirmation of an award;

(4) modifying or correcting an award; or

(5) vacating an award without directing a rehearing.

(b) The appeal shall be taken in the manner and to the same extent as an appeal from an order or judgment in a civil action.