

Alternative Dispute Resolution

Practical application of alternative dispute resolution techniques in business world as cost-saver

BY MATTHEW J. GALLO*

I shall share with you some experiences and observations on alternative dispute resolution techniques and their practical application to the business world. Although these techniques cover a range from arbitration, mediation, conciliation, negotiation, hiring a private judge, expert fact finding, mini-trial, and settlement conference, I will focus on the settlement conference and the role of the private judge.

AWARENESS

Let me begin by noting two points. Point one - alternative techniques are evolving within the legal profession through academic sources, through seminars, through professional journals, and word-of-mouth reports within corporate law departments. They will continue to evolve.

Point two - These techniques are simultaneously evolving in the business community. Increasingly, management is aware of its potential role in solving business problems, and increasingly, the high cost of litigation is making alternative approaches more attractive.

With this awareness, managements are coming to see contract problems as matters they can expedite and solve, and they are beginning to see the real value of their technical expertise, their negotiating skills, and their personal involvement. Their presence in negotiations often permits a flexibility that corporate attorneys would not assume on their own. Therefore, it often results in faster, lower-cost solutions and greater satisfaction with the results.

OPPORTUNITY

Our role as attorneys and licensing executives should mean we actively search out opportunities for applying alternative solutions and bringing this flexibility and expertise into settlements. To me, this means making such alternatives part of our arsenal of remedies. Instead of just referring a case to trial counsel for litigation, either by way of defense or pursuit of a claim, we now have effective ways of getting the *businessmen* back to the negotiating table even after litigation has started.

Over the past few years, Standard Oil of Indiana and its Amoco subsidiaries have utilized such alternatives to litigation as arbitration, negotiations, mini-trials, settle-

ment conferences, and the use of a private judge. As I mentioned, for the purpose of this presentation, we will concentrate on settlement conferences and the use of a private judge. The differences between the various dispute resolution techniques are reflected on Exhibits A and B. As you will note, settlement conferences and the use of a private judge afford the benefits of informality, privacy, and a nonbinding process.

Let's begin with the traditional approach to negotiations. These negotiations are usually conducted by attorneys in conjunction with litigation. These usual negotiated settlements are often conducted on the courthouse steps with the judge and jury standing by. Settlements are made out of uncertainty and apprehension, rather than out of fairness and a desire to resolve a problem. Negotiations are made at a time when most discovery has been completed and expenses incurred. A primary characteristic of these settlements is the frustration and dissatisfaction both parties often continue to feel for some time.

A settlement conference such as I'm describing, on the other hand, is conducted in privacy in a relatively informal, businesslike atmosphere, without the pressures of the courthouse - and usually at the early stages of any dispute before enormous sums of money have been spent on discovery.

The presentations and general negotiations are conducted by the businessmen - and not by the lawyers. This preserves the business relationship between the parties and allows the businessmen the opportunity to settle their own disputes.

I realize that many attorneys believe that nothing is more dangerous to the client than acting as his own lawyer. In the more complex legal aspects of a transaction, there is some merit in that point of view. But please keep in mind that most parts of most contracts are negotiated by businessmen. They are highly skilled at dealing with complicated contracts running into the millions of dollars.

Therefore, negotiating the settlement of a disputed part of a contract should not present a problem, provided: a) neither side takes it as a sign of weakness, and b) they both enter into such negotiations in good faith in an endeavor to resolve a dispute in a fair, businesslike manner. The lawyers' part as such is to create the forum and get the businessmen back to the negotiating table.

CONTRACT LANGUAGE

The place for lawyers to set the stage for these alternate techniques is in the language of the original contract. We do some of that right now. For example, arbitration clauses are very commonplace and accepted by industry in many different types of contracts.

That was a big step forward, and there is no reason why

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similar contractual provisions should not be inserted in contracts for other dispute techniques, even if the results are not binding unless so agreed upon in advance. Such contractual requirements would force the other side to sit and listen to your side of the controversy before costly litigation is begun. Attached as Exhibits C, D, and E are suggested contractual provisions from the very general to the specific such as might be used for a minitrial.

Until these alternate dispute techniques become more familiar and acceptable, such as in the case of arbitration clauses, some skeptical lawyers may reject them as being too uncertain or ambiguous. In reality, they are no more uncertain or ambiguous than conventional litigation, and they're cheaper. Businessmen should insist on including a provision for such techniques in contracts, and lawyers should enhance their position as counselors by drafting such provisions for inclusion in appropriate contracts.

SETTLEMENT CONFERENCE

Let me illustrate what I've just been discussing with some specific instances at one of Standard Oil's Amoco operating subsidiaries.

Domestic Construction Contract

Not very long ago, Amoco Oil Company had a dispute with a contractor at our Whiting, Indiana, refinery. The contract called for replacement of a number of steam and product pipelines. It was important that the work be handled around other refinery activities so as not to interfere with normal refinery operations.

Due to a number of factors such as weather, the performance of other contractors, and misunderstandings as to the sequence of work, the general contractor fell behind in his work. He and his subcontractor incurred alleged delay losses both in the utilization of equipment and manpower. A claim in excess of \$750,000 was made against Amoco.

When the project engineers on both sides were unable to resolve the issue as to "extras," it appeared that litigation would be the only recourse toward resolution. However, in the course of discussion, the lawyers proposed a settlement conference whereby each side would be given the opportunity of presenting its best case at separate meetings to the management of the other party.

Lawyers as such were not to be in attendance, and clarification questions could be asked. Unfortunately, the attorney on the other side had a dual position and insisted on being in attendance. This intrusion almost proved to be fatal to the peaceful settlement of the problem.

The general contractor hired a nationally known accounting firm to make its presentation to Amoco's Engineering Department with graphs, contract documents, and statistical analysis of the job. We were given a book about five inches thick setting forth the entire theory of their claim and a complete breakdown of damages.

Several weeks later, Amoco made its rebuttal presentation which was prepared by a consulting engineering firm engaged by Amoco, which analyzed the claim in detail and prepared a critical path flow chart of the work's progression and the effects of the alleged interference. A settlement proposal was also prepared.

Although Amoco's initial settlement offer was rejected, the real problem came from the attitude of the lawyer for the other side. It was evident from the comments I later

received that he was looking at the problem from a litigation point of view, rather than as a business problem to be solved. Quite frankly, I also believe he took advantage of the fact that no other lawyers were present to counter his comments.

The problem was quickly resolved by our advising the vice-president of the general contractor that we were prepared to negotiate a final settlement provided it was negotiated by top management only. No attorneys or consultants were to be present. The businessmen met as planned, and in one afternoon, the dispute was settled for a sum considerably less than the initial demand, but more than our initial offer. The settlement conference proved valuable, as it gave each side a chance to clearly understand the position of the other party and evaluate the facts. We feel we saved a great deal in time, consulting fees, and attorney expense.

International Dispute

In a second situation, Amoco Oil Company had retained an Italian manufacturer to fabricate certain large vessels for its Texas City refinery. The contract was handled through a consulting engineering firm. Due to strikes and other problems, the work fell behind schedule.

Both business and legal solutions were tried: A parade of engineers visited the plant in Italy and made numerous suggestions for improving productivity. The contract was modified to provide for liquidated damages in the event of further delays.

In spite of these steps, further delays did occur, and Amoco withheld from payment the maximum amount fixed by the contract. A dispute arose as to the amount withheld in that the manufacturer alleged that the delays were caused by strikes beyond its control.

A unique situation arose in that most of the strikes were on a rotating basis of two hours for each trade union. The manufacturer claimed that the effect was the same as if they were all on strike for a full day, because the entire assembly line was effectively shut down. Amoco took the position that only strikes in excess of four hours were to be counted as stated in the contract.

A lawsuit was threatened with each side feeling that the other had been unfair. The manufacturer threatened a lawsuit in Italy, whereas we were thinking of filing an action in the United States. In either event, it was going to be costly to both sides with witnesses and lawyers taking trips abroad.

Just getting at the facts and issues would take time. To shortcut what looked to be a long, drawn out affair, I suggested to the other side that a meeting be convened in Chicago where each side would have an opportunity to present its views of facts and issues in an uninterrupted fashion followed by a question and answer session and then negotiations. The manufacturer agreed that they would attend such a meeting without the aid of counsel. I did attend, but only as moderator with no voice as to facts or law.

The meeting went very well with both sides debating the issue of what was intended by the use of the word "strikes" in the *force majeure* provision. Amoco spoke of its losses caused by the delay in completion of the vessels, and we learned for the first time that the manufacturer had incurred comparable expenses in putting their men on an overtime schedule at premium pay to partially make up for the strike delays.

Since there was a maximum to the liquidated damages, it would have been cheaper for them to work straight time and pay the maximum. Instead, they incurred considerable overtime expenses far in excess of the maximum liquidated damage to make up for lost time.

Although the parties got a clearer understanding of the problems and expenses incurred by the other, they were unable to reach settlement. A final letter of appeal from the president of the manufacturing company to the president of Amoco did, however, cause the parties to make one last effort by telephone which proved successful.

It had really helped to meet the other side face-to-face and listen to their position. For one thing, we found out that they acted in good faith and had done their best. As businessmen, our management respected that. So the businessmen — not the lawyers — negotiated the settlement. Liquidated damages were cut in half, releases were exchanged, and both parties avoided what could have been a costly lawsuit.

Private Judge

Amoco's experience with the use of a private judge is limited to a single, but successful, case. A dispute had arisen over a transfer tax credit that Amoco acquired from a third-party firm. For one reason or another, the transferred credit could not be used, and according to the agreement, as we understood it, Amoco was to immediately receive a full refund of its unused investment.

The other side had other ideas. They felt a full refund was to be made — but a year later. If payment was to be made immediately, it would be only on a discounted basis. There was no disagreement of facts, but only in the interpretation of the contract language and the tax laws.

Under conventional procedures, it was ripe for a declaratory judgment action. But no matter how friendly such an action would be, it would place the parties in an adversary position and eliminate the businessman's flexibility. Rather than go to the expense and trouble of litigation, the parties agreed to submit the matter to a neutral third-party attorney for final decision.

Under the agreed terms, the retained attorney would act as the judge. Briefs of an informal nature would be submitted by the in-house counsel of both parties. Costs of hiring the neutral lawyer would be shared regardless of outcome. By letter agreement, the parties agreed to be bound by the judge's decision. Although the decision was favorable to Amoco, the important point is that the case was settled without formal litigation.

In this same view, a retired judge could have been retained, and the parties could have presented live

witnesses if the facts had been in dispute. For a quick judicial-type resolution, the hiring of a private judge, whether he be a neutral lawyer or a retired judge, has a great deal of potential. Unfortunately, a binding decision would exact the price of lost flexibility on the part of the businessmen. That disadvantage could be compensated for by providing the decision be advisory rather than binding, and the nonbinding resolution would still leave it up to the businessmen to reach final settlement.

BENEFITS

Alternate dispute resolution techniques offer a number of direct and indirect benefits. Four of these would be enjoyed by the clients and two by the legal profession.

From a company's standpoint: One, there are the obvious direct savings in the cost of litigation, such as attorney fees, witnesses expense, expert testimony, travel expense, etc.

Two, it provides a private means of disposing of a dispute without creating a precedent of bitter feelings which could affect future business relations.

Three, there is the indirect savings in the time and productivity of corporate personnel and in-house attorneys. This is important as litigation is very time-consuming, and normal business activities have to be set aside in preparation for trial.

And four, it provides a vehicle for direct involvement of the businessmen and their expertise and flexibility in the settlement process. Too often their role has been limited to final approval of the settlement negotiated by the attorneys.

From the standpoint of our profession, it enhances the image of attorneys as seeking resolution of disputes, rather than prolonging litigation for their own benefit. By itself, this advantage is worthwhile because it promotes a better relationship between attorneys and their clients.

Finally, even at their least successful, these approaches offer opposing attorneys opportunity to get a preview of the other party's case. Thus, issues can be narrowed, witnesses can be evaluated, and both sides can make an informal judgment as to the real merits of their cases.

In conclusion, nobody would argue that we have outgrown conventional legal procedures, but the cost of today's litigation in both money and time is so great that society is looking for ways to secure quicker, lower-cost resolutions to legal problems. I suggest that in the long run, nothing the profession could do would enhance the role of the lawyer more than actively fostering the fullest range of dispute-solving techniques. The benefits are worth the effort.

APPENDIX A
COMPARISON OF DISPUTE RESOLUTION PROCESSES*
"Hybrid" Dispute Resolution Processes

PRIVATE JUDGING	NEUTRAL EXPERT FACT-FINDING	SETTLEMENT CONFERENCE
Voluntary	Voluntary or nonvoluntary under FRE 706	Voluntary or mandatory
Binding but subject to appeal and possibly review by trial court	Nonbinding but results may be admissible	Binding or nonbinding
Party-selected third-party decision-maker; may have to be former judge or lawyer	Third-party neutral with specialized subject matter expertise may be selected by the parties	Judge, other judge, or third-party neutral selected by parties
Statutory procedure (see, e.g., Cal. Code Civ. Proc §638 et seq.) but highly flexible as to timing, place, and procedures	Informal	Informal, off-the-record
Opportunity for each party to present proofs supporting decision in its favor	Investigatory	Presentation of proofs may or may not be allowed
Win/lose result (judgment of court)	Report or testimony	Mutually acceptable agreement sought; binding conference is similar to arbitration
Findings of fact and conclusions of law possible but not required	May influence result or settlement	Agreement usually embodied in contract or release
Adherence to norms, laws, and precedent	Emphasis on reliable fact determination	Emphasis on resolving the dispute
Private process unless judicial enforcement sought	May be highly private or closed in court	Private process but may be discovered

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APPENDIX B COMPARISON OF DISPUTE RESOLUTION PROCESSES*

ADJUDICATION	ARBITRATION	MEDIATION/ CONCILIATION	TRADITIONAL NEGOTIATION	MINI-TRIAL
Non-Voluntary	Voluntary unless contractual or court centered	Voluntary	Voluntary	Voluntary
Binding	Binding (usually)	Nonbinding	Nonbinding (except through use of adjudication to enforce agreement)	Nonbinding (except through use of adjudication to enforce agreement)
Imposed, third-party neutral decision-maker; with no specialized expertise in dispute subject	Party-selected third-party decision-maker; usually with specialized subject expertise	Party-selected outside facilitator, often with specialized subject expertise	No third-party facilitator	Third-party neutral advisor often with specialized subject expertise
Highly procedural; formalized and highly structured by predetermined, rigid rules	Procedurally less formal; procedural rules and substantive law may be set by parties	Usually informal, unstructured	Usually informal, unstructured	Less formal than adjudication and arbitration but procedural rules and scope of issues may be set by the parties and implemented by neutral advisor
Opportunity for each party to present proofs supporting decision in its favor	Opportunity for each party to present proofs supporting decision in its favor	Presentation of proofs less important than attitudes of each party; may include principled argument	Presentation of proofs usually indirect or non-existent; may include principled argument	Opportunity and responsibility to present proofs supporting result in its favor
Win/lose result	Compromise result possible (probable?)	Mutually acceptable agreement sought	Mutually acceptable agreement sought	Mutually acceptable agreement sought
Expectation of reasoned statement for particular interest	Reason for result not usually required	Agreement usually embodied in contract or release	Agreement usually embodied in contract or release	Agreement usually embodied in contract or release
Process emphasizes attaining substantive consistency and predictability of results	Consistency and predictability balanced against concern for disputants' relationship	Emphasis on disputants' relationship, not on adherence to or development of consistent rules	Emphasis on disputants' relationship, not on adherence to or development of consistent rules	Emphasis on sound, cost-effective and fair resolution satisfactory to both parties
Public process; lack of privacy of submissions	Private process unless judicial enforcement sought	Private process	Highly private process	Highly private process

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APPENDIX C

DISPUTE RESOLUTION

Notwithstanding any other provision to the contrary herein contained, any controversy or claim arising out of or relating to this Agreement or breach thereof shall be settled first by presentation of the positions of each party being made to the authorized representatives of the other party (non-lawyers) in the presence of an agreed-upon neutral legal advisor, if desired, so that such representatives may confer with each other in an endeavor to amicably resolve the dispute. If the parties are unable to agree, the dispute shall be settled by arbitration in accordance with the rules of the American Arbitration Association or such other rules as it may designate. Any arbitration proceeding shall be held in Houston, Texas, U.S.A. This arbitration agreement shall be enforceable and judgment upon any award rendered by all or a majority of arbitrators may be entered in any court of any country having jurisdiction, and such award shall be final and binding upon the parties.

APPENDIX D

DISPUTE RESOLUTION

In the event of any dispute, controversy, or claim arising out of or relating to this Agreement which may give rise to litigation or termination of the Agreement, it is hereby agreed that no such action shall be taken unless the party intending to take such action first affords the other party an opportunity to meet so that each party may present its position to a senior authorized representative of the other in an endeavor to reach an amicable resolution of the matter.

Either party may initiate the meeting by giving written notice to the other of the controversy and its desire to convene a meeting pursuant to these provisions specifying five (5) dates for the meeting, no earlier than ten (10) days after receipt of such notice by the other party nor later than twenty (20) days after such notice is received. The notice shall also specify the name and title of the senior representative who will attend the meeting. The receiving party shall within five (5) days of receipt of such notice notify the initiating party in writing of the name and title of its senior representative and select one of the days so specified for the meeting. Any such meeting shall be held either at _____ or at _____ offices in _____, as elected by the initiating party. The senior representatives so selected shall be businessmen not directly involved in the controversy. Attorneys shall not be used as the representative. If the parties so desire, they may agree on a neutral legal advisor to attend such meeting and give whatever legal advice or advisory opinions as are requested of him by either party. The costs for such legal advisor is to be borne equally by the parties.

Each party shall be given equal time at the meeting to make an uninterrupted presentation of its position to the senior representatives of both parties in whatever manner such party deems advisable, including oral presentations by attorneys, experts, or by written documentation or visual aids. The parties shall then be given equal time to rebut the presentation of the other party, ask questions of its witnesses, or clarify its position. Rebutted presentations and the questioning of all witnesses shall be done by the businessmen and not by their attorneys.

At the conclusion of the presentation and rebuttal period, the senior representatives of each party together with the neutral legal advisor, if any, shall attempt to negotiate a resolution. No attorneys except for the neutral advisor shall be present during this negotiating session. The senior representatives may agree to extend such negotiations to another day or location. The neutral legal advisor may render nonbinding opinions assessing the strength and weaknesses of each party's case. No record shall be made of the proceeding.

If the parties are unable to reach agreement at said meeting or any extensions thereof, the parties shall be free to avail themselves of their legal remedies including but not by way of limitation, litigation, and termination of the Agreement, but at their own risk.

APPENDIX E

Union Carbide's Draft Agreement To Use Mini-Trial*

Editor's note: The following document is a draft (using fictitious names) of proposed ground rules for using a mini-trial to resolve a dispute over how to apportion damages that Union Carbide and another company might be required to pay in an environment tort suit now pending. The other company supplies ingredients for a product that Union Carbide manufactures and that has allegedly caused personal injury.

THIS AGREEMENT is made as of _____, 1982, between Butler Corporation ("Butler") and Brenner Corporation ("Brenner") (hereinafter collectively referred to as "Parties").

As part of this Agreement, the Parties desire to recite certain background information, so that persons who may subsequently read and interpret this Agreement (such as neutral advisors, management representatives, or counsel for the Parties) may understand the motive and intent of the Parties, and be better able to interpret its provisions, should any uncertainty arise regarding its meaning or the intent of any of its terms.

A. This Agreement is not intended to prevent or impede, nor shall it be applied so as to prevent or impede, John and John Doe (the "Claimants") from obtaining a just determination of their claims in the matter of *John and Jane Doe v. Butler Corporation*, Court of Common Pleas, Philadelphia, March Term 1982, No 1400, (the "Action").

B. The claims of the Claimants involve "AZ" herbicide or its individual components "A" and "Z", and possibly other herbicides. Brenner markets and supplies "Z" to Butler. Butler markets "A" individually and also formulates it in combination with "Z" to produce "AZ".

C. The claims asserted aggregate in excess of twenty-thousand dollars and involve assertions by the Claimants of significant injuries alleged to have resulted from the exposure to "AZ".

D. The Parties believe that they have not individually or collectively caused any injury or loss to the Claimants. However, the Parties recognize that, given the uncertainties of litigation, it is difficult to ascertain or to predict the outcome of the Action.

E. The Parties wish to provide for a means to determine a fair apportionment of the costs for defense of the Action, as well as for any settlements, or judgments in the event that the trier of fact returns a verdict against either of them.

NOW THEREFORE, the Parties agree as follows:

1. DEFINITIONS

As used herein, in addition to the terms previously defined, the terms listed below have the meanings specified:

a. "Defense" shall mean the legal representation of Butler in and with respect to the Action.

b. "Costs of Defense" shall mean and include, without limitation, counsel fees and disbursements, witness fees, experts' fees, and similar out-of-pocket expenses.

c. "Dollar Amount" of a Final Judgment shall mean, and includes, all sums awarded in a Final Judgment to the Claimants including attorneys fees, costs (for trial and appellate review), and interest less any sums in satisfaction thereof paid by persons other than on behalf of Butler.

d. "Final Judgment" shall mean a judgment entered by the trial court after trial or summary judgment on the issues of liability and damages, which becomes final (i) after completion of proceedings for direct review or appeal thereof, or (ii) after expiration of the time to obtain initial or further direct review or appeal. The Final Judgment shall be binding on each of the Parties.

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e. "Settlement" shall mean any disposition of a claim by, or on behalf of, Butler by agreement with any Claimant occurring after the date of this Agreement, whether before or after trial. The amount paid in Settlement of a claim shall mean monetary consideration provided by Butler pursuant to such an agreement.

f. "Mini-trial" shall mean a compulsory, informal information exchange meeting of management representatives for the Parties before a mutually selected neutral advisor during which the Parties will have the opportunity and responsibility through counsel to orally present their best case on the specific issues of (i) the apportionment of liability for and reasonableness of the Settlement or (ii) the apportionment of liability for the Dollar Amount of the Final Judgment, and/or (iii) regardless of whether any money is paid by Butler in Settlement or as a result of an adverse Final Judgment, for the apportionment of liability for and reasonableness of the Costs of Defense of the Action.

2. ALLOCATION OF COST OF DEFENSE AND JUDGMENT

a. Butler shall advance the Costs of Defense of the Action, provided, however, that the issue of apportionment between the Parties of liability for the Costs of Defense shall be submitted for resolution to the compulsory Mini-trial, as more fully described in Section 8 of this Agreement.

b. If a Final Judgment is entered against Butler or in the event of the Settlement of the Action, each of the Parties shall advance in satisfaction half of the Dollar Amount thereof; provided, however, that the issue of the apportionment between the Parties of liability for the Dollar Amount of the Final Judgment or of liability for or reasonableness of Settlement shall be submitted for resolution to the compulsory Mini-trial, as more fully described in Section 8 of this Agreement.

3. RESPONSIBILITY FOR DEFENSE

Butler alone shall have the right and the responsibility to conduct and to direct the Defense. Butler shall keep Brenner reasonably informed as to the status of the Defense of the Action as well as to all significant developments with respect to the Defense of the Action. Brenner shall not have the right to conduct and/or to direct the Defense of the Action.

4. SETTLEMENT BY A PARTY

a. Butler alone shall have the right and authority to settle the claims of the Claimants in the Action. Before Butler settles in whole or in part any of the claims, it shall give written notice to Brenner of all of the terms of the Settlement. Brenner shall not have the right to veto the decision of Butler to settle the claims.

b. Butler shall not agree, as part of any Settlement, to cooperate with, or provide to the Claimants documents or information relating to "A", "Z", or "AZ" to any extent exceeding such disclosure obligations under the Pennsylvania Rules of Civil Procedure.

5. PROCEDURE IN THE EVENT OF SETTLEMENT OR ENTRY OF FINAL JUDGMENT

a. Within fifteen (15) days after the entry of a Final Judgment in favor of Butler or of any of the Claimants in the Action, or of the Settlement of the Action, each of the Parties shall deposit an amount equal to its obligations under Section 2.b. hereof in an escrow account with the law firm of Montgomery, McCracken, Walker & Rhoads, Three Parkway, Twentieth Floor, Philadelphia, PA 19102 (the "Custodian").

b. When the Dollar Amount of any Final Judgment or Settlement has been deposited with the Custodian, it shall have authority to withdraw the amount required to satisfy the Final Judgment or Settlement and pay the Claimants said amount against entry of a satisfaction thereof.

c. In the event either of the Parties fail to deposit with the Custodian its share of the Dollar Amount of any Final Judgment or Settlement, the other Party shall make up the difference so that the Dollar Amount of the Final Judgment or Settlement may be paid promptly. In such event, each Party shall be entitled to interest on its proportionate share of the amount due from the defaulting Party at the rate of eighteen percent (18%) per annum until paid.

6. WITNESSES AND DOCUMENTS

a. In an effort to minimize the costs of litigation, Brenner commits and represents to Butler that in the Defense of the Ac-

tion it will extend reasonable cooperation to Butler. Subject to the provisions of paragraph c. of this Section, such cooperation and assistance shall include, but shall not be limited to, the sharing of investigation reports, reports and analyses of experts, photographs, technical information, and similar materials. Brenner will upon request use its best efforts to make its present and former employees available to Butler for interview and consultation prior to trial, and for testimony at trial.

b. Butler commits and represents to Brenner that upon request and at the expense of Brenner and subject to the provisions of paragraph c. of this Section, it will make any documents and other tangible things produced by it to the Claimants available to Brenner for inspection and copying.

c. The exchange, sharing, or disclosure by the Parties, of any and all documents and information will be subject (i) to the successful negotiation by the Parties of an acceptable arrangement, or (ii) if negotiations are unsuccessful, to the entry of an appropriate order of court, regarding the protection of proprietary or other confidential information.

7. EVIDENTIARY CONSIDERATIONS AND JOINDER OF ADDITIONAL DEFENDANTS.

a. With respect to the Action, Butler commits and represents to Brenner that it will not seek to join Brenner as an additional defendant; it will not seek to have or cooperate in having either Claimant name Brenner as a defendant or additional defendant; and it will not be the voluntary proponent of any evidentiary material, either during discovery or at trial, which it recognizes will assist the Claimants to obtain a judgment against Brenner. This provision shall not be construed to provide or suggest that Butler shall destroy, conceal or attempt to conceal any evidence relevant to the Action, or that Butler will refuse to produce any discoverable material upon the proper request of any party to the Action, or that Butler shall do, perform or sanction any act or conduct which violates any rule of court, or that Butler shall attempt to have its counsel violate any provision of the Code of Professional Responsibility with regard to the prosecution of the Action.

b. In the event that Brenner is joined as a defendant to the Action it is understood and agreed that the Parties will no longer be bound by this Agreement and that the Parties in good faith will consider entering into such other and further agreements as may be appropriate under the circumstances and consistent with the spirit of this Agreement, including but not limited to the concept of Mini-trial.

8. MINI-TRIAL

a. After Settlement of the claims, or after Final Judgment of the claims, each of the Parties shall submit to a compulsory Mini-trial the issues of (i) the apportionment of liability for and reasonableness of the Settlement or (ii) for the liability for the Dollar Amount of the Final Judgment, and/or (iii) regardless of whether any money is paid by Butler in Settlement or as a result of an adverse Final Judgment, for the apportionment and reasonableness of the Costs of Defense. The fact that such issues will be heard at the Mini-trial shall not relieve either of the Parties of the obligation to make any payment due hereunder.

b. The purpose of the Mini-trial is to inform management representatives for the Parties of the theories, strengths and weaknesses of the Parties' respective positions so that the Parties may amicably resolve the disputes at issue.

c. The Mini-trial shall be conducted as follows:

(1) Business representatives of each of the Parties empowered to decide the issues herein described will attend the Mini-trial to be conducted for one (1) business day within sixty (60) days after Settlement is reached or Final Judgment is entered, at a mutually convenient location. In addition, an individual mutually selected by counsel for the Parties will attend as a "neutral advisor."

(2) The fees and expenses of the neutral advisor will be borne equally by the Parties. Each of the Parties otherwise will pay its own costs.

(3) The neutral advisor will be provided with copies of this Agreement. Neither of the Parties nor anyone acting on its behalf shall unilaterally approach contact or communicate with the neutral advisor.

(4) Shortly after appointment of the neutral advisor, each of the Parties shall in good faith attempt to agree to produce

documents requested by the other Party in as expeditious a manner as possible. The production of documents shall be subject to the successful negotiation by the Parties of an acceptable arrangement regarding the protection of proprietary or other confidential information. In the event that after the mini-trial the Parties submit their disputes to litigation, the Parties shall in good faith attempt to agree to the entry of an appropriate protective order with respect to the documents so produced. The neutral advisor will be required to be a party to any protective order or confidentiality agreement.

(5) Shortly after appointment of the neutral advisor, mutually agreed upon source material will be jointly sent to the neutral advisor to assist him/her in familiarizing him/herself with the basic issues of the case. Seven (7) days before the Mini-trial is to be held, the Parties will exchange all exhibits they plan to use at the Mini-trial. Shortly before the scheduled Mini-trial, if the neutral advisor so suggests and if the Parties agree, the neutral advisor may confer jointly with counsel for the Parties to resolve any outstanding procedural questions. If the neutral advisor wishes to consult with the Parties' technical experts on substantive issues prior or after the meeting, he/she may outline the general areas of inquiry and, on agreement by the Parties, the neutral advisor may submit written questions to the Parties' technical experts.

(6) Within three (3) days before the Mini-trial is to be held, the Parties shall exchange and submit to the neutral advisor introductory statements which are not to be longer than ten (10) 8 1/2" x 11" double-spaced pages.

(7) In the event a Settlement is reached in the Action, only the following issues shall be considered at the Mini-trial:
a. the reasonableness of the Settlement;
b. the apportionment of liability between the Parties for the Settlement; and
c. the apportionment and reasonableness of the Costs of Defense

In the event a Final Judgment is entered in the Action, only the following issues shall be considered at the Mini-trial:
a. The apportionment of liability between the Parties for the Dollar Amount of the Final Judgment, if adverse; and
b. the apportionment and reasonableness of the Costs of Defense.

(8) The presentations at the Mini-trial will be informal, the time for which presentations will be equally divided between the Parties. Rules of evidence will not apply. In addition to asking clarifying questions, the neutral advisor will not preside like a judge or arbitrator, nor have the power to limit the scope or substance of the Parties' presentations. The presentations will not be transcribed or recorded, but either of the Parties may take notes of the proceedings.

(9) At the conclusion of the presentations and to the extent reasonable, the Parties will make their business representatives available for discussions. If the Parties are unable to resolve the disputes themselves based upon a good faith evaluation of the presentations, to assist the Parties in further discussions the neutral advisor will render his/her comments orally on the issues. Thereafter, the business representatives of the Parties will meet and be reasonably available for discussions including at least one conference.

(10) In the event that upon conclusion of the Mini-trial the Parties are unable to amicably resolve their disputes, each Party shall be free to litigate such disputes. Litigation will be limited to the issues considered at the Mini-trial and will be conducted to the extent possible on the same terms as the Mini-trial. The Parties agree to waive any applicable statute of limitations defense with respect to subsequent litigation of these disputes between the Parties.

(11) The advisory comments of the neutral advisor will be inadmissible for all purposes in this or any other dispute involving the Parties hereto. The neutral advisor will treat the subject matter of the presentations as confidential and refrain from disclosing any trade secret information disclosed by the Parties.

9. DENIAL OF LIABILITY

The Parties deny liability or fault for the occurrences alleged in the Action. This agreement shall not constitute or be used as evidence of any admission by the Parties as among themselves by any person not a party hereto.

10. CONFIDENTIALITY

This Agreement shall be confidential to the Parties and nothing contained herein shall be disclosed to any other person (other than the neutral advisor, counsel for the Parties and their insurers) without either (a) a court order compelling disclosure, or (b) the prior written consent of the Parties, which consent shall not be unreasonably withheld; provided, however, that each of the Parties are free to disclose to any other Person this Agreement if and only if the identity of the Parties and the identity of the Action is not revealed.

**APPENDIX F
PATENT LICENSING ARBITRATION
AGREEMENT FOR NEW PROCESS***

(a) In the event that subsequent to the date of this Agreement Licensee shall use a process for the manufacture of widgets not used by it prior to the date of this Agreement and not being an insubstantial variation of its present processes and which it believes in good faith does not infringe any Licensed Patents. Licensee shall give notice in writing to Licensor to that effect, and Licensee's obligation to pay royalties in respect of sales of widgets by such new process shall be determined as follows:

- (i) At the same time as Licensee gives the notice referred to above, Licensee shall disclose to Licensor full particulars of such new process together with a statement of the reasons why Licensee considers that such new process does not infringe the Licensed Patents in question.
- (ii) If Licensor agrees with Licensee that such new process does not infringe the relevant Licensed Patents then Licensee shall not be obligated to pay royalties by virtue of this Agreement on any unit of widgets actually manufactured by Licensee through the use of such new process and sold in the country or countries where the relevant Licensed Patents are in force.
- (iii) If Licensor does not agree with Licensee under (ii) above then the parties agree to refer the matter for resolution to a single lawyer specializing in patent law in the country in question who shall act as arbitrator. If the parties cannot agree on the choice of the arbitrator then the matter shall be referred to the President for the time being of the Bar of the country in question whose choice of a patent lawyer to act as arbitrator shall be final and binding upon the parties. Each party shall be entitled to make submissions to the arbitrator whose decision shall be final and binding upon the parties. Each party shall bear its own costs of such arbitration and the costs of the arbitrator shall be shared equally. The parties shall use their best endeavors to expedite such arbitration.

(b) If, at any time after a notice has been given by Licensee to Licensor under sub-paragraph (a) above, Licensor believes that the new process referred to in such notice infringes a Licensed Patent, then unless Licensee agrees that there is infringement and that it is consequently obligated to pay royalties, the matter shall be referred to arbitration pursuant to the provisions of sub-paragraph (a) above.

(c) In the event that notice is given by Licensee to Licensor under sub-paragraph (a) above then unless Licensor agrees with Licensee that the new process does not infringe the relevant Licensed Patents, Licensee shall suspend the payment of royalties whilst the matter is referred to arbitration in accordance with sub-paragraph (a)(iii) above and throughout that time Licensee shall accrue the royalties. If the arbitrator decides that the new process does infringe the relevant Licensed Patents then payment of royalties shall resume and continue to be paid as provided for in this Agreement, and the accrued royalties, with interest calculated at the rate of ten percent per annum, shall forthwith be paid to Licensor. If the arbitrator decides that the new process does not infringe the relevant Licensed Patents then Licensee shall cease payment of royalties in accordance with sub-paragraph (a)(ii) above and the accrued royalties will not have to be paid to Licensor.

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PATENT LICENSING MINI-TRIAL AGREEMENT FOR NEW CLAIMS

JOINT VENTURE DISPUTE RESOLUTION PROCEDURE—NEGOTIATION, COOLING-OFF, AND MINI-TRIAL

- 5.4 The parties agree that the following procedures are to be applicable in those situations in which this Agreement provides for the resolution of controversy between the parties as contemplated by Section 5.2:
- 5.4.1 Both Licensee and Licensor shall provide the advisor with copies of whatever documents they deem relevant to a resolution of the issue submitted to the advisor selected in accordance with the provisions of Section 5.2.
- 5.4.2 The advisor may, in his discretion, request such additional documents from either party to this agreement as may be pertinent to the issue submitted to the advisor, and the party of whom such documents are requested shall promptly supply them to the advisor.
- 5.4.3 After the documents indicated above in Sections 5.4.1 and 5.4.2 have been provided to the advisor, the advisor may either request additional pertinent information from either or both of the parties and or request a meeting with both of the parties. The parties agree to furnish such additional information and attend any such meeting.
- 5.4.4 It is contemplated that disclosures made by either party to the advisor will be maintained in confidence by the advisor and, in that regard, by endorsement on any documents submitted to the advisor, the advisor will agree to maintain information received in the performance of the work outlined herein confidential and restricted. However, the advisor will not be liable for any inadvertant or accidental disclosure which may occur despite the exercise of a reasonable degree of care.
- 5.4.5 In connection with the submission to the advisor of an issue requiring a ruling, as provided for in Section 5.2, the advisor will confer with the patent attorneys representing the parties to formulate rules concerning the presentation of evidence; the number and nature and maximum size of any briefs to be presented and the times of filing such briefs: whether or not the testimony of live witnesses can be presented; and the time, place, and duration of any hearing before the advisor.
- 5.4.6 The advisor will be disqualified as a trial witness, consultant, or expert for either party or for parties privy to the situation in the absence of agreement and approval for him to act in such capacity given by both of the parties.
- 5.4.7 The parties shall share equally the fee for the advisor's services and related administration costs.

11.2 *Disputes:* Except for any of the matters which require a unanimous vote at a properly constituted meeting of the Board of Directors, in the event of any dispute or disagreement among the Parties as to any provision of this Agreement (including any provision of any Schedule, Exhibit or Related Agreement) and, without limiting the generality of the foregoing, any dispute relating to termination of the Joint Venture due to a prolonged and significant failure of the Joint Venture to perform according to the Business Plan, upon the written request of any Party, the matter shall immediately be referred jointly to the respective top managements of each party for decision. If such executives do not agree upon a decision within thirty (30) days after reference of the matter to them, any Party may within thirty (30) days, after the thirty (30) days first referenced above, elect to utilize a nonbinding resolution procedure whereby each Party presents its case at a hearing before a panel consisting of a senior executive of each Party and a mutually acceptable judicial personage. The parties may be represented at the hearing by lawyers. Prior to the hearing the Parties shall meet to mutually agree on a set of ground rules for the hearing and a site therefor. In the event the Parties cannot reasonably promptly agree on the ground rules, judicial personage or hearing site, or any of the foregoing, if the Party initiating this dispute resolution procedure is X (Japanese company), the United States Consul General in Tokyo, or whatever official is then exercising the powers and authority of such Consul General, shall designate the ground rules, judicial personage or site, and, if the party initiating the dispute resolution procedure is Y (U.S. Company), the Japanese Consul General in Los Angeles, or whatever official is then exercising the powers and authority of such Consul General, shall designate the ground rules, judicial personage or site. At the conclusion of the hearing, the senior executives of X and Y shall meet and attempt to resolve the matter. If the matter cannot be resolved at such meeting, the judicial personage may be called upon to render his opinion as to how the matter would be resolved had the hearing been a trial in a court of law. After the opinion is received, the senior executives shall meet and try again to resolve the matter. If the matter cannot be resolved at such meeting, the may give the other Party notice of its intention to litigate. No litigation may commence concerning the matter in dispute until sixty (60) days have elapsed from the sending of the notice of intention to litigate. The Parties shall bear their respective costs incurred in connection with this procedure, except that the Parties shall share, in proportion to their ownership interest in the Joint Venture, the fees and expenses of the judicial personage, the costs of the facility for the hearing and the fee or charge, if any, of the applicable Consul General.