
Volume 11

Issue 1

American Justice at a Crossroads: A Public and Private Crisis

Article 4

12-1-2010

Economical Litigation Agreements: The "Civil Litigation Prenup" Need, Basis, and Enforceability

Daniel B. Winslow

Alexandra Bedell-Healy

Follow this and additional works at: <https://digitalcommons.pepperdine.edu/drlj>



Part of the [Civil Law Commons](#), [Civil Procedure Commons](#), [Contracts Commons](#), [Courts Commons](#), [Dispute Resolution and Arbitration Commons](#), [Judges Commons](#), [Law and Economics Commons](#), [Law and Society Commons](#), [Legal History Commons](#), [Legal Profession Commons](#), [Legal Remedies Commons](#), [Litigation Commons](#), and the [Other Law Commons](#)

Recommended Citation

Daniel B. Winslow and Alexandra Bedell-Healy, *Economical Litigation Agreements: The "Civil Litigation Prenup" Need, Basis, and Enforceability*, 11 Pepp. Disp. Resol. L.J. Iss. 1 (2010)

Available at: <https://digitalcommons.pepperdine.edu/drlj/vol11/iss1/4>

This Symposium is brought to you for free and open access by the Caruso School of Law at Pepperdine Digital Commons. It has been accepted for inclusion in Pepperdine Dispute Resolution Law Journal by an authorized editor of Pepperdine Digital Commons. For more information, please contact bailey.berry@pepperdine.edu.

[Vol. 11: 125, 2010]

PEPPERDINE DISPUTE RESOLUTION LAW JOURNAL

Economical Litigation Agreements: The “Civil Litigation Prenup” Need, Basis, and Enforceability

Daniel B. Winslow & Alexandra Bedell-Healy*

I. INTRODUCTION

The scope and purpose section of the Federal Rules of Civil Procedure (FRCP) provides that “[t]hese rules . . . should be construed and administered to secure the just, speedy, and inexpensive determination of every action and proceeding.”¹ In practice, however, civil litigation has become anything but speedy and inexpensive. Discovery procedures in civil litigation are time-consuming and expensive armaments in a war of attrition, as parties try to induce favorable settlement by grinding down an adversary or expending disproportionate resources in search of the elusive “smoking gun.” The price of civil litigation, measured by time or treasure, is often too high and too slow and lacks any proportion to the value of the dispute.²

Arbitration, once considered the preferred corporate alternative to the pitfalls of civil litigation, has lost its luster. Litigators now dominate an arbitration system marked by lengthy and expensive proceedings that are onerously similar to civil litigation. Unlike civil litigation, however,

* Daniel B. Winslow is a senior counsel at Proskauer Rose, LLP and a former Massachusetts trial court judge who developed the arbitration alternative of the Economical Litigation Agreement (ELA). Alexandra Bedell-Healy is a law student and was a Proskauer summer associate in 2010.

1. FED. R. CIV. P. 1.

2. A recent survey conducted by the Institute for the Advancement of the American Legal System revealed widespread discontent in the legal community regarding the expense, efficiency, and effectiveness of American civil litigation. INSTITUTE FOR THE ADVANCEMENT OF THE AMERICAN LEGAL SYSTEM, CIVIL LITIGATION SURVEY OF CHIEF LEGAL OFFICERS AND GENERAL COUNSEL BELONGING TO THE ASSOCIATION OF CORPORATE COUNSEL (2010), <http://www.du.edu/legalinstitute/pubs/GeneralCounselSurvey.pdf> [hereinafter GENERAL COUNSEL]. Ninety-seven percent of chief legal officers and general counsel agreed that civil litigation is too expensive. *Id.* at 17. Fifty-five percent claimed that the system is too complex. *Id.* Seventy-five percent complained that the system of notice-pleading made it hard to identify litigation issues early in the process. *Id.* at 22. See also Tony Mauro, *Discontent over Civil Litigation Creates Backdrop for Judicial Conference*, THE NAT'L L. J., May 6, 2010, <http://www.law.com/jsp/article.jsp?id=1202457729024>.

arbitration decisions generally do not result in appellate decisions that create and shape the common law. When the common law fails to keep pace with changing technologies and legal trends, lawyers (and their clients) lose an important tool of preventative law on which to base their advice. There is a solution that reduces both the cost and uncertainty of civil litigation while creating a body of common law to allow companies to avoid problems: the Economical Litigation Agreement (ELA),³ often referred to as the “civil litigation pre-nup.”

The ELA is a hybrid of arbitration and litigation that incorporates a discovery agreement for civil litigation instead of an arbitration clause in the parties’ underlying business contract. The discovery agreement requires any discovery to be finite and proportionate to the amount in controversy. The discovery agreement itself includes an arbitration clause, so an arbitrator will enforce the ELA. The substantive dispute remains in the civil justice system, with a judge deciding the merits of any threshold motion, dispositive motion, or trial, based on applicable law, with all appellate rights preserved. Discovery, by contrast, is entirely defined by the parties’ ELA with any discovery dispute being decided by the ELA arbitrator with “loser pays” cost-shifting of discovery disputes included in binding arbitration awards.

This article identifies the basis and limits of the parties’ abilities to define and enforce discovery in an *ex ante* contract. Despite the deficiencies of litigation, the free, public dispute resolution forum of the civil justice system provides significant value in commercial disputes. That value can be used to maximum mutual advantage only if parties replace the infinite discovery permitted in conventional litigation with the finite discovery contracted in ELA litigation. This article will help parties to understand the benefit and enforceability of the ELA.

II. THE CIVIL LITIGATION QUAGMIRE

A recent study by the Institute for the Advancement of the American Legal System (IAALS) revealed a widespread desire in the legal community for a more timely and cost-effective civil litigation process.⁴ A Duke University conference on civil litigation focused on the need to improve the civil justice system.⁵ Legal officers of leading companies consider discovery to be the systemic root of the problems of the civil justice system.⁶

3. *See infra* Appendix A.

4. GENERAL COUNSEL SURVEY, *supra* note 2, at 42.

5. Duke Law News & Events, Duke Law Holds Conference on Litigation in Federal Courts, May 10-11, May 5, 2010, <http://www.law.duke.edu/news/story?id=4933&u=11>.

6. GENERAL COUNSEL SURVEY, *supra* note 2, at 42.

[Vol. 11: 125, 2010]

PEPPERDINE DISPUTE RESOLUTION LAW JOURNAL

The vast majority of officers responding to the IAALS study—ninety percent—reported that civil litigation takes too long.⁷ The median time a civil case takes to move from filing to trial is 25.3 months.⁸ This number has increased steadily over the past five years.⁹ The median time a civil case takes from filing to disposition (whether by trial, motion, or default) is 8.9 months.¹⁰ This number has similarly increased over the past five years.¹¹ Once a case actually reaches trial, the median time interval for a U.S. district court trial is 33.1 months.¹²

In the last five years, many companies' active caseloads and pretrial costs have increased.¹³ Ninety-seven percent of companies responding to the IAALS survey reported that litigation simply is too expensive.¹⁴ A reason, as one respondent noted, is that:

The plaintiff[s'] lawyers take the tactic of suing as many defendants as possible under as many legal theories as possible "to see what sticks" The defense attorneys, billing at an hourly rate, benefit [from the resulting] broad discovery and the amount of time and effort it requires The judges . . . often do not grant motions . . . that could serve to whittle the complaint down to the true cause of actions [or] act to sufficiently limit discovery. . . .¹⁵ By freely granting motions to continue, they allow the cases to drag on for years

Another respondent wrote: "[L]egal fees and discovery costs have ruined civil trials as a truth seeking method. Lawyers have no incentive to get things over with. This makes me sad because I think the trial system

7. *Id.* at 17.

8. UNITED STATES COURTS, FEDERAL COURT MANAGEMENT STATISTICS (2009), <http://www.uscourts.gov/Statistics/FederalCourtManagementStatistics.aspx> (follow "District Courts 2009" hyperlink; then follow "Generate" hyperlink) [hereinafter DISTRICT COURT STATISTICS].

9. *Id.*

10. *Id.* Disposition reflects all terminated civil cases, regardless of whether disposal occurred by trial or other methods. Case disposition may occur prior to trial if the judge, for example, grants a motion to dismiss or a motion for summary judgment.

11. *Id.*

12. UNITED STATES COURTS, TABLE C-5: U.S. DISTRICT COURTS—MEDIAN TIME INTERVALS FROM FILING TO DISPOSITION OF CIVIL CASES TERMINATED, BY DISTRICT AND METHOD OF DISPOSITION, DURING THE 12-MONTH PERIOD ENDING MARCH 31, 2009 (2009), <http://www.uscourts.gov/uscourts/Statistics/FederalJudicialCaseloadStatistics/2009/tables/C05Mar09.pdf>.

13. GENERAL COUNSEL SURVEY, *supra* note 2, at 16.

14. *Id.* at 17.

15. *Id.* at 18.

could be a good way to get to the truth of some things.”¹⁶ Moreover, a majority of respondents found that opposing counsel typically are uncooperative.¹⁷

Most respondent companies have experienced litigation costs that do not align with what is at stake in the dispute.¹⁸ Nearly ninety percent of respondents disagreed with the statement that “litigation costs are generally proportionate to the value of the case.”¹⁹ One legal officer reported that summary judgment preparation and simply getting through discovery can cost upward of \$100,000 even in low-stakes, minor actions.²⁰ Significantly, the majority of respondents agreed that the ability to spend on litigation correlates to the outcome of the case more than the merits.²¹ Eighty percent of respondents disagreed with the proposition that “outcomes are driven more by the merits of the case than by litigation costs.”²² The greatest expense of pretrial litigation is driven by discovery.²³ Companies generally maintain greater quantities of documents and data that feed the scope and costs of discovery.²⁴ IAALS survey respondents favor eliminating “scorched earth” discovery battles and fishing expeditions.²⁵ Two-thirds of responding companies reported that discovery occurs in seventy percent of their cases.²⁶ A plurality reported that their company engaged in discovery in ninety percent of cases.²⁷ Of these respondents, approximately forty percent claimed that parties frequently ignore or violate discovery rules,²⁸ often without effective and timely resort to judicial management or decision.

The burgeoning presence of e-discovery (electronic discovery) poses major problems for small and large companies and the attorneys that represent them.²⁹ The massive volume of electronic data that needs to be vetted, controlled, and communicated in litigation swells litigation budgets

16. *Id.* at 21.

17. *Id.*

18. *Id.* at 19.

19. *Id.*

20. *Id.*

21. *Id.*

22. *Id.*

23. *Id.* at 1.

24. *Id.* at 16.

25. *Id.* at 2.

26. *Id.* at 14.

27. *Id.*

28. *Id.* at 26.

29. *Id.* at 31.

[Vol. 11: 125, 2010]

PEPPERDINE DISPUTE RESOLUTION LAW JOURNAL

and creates delay.³⁰ E-discovery vendors often lead to astronomical litigation expenses in addition to legal fees.³¹

III. THE ARBITRATION QUANDARY

Enacted in 1925, the Federal Arbitration Act (FAA) enables parties to engage in contractually-based, binding, and non-appealable arbitration.³² Arbitration was intended to be a faster, cheaper, and private dispute resolution alternative to litigation. As more civil litigators have gravitated to arbitration, arbitration has inherited many of the characteristics of civil litigation. When measured in delay and expense, arbitration is not the alternative of choice for many companies.³³

Arbitration can be a lengthy process. One study showed that the average time to resolve a dispute by arbitration is 16.5 months (measured from the date of filing to the date of award).³⁴ Arbitration can also be expensive.³⁵

For example, a two-party arbitration that involved three days of hearings in San Francisco before a single arbitrator, two days of prehearing preparation, and two days of post-hearing research and award preparation might cost each party \$450 in case management fees and \$11,200 in arbitrator's fees, plus counsel fees. Depending upon the arbitrators selected, the same dispute might cost as much as \$96,000 per party in arbitrator's fees if held before a three arbitrator panel. The costs increase accordingly if one anticipates an arbitration that will require weeks or months of motion practice, testimony, argument and deliberation.³⁶

The dissatisfaction of American companies with conventional civil litigation and the growing dissatisfaction with arbitration have spurred the development of a third choice for commercial dispute resolution: the ELA. A copy of the ELA as well as the model clause to incorporate the provision into contracts is attached as the Appendix to this article.

30. *Id.*

31. Jason Krause, *Are E-Discovery Sanctions Tough Enough?*, LAW.COM, June 25, 2010, http://www.law.com/jsp/lawtechnologynews/PubArticleLTN.jsp?id=1202463057428&Are_EDiscovery_Sanctions_Tough_Enough.

32. 9 U.S.C. § 2 (2000).

33. See GENERAL COUNSEL SURVEY, *supra* note 2, at 40-41.

34. Henry S. Noyes, *If You (Re)Build It, They Will Come: Contracts to Remake the Rules of Litigation in Arbitration's Image*, 30 HARV. J.L. & PUB. POL'Y 579, 585 (2007).

35. *Id.* at 586.

36. *Id.* at 587.

IV. THE LEGAL BASIS OF A LITIGATION PRENUPI

The question of whether parties can privately contract to alter the rules of public civil justice dispute resolution has not received due examination by the courts. There are clear limits to litigants' private decision-making power within the civil justice system. A party cannot, for example, bestow subject-matter jurisdiction on a court via private contract.³⁷ However, with the exception of some clearly defined limitations, the Federal Rules of Civil Procedure support the concept of customized discovery by *ex ante* contract.

Rule 29 of the FRCP affords litigants a broad mandate to modify discovery procedures.³⁸ The rule only requires court approval for a modification that extends discovery deadlines or pretrial schedules set by rule or judicial order: "the parties may stipulate that . . . other procedures governing or limiting discovery be modified—but a stipulation extending the time for any form of discovery must have court approval if it would interfere with the time set for completing discovery, for hearing a motion, or for trial."³⁹ The notes of the Advisory Committee overseeing the Rule's 1970 and 1993 amendments further support the purpose of the rule to encourage customizing discovery to ensure efficiency. In 1970, the committee wrote that:

[t]here is no provision for stipulations varying the procedures by which methods of discovery other than depositions are governed. It is common practice for parties to agree on such variations, and the amendment recognizes such agreements and provides a formal mechanism in the rules for giving them effect. Any stipulation varying the procedures may be superseded by court order, and stipulations extending the time for response to discovery under Rules 33, 34, and 36 require court approval.⁴⁰

The rule was further amended in 1993. The Advisory Committee Notes further clarified the intention to support parties who customize discovery procedures to enhance efficiency:

37. U.S. CONST. art. II, § 2 specifies the subject-matter jurisdiction of the federal courts.

38. Most states have similar language to Rule 29 of the Federal Rules of Civil Procedure and similarly encourage litigants to agree to customize their discovery procedures. *See, e.g.*, MASS. R. CIV. P. § 29 ("Unless the court orders otherwise, the parties may by written stipulation (1) provide that depositions may be taken before any person, at any time or place, upon any notice, and in any manner and when so taken may be used like other depositions; and (2) modify the procedures provided by these rules for other methods of discovery."). *See also* CAL. CIV. PROC. CODE § 2016.030 (West 2005) ("Unless the court orders otherwise, the parties may by written stipulation modify the procedures provided by this title for any method of discovery permitted under Section 2019.010.").

39. FED. R. CIV. P. 29.

40. FED. R. CIV. P. 29 advisory committee's note (1970).

[Vol. 11: 125, 2010]

PEPPERDINE DISPUTE RESOLUTION LAW JOURNAL

This rule is revised to give greater opportunity for litigants to agree upon modifications to the procedures governing discovery or to limitations upon discovery. Counsel are encouraged to agree on less expensive and time-consuming methods to obtain information, as through voluntary exchange of documents, use of interviews in lieu of depositions, etc. Likewise, when more depositions or interrogatories are needed than allowed under these rules or when more time is needed to complete a deposition than allowed under a local rule, they can, by agreeing to the additional discovery, eliminate the need for a special motion addressed to the court. Under the revised rule, the litigants ordinarily are not required to obtain the court's approval of these stipulations. By order or local rule, the court can, however, direct that its approval be obtained for particular types of stipulations; and, in any event, approval must be obtained if a stipulation to extend the 30-day period for responding to interrogatories, requests for production, or requests for admissions would interfere with dates set by the court for completing discovery, for hearing of a motion, or for trial.⁴¹

This 1993 amendment deleted the requirement of court approval for any stipulations regarding discovery from the rule, except agreements that would delay discovery deadlines or pretrial schedules based on rule or judicial order. In its post-1993 form, Rule 29 empowers litigants to stipulate to limited discovery or tailor discovery procedures contained in the Federal Rules to the needs of the litigation and parties. The case law interpreting the discovery rules does not necessarily shed more light on Rule 29 than the clear purpose laid out in the Advisory Committee Notes. Still, two overarching lessons emerge from cases discussing discovery rules. First, courts only enforce these agreements when the parties agree in writing. Second, when interpreting the rules, judges should err on the side of efficiency. These will be discussed in detail below.

The provisions allowing agreements were adopted to further the purpose of the FRCP to ensure speedy, just, and inexpensive proceedings.⁴² Should parties stipulate to limited discovery in an ex ante contract, such an agreement would fall within the purview of the mandate. Also, discovery-related rules, such as Rule 29, are to be accorded broad and liberal treatment.⁴³ Courts have limited the interpretation of discovery rules only to the extent that such stipulations should be agreed to in writing ex ante, or in *Atlantic Leasing Co. v. General Outdoor Advertising Co.*, where the stipulations regarding how the parties could depose witnesses would complicate and not simplify the discovery process.⁴⁴

41. FED. R. CIV. P. 29 advisory committee's note (1993).

42. FED. R. CIV. P. 1.

43. *Hickman v. Taylor*, 329 U.S. 495, 507 (1947).

44. *Atl. Leasing Co. v. Gen. Outdoor Advert. Co.*, 4 F.R.D. 122, 123 (S.D.N.Y. 1943).

V. ENFORCEABILITY

While there have been no cases deciding the enforceability of the ELA, there have been several other types of contract-based dispute procedures that have drawn judicial scrutiny, which could provide helpful guidance in assessing the enforceability of ELA Agreements. The United States Supreme Court historically was hostile to the notion of an *ex ante* contract that altered the course of public dispute resolution. In *Home Insurance Co. v. Morse*, the Court compared waiving one's future right to a jury trial to contracting away one's freedom:

Every citizen is entitled to resort to all the courts of the country, and to invoke the protection which all the laws or all those courts may afford him. A man may not barter away his life or his freedom, or his substantial rights

. . . [A]greements in advance to oust the courts of the jurisdiction conferred by law are illegal and void.⁴⁵

"In refusing to enforce a statutorily recognized agreement not to seek removal of a case to federal court, the opinion made several other sweeping pronouncements about the inability of parties to contractually alter the judicial system prior to litigation."⁴⁶

He [a potential litigant] cannot, however, bind himself in advance by an agreement, which may be specifically enforced, thus to forfeit his rights at all times and on all occasions, whenever the case may be presented.

. . . . The regular administration of justice might be greatly impeded or interfered with by such stipulations if they were specifically enforced.⁴⁷

This reasoning came to be known as the "Ouster Doctrine."⁴⁸ The Supreme Court in *Home Insurance* established the view that the courts are sacred and exclusive protectors of rights described in the Constitution and by the Legislature, and that the courts cannot be ousted from their jurisdiction.⁴⁹ Judges would rely on the Ouster Doctrine to nullify private agreements which altered rights bestowed upon citizens by the Constitution and Legislature.⁵⁰

The enactment of the Federal Arbitration Act in 1925 heralded a new chapter in American legal history where the Ouster Doctrine no longer could

45. *Home Ins. Co. v. Morse*, 87 U.S. 445, 451 (1874).

46. David H. Taylor & Sara M. Cliffe, *Civil Procedure by Contract: A Convoluted Confluence of Private Contract and Public Procedure In Need of Congressional Control*, 35 U. RICH. L. REV. 1085, 1092 (2002).

47. *Home Insurance Co.*, 87 U.S. at 452.

48. Taylor & Cliffe, *supra* note 46, at 1092.

49. *See id.*

50. *Id.*

[Vol. 11: 125, 2010]

PEPPERDINE DISPUTE RESOLUTION LAW JOURNAL

prevent private contracts that altered dispute resolution procedures.⁵¹ Ultimately, the Supreme Court came to embrace the legislative action that promoted great efficiency in dispute resolution.⁵²

With the FAA and resulting Supreme Court decisions, the legislature and the judiciary completely reinvented fundamental and long-standing perceptions of dispute resolution procedure. Throughout the twentieth century, arbitration awards were consistently enforced in federal and state courts with no assessment of the merits.⁵³ The Supreme Court has vastly stretched the reach of arbitration legislation. The Court, perhaps swayed by the savings in cost and time for the judiciary, made the Act applicable to a wide array of contracts.⁵⁴ Arbitration, as a result, is ubiquitous.

A. *Forum Selection Clauses*

In addition to encouraging parties to resolve their disputes privately with arbitration, the Supreme Court favored freedom of contract arguments where parties' privately-negotiated *ex ante* contracts provided for certain procedures in the event of dispute.⁵⁵ In *The Bremen v. Zapata Off-Shore Company*, the Supreme Court endorsed forum selection clauses.⁵⁶ The Supreme Court held that forum selection clauses "are prima facie valid and should be enforced unless enforcement is shown by the resisting party to be 'unreasonable' under the circumstances."⁵⁷ The only standard for escaping a forum selection clause noted by the Supreme Court is that trial "will be so gravely difficult and inconvenient that [the party seeking a different forum] will for all practical purposes be deprived of his day in court."⁵⁸ Absent such a high standard of proof, forum selection clauses should be "specifically enforced" unless the moving party "could clearly show that

51. *Id.* at 1095.

52. Paul D. Carrington & Paul H. Haagen, *Contract and Jurisdiction*, 1996 SUP. CT. REV. 331, 339-50 (1996).

53. Paul D. Carrington & Paul Y. Castle, *The Revocability of Contract Provisions Controlling Resolution of Future Disputes Between the Parties*, 67 LAW & CONTEMP. PROBS. 207, 211 (2004). The only plausible defenses are normal contract defenses, like fraud. *Id.*

54. Carrington & Haagen, *supra* note 52, at 331.

55. *The Bremen v. Zapata Off-Shore Co.*, 407 U.S. 1, 15 (1972).

56. *Id.*

57. *Id.* at 10.

58. *Id.* at 18.

enforcement would be unreasonable and unjust, or that the clause was invalid for such reasons as fraud and overreaching.”⁵⁹

The Supreme Court asserted that revocation of such contracts would limit the expanding face of U.S. and international business.⁶⁰ Justice Burger wrote:

Here we see an American company with special expertise contracting with a foreign company to tow a complex machine thousands of miles across seas and oceans. The expansion of American business and industry will hardly be encouraged if, notwithstanding solemn contracts, we insist on a parochial concept that all disputes must be resolved under our laws and in our courts

. . . Many courts, federal and state, have declined to enforce such clauses on the ground that they were ‘contrary to public policy,’ or that their effect was to ‘oust the jurisdiction’ of the court We believe this is . . . merely the other side of the proposition recognized by this Court in *National Equipment Rental, Ltd. v. Szukhent* . . . holding that in federal courts a party may validly consent to be sued in a jurisdiction where he cannot be found for service of process through contractual designation of an ‘agent’ for receipt of process in that jurisdiction. In so holding, the Court stated: ‘*It is settled . . . that parties to a contract may agree in advance to submit to the jurisdiction of a given court to permit notice to be served by the opposing party, or even to waive notice altogether.*’

. . . *It accords with ancient concepts of freedom of contract and reflects an appreciation of the expanding horizons of American contractors who seek business in all parts of the world* The choice of that forum was made in an arm’s-length negotiation by experienced and sophisticated businessmen, and absent some compelling and countervailing reason it should be honored by the parties and enforced by the courts.⁶¹

Justice Burger further wrote:

The argument that such clauses are improper because they tend to ‘oust’ a court of jurisdiction is hardly more than a vestigial legal fiction. It appears to rest at core on historical judicial resistance to any attempt to reduce the power and business of a particular court and has little place in an era when all courts are overloaded and when businesses once essentially local now operate in world markets.⁶²

Judicial deference for the parties’ power to contract is so great that the Supreme Court even has enforced forum selection clauses in consumer contracts. In *Carnival Cruise Lines, Inc. v. Schute*, the Supreme Court refused to revoke a forum selection clause printed on boiler-plate language on the back of a non-refundable Carnival Cruise Lines ticket.⁶³ In enforcing

59. *Id.* at 15.

60. *Id.* at 8-12.

61. *Id.* (emphasis added).

62. *Id.* at 12.

63. *Carnival Cruise Lines, Inc. v. Schute*, 499 U.S. 585 (1991).

[Vol. 11: 125, 2010]

PEPPERDINE DISPUTE RESOLUTION LAW JOURNAL

the contract, the Court asserted that the general principles from *The Bremen* decision had broad application:

In evaluating the reasonableness of the forum clause at issue in this case, we must refine the analysis of *The Bremen* to account for the realities of form passage contracts Including a reasonable forum clause in a form contract of this kind well may be permissible for several reasons: First, a cruise line has a special interest in limiting the fora in which it potentially could be subject to suit Additionally, a clause establishing ex ante the forum for dispute resolution has the salutary effect of dispelling any confusion about where suits arising from the contract must be brought and defended, sparing litigants the time and expense of pretrial motions to determine the correct forum and conserving judicial resources that otherwise would be devoted to deciding those motions. . . . Finally, it stands to reason that passengers who purchase tickets containing a forum clause like that at issue in this case benefit in the form of reduced fares reflecting the savings that the cruise line enjoys by limiting the fora in which it may be sued.⁶⁴

The Court erred on the side of conservation of judicial and litigant resources. The Court also dismissed the notion that the Shutes were physically and financially incapable of pursuing the litigation in Florida, reiterating that inconvenience is a very high burden of proof.⁶⁵

B. *Jury Waiver*

The Constitution and the FRCP guarantee the right to a jury trial.⁶⁶ A party can waive or lose the right if the party fails to serve demand for a jury trial within the specified amount of time.⁶⁷ With regard to parties contractually waiving their right to a jury trial in an ex ante contract, the parties must have done so in some variation "intelligently" or "knowingly" or "voluntarily."⁶⁸

Though the issue of enforceability of such waiver provisions has yet to reach the Supreme Court, the Federal Circuit has addressed the issue from a perspective of fairness.⁶⁹ By linking enforceability to whether the agreement was made intelligently, knowingly, and voluntarily, the district courts and court of appeals have set an unproblematic bar for sophisticated business

64. *Id.* at 593-94.

65. *Id.* at 594-95.

66. U.S. CONST. art. III; FED. R. CIV. P. 38.

67. U.S. CONST. art. III; FED. R. CIV. P. 38.

68. *Nat'l Equip. Rental, Ltd. v. Hendrix*, 565 F.2d 255, 258 (2d Cir. 1977).

69. *Id.*

parties (and likely less sophisticated parties) to waive procedural and constitutional rights.⁷⁰

C. *Commonplace Contractual Provisions that Tailor Procedural Rules*

It has become commonplace for parties to provide for waiver or modification of certain dispute resolution rights in *ex ante* contracts. Parties can designate which state's law will apply in case of a dispute with boilerplate "choice of law" language. Parties can contract that the losing party will pay attorney's fees to the other side in case of a dispute, contrary to the American Rule where all parties pay their own fees.⁷¹ Parties can also waive all claims—even the right to raise future claims that are unknown at the time of contract execution—and the right to appellate review.⁷²

D. *Limitations on Procedural Modifications*

The ability to customize litigation in an *ex ante* contract is not without limitation. An agreement which bestows subject-matter jurisdiction on a court that it would not otherwise have is unenforceable.⁷³ Unlike personal jurisdiction, subject-matter jurisdiction can never be waived, and any decision by a court lacking in subject-matter jurisdiction is null and void.⁷⁴

Any waiver of rights bestowed by the Constitution likely will be subject to the knowing, voluntary, and intelligent standard. Jury waivers have only been enforced under some variation of this standard, and any waiver of constitutional rights in civil litigation will likely garner similar scrutiny.⁷⁵ The Supreme Court discussed this standard in a case involving waiver of due process rights, specifically notice and hearing. In *D.H. Overmyer Co. v. Frick Co.*, the Court enforced a cognovit note, a contractual *ex ante* waiver of the due process rights of notice and hearing, where the waiver was

70. *Id.*

71. FED. R. CIV. P. 54(d)(2) ("A claim for attorney's fees . . . must be made by motion unless the substantive law requires those fees to be proved at trial as an element of damages.")

72. *United States v. Sardie*, 191 F. Supp. 2d 1128, 1134 (C.D. Cal. 2000) (holding that a negotiated settlement agreement of the state court claims contained a general release of all known and unknown claims).

73. U.S. CONST. art. III, § 2.

74. FED. R. CIV. P. 12(h)(3) (requiring federal courts to dismiss a case *sua sponte* if it lacks subject matter jurisdiction).

75. *Nat'l Equip. Rental*, 565 F.2d at 258.

[Vol. 11: 125, 2010]

PEPPERDINE DISPUTE RESOLUTION LAW JOURNAL

“voluntarily, intelligently[,] and knowingly made.”⁷⁶ Justice Blackmun explained:

Even if, for present purposes, we assume that the standard for waiver in a criminal proceeding, that is, that it be voluntary, knowingly, and intelligently made . . . [.] that standard was fully satisfied here . . . Overmyer is a corporation . . . This is not a case of unequal bargaining power or overreaching. The Overmyer-Frick agreement, from the start, was not a contract of adhesion.⁷⁷

Justice Blackmun indicated contractual waivers may not need to meet this higher standard of scrutiny, but such a contract between two sophisticated business parties usually will pass the test.⁷⁸

VI. CONCLUSION

Economical Litigation Agreements have the potential to be an important new tool for the prompt and affordable resolution of business disputes in the civil justice system. Unlike arbitration, which provides no means of appellate review, cases handled in accordance with ELA discovery procedures will allow the common law to keep pace with changing technologies as cases are appealed. The common law, that is, the body of reported decisions addressing the outcomes of business disputes, provides an important component in preventative law on which lawyers depend to give clients sound legal advice. While the ELA innovation still is too new to have received judicial scrutiny and approval, judicial review of other contract-based dispute provisions—such as forum selection clauses—provide a helpful parallel to the likely judicial approval of ELA. Even if a court declared the ELA unenforceable, the only consequence would be that the parties would revert to conventional civil litigation or retain their rights to have the substantive dispute decided by binding arbitration. In short, there is much to gain and little to lose for companies that choose to incorporate the model ELA clause in their commercial contracts. Time will tell if companies embrace this new option to reduce the costs of litigation.

76. D.H. Overmyer Co. v. Frick Co., 405 U.S. 174, 186-87 (1972). “The cognovit is the ancient legal device by which the debtor consents in advance to the holder’s obtaining a judgment without notice or hearing, and possibly even with the appearance, on the debtor’s behalf, of an attorney designated by the holder.” *Id.* at 176.

77. *Id.* at 185-86.

78. *Id.* at 186.

APPENDIX A

THE ECONOMICAL LITIGATION AGREEMENT

The following model clause may be inserted into a commercial contract to incorporate by reference the terms of the International Institute for Conflict Prevention & Resolution Economical Litigation Agreement provisions. Because waiver of trial by jury has been held by several jurisdictions to be required to be “knowing, intelligent, and voluntary” to be valid, the model clause makes explicit that the civil litigation shall be jury-waived.⁷⁹ Some jurisdictions, such as California, explicitly prohibit advance waiver of trial by jury, so the model language defers to such explicit prohibitions. By incorporating a forum selection clause and choice of law clause in their contract, the parties can control whether any litigation occurs in jurisdictions that prohibit advance jury waiver. The ELA clause states:

- XX. Economical Litigation Agreement:** Any Dispute arising out of or relating to this contract, including the breach, termination or validity thereof, whether based on action in contract or tort, shall be finally resolved by civil litigation in accordance with the International Institute for Conflict Prevention & Resolution Economical Litigation Agreement (2010 edition), by a judge sitting without a jury. In jurisdictions where advance waiver of jury is prohibited as a matter of law, or where all parties to this agreement subsequently agree in writing, such Dispute shall be decided by a jury.

This incorporation eliminates the need to repeat the entire ELA in the body of the underlying transaction. By using this model clause, the parties are agreeing to the following litigation pre-nup:

79. Noycs, *supra* note 34, at 606.

[Vol. 11: 125, 2010]

PEPPERDINE DISPUTE RESOLUTION LAW JOURNAL

International Institute For Conflict Prevention & Resolution
Economical Litigation Agreement
General Provisions

I. Purpose

1.1. Prompt and Affordable Justice. The purpose of the parties' Economical Litigation Agreement ("ELA") shall be to provide a means for the parties to secure prompt and affordable resolution of any Dispute arising out of or relating to their contract ("Dispute"). The parties have agreed to this ELA as an alternative to binding arbitration in which significant rights pursuant to civil litigation would have been waived. The ELA shall not have any effect on the court's inherent ability to manage trial or to render judgment in accordance with applicable law.

1.2 Reservation of Arbitration. In the event a judge enters orders contrary to the terms of the ELA between the parties, both parties may by written agreement choose either to waive such provision of the ELA or to submit their Dispute instead to binding arbitration in accordance with the International Institute for Conflict Prevention & Resolution ("CPR") Rules for Non-Administered Arbitration for determination by a sole arbitrator. In the event the parties fail to agree either to waive the affected provisions of the ELA or to submit their Dispute to binding arbitration, any party may seek a summary hearing and ruling from the ELA Arbitrator appointed pursuant to Section 6 that the judge's order materially violates the terms of the ELA. If the ELA Arbitrator so rules, the parties shall submit the merits of their Dispute to binding arbitration before the ELA Arbitrator forthwith. By filing or responding to an action in court, the parties do not waive their right to have the Dispute decided by binding arbitration in such event. Any such arbitration shall be governed by the Federal Arbitration Act, 9 U.S.C. §§ 1 *et seq.*, and judgment upon the award rendered by the arbitrator may be entered by any court having jurisdiction thereof.

II. Waiver of Right to Trial by Jury

2.1. Jury-Waived Trial. The parties agree that any trial of their Dispute shall be heard by a judge sitting without a jury and that their constitutional right to trial by jury is hereby waived.

2.2. Knowing, Intelligent, and Voluntary Waiver. The parties knowingly, intelligently, and voluntarily waive their right to trial by jury, after having opportunity to confer with counsel regarding such waiver. The parties acknowledge that they understand their right to trial by jury includes submitting their Dispute to a jury of their peers, randomly chosen from the community, in which they would have the opportunity to challenge any jurors whom they believe to be biased or for other good cause and that judgments only could be rendered upon a jury verdict determined by five/sixths of the jury or such other portion of agreement by the jurors as required by the applicable jurisdiction.

2.3. Exception. Where advance waiver of jury is prohibited as a matter of law, or where all parties agree in writing, the Dispute shall be decided by a jury.

III. Pre-Litigation Mandatory Dispute Resolution

3.1. Exhaustion Required. Except as provided in 3.2, below, the parties agree that no party may file a civil complaint or petition against any party without first exhausting the pre-litigation Dispute resolution procedures contained in this section. The parties by written agreement may extend the deadlines described in this section and may agree to additional pre-litigation Dispute resolution activities.

3.2. Exception: Preservation of Statutes of Limitation. Where an applicable statute of limitation may expire during the period required for mandatory pre-litigation Dispute resolution, where a party fails or refuses to timely agree to and execute a tolling agreement of the applicable statute of limitation to allow pre-litigation Dispute resolution to occur, a party may file a civil complaint or petition against such party but shall not serve such complaint or petition until the pre-litigation procedures described in this section have been exhausted, unless otherwise required by law to prevent expiration of such statutes.

3.3. Escalating Negotiation. The parties shall attempt in good faith to resolve any Dispute arising out of or relating to their contract promptly by negotiation between executives who have authority to settle the controversy, who are at a higher level of management than the persons with direct responsibility for administration of the contract and who have not been previously involved in the Dispute. Any party may give another party written notice of any Dispute not resolved in the normal course of business by letter or email captioned “**Demand for Negotiation of Business**”

[Vol. 11: 125, 2010]

PEPPERDINE DISPUTE RESOLUTION LAW JOURNAL

Dispute.” Within 15 days after delivery of the notice, for which acknowledgment of receipt or receipted delivery has been made (“delivery”), the receiving party shall submit to the other a written response by letter or email. The notice and response shall include (i) a statement of each party’s position and a summary of arguments supporting that position, and (ii) the name and title of the executive who will represent that party and of any other person who will accompany the executive at any meeting or conference call. Within 30 days after delivery of the disputing party’s notice, the designated executives of both parties shall meet or confer telephonically or by video conference or in person at a mutually acceptable time and place, and thereafter as often as they reasonably deem necessary, to attempt to resolve the Dispute. All reasonable requests for information made by one party to the other shall be honored. All negotiations pursuant to this section are confidential and shall be treated as compromise and settlement negotiations for purposes of applicable rules of evidence. The parties may be assisted by legal counsel during negotiations, but in no event shall outside legal counsel represent any party in such negotiations. All communication between parties in the negotiation shall occur between executives and not by their outside counsel.

3.4. Mandatory Mediation. If the Dispute has not been resolved by negotiation within 45 days after delivery of the disputing party’s notice, or if the parties failed to meet within 30 days as required by Section 3.3, the parties shall endeavor to settle the Dispute by mediation under the then current CPR rules with respect to the mediation of commercial Disputes, or such other similar procedures as agreed to by the parties. Any mediation between the parties shall conclude no later than 90 days after delivery of the notice of Dispute negotiation.

IV. Waiver of Service of Process

4.1. Service by Overnight Delivery Service. Each party defendant agrees to waive service of process. In lieu of formal service of process, the parties agree that any complaint or petition shall be served by overnight delivery service to the business address of the chief executive officer for each party defendant and, if applicable, with a copy by overnight delivery service to the general counsel or senior legal officer of such party defendant.

4.2. Proof of Service. The parties agree that the tracking order showing overnight delivery shall be *prima facie* proof of service and may be filed as an exhibit with an affidavit of service by counsel for each party plaintiff with the court.

V. Time for Responsive Pleading

5.1. Answer Extension as of Right. The parties agree that upon written notice by a defendant to the plaintiff(s) by letter or email to each plaintiff's counsel, the time within which the defendant shall answer, move or otherwise respond to the complaint shall be extended an additional 15 days beyond the date such answer or response otherwise would be due under the applicable rules of civil procedure to the same extent as filing a stipulation and without need for a court motion or order. In the event the extended deadline falls on a weekend or legal holiday, the answer or response shall be due on the next business day following such weekend or legal holiday.

5.2. Counterclaim Reply Extension as of Right. In the event a party defendant files a counterclaim, the parties agree that upon written notice by a counterclaim defendant to the counterclaim plaintiff(s) by letter or email to counterclaim plaintiff's counsel, the deadline for the counterclaim defendant to file an answer, move or otherwise respond shall be extended an additional 15 days beyond the date such answer or response otherwise would be due under the applicable rules of civil procedure to the same extent as filing a stipulation and without need for a court motion or order. In the event the extended deadline falls on a weekend or legal holiday, the answer or response shall be due on the next business day following such weekend or legal holiday.

VI. Appointment of ELA Arbitrator

6.1. Agreed Designation by Parties. Within seven business days after the filing of the answer, motion, or response, the parties' counsel shall confer for purposes of selecting an ELA Arbitrator who shall preside over all discovery process in the litigation.

6.2. Designation by CPR. Unless counsel for all parties agree on a particular ELA Arbitrator within seven business days after the filing of the answer, motion, or other response, counsel for the plaintiff party shall notify CPR in writing, with a copy to counsel for each defendant party, of the need for an ELA Arbitrator in connection with the litigation. Such notice shall include the names, addresses, telephone and fax numbers, and email

[Vol. 11: 125, 2010]

PEPPERDINE DISPUTE RESOLUTION LAW JOURNAL

addresses of all counsel as well as the names and addresses of all parties to the Dispute. Within seven business days from its receipt of such notice, CPR shall transmit to counsel for all parties a list of no fewer than five attorneys whom CPR has determined to be trained in ELA case management. Such list shall include a brief statement of each candidate's qualifications and the candidate's fees for serving as an ELA Arbitrator. Within seven business days after receipt of such list, each party shall provide to CPR without notice to the opposing party a ranking of the candidates in order of preference and shall note any objection it may have to any candidate. Any party failing without good cause to return the candidate list so marked within seven business days after delivery shall be deemed to have assented to all candidates listed. CPR shall designate as ELA Arbitrator the candidate willing to serve for whom the parties collectively have indicated the highest preference. If a tie should result between two candidates, CPR may designate either candidate. If this procedure for any reason should fail to result in designation of the ELA Arbitrator or if a party fails to participate in this procedure, CPR shall appoint a person whom it deems qualified to fill the position of ELA Arbitrator.\

6.3. Duties of ELA Arbitrator. The parties agree that the ELA Arbitrator so designated shall have the power to administer and enforce the pre-trial discovery procedure agreed to by the parties pursuant to the ELA. The ELA Arbitrator shall be responsible for ensuring the prompt and affordable resolution of the parties' Dispute by civil litigation to the point of settlement or disposition by motion or trial. All decisions by the ELA Arbitrator shall be preceded by a summary hearing at which counsel for all parties shall have an opportunity to be heard and, if necessary for decision by the ELA Arbitrator, to present and question evidence. The ELA Arbitrator shall have the power to award monetary damages and sanctions in accordance with the ELA which damages and sanctions shall have the force of a binding arbitration award pursuant to the Federal Arbitration Act, 9 U.S.C. §§ 1, *et seq.* Actions to confirm any award(s) rendered by the ELA Arbitrator may be entered in any court having appropriate venue and jurisdiction thereof at any time before settlement or within 30 days after the entry of judgment of the underlying Dispute.

6.4. Costs of ELA Arbitrator. The parties agree to bear equally the cost of the ELA Arbitrator's services on an hourly rate, charged by the ELA Arbitrator and CPR, which shall be invoiced monthly by CPR.

6.5. Appearances Before ELA Arbitrator. All communications between the ELA Arbitrator and counsel for the parties may be by email, conference call, video conference, or in person, provided that no counsel shall be required to travel further than five miles to attend a meeting in person. No party or counsel may engage in ex parte communications with the ELA Arbitrator.

6.6. Discovery Motions and Compliance. The parties agree that all motions regarding discovery and all issues concerning compliance with this ELA shall be submitted to and decided by the ELA Arbitrator and not by the court, except motions to compel discovery from non-party witness(es) in accordance with Section 13.1.1.

6.6.1. Protective Orders. Any party may seek to limit the scope of discovery that seeks privileged information or trade secrets by motion to the ELA Arbitrator, who shall weigh the relevance, materiality, and relative harm to each party to decide the motion.

6.6.2. Obligation to Confer. Before filing any discovery-related motion with the ELA Arbitrator, the moving party shall confer with the opposing party to attempt a negotiated resolution.

VII. Motion Practice

7.1. Page Limits. Unless the court sua sponte orders otherwise or local rules of procedure require a lesser number of pages, the parties agree that no motion filed with the court or ELA Arbitrator shall exceed three pages in length, excluding caption and certificates of service, and no memorandum in support of any motion shall exceed ten pages in length, excluding caption, affidavits filed in support of such motions and certificates of service.

7.2. Affidavit Summaries. Unless otherwise ordered by the court, the parties agree that any affidavit filed in court or with the ELA Arbitrator shall be accompanied by an executive summary paragraph no longer than one page prepared by counsel for ease of reference before any statement by the affiant.

7.3. Definition of “Page.” For purposes of this section, a “page” shall be 8½ by 11 inch paper, 12 point font, with margins no less than one inch on the top, left and bottom margins and no less than ½ inch on the right margin,

[Vol. 11: 125, 2010]

PEPPERDINE DISPUTE RESOLUTION LAW JOURNAL

unless the civil rules or local rules of the court in which the litigation is being conducted provide otherwise, in which case such rule shall prevail.

7.4. Waiver of Oral Argument Before the Court. Except for motions to dismiss, judgment on the pleadings, or summary judgment, the parties agree that all pretrial motions before the court shall be submitted on the papers without oral argument, and no party shall request oral argument, except as the court may otherwise require.

VIII. Judicial Appearances

8.1. Personal Appearances Waived. Unless the court otherwise requires, the parties agree that they jointly will request that all appearances by counsel for pre-trial conference, including the Rule 16 conference pursuant to the Federal Rules of Civil Procedure or conference pursuant to a comparable state rule of procedure, shall be by telephonic conference call or, if the court permits, video conference with the judge and counsel. No counsel shall appear in person before the judge if any other counsel is not so present, unless such absent counsel has consented in writing in advance of the hearing.

8.2. Submission of ELA to Court. At any conference with the court pursuant to Federal Rules of Civil Procedure Rule 16 or a comparable state rule of procedure, the parties agree that they shall jointly submit the ELA to the judge as their jointly stipulated discovery management procedure.

IX. Discovery Sequencing

9.1. Threshold Motions. In the event a defendant party files a motion to dismiss or for judgment on the pleadings, the parties agree that all discovery shall be stayed with the exception of discovery requests that directly concern the basis of that motion until the date the court issues its decision on that motion.

9.2. Summary Judgment Motions. In the event that any party files a motion for summary judgment, all discovery shall be stayed in the case from the date the opposition to the summary judgment motion is filed until the date the court issues its decision regarding summary judgment. For the purposes of this section, opposition solely grounded on Rule 56(f) of the

Federal Rules of Civil Procedure or a comparable state rule of procedure shall not be considered to be an opposition for purposes of staying discovery. This section shall not apply to motions for partial summary judgment.

9.3. Preservation of Inherent Judicial Authority. Nothing in this section shall prevent the court from ordering or the parties from requesting that the proceedings be bifurcated to address or try distinct issues in sequence.

X. Discovery Procedure

10.1. Mandatory Disclosure. The parties agree to engage in voluntary disclosure of relevant facts which shall be completed by any party before that party may initiate discovery of any kind. For purposes of disclosure, each party shall produce at its own expense or make available for inspection and copying at the reviewing party's expense all non-electronic documents that support any claim or defense asserted by the party in the possession, custody, or control of that document. Each party also shall provide a list of all persons with relevant personal knowledge of any claim or defense; for any such person not able to be contacted through party counsel, the list shall include current or last known contact information. The parties also shall disclose no later than 60 days before any evidentiary hearing or trial all documents in a party's possession, custody, or control that such party will offer as evidence or use for cross-examination.

10.2. Scope of Discovery. The parties agree that the scope of permissible discovery shall be information and documents that are both relevant and material to the underlying dispute between the parties.

10.3. Non-Electronic Discovery Limits and Time for Response. The parties further agree to the following limits on non-electronic discovery based on the lesser of (a) the stated monetary consideration of the contract or (b) the amount claimed in the complaint or counterclaim (see Table 1 for summary chart). Where the value of the Dispute cannot be determined from the face of the contract, claim, or counterclaim, upon request of any party, the ELA Arbitrator shall decide the alleged value of the Dispute solely for purposes of determining applicable discovery limits. All discovery interrogatories, document requests, requests for admissions, and omnibus conditional discovery requests shall be responded to within 30 days after the date of service, with three additional days for service by mail, or such additional time as the parties may agree. If the day a response is required is

[Vol. 11: 125, 2010]

PEPPERDINE DISPUTE RESOLUTION LAW JOURNAL

a weekend or holiday, the response shall be due on the next following business day.

10.3.1. Interrogatories. Interrogatories propounded by any party shall not contain any instructions and shall not include any definitions other than shorthand expression of relevant parties, places, or events. No interrogatory shall contain multiple parts or subparts or consist of more than one sentence. All parties are entitled to one interrogatory seeking the name and contact information of all factual witnesses and one interrogatory seeking expert witness(es) information allowed by Rule 26(a)(2) of the Federal Rules of Civil Procedure or a comparable state rule of procedure, if applicable. The parties agree that each party shall be limited to the additional number of interrogatories specified below:

10.3.1.1. Disputes up to \$400,000: 5;

10.3.1.2. Disputes up to \$1,000,000: 10;

10.3.1.3. Disputes up to \$10,000,000: 15;

10.3.1.4. Disputes \$10,000,000 or more: 20, plus any additional found by the ELA Arbitrator to be necessary to prepare for dispositive motion or trial.

10.3.2. Requests for Production of Documents. Requests for Production of Documents shall not contain any instructions and shall not include any definitions other than shorthand expression of relevant parties, places, or events. No document request shall contain multiple parts or subparts or consist of more than one sentence. Document requests shall be deemed to exclude documents that exist in electronic form only, including emails, on the date the document request is made; electronic discovery shall be conducted exclusively in accordance with Section 12. Document requests may seek categories of documents relevant and material to the case. The parties agree that each party shall be limited to the number of requests specified below:

10.3.2.1. Disputes up to \$400,000: 7;

10.3.2.2. Disputes up to \$1,000,000: 14;

10.3.2.3. Disputes up to \$10,000,000: 21;

10.3.2.4. Disputes \$10,000,000 or more: 28, plus any additional found by the ELA Arbitrator to be necessary to prepare for dispositive motion or trial.

10.3.3. Requests for Admission. Requests for Admission shall not contain any instructions and shall not include any definitions other than shorthand expression of relevant parties, places, or events. No request shall contain multiple parts or subparts or consist of more than one sentence. The parties agree that each party shall be limited to the number of requests specified below:

10.3.3.1. Disputes up to \$400,000: 6;

10.3.3.2. Disputes up to \$1,000,000: 12;

10.3.3.3. Disputes up to \$10,000,000: 18;

10.3.3.4. Disputes \$10,000,000 or more: 24, plus any additional found by the ELA Arbitrator to be necessary to prepare for dispositive motion or trial.

10.4. Omnibus Conditional Discovery Requests. The parties may serve omnibus discovery requests on a conditional basis, consisting of a single document that includes interrogatories, document requests, and requests for admission, in which any interrogatory or document request shall be deemed to be withdrawn if a request for admission to which such interrogatory or document request corresponds is admitted. For purposes of the discovery limits, any interrogatory or document request that is withdrawn because a corresponding request for admission has been admitted shall not be counted toward the limit of discovery for such party.

XI. Deposition Practice and Witness Interviews

11.1. Depositions Generally. The parties agree that depositions may be conducted by audio visual means by any party upon written notice to all other parties at least one week before the scheduled deposition. Depositions shall not exceed four hours of examination by any party or counsel, excluding recesses agreed to by all counsel or suspension required for resolution of disputes by the ELA Arbitrator. The court reporter shall be

[Vol. 11: 125, 2010]

PEPPERDINE DISPUTE RESOLUTION LAW JOURNAL

responsible for determining the amount of time remaining for each party to conduct an examination and shall be requested to advise such party 30 minutes before the four-hour limit is reached. Counsel for any party may appear at any deposition by conference call or video conference and the party taking such deposition shall make accommodation for such calls or video appearances to occur. The parties agree that deponents shall have seven business days after the court reporter mails the transcript of their testimony to their counsel to review and submit any errata sheet signed by the deponent regarding such deposition testimony.

11.2. Number of Depositions Allowed. The parties agree that the number of depositions shall be limited by the amount in controversy as defined in Section 10.3, and that each party shall be permitted to initiate no more than the following number of depositions. For purposes of these limits, a deposition pursuant to Rule 30(b)(6) of the Federal Rules of Civil Procedure or comparable state rule of procedure shall be deemed to be one deposition regardless of how many witnesses are tendered by the party being deposed.

11.2.1. Disputes up to \$400,000: 2;

11.2.2. Disputes up to \$1,000,000: 4;

11.2.3. Disputes up to \$10,000,000: 6;

11.2.4. Disputes \$10,000,000 or more: 8, plus any additional found by the ELA Arbitrator to be necessary to prepare for dispositive motion or trial.

11.3. Informal Witness Interviews. In addition to depositions, counsel for any party shall be permitted to conduct informal witness interviews with any current or former employees of the opposing party or third persons by teleconference at which all counsel are invited to be present, provided that any counsel wishing to conduct an informal interview of a witness shall give written notice to counsel for all other parties at least seven business days before the interview, the interview is conducted by teleconference at which counsel for any party may dial in to participate, the conference call is audio recorded and the witness so advised at the outset of the interview, and the witness agrees at the outset of the interview to tell the

truth. Any witness who fails to agree to be recorded or to agree to tell the truth, or refuses to cooperate with the interview as determined by the ELA Arbitrator, may be subject to deposition by the inquiring party in addition to the limits on number of depositions described above. No counsel may interview a witness longer than 45 minutes, provided that any other counsel for different parties participating in the conference call also may interview the witness in turn for up to 45 minutes each. Counsel for witnesses or any party for whom the witness is currently or was formerly employed may briefly interject cautions to the witness on matters of privilege during any counsel's interview. Each party shall be permitted to initiate the following number of informal witness interviews:

11.3.1. Disputes up to \$400,000: 3;

11.3.2. Disputes up to \$1,000,000: 6;

11.3.3. Disputes up to \$10,000,000: 9;

11.3.4. Disputes \$10,000,000 or more: 12, plus any additional found by the ELA Arbitrator to be necessary to prepare for dispositive motion or trial.

11.3.5. Copy of Witness Interviews. Within seven business days after completion of the witness interview, the party initiating the witness interview shall provide a copy of the audio recording, either in analog or digital format, to all counsel who request it in writing or by email and to the witness.

XII. E-Discovery. Electronic discovery ("e-discovery") refers to the preservation, search, collection, and production of electronic documents. E-discovery includes both key word-based searches for electronic documents as well as requests for specific electronic documents.

12.1. General.

12.1.1. Scope. The parties agree that the scope of permissible e-discovery shall be documents both relevant and material to the underlying Dispute between the parties. The parties shall not be entitled to any e-discovery except as specifically set forth in Section 12. All e-discovery requests shall be responded to within 30 days after the date of service, with three additional days for service by mail, or such additional time as the parties may agree.

[Vol. 11: 125, 2010]

PEPPERDINE DISPUTE RESOLUTION LAW JOURNAL

12.1.2. Search Tools. To the extent necessary, parties shall conduct key word-based searches using any software tool or tools that are capable of searching searchable files and e-mails, including the contents of e-mail archive files (such as .PST and .NSF), attachments, and the contents of files compressed using common formats, such as ZIP, RAR, GZIP, LHZ and TAR. E-mails shall be searched with a tool or tools capable of searching the FROM, TO, CC, BCC, SENT, RECEIVED, and SUBJECT fields, the body of the e-mail, and any searchable attachments.

12.1.3. Document Retrieval. Specific electronic documents requested by a party may be retrieved in any manner at the sole discretion of the custodial party that does not alter the contents of the document. The retrieval may alter metadata with the exception of "created by" and "doc date."

12.1.4. Non-Searchable Files. Parties are under no obligation to make non-searchable files searchable. Parties shall not produce a non-searchable version of a document when a searchable version exists and can be accessed by the same custodian.

12.1.5. Format. Spreadsheets, or the exported contents of databases, shall be produced in native format, unless the native format would render the data not reasonably accessible because it would require software not licensed to the requesting party. In such case, the spreadsheet or database export shall be produced in an alternate searchable format that maintains the organization of the spreadsheet or database export to the extent possible. All other documents need not be produced in native format and, at the sole discretion of the custodial party, may instead be produced in alternate formats that are at least as searchable as the documents' native format.

12.1.6. Identification. An identification of a document's custodian shall be provided with each document or group of documents.

12.1.7. Preservation of Privileges and Work Product. The parties agree that the attorney-client privilege and work product doctrine and any other privileges recognized in the jurisdiction whose laws govern the substantive Dispute shall not be waived by disclosure of any privileged

information to any other party. Notwithstanding any such disclosure during e-discovery, the parties reserve the right to object and move to strike any privileged or work product-protected information to the court in connection with any submission to or introduction of evidence to the court. Nothing in Section 12 shall prevent the custodial party from objecting to the production of privileged documents or attorney work product. A party shall be under no obligation to withhold documents subject to privilege or work product protections prior to production, and the parties agree that a failure to withhold such documents prior to production shall not constitute a waiver of the applicable privilege or work product protections.

12.1.8. Protective Relief. To the extent a party believes that a request for electronic discovery is beyond the scope of discovery or made for an improper purpose, that party may submit a discovery motion seeking relief to the ELA Arbitrator.

12.2. Presumptions. It shall be presumed that:

12.2.1. Metadata. Metadata or slack space need not be searched or produced, with the exception of “created by” and “doc date.”

12.2.2. Reasonable Accessibility. Electronic repositories that are not reasonably accessible because of undue burden or cost need not be restored, searched, or produced. Examples of not reasonably accessible repositories include backup tapes that are intended for disaster recovery purposes and that are not searchable, legacy data from obsolete systems and not readable, and deleted data potentially discoverable through forensics.

12.2.3. Personal Digital Devices. Electronic information residing on PDAs, Smartphones, and instant messaging systems need not be searched, collected, or produced unless such repository is the only place where particular discoverable information resides.

12.2.4. Voicemail. Voicemail systems need not be searched, collected, or produced.

12.2.5. Foreign Privacy Laws. Repositories of documents subject to the European Union’s Data Protection Directive or other foreign laws restricting the processing or transfer of data to the United States for use in civil litigation (“Foreign Privacy Laws”) need not be searched and documents subject to Foreign Privacy Laws need not be produced.

[Vol. 11: 125, 2010]

PEPPERDINE DISPUTE RESOLUTION LAW JOURNAL

12.3. Overcoming Presumptions. A party seeking to rebut the presumptions set forth in Section 12.2 may submit a discovery motion to the ELA Arbitrator showing good cause why such discovery is essential to a claim or defense along with an explanation why the same or equivalent information cannot be found from a different source.

12.4. Preservation. Custodial parties shall take reasonable steps to preserve electronic documents that reasonably can be anticipated to be relevant and material to a Dispute.

12.4.1. Exception: Written Information Management Policy. Notwithstanding the above, to the extent an organization has a written information management policy, that organization may continue to follow that policy, including the destruction of documents in the ordinary course of business, with the exception of documents located in repositories accessible by a custodian. Such repositories must continue to be preserved during the pendency of the Dispute even if documents in such repositories were scheduled for destruction in the ordinary course of business unless, after a good faith investigation by the custodial party, a party has a good faith reasonable belief that no documents that are relevant and material to a known Dispute are located in a particular repository.

12.4.2. Exception: Permission of ELA Arbitrator. To the extent a custodial party believes that the preservation of a particular electronic repository is unreasonably burdensome, the custodial party can seek relief by motion to the ELA Arbitrator, with a specific showing of the burden that makes preservation unreasonable.

12.5. E-Discovery Limits. The parties agree to the following limits on e-discovery determined by the amount in controversy based on the lesser of (a) the stated monetary consideration of the contract or (b) the amount claimed in the complaint or counterclaim (see Table 2 for summary chart). Where the value of the dispute cannot be determined from the face of the contract, claim, or counterclaim, upon request of any party, the ELA Arbitrator shall decide the alleged value of the dispute solely for purposes of determining applicable discovery limits.

12.5.1. Document Requests for Specific Electronic Documents. Requests for Specific Electronic Documents shall not contain any

instructions and shall not include any definitions other than shorthand expression of relevant parties, places, or events. No request for electronic documents shall contain multiple parts and subparts or consist of more than one sentence. Requests for Specific Electronic Documents shall reasonably describe the specific electronic document that is sought. In the case of a database or spreadsheet, the Request shall further reasonably identify the specific tables or records requested. Requests for Specific Electronic Documents shall not seek broad categories of documents or require key word searches. To the extent a database subject to a Request for Specific Electronic Documents has a built-in search capability, the parties shall not be required to use any search tools to extract relevant records from the database other than that built-in capability. The parties agree that each party shall be limited to the number of requests specified below:

12.5.1.1. Disputes up to \$400,000: 4;

12.5.1.2. Disputes up to \$1,000,000: 7;

12.5.1.3. Disputes up to \$10,000,000: 15;

12.5.1.4. Disputes \$10,000,000 or more: 25, plus any additional found by the ELA Arbitrator to be necessary to prepare for dispositive motion or trial.

12.5.2. Document Requests for Key Word Searches. Requests for Key Word Searches of Electronic Documents shall include an identification of the custodians whose electronic repositories are to be searched, along with a single set of key words that will be searched in those repositories. Requests shall not contain any other instructions and shall not include any definitions other than shorthand expression of relevant parties, places, or events. No request for key word searches shall contain multiple parts and subparts or consist of more than one sentence.

12.5.2.1. General.

12.5.2.1.1. Designation of Custodian. Subject to the limitations set forth below, a party may designate any current or former employee or executive of another party as a custodian if there is a reasonable basis for believing that custodian has relevant documents.

12.5.2.1.2. Scope of Search. For each identified custodian, subject to the limitations of Section 12, searches shall be run in the

[Vol. 11: 125, 2010]

PEPPERDINE DISPUTE RESOLUTION LAW JOURNAL

Custodian's live and archived e-mail and work computer(s) (desktop and/or laptop). Searches also shall be run in any network locations that are associated with the custodian's work computer, including group shares, that, after a reasonable investigation by the custodial party, are determined to be reasonably likely to contain relevant and material information.

12.6.2.1.3. Limits of Search. The custodial party shall not be obligated to search an electronic repository if, after a reasonable investigation by the custodial party, it is determined to not be reasonably likely to contain relevant information, even though that electronic repository is accessible by the custodian.

12.5.2.1.4. Key Words. Key words shall consist of words or Boolean phrases with proximity believed to be reasonably likely to return a reasonable volume of relevant documents. A key word shall not include a word that is not substantively related to the dispute (such as "and"). Key words shall not include the name of a product, a party, or a current or former employee or executive of a party, but may include these words in combination with other key words. A Boolean combination of key words shall count as a single key word. Key words may include a reasonable use of wild cards and root extenders.

12.5.2.1.5. Number of Key Word Search Requests. A party shall make no more than two requests for key word searches, which may include in total the key word search limits described below.

12.5.2.1.6. Protective Orders. A custodial party that believes that a requested key word or custodian was selected for an improper purpose, or would result in an unreasonable volume of documents, after consultation with opposing counsel to attempt to resolve the issue by agreement, can file a motion with the ELA Arbitrator requesting relief. Such motion shall include the results of sampling, or other evidence, showing the unreasonableness of the requested key word or custodian.

12.5.2.2. Key Word Search Limits. The parties agree that each party's Requests for Key Word Searches shall be limited as specified below:

12.5.2.2.1. Disputes up to \$400,000: No Requests for Key Word Searches allowed.

12.5.2.2.2. Disputes up to \$1,000,000: Requests for Key Word Searches may be sent in the form of an e-document request as follows: Identifying no more than 4 custodians of information; for a period of time no more than six months, which may include multiple periods of time aggregating to no more than six months; and involving not more than six key words likely to lead to the discovery of information both relevant and material to the underlying dispute.

12.5.2.2.3. Disputes up to \$10,000,000: Requests for Key Word Searches may be sent in the form of an e-document request as follows: Identifying no more than 8 custodians of information; for a period of time no more than 1 year, which may include multiple periods of time aggregating to no more than 1 year; and involving not more than 18 key words likely to lead to the discovery of information both relevant and material to the underlying dispute.

12.5.2.2.4. Disputes more than \$10,000,000: Requests for Key Word Searches may be sent in the form of an e-document request as follows: Identifying no more than 16 custodians of information; for a period of time no more than 3 years, which may include multiple periods of time aggregating to no more than 3 years; involving not more than 40 key words likely to lead to the discovery of information both relevant and material to the underlying dispute; and upon an assertion that additional requests are necessary to discover information both relevant and material to the underlying dispute, the ELA Arbitrator may allow additional e-discovery at the request of any party.

XIII. Discovery Disputes and Cost-Shifting

13.1. Exclusive Authority of ELA Arbitrator. Any discovery-related motion, including motions for protective orders, motions to compel, motions for sanctions, and motions regarding e-discovery, shall be served on all other parties and then sent to the ELA Arbitrator without filing in court. The ELA Arbitrator shall invite any opposition to be submitted in writing and then shall convene a hearing at which all interested parties may be heard. After the hearing, the ELA Arbitrator shall enter an order regarding discovery, including the presumption of an award of attorneys' fees to the prevailing party in accordance with Section 13.2., which shall have the force of an arbitration award.

[Vol. 11: 125, 2010]

PEPPERDINE DISPUTE RESOLUTION LAW JOURNAL

13.1.1. Exception: Non-Party Witness Subpoenas and Compelled Testimony. In the event a non-party witness will not voluntarily submit to discovery in accordance with this ELA, the party seeking discovery may initiate subpoenas and seek judicial orders to compel compliance with such discovery.

13.1.2. Exception: Preclusive Motions. Nothing in this ELA shall preclude any party from seeking a judicial order to preclude from hearing or trial any discovery that was not timely disclosed in accordance with the requirements of this ELA, in addition to damages and costs to be awarded by the ELA Arbitrator.

13.2. Attorney Fee Shifting. Unless the ELA Arbitrator finds that the discovery dispute was (a) reasonable and (b) not susceptible of voluntary resolution between counsel, the ELA Arbitrator shall determine and award attorneys' fees incurred by the party who prevailed in any discovery dispute to be paid by the opposing party. In making the determination whether a dispute was susceptible of voluntary agreement by counsel, the ELA Arbitrator shall consider whether any counsel engaged in lack of civility or professional courtesy. The parties agree that the ELA Arbitrator shall award damages in the amount of increased costs of litigation as well as reasonable costs and attorneys' fees to any party who prevails in a hearing before the ELA Arbitrator to enforce the terms of their ELA.

XIV. Further Agreement of Parties

The parties may agree in writing at any time to additional or different procedures consistent with the purpose of this ELA.

TABLE 1: PAPER DISCOVERY LIMITS					
	Interrogatories	Document Requests	RFAs	Depositions	Interviews
Up to \$400,000	5	7	6	2	3
Up to \$1,000,000	10	14	12	4	6
Up to \$10,000,000	15	21	18	6	9
\$10,000,000 or more	20+	28+	24+	8+	12+

[+ = Additional found by ELA Arbitrator to be necessary to prepare for dispositive motion or trial.]

TABLE 2: E-DISCOVERY LIMITS				
	Requests for Specific E-Documents	Key Word: Custodians	Key Word: Time Period	Key Word: Number
Up to \$400,000	4	0	0	0
Up to \$1,000,000	7	4	6 months	6
Up to \$10,000,000	15	8	1 year	18
\$10,000,000 or more	25 +	16 +	3 years +	40 +

[+ = Any additional found by ELA Arbitrator to be necessary to prepare for dispositive motion or trial.]