THE TIES THAT KEEP ON BINDING:
2007 CASE LAW UPDATE

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I. INTRODUCTION

Despite repeated predictions of its demise, alternative dispute resolution as an alternative to litigation is alive and well, and there are cases discussing its operation of which the practitioner should be aware. What follows is an overview of the significant cases discussing the law governing alternative dispute resolution in Texas from October 2006 to date.

II. DISCLOSURE: *POSITIVE SOFTWARE SOLUTIONS*—THE CASE OF THE YEAR, AGAIN

As always, a fertile area for litigation are cases raising questions of disclosure: what to disclose, to whom, when, and what are the consequences of failing to disclose. Fortunately, the cases decided in the past year have returned some stability to the law governing disclosure, if not predictability.

The most significant case addressing disclosure in 2006 was the Fifth Circuit's decision in *Positive Software Solutions, Inc. v. New Century Mtg. Corp.*, 436 F.3d 495 (5th Cir. 2006) [hereinafter "*Positive Software I*"]. The decision, authored by Judge Reavley, established a very broad standard of arbitrator disclosure. The most significant case addressing disclosure in 2007 was the Fifth Circuit's en banc decision in *Positive Software Solutions, Inc. v. New Century Mtg. Corp.*, 476 F.3d 278 (5th Cir.), *cert. denied*, 127 S. Ct. 2943 (2007) [hereinafter "*Positive Software II*"]. The decision in *Positive Software II*, authored by Judge Jones, reversed the panel's decision and significantly narrowed an arbitrator's obligation to disclose, although exactly how much this obligation has been narrowed is not yet clear.

A. Background

In order to understand why *Positive Software II* is so important, it is necessary to know something about the facts of the case, because the facts drove the decision of both the panel and the en banc court. At its heart the claims in *Positive Software I* involved a dispute over alleged copyright infringement. 436 F.3d at 496. The matter was sent to arbitration, and the parties chose a single arbitrator through the AAA. *Id.* at 497. Despite being asked on several occasions to disclose all circumstances "likely to affect impartiality or create an appearance of partiality," including "past or present relationships with . . . counsel, direct or indirect, whether . . . professional . . . or any other kind," the arbitrator indicated he had nothing to disclose. *Id.* After the plaintiff lost, it investigated further and discovered that the arbitrator had been co-counsel with the defendant's counsel—along with seven other law firms and thirty-four other lawyers—in what was described as "protracted patent litigation" about a decade earlier. *Id.* at 497-98. Because this fact was not disclosed, the plaintiff moved to vacate the award on the ground that it was the product of evident partiality. *Id.* at 497. The district court vacated the award on this ground, and the case was appealed to the Fifth Circuit. *Id.* at 498.

B. The Panel's Decision

On appeal, the Fifth Circuit's panel decided that evident partiality existed under the FAA when "undisclosed facts show[ed] a reasonable impression of partiality." *Id.* at 501. It did so based in large part on its believe that the Supreme Court's decision in *Commonwealth Coating Corp. v. Continental Cas. Co.*, 393 U.S. 145 (1968), required this finding, even though the decision was by a plurality of the Court. *Id.* at 499-503. Based on this conclusion, it found that while every failure to disclose a connection between an arbitrator and someone involved in the arbitration does not support a finding of evident partiality, full disclosure of material matter is always required because the failure to disclose material matter is itself evidence of partiality. The reason the court in *Positive Software I* found a failure to disclose might indicate partiality by the arbitrator is because a failure to disclose some material fact "might create a reasonable impression of the arbitrator's partiality," even in the absence of evidence showing that the arbitrator was actually biased. *Id.* at 502. Applying this standard, the court in *Positive Software I* found the fact that the arbitrator had had a prior professional relationship with one of the lawyers might convey the impression of partiality, and, because this relationship had not been disclosed, it affirmed the trial court's vacatur of his award. *Id.* at 503-04.

C. En Banc Review

After the panel issued its opinion, the Fifth Circuit took the very unusual step of granting a request that the decision be reviewed en banc by all of the judges on the court. *Positive Software Solutions, Inc. v. New Century Mtg. Corp.*, 449 F.3d 616 (5th Cir. 2006). The case was reargued in September of last year, and early this year the court issued a new decision, *Positive Software II*, reversing the panel that had decided *Positive Software I* and confirming the arbitrator award.

The fundamental disagreement between the court en banc and the panel was over the definition of "evident partiality." The en banc court wrote that evident partiality "conveys a stern standard," and, parsing the phrase, found that it means something like a "bias that is clear to the vision or understanding." *Positive Software II*, 476 F.3d at 281. It reviewed the Supreme Court's decision in *Commonwealth Coating*, finding that the Court probably envisioned using evident partiality as a ground for vacating an arbitration award when the claim is that the arbitrator failed to disclose some material connection with another person only if the matter not disclosed is highly significant and all but certain to have influenced the arbitrator's decision. *Id.* at 281-84. To hold otherwise would seriously affect the arbitral process because (1) it would give "losers" a strong incentive to conduct after-the-fact investigations in attempting to discover relationships that could be used to argue the arbitrator was evidentially partial; (2) it would lead to expensive and protracted "satellite" litigation about issues of partiality that have nothing to do with the merits of the matters being arbitrated; (3) it would often result in the disqualification of the best and most qualified arbitrators, i.e., those with extensive experience in the field; and (4) it would have the undesirable effect of functionally imposing a higher ethical standard on arbitrators than on Article III judges. *Id.* at 285-86.

Reviewing the facts, the court in *Positive Software II* found that the arbitrator's prior association with one of the lawyers in the case as co-counsel in another, unrelated case was "trivial" because (1) although they both represented the same client, they had never met or spoken before the arbitration; (2) they were two of thirty-four lawyers on the case; (3) they came from different firms, and their firms represented only two of the seven firms involved in the litigation; and (4) their association ended seven years before the arbitration at issue. *Id.* at 283-84. "The draconian remedy of vacatur is only warranted upon nondisclosure that involves a significant compromising relationship. This case does not come close to meeting this standard." *Id.* at 286.

D. Lessons Learned

So at the end of the day the arbitrator was found not to have been unfairly partial to the winner, and the award was affirmed. But what lessons can the practitioner take from *Positive Software II*? Surprisingly, I think its lessons are more equivocal than the opinion in *Positive Software II* would suggest.

Most significantly, the disagreement between *Positive Software I* and *Positive Software II* came down to a disagreement about when a failure to disclose shows evident partiality: The panel decision set a lower threshold than did the court en banc. However, the decision in *Positive Software II* ultimately did not announce a bright-line rule governing disclosure—in fact, it could not, because the question of when a relationship is material enough that it should be disclosed is so fact-intensive that a one-size-fits-all rule simply will not work. Although *Positive Software II* may make it more difficult for dissatisfied litigants to have an arbitration award set aside, the fact that nondisclosure can still justify vacatur if the matter that was not disclosed is sufficiently material and could be characterized as a "bias that is clear to the vision or understanding" probably means aggrieved parties to an arbitration are likely to continue to try to argue the failure to disclose some fact justifies vacating the arbitration award, at least if the stakes are high enough or the lawyers aggressive enough.

Therefore, although they reached different conclusions under the facts, both *Positive Software I* and *Positive Software II appear to* drive home what is a good rule for all ADR neutrals to follow: When in doubt, disclose. If the matter disclosed is trivial, it is unlikely to lead the parties to strike the neutral. The author finds it difficult to believe that litigants are likely to have a strong objection to the fact that the arbitrator previously worked with one of the lawyers involved in the arbitration, and preemptively move to have the arbitrator stricken before the arbitration begins. This is especially true given that *Positive Software II* gives litigants a strong incentive to make any objections they have before the arbitration award is rendered, not after. The author also believes that the issue of undisclosed but trivial connections between arbitrators and those involved in the arbitration only become important once one side has lost. Conversely, if the disclosure is about some matter that reasonable persons would agree is material (for example, that the arbitrator is the brother-in-law of one of the litigants), the author suspects that even the court in *Positive Software II* would find this failure to disclose more than trivial and would be evidence of a lack of partiality. Lawyers in small towns and rural areas have dealt with conflicts at least as serious as the one in *Positive Software* for years without much trouble, and a litigant who is too picky about prior contacts between an arbitrator and anyone involved in the arbitration might find he or she has disqualified everyone experientially qualified to act as arbitrator.

An arbitrator resembles a judge, an umpire, a referee, or any other neutral who is called on to pass judgment on the behavior of others: If no one has any reason to know his name, he has probably done a

pretty good job. The only sure way to prevent a nonfrivolous challenge to an arbitration award based on a failure to disclose is to disclose early, often, and all, and despite the fact that the award was ultimately affirmed, this is the ultimate lesson of *Positive Software I* and *Positive Software II*.

III. BINDING THE NONSIGNATORY TO AN AGREEMENT TO ARBITRATE

Another "hot topic" in many cases is the question of whether and when a person who did not sign an arbitration agreement may nevertheless be bound by the agreement and made to arbitrate certain claims. The "hottest" part of this hot topic is a case involving estoppel—the idea that a litigant can be bound to an arbitration agreement he never signed if it would be unfair to allow him to avoid its effects.

A common situation where such an estoppel would be found is so-called "direct benefits estoppel," where a plaintiff seeks to directly benefit from a contract involving an arbitration provision. Direct benefits estoppel is intended to preclude the plaintiff from having it both ways: suing a defendant and seeking to enforce the obligations imposed by a contract containing an arbitration clause, while at the same time avoiding having these claims arbitrated. *Meyer v. WMCO-GP, L.L.C.*, 211 S.W.3d 302, 306 (Tex. 2006). The reach of direct benefits estoppel is very broad, extending to any claim that in any way arises under or is connected to a contract with an arbitration provision. For example, tort claims brought by a prospective purchaser of a car dealership's assets brought against a car manufacturer were found to be subject to arbitration because the contract between the purchaser and the seller contained an arbitration clause. *Id.* at 306-08. Similarly, a wrongful death suit brought by the children of the signatory to a contract with an arbitration clause had to be arbitrated, because the suit involved a claim for breach of a warranty found in the agreement. *In re Ford Motor Co.*, 220 S.W.3d 21, 24 (Tex. App.—San Antonio 2006, orig. proceeding). Perhaps most interestingly, it was held that the question of whether direct benefits estoppel applies under a given set of facts is the kind of "gateway" issue that is decided by the court rather than by an arbitrator. *Id.* at 23-24.

However, the fact that litigants can make nonsignatories arbitrate under some circumstances should not cause them to lose sight of the basic rule, which is that arbitration is a creature of agreement and, therefore, usually requires a contract. This rule was driven home by two recent cases from the supreme court involving disputes over investment decisions. In one of the cases, the plaintiff, who had previously been injured in a refinery explosion and had received a large settlement, invested his money with Merrill Lynch. *In re Merrill Lynch Trust Co. FSB*, 2007 WL 2404845, at *1 (Tex. Aug. 24, 2007) (orig. proceeding). On the advice of a Merrill Lynch employee, the plaintiff invested a large sum in a variable life policy issued by Merrill Lynch subsidiaries. *Id.* The plaintiff later sued the employee and the subsidiaries, but not Merrill Lynch itself. *Id.* This proved to be important: Although the court found that the claims against the employee arose out of his employment and therefore were covered under the contract with Merrill Lynch (which contained an arbitration clause), *id.* at * 2; *see also In re Kaplan Higher Educ. Corp.*, 2007 WL 2404836, at *2 (Tex. Aug. 24, 2007) (orig. proceeding) (per curiam) (case decided the same day; holding that parties to an agreement to arbitrate cannot avoid the obligation to arbitrate claims against the other signatory by suing its agents), it was found that the claims against the subsidiaries were not subject to being arbitrated because the plaintiff's agreements with the subsidiaries were governed by separate contracts that did not contain arbitration clauses, *Id.* at *3. *Accord In re Merrill Lynch Trust Co. FSB*, 2007 WL 2458421 (Tex. Aug. 31, 2007) (orig. proceeding) (per curiam) (same result in similar case brought by different plaintiff). Perhaps most interestingly, the court refused to find that the claims against the subsidiaries were subject to arbitration under the theory of "concerted misconduct equitable estoppel," a theory recognized by a few courts that requires arbitration of all interdependent claims when any claim is subject to an agreement to arbitrate and where the plaintiff alleges that the defendants engaged in "concerted misconduct." *Id.* at *3-*5. Although the court recognized that such a claim could exist, it was unwilling to override the general rule that all arbitrations must be the product of an agreement to arbitrate, at least in the absence of some clear and direct guidance from the supreme court. *Id.* at *5.

Finally, a somewhat similar result can be reached under a logically related theory, the idea that the plaintiff is either a party to or a third-party beneficiary of an agreement containing an arbitration clause and, therefore, is bound by its terms even if he or she did not sign or otherwise directly consent to the terms of the agreement. For example, a nursing home resident was bound by an arbitration provision signed by her mother, where it was contained in an agreement the nursing home required before she would receive the care she desired. *J.P. Morgan Chase & Co. v. Conegie*, 2007 WL 2028926, at * 3 (5th Cir. July 16,

2007).[1] The close conceptual relationship between a claim of direct benefits estoppel and third-party beneficiary status is illustrated by a recent, factually complex, case involving claims by and between a number of entities arising out of a stock purchase agreement. *Wood v. PennTex Resources, L.P.*, 458 F. Supp. 2d 355, 357-61 (S.D. Tex. 2006). There, the court found that the party opposing arbitration was, factually, a party to the agreement containing the arbitration clause and, therefore, was bound to arbitrate. *Id.* at 362-65. However, even after making this determination, the court then spent a great deal of ink and effort to show that the result was the same even if it had approached the issue as being one of direct benefits estoppel, writing a small law review article on the topic. *Id.* at 365-74.[2]

IV. WAIVER OF RIGHT TO SEEK ARBITRATION

It should come as no surprise that the courts have continued to hold the line on what it takes to constitute waiver of the right to seek arbitration, and the strong policy presumptions in favor of arbitration mean waiver will only be found rarely, and under egregious facts. Applying the general rule that an insubstantial invocation of the jurisdiction of a court does not waive the right to seek arbitration, the supreme court held, in *In re Bank One, N.A.*, 216 S.W.3d 825, 826 (Tex. 2007) (orig. proceeding), that asking the trial court to set aside a default judgment does not waive a party's right to arbitrate. The case involved a suit against a bank for the improper payment of forged checks. The plaintiff took a default against the bank, and the bank successfully moved to have the default set aside and answered. *Id.* at 826. Eight months later, the bank moved to have the matter sent to arbitration, and on a petition for a writ of mandamus the supreme court held (with little analysis) that the request to have a default judgment set aside did not constitute a waiver of the right to seek arbitration. *Id.* at 827. The lower courts continue to follow suit. *See, e.g., Grand Homes 96, L.P. v. Loudermilk*, 96 S.W.3d 696, 704 (Tex. App.—Fort Worth 2006, pet. filed) (litigant did not waive the right to seek arbitration, where it never asked the court for a dispositive rule on the case, the case had been on file for only eight months, and little discovery had occurred).

However, it may come as a surprise to learn that the courts decided two such cases in the past year, finding in both the waiver of the right to seek arbitration. The first such case was an unusual one, brought by a Russian who had been relocated to the United States for business against the company hired to coordinate his international move. *Interconex, Inc. v. Ugarov*, 224 S.W.3d 523, 528 (Tex. App.—Houston [1st Dist.] 2007, no pet.). After being sued, the defendant moved to have the matter sent to arbitration. *Id.* at 533. In finding that the defendant had waived its right to seek arbitration, the court noted: (1) the defendant was served in January 2004 and defaulted on liability in March 2004, but took no action to set aside this default until October 2004; (2) when its request to set aside the partial default was denied, the defendant demanded a jury trial, causing the trial date to be reset to December 2004; (3) only ten days before this trial the defendant moved to arbitrate; and (4) the trial court denied this request because the defendant had failed to timely file an answer. *Id.* at 534-35. It found that these acts were inconsistent with the defendant's right to have the claims against it arbitrated, because (1) the defendant did not answer the suit and did not seek arbitration before being partially in default; (2) the defendant requested a reset of the date for the damages trial so the matter could be heard by the jury; and (3) it waited until very soon before trial before seeking arbitration. These inconsistent acts, coupled with evidence showing that the plaintiff had flown from Kiev to Houston for trial and that the defendant had gained access to materials through discovery it would not have received in an arbitration showed that the plaintiff was prejudiced, and the right to seek arbitration was waived. *Id.* at 535.

[1] As a practical matter, the author believes the third-party beneficiary theory has more traction in federal litigation because Texas state law makes it very difficult for a person to be found a third-party beneficiary of a contract. *Stine v. Stewart*, 80 S.W.3d 586, 589 (Tex. 2002) (per curiam).

[2] As an aside, the discussion of this issue in *Wood* is a good one, and worth reviewing if you are involved in a case where direct benefits estoppel is at issue.

A similar result was reached by the court in Corpus Christi. In a wrongful death suit against a decedent's former employer, the court found that the employer had waived its right to seek arbitration. *In re Corpus Christi Spohn Health Sys. Corp.*, 2007 WL 2199120 (Tex. App.—Corpus Christi July 31, 2007, orig. proceeding) (mand. denied) (not yet released for publication). It did so because the evidence showed that the employer (1) waited fourteen months before seeking arbitration; (2) filed a motion for leave to designate responsible third parties; (3) filed a third-party petition; (4) applied for and received a TRO and an injunction against the plaintiffs; (5) participated in setting the case for trial twice and continued those setting twice; (6) requested entry of an order granting a discovery control plan; and (7) engaged in "voluminous discovery," including seven sets of written discovery and eight motions to compel, and participated in at least seventeen depositions. *Id.* at *3-*4. The court also considered the fact that the plaintiffs had asked the employer about whether it might seek arbitration, and the employer stated that it did not consider the basis of the suit to be an "event" that would be subject to arbitration. *Id.* at *4. Finally, it found the fact that the plaintiffs were forced to spend tens of thousands of dollars in litigating the case constituted prejudice, especially in light of the testimony that had the employer sought arbitration early on the plaintiffs would have pursued a different (and far less expensive) strategy in preparing for the arbitration than they would have done in doing battle in court. *Id.* at *5-*6.

All these cases highlight what are by now well-settled general rules. Participating in a lawsuit does not waive the right to seek arbitration, especially if the participation is "defensive" in nature. However, participation in a lawsuit to a significant extent, especially when coupled with requests for affirmative relief from the court, may well result in the waiver of the right to seek arbitration. Delay, while not sufficient to support a finding of waiver in and of itself, may be an important factor considered in deciding whether a party has impliedly waived its right to seek arbitration—delay is not a friend of arbitration, a sensible conclusion, given that one of the perceived benefits of arbitration is the rapidity with which the matter may be resolved. Finally, no matter how extensive the participation in the litigation might be, waiver will not be found unless it is coupled with some prejudice attributable to the litigation. Ultimately, the question of whether there has or has not been waiver is a very fact-dependent one, meaning it is at least as difficult to create a bright-line rule regarding when arbitration has been waived as it is to create a bright-line rule governing what disclosure is appropriate.

Finally, the availability of mandamus as a vehicle for challenging an order to arbitrate seems to be growing. Expanding on the supreme court's decision in *In re Palacios*, 221 S.W.3d 564 (Tex. 2006) (orig. proceeding) (per curiam),[3] the Eastland

V. APPEAL OF ORDERS GOVERNING ARBITRATION

The law governing when and how a party challenges a trial court's decision to grant or deny a request that a case be sent to arbitration has not changed at all in the past year, but a recent case lays out the process with admirable brevity and clarity where the request that the case be sent to arbitration has been denied. It says:

> If arbitration is denied under the Texas Arbitration Act ("TAA"), the trial court's order may be challenged through an interlocutory appeal. However, relief from a denial of arbitration under the Federal Arbitration Act ("FAA") must be pursued through mandamus.

D.R. Horton, Inc. v. Brooks, 207 S.W.3d 862, 866 (Tex. App.—Houston [14 Dist.] 2006, no pet.) (internal citations omitted).

It is also clear that, if the dispute is subject to a valid arbitration agreement, the trial court's authority is limited to enforcing the agreement. In a case involving a dispute that everyone agreed was subject to an agreement to arbitrate, but which also raised issues subject to the jurisdiction of the Texas Motor Vehicle Board ("TMVB"), the appellate court found that the trial court had abused its discretion when it abated the matter to allow the TMVB to exercise its jurisdiction and when it provided that arbitration would occur only after the TMVB had declined to act or the proceedings were concluded. *In re Sonic-Carrollton V, L.P.*, 2007 WL 1990396, at *3-*4 (Tex. App.—Dallas July 11, 2007, orig. proceeding) (not yet released for publication).

[3] And, possibly, its decision in *In re Prudential Ins. Co. of Am.*, 148 S.W.3d 124 (Tex. 2004) (orig. proceeding). In *Prudential*, the Supreme Court enforced a waiver of a jury trial by mandamus, in part because it found making the party to go through a jury trial and then appeal was a large enough waste of resources render the legal remedy "inadequate." *Id.* at 135-37. Thus, *Prudential* seems to recognize that

Court of appeals considered and granted a petition for a writ of mandamus, finding that the trial court's decision to order the parties to arbitrate was a clear abuse of discretion. *In re Great W. Drilling, Ltd.*, 211 S.W.3d 828, 834-43 (Tex. App.—Eastland 2006, orig. proceeding) (mand. filed).[4] The moral seems to be that if you can show the trial court's decision to send a matter to arbitration was really, really, *really* wrong (oh-so-very-wrong) you may have that order set aside by way of a mandamus proceeding. This holding, an extension on the decision in *Palacios*, which recognized that which a remedy might well be available, will further increase the amount of ancillary litigation of questions regarding the propriety of an orders governing arbitration.[5]

But *Great W. Drilling* also implicitly raises another issue: What is the scope of the appellate court's review of a decision to order litigants to arbitration by mandamus? In most cases involving a request to enforce an arbitration clause, the issues the court may decide are limited, with issues touching on the merits reserved for the arbitrator. Does the same rule apply where the issue is whether the trial court abused its discretion in ordering the parties to arbitration to such a degree that mandamus should issue? Or (put another way) does the different posture of the case allow the court to go where it could not otherwise go?

In *Great W. Drilling*, this issue was presented in the context of determining the scope of the arbitration clause. The general rule regarding this issue is well settled: Although it is up to the court to decide whether a given dispute falls within the ambit of a particular agreement to arbitrate, *Dennis v. Coll. Station Hosp., L.P.*, 169 S.W.3d 282, 285 (Tex. App.—Waco 2005, pet. denied); *Menna v. Romero*, 48 S.W.3d 247, 250 (Tex. App.—San Antonio 2001, pet. dism'd w.o.j.), the court's analysis is constrained by the fact that the law so favors arbitration, any doubts are to be resolved in favor of arbitration, and the matter should not be tried unless the court can say with "positive assurance" that the matter falls outside the scope of the arbitration clause. *Prudential Sec., Inc. v. Marshall*, 909 S.W.2d 896, 899 (Tex. 1995) (orig. proceeding) (per curiam); *Dennis*, 169 S.W.3d at 285; *Dewey v. Wegner*, 138 S.W.3d 591, 602 (Tex. App.—Houston [14th Dist.] 2004, no pet.).

In *Great W. Drilling*, the court considered whether the dispute fell within the ambit of the arbitration agreement, ultimately concluding that it did not. 211 S.W.3d at 843. Although several times the court made observations to the effect that arbitration provisions are to be construed broadly, broadly written arbitration claims will usually result in arbitration, *id.* at 837-38, 840, the court's analysis seemed to give short shrift to the idea that the claims at issue in the suit were related to the agreement containing the arbitration provision, *id.* at 841-43, raising the question of whether the court was engaging in the same kind of very limited review permitted courts in most arbitration cases or whether it felt it could go further. However, even if one concludes that the court in *Great W. Drilling* really did engage in the kind of limited analysis it is permitted to undertake, this still leaves open the question: Does the fact that the number of ways a court could conceivably abuse its discretion in ordering parties to arbitrate (thereby justifying a petition for a writ of mandamus under *Palacios*) limitlessly expand the issues the appellate courts may consider in deciding whether an abuse of discretion has occurred?

If *Palacios* is correct, and a mandamus may be

"incorrect trial form" is a serious enough error to justify a mandamus, and although it involved a jury trial vs. trial to the court a similar analysis applies if the issue is trial versus arbitration. Put another way, while *Palacios* opened the door to mandamus petitions after an improper arbitration order, *Prudential* opened the door to such claims generally, paving the way for *Palacios*.

While there is some debate about whether *Prudential* has caused a mandamus explosion or whether it merely reflects the current court's greater willingness to entertain mandamus proceedings, the number of mandamus petitions granted since *Prudential* has increased considerably. Between 2002 and 2004 (the year *Prudential* was decided), the court granted an average of 2.1% of the petitions for mandamus filed, while from 2005 through July, 2007 it granted 10.7% of the petitions filed, although the overall number of petitions filed remained nearly constant (ranging from 249 to 271). Reagan W. Simpson & Aditi R. Dravid, *The Aftermath of Prudential: Much Ado About Nothing?*, 2007 Adv. Civ. App. Prac. Course, Tab 22 at 4-5. In any case, whether you believe *Prudential* is the chicken or the egg, it seems that mandamus relief is easier than ever to get, either in an arbitration context or otherwise.

[4]Interestingly, the court in *Great W. Drilling* did not specifically explain why it believed the petitioner lacked an adequate remedy at law; presumably, it thought forcing the petitioner to go through an entire arbitration and then appealing the issue would be a sufficiently great waste of resources to justify mandamus, *a la Prudential* and *Palacios*.

[5]*Great W. Drilling* is interesting for another reason: The trial court delayed ruling on the request that the parties be sent to arbitration to permit discovery regarding the arbitration provision. *Id.* at 835-36. Although the court noted that such discovery is typically not permitted, *Id.* at 835, it ultimately found that because the discovery requests were not in the record the court was unable to say that the trial court abused its discretion in allowing this discovery. *Id.* at 835-36.

appropriate in certain cases where parties have improperly been sent to arbitration, it stands to reason that appellate courts must have the full power to review the trial court's decision and the reason therefor in order to determine whether it was correct or whether it was an abuse of discretion. If this is the case, it could have the anomalous result of arguably incorrect decisions to send matters to arbitration judged under different rules than arguably incorrect decisions to refuse to send matters to arbitration or, alternatively, creating some new kind of "limited mandamus" review that applies only in *Palacios*-type cases. The supreme court has been asked to review the matters presented in *Great W. Drilling* in a petition for writ of mandamus, a request on which it has not yet ruled. Stay tuned.

VI. SCOPE OF THE ARBITRATOR'S POWER TO DECIDE ISSUES

The cases from the last year also confirm that in most cases the question of whether an arbitration clause is enforceable and/or whether a particular issue is or is not subject to arbitration is a question for the arbitrator rather than the court, unless the challenge is being made to the arbitration clause itself.

For example, a plaintiff who tried to avoid arbitration by arguing that the employment agreement containing the arbitration agreement was invalid as the product of economic duress was told to address this claim to the arbitrator; because the plaintiff challenged the entire agreement and not just the arbitration provision, the question of whether the agreement could be enforced was not a question the court would address. *In re RLS Legal Solutions, L.L.C.*, 221 S.W.3d 629, 630-31 (Tex. 2007) (per curiam) (orig. proceeding); *accord Downer v. Siegel*, 489 F.3d 623, 627-28 (5th Cir. 2007). More commonly, questions regarding the scope of the arbitrator's power to decide issues arise in the context of a claim that the arbitration agreement is procedurally unconscionable, i.e., that the circumstances surrounding the adoption of the arbitration agreement are unfair. An excellent outline of the general rules governing procedural unconscionability, as well as the evidence needed to sustain a procedural unconscionability challenge to the arbitration clause itself, is found in *TMI, Inc. v. Brooks*, 225 S.W.3d 783, 792-95 (Tex. App.—Houston [14th Dist.] 2007, orig. proceeding, pet. filed). *See also In re December Nine Co.*, 225 S.W.3d 693, 701-02 (Tex. App.—El Paso 2006, orig. proceeding) (discussing both procedural and substantive unconscionability).

However, the question of whether a given claim falls within the ambit of an arbitration clause may be decided by the court if it is presented in connection with other claims properly before the court. *See, e.g., In re Champion Techs., Inc.*, 222 S.W.3d 127, 134 (Tex. App.—Eastland 2006, orig. proceeding) (reversing trial court's determination that arbitration provision was unenforceable because it was illusory, but affirming its determination that ex-employee's tortious interference claims did not fall within the ambit of the agreement to arbitrate because of the lack of any connection between those claims and plaintiff's employment; remanding case with directions that trial court compel arbitration on claims falling within the ambit of the agreement).

VII. REVIEW OF ARBITRATOR'S AWARD

Finally, there are the inevitable legal challenges to the confirmation of an arbitrator's award; although the grounds for challenging an arbitrator's award under both the FAA and the TAA are very limited, every year sees a few cases where an aggrieved litigant tries to convince the court it should exercise its appellate jurisdiction over the arbitration and vacate the award. The cases of this sort from the year past show that this approach is the last-second, Hail Mary, option and unlikely to succeed.

As an initial matter, a party who wishes to appeal an arbitrator's award for some reason related to the arbitrator's conduct of the hearing or to the basis of his decision had better present a record. As logic suggests, the absence of a record showing what happened during the arbitration and why means that a court is in no position to review the arbitrator's decision under even the narrow grounds permitted by statute. *Gumble v. Grand Homes 20000, L.P.*, 2007 WL 1866883, at *3 (Tex. App.—Dallas June 29, 2007, n.p.h.) (not yet released for publication).

However, even if a record is made, it is still difficult to convince the court that the arbitrator has gone so far wrong that his award should be overturned. Other than claims of bias (usually based on nondisclosure, and discussed above), many a disappointed litigant claims that the arbitrator is guilty of a "manifest disregard for the law" (under the FAA) or "gross mistake" (under the TAA). Fortunately for arbitrators, these claims rarely prevail. Merely failing to follow the law does not support a vacatur of the arbitration award. *Am. Laser Vision, P.A. v. Laser Vision Inst., L.L.C.*, 487 F.3d 255, 258 (5th Cir. 2007). Instead, the aggrieved party to an arbitration must prove that the arbitrator ignored the law so completely that his award should be vacated, *see, e.g., id.* at 258-59 (arbitrator's award is subject to being vacated only if the arbitrator strayed so far from the law that he is effectively dispensing his own brand of justice and his

decisions are irrational), which is hard to do if the party fails to identify any particular law the arbitrator supposedly ignored, *Teel v. Beldon Roofing & Remodeling Co.*, 2007 WL 1200070, at *2-*3 (Tex. App.—San Antonio Apr. 25, 2007, n.p.h.) (not yet released for publication). It also requires showing that the arbitrator's decision was intentional, i.e., that he was aware of this settled law but nevertheless chose to ignore it. *Apache Bohai Corp. v. Texaco China BV*, 480 F.3d 397, 405 (5th Cir. 2007). This degree of error rarely occurs, which tends to make arbitration awards very certain.

Nor will the right of the arbitrator to reach a decision in the case be assailed unless it is crystal clear that the arbitrator lacks the authority to act. This means that a party to an arbitration must convince the arbitrator that he lacks the authority to decide a dispute under the agreement or that the dispute lies outside the scope of the arbitration clause; if he fails to do so, the court will resolve the claims in favor of finding that the arbitrator had the authority to act if it is at all possible to do so. *See, e.g.*, *Downer*, 489 F.3d at 625-27 (rejecting assertion that claims fell outside the ambit of the arbitration clause, and finding it was broad enough the arbitrator could have found he had the authority to decide the dispute presented, and therefore upholding the award he rendered).

VIII. CONCLUSION

Although the past year has seen remarkable stability in the basics of ADR law, the cases discussed above show that even in stability there is conflict and tension, conflict and tension that will play themselves out in the courts in the months and years to come. I hope practitioners find the foregoing review useful in their practices in the coming year.