LICENSING LAW AND BUSINESS REPORT

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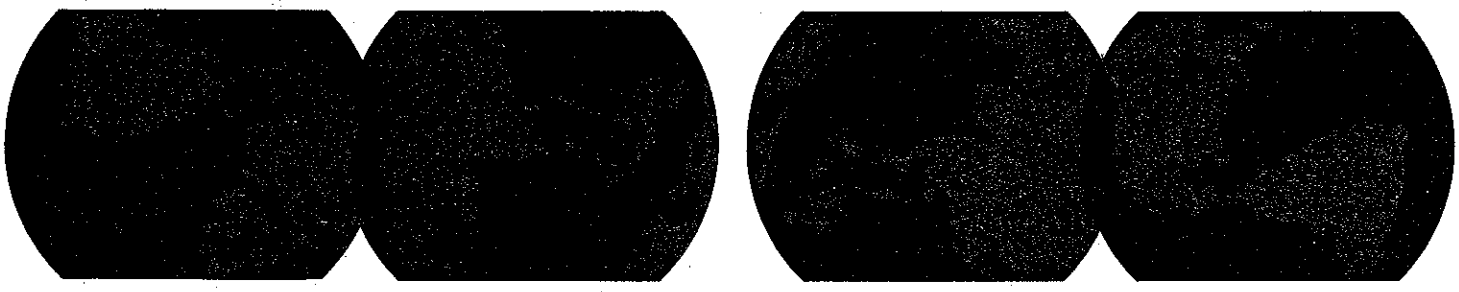

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ARBITRATING LICENSING DISPUTES: PUTTING THE "BINDING" IN BINDING ARBITRATION (Part One of a Two-Part Article)

by John R. Ackermann, Jr.*

- The Federal Arbitration Act
- The FAA and State Law
- Arbitration of Intellectual Property Disputes
- The American Arbitration Association Rules
- The "Defensive" Arbitration Clause

1. Introduction

Litigation is expensive, and it is becoming more so all the time. Trials today are measured in months, discovery can take years, and the cost includes not only legal fees, but lost productivity as well. Moreover, there are runaway juries, bad publicity, and years of appeals to contend with.

The answer is to avoid disputes, but despite best efforts some controversies arise that just cannot be settled solely between the parties. They require a third party to resolve issues the parties themselves cannot—or will not. Many companies have come to believe that the best forum for such resolution is binding arbitration, rather than courts.

Arbitration has advantages that make it attractive as an alternative to litigation. First, discovery is limited. Second, many believe that an arbitrator is less likely to be swayed by emotion than a jury might be. Third, the proceedings can be confidential. Fourth, there is generally no appeal from an arbitrator's award and thus it brings the matter to a final conclusion. Fifth, because arbitration is based on contract, the parties have great flexibility to craft the arbitration procedure to suit the case. These factors together mean that arbitration can

*Mr. Ackermann is a Senior Attorney in the Law Department of NCR Corporation. He is experienced in both technology licensing and litigation. As a litigator, he has arbitrated—and enforced arbitration clauses in—numerous computer-related disputes. He is a graduate of the University of Michigan Law School.

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resolve a dispute in months instead of years, significantly reducing the cost and burden of resolution.

Another advantage of arbitration comes to light when the contract—and any likely dispute—involves a complex subject such as an intellectual property license. Unlike the courts, where the goal is to obtain a finder of fact who brings a mental blank slate to the proceedings, in arbitration the parties can agree to choose an arbitrator who is familiar with the terrain to be covered.

NCR Corporation became convinced of these benefits nearly two decades ago and has been including arbitration clauses in its hardware and software contracts since the mid-seventies. The results have been gratifying, and arbitration has saved the company millions of dollars in legal fees and lost productivity. The additional savings in jury verdicts that might have been awarded, but were avoided through arbitration, are unknowable but certainly significant.

NCR has found that arbitration creates an environment that makes settlement more likely (it is true that "you never win a lawsuit with a customer"), reduces the time and cost of resolving disputes, permits increased use of in-house counsel, decreases the likelihood of runaway verdicts, and nearly eliminates the bad publicity that may result from high-profile litigation. However, one lesson learned from this odyssey of alternative dispute resolution is that many attorneys—and even some courts—are unfamiliar with arbitration under the Federal Arbitration Act (FAA), 9 U.S.C. §§ 1-15, and refuse to believe that "binding" arbitration means just that. Part I of this article explores the basics of arbitration in a commercial setting, and provides a sample "defensive" arbitration clause for use in licensing agreements. This provision is designed to maximize the likelihood it will withstand the variety of tactics used to bypass arbitration.

Part II will discuss legal theories frequently used in attempts to avoid, or diminish the benefits of, arbitration, and ways to anticipate and defend against them. Although not many reported decisions address arbitration in the context of licensing disputes, in both Parts I and II licensing issues and cases are noted where appropriate.

2. The Federal Arbitration Act

Although arbitration would be possible without any statutory authority, without such legislative backing an agreement to arbitrate would neither deprive a court of jurisdiction, nor make the arbitrator's award enforceable as is a court judgment. To make arbitration a viable alternative to litigation, in 1925 Congress enacted the FAA, which "revers[es] centuries of judicial hostility to arbitration agreements" and places them "upon the same footing as other contracts." *Scherk v. Alberto-Culver Co.*, 417 U.S. 506, 510-11 (1974). The FAA, and the cases interpreting it, remove any doubt that arbitration agreements will be enforced and that both state and federal courts in the United States are obligated to encourage and promote arbitration.

[a] Scope of the FAA

The Act's intent is clear: "A written provision in any . . . contract evidencing a transaction involving commerce to settle [a controversy] by arbitration . . . shall be valid, irrevocable, and enforceable." 9 U.S.C. § 2 (1992). The Act defines "commerce" expansively to mean "commerce among the several states or with foreign nations." *Id.* § 1. *See also Prima Paint Corp. v. Flood & Conklin Mfg. Co.*, 388 U.S. 395, 401 (1967). The parties to an arbitration agreement need not be from different states for the FAA to apply; the only requirement is that the transaction involve the use, in whole or in part, of materials, equipment, or subcontractors from different states. *R. J. Palmer Constr. Co. v. Wichita Bank Instrument Co.*, 7 Kan. App. 2d 363, 367, 642 P.2d 127, 130 (Kan. Ct. App. 1982).

Once interstate commerce is established, both federal and state courts must apply federal substantive law on the issue of arbitrability. "Section 2 [of the FAA] is a congressional declaration of a liberal federal policy favoring arbitration agreements, notwithstanding any state substantive or procedural policies to the contrary. The effect of the section is to create a body of federal substantive law of arbitrability, applicable to any arbitration agreement within the coverage of the Act." *Moses H. Cone Memorial Hosp. v. Mercury Constr. Corp.*, 460 U.S. 1, 24 (1983).

The FAA preempts any inconsistent state law: "In enacting § 2 of the federal Act, Congress declared a national policy favoring arbitration and withdrew the power of the states to require a judicial forum for the resolution of claims which the contracting parties agreed to resolve by arbitration." *Southland Corp. v. Keating*, 465 U.S. 1, 10 (1984). "In creating a substantive rule applicable in state as well as federal courts, Congress intended to foreclose state legislative attempts to undercut the enforceability of arbitration agreements." *Id.* at 16 (footnote omitted). *See generally* William G. Phelps, Annotation, *Pre-emption by Federal Arbitration Act (9 U.S.C. §§ 1 et seq.) of State Laws Prohibiting or Restricting Formation or Enforcement of Arbitration Agreements*, 108 A.L.R. Fed. 179 (1992).

The FAA supports arbitration by requiring courts to stand aside while arbitration is pending. Section 3 of the FAA provides that upon request of a party, a court "shall . . . stay the trial of the action until such arbitration has been had in accordance with the terms of the agreement." Section 4 goes on to state that federal courts, upon petition by a party to an arbitration agreement, "shall make an order directing the parties to proceed to arbitration in accordance with the terms of the agreement." 9 U.S.C. §§ 3, 4.

Notice that these Sections are mandatory and not permissive; if a valid arbitration agreement exists, all courts are required to stand aside until the arbitration process is complete. "By its terms, the Act leaves no place for the exercise of discretion by a district court, but instead mandates that district courts *shall* direct the parties to proceed to arbitration on issues as to which an arbitration agreement has been signed." *Dean Witter Reynolds Inc. v. Byrd*, 470 U.S. 213, 218 (1985) (emphasis in original).

If a party challenges the existence of an agreement to arbitrate, the court must proceed summarily to trial of that issue. If requested, a jury trial is available. *Par-Knit Mills, Inc. v. Stockbridge Fabrics Co.*, 636 F.2d 51, 54 (3d Cir. 1980); *A/S Custodia v. Lessin Int'l, Inc.*, 503 F.2d 318, 320 (2d Cir. 1974).

For years there was great confusion about whether—and when—an order compelling, or denying, arbitration could be appealed. A series of Supreme Court decisions forming the "*Enelow-Ettelson* doctrine," which effectively made stays ordered pending arbitration appealable, was finally overturned by the Supreme Court in *Gulfstream Aerospace Corp. v. Mayacamas Corp.*, 485 U.S. 271, 287-88 (1988). Thanks to *Gulfstream* and recent amendments to Section 15 of the FAA, the rule is now clear: orders *denying* arbitration are subject to interlocutory appeal; those *granting* motions to compel arbitration are not appealable.

If there can be any question remaining after a perusal of the FAA, the courts have consistently held that federal law encourages arbitration. "Contracts to arbitrate are not to be avoided by allowing one party to ignore the contract and resort to the courts. Such a course could lead to prolonged litigation, one of the very risks the parties, by contracting for arbitration, sought to eliminate." *Southland*, 465 U.S. at 7. "[A]ny doubts concerning the scope of arbitrable issues should be resolved in favor of arbitration, whether the problem at hand is the construction of the contract language itself or an allegation of waiver, delay, or a like defense to arbitrability." *Moses H. Cone Memorial Hosp.*, 460 U.S. at 24-25. Even a claim that a contract containing an arbitration clause was fraudulently induced is generally subject to arbitration, *Prima*, 388 U.S. at 403-04, though, as discussed below, fraud and arbitration mix together to produce some murky distinctions which affect the court's ability to hear such claims.

[b] Confirming, Vacating, or Modifying Arbitration Awards

An arbitration award may be confirmed by any court having jurisdiction over the parties or property involved. 9 U.S.C. § 9. Confirmation of an arbitration award is "a summary proceeding that merely makes what is already a final arbitration award a judgment of the court." *Florasynth, Inc. v. Pickholz*, 750 F.2d 171, 176 (2d Cir. 1984). *See also Barbier v. Shearson Lehman Hutton, Inc.*, 752 F. Supp. 151, 159 (S.D.N.Y. 1990), *aff'd in part, rev'd in part*, 948 F.2d 117 (2d Cir. 1991).

Once confirmed, the award is enforceable as if it were a final judgment. There is no appeal as such from an arbitration award. A disgruntled party may seek to vacate the award under Section 10 of the FAA, but the grounds upon which a court may do so are very limited:

> [T]he United States court in and for the district wherein the award was made may make an order vacating the award . . . (1) Where the award was procured by corruption, fraud, or undue means. (2) Where there was evident partiality or corruption in the arbitrators, or either of them. (3) Where the arbitrators were guilty of misconduct in refusing to postpone the hearing, upon sufficient cause shown, or in refusing to hear evidence pertinent and material to the controversy; or of any other misbehavior by which the rights of any party have been prejudiced. (4) Where the arbitrators exceeded their powers, or so imperfectly executed them that a mutual, final, and definite award upon the subject matter submitted was not made.

9 U.S.C. § 10(a). *See generally* Margaret Shulenberger, Annotation, *Construction and Application of § 10(a-d) of United States Arbitration Act of 1947 (9 USCS § 10(a-d)), Providing Grounds for Vacating Arbitration Awards*, 20 A.L.R. Fed. 295 (1992).

In addition to vacating an award for these reasons, the court may order a rehearing by the arbitrators in order to correct the defect, if the time permitted under the arbitration agreement for the making of an award has not expired. 9 U.S.C. § 10(a)(5).

It is important to note that a court's review of an arbitration award is far more limited than the review of trial proceedings:

> Courts thus do not sit to hear claims of factual or legal error by an arbitrator as an appellate court does in reviewing decisions of lower courts. To resolve disputes about the application of . . . an agreement, an arbitrator must find facts and a court may not reject those findings simply because it disagrees with them. The same is true of the arbitrator's interpretation of the contract. The arbitrator may not ignore the plain meaning of the contract; but the parties having authorized the arbitrator to give meaning to the language of the agreement, a court should not reject an award on the ground that the arbitrator misread the contract. . . . [A]s long as the arbitrator is even arguably construing or applying the contract and acting within the scope of his authority, that a court is convinced he committed serious error does not suffice to overturn his decision.

United Paperworkers Int'l Union v. Misco, Inc., 484 U.S. 29, 38 (1987). Although labor arbitrations are not governed by the FAA, the federal courts "have often looked to the Act for guidance in labor arbitration cases." *Misco*, 484 U.S. at 40 n.9. With a few notable exceptions, the law of labor arbitration parallels that of the FAA. *See also Bernhardt v. Polygraphic Co. of Am.*, 350 U.S. 198 (1956), *on remand*, 235 F.2d 209 (2d Cir. 1956); *Inter-City Gas Corp. v. Boise Cascade Corp.*, 845 F.2d 184 (8th Cir. 1988).

The courts, however, have not always tied themselves to the precise language of § 10. Courts have added "abuse of discretion," *Jenkins v. Prudential-Bache Sec., Inc.*, 847 F.2d 631, 634 (10th Cir. 1988), and "manifest disregard of the law," *Wilko v. Swan*, 346 U.S. 427, 436 (1953), as grounds for vacating awards. *See also Lee v. Chica*, Nos. 91-3043, 91-3146, 1993 U.S. App. LEXIS 248, at *6 (8th Cir. Jan. 12, 1993) (arbitration award will not be set aside unless it is "completely irrational or evidences a manifest disregard for law"). These nonstatutory grounds are sometimes summarized (again by reference to labor arbitration cases) by stating that the arbitrator's award "is legitimate only so long as it draws its essence from the . . . agreement." *Jenkins*, 847 F.2d at 634, *quoting United Steelworkers v. Enterprise Wheel & Car*, 363 U.S. 593, 597 (1960).

Although a court may void an arbitration award on public policy grounds, the policy in question must be an explicit one:

> [A] court's refusal to enforce an arbitrator's *interpretation* of such contracts is limited to situations where the contract as interpreted would violate "some explicit public policy" that is "well defined and dominant, and is to be ascertained 'by reference to the laws and legal precedents and not from general considerations of supposed public interest.' ". . . At the very least, an alleged public policy must be properly framed . . . and the violation of such a policy must be clearly shown if an award is not to be enforced.

Misco, 484 U.S. at 43 (emphasis in original) (citations omitted) (quoting *Muschany v. United States*, 324 U.S. 49, 66 (1945).

An award may be modified if there is evident material miscalculation of figures, misdescription of a person or property, the award was on a matter not submitted to the arbitrators, or the award was imperfect in form, 9 U.S.C. § 11, but courts should avoid undertaking an "overly technical judicial review" of arbitration awards. *Federal Commerce & Navigation Co. v. Kanematsu-Gosho Ltd.*, 457 F.2d 387, 389 (2d Cir. 1972). Section 11 does not permit courts to substitute their judgment for that of the arbitrator. *Diapulse Corp. of Am. v. Carba, Ltd.*, 626 F.2d 1108, 1110 (2d Cir. 1980).

[c] Jurisdiction

Although most cases interpreting the FAA are brought in the federal courts, the Act does not establish a separate basis for federal jurisdiction. A motion to stay a proceeding pending arbitration, or to compel enforcement of an arbitration provision, may be brought before a federal court only if diversity or some other independent jurisdictional ground exists. *Moses H. Cone Memorial Hosp.*, 460 U.S. at 25 n.32. *See also Moseley, Hallgarten, Estabrook & Weeden, Inc. v. Ellis*, 849 F.2d 264, 265 n.1 (7th Cir. 1988).

In the absence of federal jurisdiction, the state courts may be called upon to enforce the FAA. It is almost unanimously recognized that § 3 of the Act requires state as well as federal courts to stay proceedings pending arbitration. *Moses H. Cone Memorial Hosp.*, 460 U.S. at 26 n.34. Whether § 4 similarly requires state courts to compel arbitration is not so clear; unlike § 3's applicability to "any of the courts of the United States," § 4 refers specifically to "any United States District Court." But at least one state court has ruled that § 4 requires it to compel arbitration in an appropriate case. *Main v. Merrill Lynch, Pierce, Fenner & Smith, Inc.*, 67 Cal. App. 3d 19, 24-25, 136 Cal. Rptr. 378, 381 (Cal. Ct. App. 1977). The Supreme Court did not rule on the issue, but mentioned *Main* without disapproval, in *Moses H. Cone Memorial Hosp.*, 460 U.S. at 26 n.35.

The requirement for independent jurisdictional grounds extends to § 9 actions to confirm awards, *Comprehensive Accounting Corp. v. Rudell*, 760 F.2d 138, 141 (7th Cir. 1985), and § 10 actions to vacate them, *Harry Hoffman Printing, Inc. v. Graphic Communications, Int'l Union, Local 261*, 912 F.2d 608, 611 n.1 (2d Cir. 1990). If diversity or pendent jurisdiction do not exist, an action to confirm or vacate an award must be brought in state court.

[d] Arbitration of Disputes with Foreign Parties

Chapter 2 of Title 9 (9 U.S.C. §§ 201-208) governs the arbitration of disputes where one party is a foreign national, or where a legal relationship between U.S. citizens "involves property located abroad, envisages performance or enforcement abroad, or has some other reason-

able relation with one or more foreign states." 9 U.S.C. § 202. Chapter 2 implements the Convention on the Recognition and Enforcement of Foreign Arbitral Awards of June 10, 1958. As its title suggests, the Convention is intended primarily to govern the enforcement of foreign awards.

Similarly, Chapter 3 of Title 9 (9 U.S.C. §§ 301-307) implements the Inter-American Convention on International Commercial Arbitration of January 30, 1975. Chapter 3 incorporates several provisions of Chapter 2, and provides a mechanism for determining which Convention applies where parties to a dispute are subject to both. To the extent it is not inconsistent with these Conventions or their implementing legislation, the FAA also applies to actions brought under Chapter 2, 9 U.S.C. § 208, and Chapter 3, 9 U.S.C. § 307.

The American Arbitration Association's Commercial Rules contemplate arbitration in the United States between U.S. citizens, though there is no reason the rules cannot apply to international arbitrations if the parties so agree. Several other treaties, agreements, and agencies are available to govern international arbitrations, including the International Chamber of Commerce.

3. The FAA And State Law

The FAA is a powerful tool, but it applies only to matters involving interstate commerce (or maritime disputes). At least 36 states, seeing the same benefits of arbitration that Congress saw, have adopted the Uniform Arbitration Act (UAA). The UAA in large part parallels the Federal Arbitration Act, but it applies to transactions not satisfying the FAA's interstate commerce requirement.

However, the UAA is subject to local variations in enactment and interpretation, and consequently creates some traps for the unwary. In particular, the obligation to arbitrate under the UAA has sometimes been subordinated to other state statutes requiring court involvement in what would otherwise be arbitrable disputes. The prime example is the U.S. Supreme Court's decision in *Volt Information Sciences, Inc. v. Board of Trustees of Leland Stanford Junior University*, 489 U.S. 468 (1989), a case that not only shows the vagaries of state law, but also demonstrates that sometimes the parties' "intention" isn't what they think it is.

In *Volt*, the parties entered into an agreement with an arbitration clause and a choice of law provision selecting the "law of the place where the Project is located," *id.* at 470, in this case California. A dispute arose and Volt demanded arbitration. Stanford University responded by filing an action in state court. Stanford's lawsuit also included two other defendants from whom it sought indemnity and who were not parties to the arbitration agreement. When Volt moved to stay the action pending arbitration, Stanford moved to stay arbitration under the California Arbitration Act, which permits a stay when a related action includes parties not bound to arbitrate and when "there is a possibility of conflicting rulings on a common issue of law or fact." *Id.* at 471.

The Supreme Court held that because the parties specified that their agreement would be governed by California law, they had incorporated California's arbitration law, and that the California stay provision was not preempted by the FAA. The FAA:

> does not confer a right to compel arbitration of any dispute at any time; it confers only the right to obtain an order directing that "arbitration proceed *in the manner provided for in [the parties'] agreement.*" . . . [B]y incorporating the California rules of arbitration into their agreement, the parties had agreed that arbitration would not proceed in situations which fell within the scope of [the California stay provision].

Id. at 474-75 (emphasis added by decision) (citation omitted).

The Court went on to find that incorporating California's arbitration rules did not violate the federal policy in favor of arbitration identified in *Moses H. Cone Memorial Hospital, Volt*, 489 U.S. at 475-76, and that the FAA did not preempt the state arbitration statute:

> Where, as here, the parties have agreed to abide by state rules of arbitration, enforcing those rules according to the terms of the agreement is fully consistent with the goals of the FAA, even if the result is that arbitration is stayed where the Act would otherwise permit it to go forward. By permitting the courts to "rigorously enforce" such agreements according to their terms . . . we give effect to the contractual rights and expectations of the parties, without doing violence to the policies behind the FAA.

Id. at 479 (citation omitted). Thus, an innocent-looking choice-of-law provision can drag with it state-law provisions that undermine the advantages the parties thought they were obtaining by their agreement to arbitrate.

Though the reasoning and practicality of the *Volt* decision may be questioned, the problem can be avoided by modifying the choice of law provision used in agreements containing arbitration clauses to make clear the parties' intent to be governed by the federal law of arbitration. For example, the NCR arbitration clause contains a choice-of-law provision which makes it clear that federal and not state arbitration law applies: "Issues of arbitrability shall be determined in accordance with the federal substantive and procedural laws relating to arbitration; all other aspects of this Agreement shall be interpreted in accordance with the laws of the State of _____."

Some have argued, particularly in the context of the arbitrator's power to award punitive damages (discussed in Part II), that *Volt* requires the wholesale incorporation of state law, to the exclusion of the federal law of arbitration, where an agreement contains a choice-of-law clause. To date those arguments have not been successful.

For example, the Ninth Circuit has noted:

> The Supreme Court did not say a state choice-of-law provision that does not expressly encompass state arbitration rules, does so by operation of law. The court merely said that it would not disturb a state court's factual determination that the parties to the contract in *Volt* intended, to invoke California arbitration rules. . . . In this case it is clear that federal rules, rather than New York state rules apply. The Supreme Court has said time and again that issues of arbitrability in cases subject to the Act are governed by federal law. . . . The Supreme Court did not reconsider these cases in *Volt* and the rule that federal law governs applies in this case.

Todd Shipyards Corp. v. Cunard Line, Ltd., 943 F.2d 1056, 1062 (9th Cir. 1991) (citations omitted).

4. Arbitration of Intellectual Property License Disputes

Because many of the rights involved in licensing disputes are statutory, and many of the governing statutes provide quite detailed procedures for their enforcement, it is natural to ask whether disputes involving such rights are arbitrable under the FAA.

In the past, courts were reluctant to order arbitration of infringement suits; it was perceived that the complexity of the issues involved was beyond the expertise of arbitrators. In addition, it was questioned whether the monopoly rights granted by patents and trademarks should be subject to private enforcement. Today, that view has changed and disputes involving intellectual property rights are generally arbitrable.

35 U.S.C. § 294 now expressly permits arbitration of patent disputes, including those involving questions of validity and infringement. Note, though, that this statute creates an arbitration scheme parallel to, but distinct from, arbitration under the FAA. Similarly, 35 U.S.C. § 135(d) now provides for arbitration of patent interferences. Congress has thus clearly indicated that arbitration is an appropriate mechanism for the determination of patent rights.

In the case of copyrights, no statutory right to arbitration has been enacted, but numerous cases have upheld the arbitrability of disputes over the ownership and validity of copyrights. Perhaps the leading case is *Saturday Evening Post Co. v. Rumbleseat Press, Inc.*, 816 F.2d 1191 (7th Cir. 1987), where the Seventh Circuit (speaking through Judge Posner) held that the exclusive grant of jurisdiction to federal courts concerning issues of copyright validity did not prevent such claims from reaching an arbitrator. The court first noted that a suit over the terms of a copyright license is *not* a dispute arising under the Copyright Act, *id.* at 1194 (citing *T. B. Harms Co. v. Eliscu*, 339 F.2d 823, 828 (2d Cir. 1964)), and that therefore federal jurisdiction over a motion to compel arbitration of such a suit must be based on diversity, which was present. *Saturday Evening Post*, 816 F.2d at 1195-96.

The next question addressed in *Saturday Evening Post* was whether an arbitrator could rule on copyright claims generally. The defendant argued that the Copyright Act's exclusive jurisdiction over copyright actions implicitly precludes arbitration of such disputes. Because state courts have jurisdiction over copyright license disputes (and federal courts have only diversity or pendent jurisdiction over them), Judge Posner found that the Congress did not intend to take over the field entirely. *Id.* at 1198.

The final step of Judge Posner's analysis was determining whether claims of copyright *validity* were subject to arbitration. He found that they were, though his reasoning was by analogy rather than precedent. Against the claim that copyrights are a monopoly and therefore require careful scrutiny by the courts, Judge Posner found that (i) in *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614 (1985), the Supreme Court allowed arbitration of antitrust disputes, and thus the existence of a monopoly does not automatically deprive arbitrators of jurisdiction; (ii) a copyright is a legal rather than economic monopoly; and (iii) 35 U.S.C. § 294 permits arbitration of disputes over patent validity, and a patent creates a stronger monopoly than does a copyright. Thus, he concluded that "federal law does not forbid arbitration of the validity of a copyright, at least where that validity becomes an issue in the arbitration of a contract dispute." *Saturday Evening Post,* 861 F.2d at 1199.

The arbitrator cannot, however, show a manifest disregard for such statutory requirements as registering copyrights before asserting infringement claims. In *SCS Business & Technical Inst., Inc. v. Interactive Learning Sys.*, No. 92 Civ. 0724 (PKL), 1992 U.S. Dist. LEXIS 11483 (S.D.N.Y. Aug. 3, 1992), the court vacated an arbitrator's award of damages for copyright infringement based on unauthorized duplication of software diskettes because the plaintiff had failed to register the copyrights validly.

For a thorough overview of cases considering the arbitrability of trademark, patent, and copyright disputes, see Vicki M. Young, *Arbitrability of Intellectual Property Disputes*, 3 J. Proprietary Rts. 9 (Sept. 1991).

[a] Injunctive Relief To Protect Intellectual Property

A concern often raised during negotiation of arbitration provisions in intellectual property licensing agreements is the protection of trade secret or confidential information. Many licensors want to retain the ability to seek an injunction for a violation of confidentiality provisions or license grants and believe that arbitration will not permit such relief.

There is no question that an arbitrator may grant equitable relief: "Arbitrators enjoy broad equitable powers. They may grant whatever remedy is necessary to

right the wrongs within their jurisdiction." *Gilmer v. Interstate/Johnson Lane Corp.*, 895 F.2d 195, 199 (4th Cir. 1990). *See also Sperry Int'l Trade, Inc. v. Government of Israel*, 689 F.2d 301, 306 (2d Cir. 1982). The American Arbitration Association Commercial Rules (discussed below) permit the "grant [of] any remedy or relief that the arbitrator deems just and equitable and within the scope of the agreement of the parties, including, but not limited to, specific performance of a contract." American Arbitration Association, Commercial Arbitration Rules, R. 43 (Jan. 1, 1991) [hereinafter AAA Rules].

Although few federal courts have spoken of the arbitrator's power to grant injunctions as distinct from specific performance, numerous courts have upheld awards that strongly resemble injunctions. *See, e.g., Island Creek Coal Sales Co. v. City of Gainesville*, 729 F.2d 1046, 1049 (6th Cir. 1984) (arbitrator's award ordering purchase under contract treated as an injunction).

Arbitrators' "substantial power to fashion remedies that they believe will do justice between the parties," *Sperry*, 689 F.2d at 306 (citing New York law), includes the power to order the parties to take, or to refrain from taking, specific actions. For example, in *Sperry* the arbitrator's interim order preventing a party from drawing against a letter of credit was upheld. A review of the cases cited in *Power of Arbitrators to Award Injunction or Specific Performance*, 70 A.L.R. 2d 1055 (1992), shows that numerous state courts have similarly upheld the power of an arbitrator to award injunctive relief.

Since arbitration is a creature of contract, specific inclusion of provisions for equitable relief in the agreement should remove any doubt of the arbitrator's power to order such relief. NCR's arbitration provision described in Section 6, below, both grants the arbitrator equitable powers, and provides for temporary injunctive relief from a court pending arbitration.

5. The American Arbitration Association Rules

The FAA turns arbitration into a powerful alternative to traditional civil litigation, but the statute does not establish a procedural framework for arbitration. The growth of arbitration and other forms of dispute resolution has led to the formation of groups around the world to provide dispute resolution services. In the United States, the American Arbitration Association (AAA) is the leading such organization and most commercial arbitrations are conducted under its auspices.

The AAA has established rules for the conduct of arbitrations, and it provides access to a large pool of trained arbitrators nationwide. The AAA is a private, non-profit organization and has been imbued with no statutory powers; its rules apply to an arbitration only to the extent the parties permit them to. For this reason, it is wise in the arbitration agreement to specify that the rules of the AAA will govern. The Association recommends the following language as an arbitration clause in agreements:

> Any controversy or claim arising out of or relating to this contract, or the breach thereof, shall be settled by arbitration 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 in any court having jurisdiction thereof.

AAA Rules, at 5.

Although this language may suffice to bring a dispute before an arbitrator, in order to maximize the likelihood of a court ordering arbitration where one of the parties objects, there are several additional terms that should be included. Because of all the problems discussed in this article, it is advisable to use a more detailed arbitration provision. An arbitration clause used by NCR is included in Section 6 below; that provision is much more bullet-proof than the simple AAA clause.

What follows is a description of arbitration under the AAA Commercial Arbitration Rules. The AAA also has a set of rules to govern patent disputes; those are not considered here.

[a] Filing an Arbitration Demand

To begin an arbitration, the aggrieved party prepares and sends a written arbitration demand to the other party or parties. The demand must set forth the nature of the claim, the amount in dispute, the remedy sought, and the hearing locale requested, AAA Rules, R. 6. The demand does not ordinarily include the amount of detail usually found in a civil complaint. In particular, the demand does not usually set forth causes of action or specific legal theories upon which recovery is sought.

Three copies of the demand and of the parties' arbitration agreement are sent to the appropriate AAA regional office, together with a filing fee based on the amount of the claim. The fee currently ranges from $300 (for claims under $10,000) to $15,000 (for claims up to $5 million). The respondent may file an answer within ten days after notice from the AAA, but there is no requirement to do so; the respondent's silence is treated as denial of the claim and failure to file an answer will not delay the arbitration.

The respondent may file a counterclaim, which must contain the same kinds of information required of the demand. Making a counterclaim also requires payment of a fee to the AAA based on the damages alleged; the fee schedule is the same as that for a claim. AAA Rules, R. 6.

Once the demand and any answers or counterclaims have been filed and exchanged, the arbitration may follow one of two paths. For claims under $50,000, or where the parties agree, the AAA's Expedited Procedures apply; these procedures include notices by telephone, quick

appointment of a single arbitrator from a panel of five, an expectation that the hearing will last for no more than one day, and the issuance of the award within fourteen days from the closing of the hearing. AAA Rules, R. 53-57. Other claims are handled through the normal AAA Commercial Rules described here.

[b] Choosing an Arbitrator

Arbitration provides the parties more flexibility in choosing an arbitrator than the limited judge-shopping permitted in civil litigation. Through the arbitration agreement, for example, they can specify that the arbitrator will be knowledgeable in certain fields: "The arbitrator shall be knowledgeable in the field of computer software licensing." Be aware, however, that imposing stringent requirements on the arbitrator's qualifications may result in having a smaller pool of potential arbitrators to choose from; as discussed below, this may have tactical implications.

The arbitration agreement may also appoint a specific individual to serve in the event of a dispute. More commonly, the agreement either provides for a single arbitrator, or requires that the arbitration be conducted by a panel of three. The AAA Rules contemplate use of multiple arbitrators if the parties so request. AAA Rules, R. 14-15. The panel may consist entirely of independent "neutral" arbitrators, or may include one arbitrator appointed by each party, with those arbitrators selecting the third as a neutral.

Although arguments can be made in favor of multi-person arbitration panels, NCR has found that in practice those advantages are outweighed by the difficulty of scheduling hearings around the calendars of multiple arbitrators who generally have plenty of other commitments to meet. The single arbitrator approach has proven to be much faster and more practical.

Not all members of the AAA's arbitrator pool are attorneys. There may be advantages to using a nonlawyer arbitrator, particularly if he or she has professional experience and knowledge relevant to the subject matter of the dispute. Because, as discussed below, arbitration hearings are conducted with much less formality than civil trials, and particularly because the rules of evidence generally do not apply, a nonlawyer arbitrator is not necessarily at a procedural disadvantage.

On the other hand, an attorney arbitrator is likely to maintain greater control of the hearing and be more receptive to technical objections. Some disputes—and some opponents—might be better handled under more disciplined conditions. Although the parties may choose in the arbitration agreement to select only lawyer, or nonlawyer, arbitrators, this question can usually be dealt with during the selection phase by peremptorily striking members from the pool.

Unless the arbitration agreement provides otherwise, the AAA will ordinarily select a single arbitrator (though in its discretion it may name a multi-person panel) through a "strike-off" process. The AAA sends the parties a list of potential arbitrators with a brief resume of each; the parties strike the names of those who are not acceptable and number the others in order of preference. Assuming there are some potential arbitrators acceptable to all parties, the AAA will attempt to select the arbitrator with the highest mutual preference. AAA Rules, R. 17.

If the panel contains no mutually acceptable names, the AAA may select another arbitrator without the parties' approval, though in practice it will usually make a second attempt to find an acceptable arbitrator through the strike-off process. AAA Rules, R. 13. The Rules provide the expected procedures for dealing with an arbitrator's conflicts of interest or inability to serve after appointment. AAA Rules, R. 19, 20. Once appointed, the arbitrator controls the progress of the claim, schedules the hearing and other deadlines, and rules on pre-hearing issues. AAA Rules, R. 10, 21.

[c] Pretrial Discovery

There is generally no right to court-ordered discovery under the FAA unless the moving party can show extraordinary circumstances. *Bigge Crane & Rigging Co. v. Docutel Corp.*, 371 F. Supp. 240, 244-45 (E.D.N.Y. 1973); *Commercial Solvents Corp. v. Louisiana Liquid Fertilizer Co.*, 20 F.R.D. 359, 363 (S.D.N.Y. 1957). Where discovery *has* been allowed, the circumstances generally have been truly compelling. For example, courts have ordered depositions to be taken of seamen about to set sail, *Bergen Shipping Co. v. Japan Marine Servs., Ltd.*, 386 F. Supp. 430 (S.D.N.Y. 1974), and have permitted discovery to continue where evidence may literally be covered up as construction continues during the pendency of arbitration, *Vespe Contracting Co. v. Anvan Corp.*, 399 F. Supp. 516 (E.D. Pa. 1975). *See generally Discovery in Aid of Arbitration Proceedings*, 98 A.L.R. 2d 1247 (1992); W. Michael Tupman, *Discovery and Evidence in U.S. Arbitration: The Prevailing Views*, 44 Arb. J. 27–34 (Mar. 1989).

The AAA Rules make only very limited provision for discovery, and then only with the arbitrator's approval: "Consistent with the expedited nature of arbitration, the arbitrator may, at the preliminary hearing, establish (i) the extent of and schedule for the production of relevant documents and other information, (ii) the identification of any witnesses to be called . . . " AAA Rules, R. 10. Rule 31's requirement that all evidence be taken "in the presence of all of the arbitrators and all of the parties." can also be read to prohibit the production of evidence before the hearing. Note that the Rules make no provision whatsoever for depositions.

Some have argued that Fed. R. Civ. P. 81(a)(3), which makes the Federal Rules of Civil Procedure (FRCP) applicable to "proceedings under [the FAA] relating to arbitration . . . only to the extent that matters of procedure are not provided for in [that statute]," brings arbitration hearings under the FRCP because the FAA does not specifically deal with discovery. Courts have rejected this argument, noting that the "proceedings" referred to in Rule 81—such as actions to confirm an award—are distinct from the arbitration hearing proper. "[T]he Arbitration Act itself does not in any w[ay] attempt to regulate the procedures before the arbitrators or prescribe rules or regulations with respect to hearings before arbitrators." *Foremost Yarn Mills, Inc. v. Rose Mills*, Inc., 25 F.R.D. 9, 11 (E.D. Pa. 1960).

Limited discovery requires each party to investigate thoroughly and prepare its case without the waste of time and the expense of fishing for proof in the other party's documents. The element of surprise obviously comes into play unless the parties agree to—or the arbitrator orders—an exchange of exhibits or disclosure of witnesses.

If requested by a party, most arbitrators will agree to a narrowly drawn set of interrogatories or requests for production of documents. But even at its most broad, discovery in arbitration is far less intrusive than under the Federal Rules of Civil Procedure. Once again, the contractual nature of arbitration would let the parties agree to extensive discovery, but such an agreement would eliminate one of the primary advantages of arbitration, and should be considered very carefully.

As discussed more fully in Part II, any motion to stay an action pending arbitration should specifically request a stay of discovery as well. 9 U.S.C. § 3 only authorizes the court to "stay the *trial of the action*," *Id.* (emphasis added), and a few courts have held that such a stay does not preclude discovery from continuing during the stay. *See, e.g., International Ass'n of Heat & Frost Insulators & Asbestos Workers, Local 66 v. Leona Lee Corp.*, 434 F.2d 192, 194 (5th Cir. 1970).

Fortunately, most courts come to the more practical conclusion that permitting discovery to proceed under such circumstances largely destroys the value of arbitration, and these courts will imply a stay of discovery. *See, e.g., Suarez-Valdez v. Shearson Lehman/Am. Express, Inc.*, 845 F.2d 950, 951 (11th Cir. 1988). But because of the potential that a court may read the statute strictly, it is prudent to request explicitly a stay of discovery to accompany the stay of trial.

[d] Hearing Preparation

Hearing preparation is much like that for any adversary proceeding. Without discovery, preparation has to be more inwardly focused, and knowing the strengths and weaknesses of your own case is probably more crucial than in courtroom litigation.

At NCR, prehearing preparation includes intensive investigation of the case, preparation of testimony and exhibits, and usually the preparation of a prehearing brief. Some arbitrators desire, and others refuse to consider, such a brief, but having one prepared helps in organizing the case and provides the opportunity to educate the arbitrator. Since arbitrators generally do not wish to hear opening or closing arguments, the brief may be your only chance to present an outline of the case prior to presenting your evidence.

It is also useful to prepare exhibit books prior to the hearing; make a set for your own use, as well as a copy for the arbitrator and opposing counsel. Having the exhibits in one place, in order, and prenumbered can help the hearing move much more smoothly.

One aspect of courtroom litigation is conspicuously absent from arbitration preparation: since the formal rules of evidence do not apply, motions *in limine* and other evidentiary issues are generally nonexistent. You should assume that the arbitrator will admit hearsay "for what it's worth" and plan to counter, rather than eliminate, your opponent's evidence.

[e] The Hearing

An arbitration hearing is much less formal than any courtroom proceeding; it is more similar to an administrative hearing. Generally taking place in a conference room at the arbitrator's office, the hearing is a private event governed largely by the agreement of the parties, and failing that, by the arbitrator's wishes.

Arbitrations are for practical purposes confidential since they create no public documents and generate no publicity. But if the hearing will involve sensitive information, a party may request the arbitrator to order confidentiality. The arbitrator may exclude nonparties from the hearing under AAA Rules, R. 25, and the parties may agree (in the arbitration clause or later) to maintain the proceedings in confidence.

Unlike a courtroom trial, an arbitration hearing has no automatic provision for a court reporter. Unless the parties agree, or one of the parties agrees to bear the entire cost, there will be no transcript of the hearing. AAA Rules, R. 23. Since an appeal from the arbitrator's decision is very unlikely, the only real purpose for a transcript is to aid in preparing the post-hearing brief or to assist in preparing for the next part of a multi-session hearing. To obtain a turnaround fast enough for these purposes, it may be necessary to pay the court reporter to work on an expedited basis. Alternatively, the parties may (jointly or individually) tape the proceedings; this, coupled with detailed notes containing frequent time markers, works well in many cases.

Arbitrators generally frown on many of the litigator's most cherished tools. Objections, unless very sparingly made, are likely to antagonize the arbitrator and will

generally be overruled. Although the arbitrator may permit brief opening and closing statements, they tend to have little bearing on the outcome of the case. Generally, a motion for directed award is wasted effort; the arbitrator will almost invariably let both sides be heard, because one of the few grounds under Section 10 of the FAA for vacation of the award is the arbitrator's refusal to hear testimony.

Occasionally, though, a dispositive motion may have strategic value for the respondent. It may cause the arbitrator to question the merits of the claimant's case before you present yours, and it may put the claimant on the defensive. But most important, it may give you the chance to argue your cause twice.

Arbitration hearings are generally much shorter than a corresponding trial. A "routine" dispute between a customer and a software supplier may have three or four hearing days in an arbitration proceeding. This is because many of the time-consuming trappings of courtroom litigation, such as jury selection and motion practice, are bypassed, but also because the lack of discovery provides less opportunity for counsel to stray from the real issues of the case. That the arbitrator is generally fitting the hearing into a busy schedule, and that he is paid by the day (and by the parties), certainly have an impact on the pace of the hearing as well.

One result of this is a need to keep the witness list—and the witnesses—under control. The arbitrator will tire quickly of cumulative testimony, and in particular an overloading of experts should be avoided.

One part of arbitration practice may come as a shock to courtroom veterans. The arbitrator is permitted to—and generally will—question the witnesses directly. Although this usually will occur after the parties complete their direct and cross examinations, the arbitrator may ask questions at any time. It pays to listen carefully to such questions; they may provide the only opportunity to sense which way the arbitrator is leaning and what issues are having an impact.

The arbitrator has the power under the FAA to issue subpoenas to compel attendance at the hearing. The subpoena may be enforced by the federal district court for the district in which the arbitration is being held. 9 U.S.C. § 7; AAA Rules, R. 31. However, Section 7 of the FAA requires the subpoena to be served "in the same manner as subpoenas to appear and testify before the court," and thus a subpoena in arbitration is subject to the same requirements as one issued in civil litigation. Both are governed by Rule 45, FRCP, and it is important to keep that Rule—and particularly its territorial limitations—in mind when requesting the arbitrator to issue a subpoena.

The laxity of the rules gives the arbitrator great flexibility in hearing evidence. He or she may permit telephonic or videotaped testimony and may permit an expert to give a presentation, rather than provide opinions in traditional question-and-answer format. Finally, the arbitrator may receive evidence through affidavits. AAA Rules, R. 32. This is one area where NCR frequently objects; affidavits have a tendency to be self-serving, and if the witness is subject to subpoena, he or she should be compelled to testify in person. Most arbitrators will agree with this position but will accept the affidavit—like other suspect evidence—"for what it's worth."

[f] Briefs

Although the arbitrator may or may not consider prehearing briefs, post-hearing briefs are commonly used and may provide the only chance to educate the arbitrator about how the evidence requires an award in your favor. The brief should focus heavily on the facts. Remember that without a transcript it will be difficult for the arbitrator to peruse the record to find relevant evidence and you need to point him or her in the right direction. In the absence of a court reporter, most arbitrators take extensive notes, or record the testimony themselves. The brief should make it easy to find the relevant material from those sources. NCR generally cites testimony by witness name and approximate time.

The briefing schedule varies according to the arbitrator's desire. It is common to see either the simultaneous exchange of briefs and replies, or a more traditional sequence of filing the claimant's brief first, followed by respondent's reply and then claimant's rebuttal. Briefing is usually completed within two or three weeks after the hearing, as AAA Rules, R. 41 requires the arbitrator to issue the award within 30 days after the close of the hearing unless the parties agree otherwise.

[g] The Award

The arbitrator's award may be a letdown, even if you are on the winning side. Unless directed otherwise by the parties or the arbitration agreement, the arbitrator is under no obligation to state the reasons for his or her decision. *Atkinson v. Sinclair Refining Co.*, 370 U.S. 238, 244 n.4 (1962). An arbitrator is unlikely to provide reasons voluntarily, since silence is strong insulation against a court vacating the award: "[T]o allow a court to conclude that it may substitute its own judgment for the arbitrator's whenever the arbitrator chooses not to explain the award would improperly subvert the proper function of the arbitral process." *Stroh Container Co. v. Delphi Indus.*, 783 F.2d 743, 750 (8th Cir. 1986). Thus, the award generally says no more than who won and what the relief is.

[h] Mediation

Although the role of the AAA as described above seems to be solely that of a judicial substitute, the Association is involved in other areas of alternative dispute resolution as well. In particular, the AAA maintains a mediation service to provide assistance in settling, rather

than trying, disputes. At any stage of the arbitration proceedings, the parties may arrange a mediation conference under the AAA Commercial Mediation Rules in an attempt to reach a settlement. The mediator will be a person other than one of the arbitrators in the case. AAA Rules, R. 10.

Mediation is worth considering as a tool in dispute resolution, and the ease of arranging mediation as a step in the arbitration process makes it a painless one. A mediator may be able to move the parties toward settlement, but even if the mediation is not successful it may serve both to narrow the issues remaining in dispute, and to provide informal discovery of the key points of each party's case.

6. The "Defensive" Arbitration Clause

NCR has developed an arbitration clause that is intended to deal with the arbitration-avoidance tactics described in this article. It is "defensive" because it is not intended to give the drafting party an advantage, but rather to make it as difficult as possible for either party to avoid arbitration. That clause, with comments in italics, follows.

Section ___: Arbitration; Choice of Law

[a] Any controversy or claim, whether based on contract, tort, statute, or other legal theory (including but not limited to any claim of fraud or misrepresentation), arising out of or related to this Agreement, or any subsequent agreement between the parties, shall be resolved by arbitration pursuant to this section and the then-current Commercial Rules and supervision of the American Arbitration Association. *This is the standard "broad form" language recommended by the AAA, with two additions: first, it specifically includes claims of fraud and misrepresentation, to prevent a court finding that these tort claims fall outside the scope of the clause (the complex relationship between fraud and arbitration is discussed at length in Part II), and second, it includes "subsequent agreements" of the parties within the duty to arbitrate. Incorporating the AAA Commercial Rules provides a framework for the arbitration.*

The duty to arbitrate shall extend to any officer, employee, shareholder, principal, agent, trustee in bankruptcy or otherwise, affiliate, subsidiary, third-party beneficiary, or guarantor, of a party hereto making or defending any claim which would otherwise be arbitrable hereunder. *This language makes it clear that any party making a claim that is related to this agreement will be subject to the arbitration provision. Even though some courts may be unwilling to enforce this language against a nonsignatory, it removes any doubt that the parties intended arbitration to be the sole vehicle for the resolution of disputes arising from the agreement.*

[b] The arbitration shall be held in the headquarters city of the party not initiating the claim before a single arbitrator who is knowledgeable in business information and electronic data processing systems. *This sentence is a "dispute avoidance" provision. It requires the party initiating the claim to file in the backyard of the other party. This both removes the advantage of preemptive filing and, by making it inconvenient to bring a claim, encourages pre-filing settlement. We agree to a single arbitrator, who will be knowledgeable in the likely subject matter of a dispute arising under the agreement.*

The arbitrator's decision and award shall be final and binding and may be entered in any court having jurisdiction thereof. *This is standard language recommended by the AAA.*

The arbitrator shall not have the power to award punitive or exemplary damages, or any damages excluded by, or in excess of any damage limitations expressed in, this Agreement or any subsequent agreement between the parties. *This makes clear that an award of punitive damages is beyond the arbitrator's authority, and further expressly binds the arbitrator to follow the liability limitation provisions of the contract.*

[c] In order to prevent irreparable harm, the arbitrator may grant temporary or permanent injunctive or other equitable relief for the protection of intellectual property rights. *This sentence, together with the penultimate paragraph of this section, provides for injunctive relief where appropriate. The relief is limited to IP rights to avoid making equitable relief a general-purpose tool. There may be circumstances where such a limitation is not appropriate.*

[d] Issues of arbitrability shall be determined in accordance with the federal substantive and procedural laws relating to arbitration; all other aspects of this Agreement shall be interpreted in accordance with, and the arbitrator shall apply and be bound to follow the substantive laws of, the State of _____. *This sentence deals with the "Volt problem" by ensuring that questions of arbitrability are determined under the FAA and not state law. The choice-of-law provision here makes it unnecessary to include a separate "governing law" section in the contract.*

Each party shall bear its own attorney's fees associated with the arbitration and other costs and expenses of the arbitration shall be borne as provided by the rules of the American Arbitration Association. *This is standard language, but note the exception that follows.*

[e] If court proceedings to stay litigation or compel arbitration are necessary, the party who unsuccessfully opposes such proceedings shall pay all associated costs, expenses and attorney's fees which are reasonably incurred by the other party. *This makes a party think twice about ignoring the arbitration provision.*

[f] The arbitrator may order the parties to exchange copies of nonrebuttal exhibits and copies of witness lists in advance of the arbitration hearing. However, the arbitrator shall have no other power to order discovery or depositions unless and then only to the extent that all parties otherwise agree in writing. *This permits some prehearing information exchange, and expressly limits the ability of the arbitrator to order discovery absent the agreement of the parties.*

[g] Neither a party, witness, or the arbitrator may disclose the contents or results of any arbitration hereunder without prior written consent of all parties, unless and then only to the extent required to enforce or challenge the award, as required by law, or as necessary for financial and tax reports and audits. *The arbitration will be treated as confidential.*

[h] No party may bring a claim or action regardless of form, arising out of or related to this Agreement, including any claim or fraud or misrepresentation, more than one year after the cause of action accrues, unless the injured party cannot reasonably discover the basic facts supporting the claim within one year. *This statute-of-limitations provision could be placed elsewhere in the agreement, but it makes sense to include it in the section governing the resolution of disputes.*

[i] Notwithstanding anything to the contrary in this Section, in the event of alleged violation of a party's intellectual property rights (including but not limited to unauthorized disclosure of confidential information), that party may seek temporary injunctive relief from any court of competent jurisdiction pending appointment of an arbitrator. The party requesting such relief shall simultaneously file a demand for arbitration of the dispute, and shall request the American Arbitration Association to proceed under its rules for expedited hearing. In no event shall any such temporary injunctive relief continue for more than 30 days. *This paragraph allows a party to go to court for temporary relief, but enforces limits on that relief to ensure that the arbitration process is not bypassed.*

[j] If any part of this Section is held to be unenforceable, it shall be severed and shall not affect either the duty to arbitrate hereunder or any other part of this Section. *A court might not like some part of this clause. This provision attempts to salvage arbitrability despite any perceived overreaching. Note that the entire arbitration clause is arranged in subparagraphs; this helps the court separate out the provisions in case this "mini-severability" clause comes into play.*

This lengthy clause may seem to be overkill, and in some cases all the provisions here may not be necessary. Its length, however, is a result of experience in the real world. Part II of this article will explore some of the theories and cases that led to the language of this clause.