

ARBITRATION: PROS & CONS



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CONS OF ARBITRATION

MAY NOT BE CHEAPER

MAY NOT BE QUICKER

Limited Appeal

- (1) the award was obtained by corruption, fraud, or other undue means
- (2) the rights of a party were prejudiced by:
 - (A) evident partiality by an arbitrator appointed as a neutral arbitrator;
 - (B) corruption in an arbitrator; or
 - (C) misconduct or willful misbehavior of an arbitrator;

Limited Appeal

- 3) the arbitrators:
 - (A) exceeded their powers;
 - (B) refused to postpone the hearing after a showing of sufficient cause for the postponement;
 - (C) refused to hear evidence material to the controversy; or
 - (D) conducted the hearing, contrary to Section 171.043, 171.044, 171.045, 171.046, or 171.047, in a manner that substantially prejudiced the rights of a party; or

Limited Appeal

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

Limited Discovery

- Sec. 171.050. DEPOSITIONS. (a) The arbitrators may authorize a deposition
- Sec. 171.051. SUBPOENAS. (a) The arbitrators, or an arbitrator at the direction of the arbitrators, may issue a subpoena for

NO RIGID ADHERENCE TO
RULES OF CIVIL PROCEDURE
OR RULES OF EVIDENCE

NOT REQUIRED TO
FOLLOW LAW

TENDENCY TO SPLIT
THE BABY

MAY NOT BE ABLE TO HAVE
ALL NECESSARY PARTIES
PRESENT

POLL QUESTION

- Which team won the Super Bowl in 1967?
- Buffalo Bills
- Dallas Cowboys
- Kansas City Chiefs
- Green Bay Packers

ADVANTAGES OF ARBITRATION

Advantages of Arbitration

- Knowledgeable arbitrator
- More informal
- Confidentiality
- Flexibility on rules of discovery and evidence
- Potential speed and efficiency of the process
- Less adversarial
- Finality of the award

Why Avoid Court?

- Decision-maker lacks specialized knowledge relevant to the dispute.
- Delays
- Jury Risks
- Potential for higher damages
- Lack of finality due to appellate process.

Arbitration Clause Will Be Enforced

- There is a strong presumption in favor of arbitration under Federal and Texas law.
- The parties' arbitration agreement will be enforced.
 - If only one party wants to arbitrate and the dispute is subject to the arbitration agreement, the willing party can compel the other party to arbitrate.
 - Exception: the parties can agree NOT to arbitrate and proceed with litigation.

Power to Contract for the Arbitration You Want

- Define the arbitration process in the contract.
- The procedures and rules governing the arbitration can be determined by:
 - The parties' contract;
 - The rules of an organization, i.e. AAA; or
 - The arbitrator.

Will You Agree to Arbitrate?

- Determine if you will agree to an arbitration clause in a contract.
- Will you agree to the scope of the arbitration clause?
- Will you agree to the format governing the arbitration process, including the hearing?
- Will the Federal Arbitration Act or the Texas General Arbitration Act (or other applicable state statutes) apply?

Administered by a Third-Party

- The format is largely pre-determined:
 - The parties are provided with a list of arbitrators from which to select;
 - There are rules in place that govern the process; and
 - There is are administrators who fulfill a role similar to a court clerk.
- Arbitrator's fees and other costs, i.e. administrative and filing fees

Defining the Arbitration Process in the Contract

- Conditions precedent
 - Mediation
- Applicable law
- Forum selection
- Confidentiality
- Are other parties subject to arbitration?
 - Allow other parties to join the arbitration?

The Arbitrator(s)

- Panel or single arbitrator?
- How will the arbitrator(s) be selected?
- What qualifications must the arbitrator(s) possess?
- How much control will the arbitrator have over the process?
- Fees

Discovery

- Type of discovery allowed
- Exchange all documents
- Limitations on discovery, i.e. limit the number of depositions
- What rules, if any, will be followed?

Arbitration

- Motion practice
 - Will dispositive motions be allowed?
 - Pre or post-arbitration briefing?
- Hearing options
 - Obtaining an award without a hearing
 - Will any evidentiary rules apply?
 - Presentation of evidence, including witnesses
 - Transcript?

The Arbitration Award

- Reasoned award?
- Can define the scope of the arbitrator's authority in awarding damages
 - What damages are recoverable?
 - Can attorney fees be awarded?
- Deadline by which an award must be rendered
- Finality of the award.

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