

ARBITRATION -- A BINDING DECISION

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When entering into a contract, rarely is the first question that enters your mind- "When this contract is breached, do I want a jury trial, or do I want to arbitrate the dispute?" Thinking about your litigation options is not typically done at the outset of a contractual relationship except in larger transactions. Increasingly however, as both federal and state trial courts compel arbitration, perhaps it should be part of your initial evaluation before entering into contracts of any type.

The decision to agree to arbitrate a potential dispute should be carefully considered before entering into a contract. Recent case law illustrates that trial courts will compel arbitration upon signatories and non-signatories alike, whether the claim is for contractual or personal injury damages. Perhaps even more importantly, after arbitration is ordered it is difficult, if not impossible, to obtain appellate review of the order compelling arbitration. Finally, after an arbitration award is made and confirmation is sought in the trial court, the court's review of any arbitration award is limited-leaving the trial court with little choice but to rubber stamp the award.

Did we agree to arbitrate?

Issues of arbitration most often arise after a traditional lawsuit is filed in trial court. The party seeking to enforce an arbitration clause will likely file a motion to compel arbitration, seeking to have the claims resolved by arbitration as opposed to a judge or jury. This party then bears the burden to prove the existence of a valid agreement to arbitrate and that the claims fall within the scope of the arbitration agreement.

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Obviously, those who sign a contract containing an arbitration clause have agreed to resolve at least some of their disputes via arbitration. But, surprisingly, non-signatories to the contract are also often bound by that same agreement. Indeed early last month the Fifth Circuit Federal Court of Appeals held that wrongful death beneficiaries (non-signatories to any agreement containing an arbitration clause) must arbitrate their claims because the decedent's employment agreement contained an arbitration clause. The Texas Supreme Court had previously addressed this issue, and likewise held that wrongful death beneficiaries are generally bound by a decedent's pre-death contractual agreement because of the derivative nature of their claims. Thus, arbitration clauses can be enforced against non-signatories in both commercial and personal injury contexts.

Separate and apart from whether an agreement to arbitrate exists between the parties, before compelling arbitration, a trial court must also determine whether the asserted claims fall within the scope of the arbitration clause. Given the courts' inherent disposition favoring arbitration, it should come as no surprise that parties have been compelled to arbitrate disputes that do not arise under the contract, but rather merely have a "substantial relationship" with the contract.

The Texas Supreme Court has taken an even broader view, approving arbitration of any issues that "touch matters" within the agreement containing the arbitration clause. With the broad interpretation by trial courts of not only who must arbitrate but also the type of claims that must be arbitrated, unwilling parties are often left with no choice but to seek appellate review.

The Judge Made A Mistake-Now What do I do?

If you are compelled to arbitration despite serious questions concerning the validity or scope of the arbitration agreement, unfortunately, there is little immediate appellate relief. In *Green Tree Financial Corp. v. Randolph*, the United States Supreme Court observed that the Federal Arbitration Act ("FAA"), "generally permits immediate appeal of orders *hostile* to arbitration ... but bars appeal of interlocutory orders *favorable* to arbitration."

After authorizing general mandamus review of orders either compelling or denying arbitration under the FAA, the Texas Supreme Court in *In re Palacios* backtracked, limiting mandamus review to orders denying arbitration. The Texas Supreme Court stopped short of holding that mandamus relief is never available following the lead of the Fifth Circuit in *Apache Bohai Corp. v. Texaco China*. But the Court held that mandamus review of orders compelling arbitration is rarely available because the parties have an adequate remedy by appeal, and that the time and expense of an unnecessary arbitration is insufficient to show an inadequate remedy by appeal.

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Given that mandamus review of an order compelling arbitration will unlikely be successful, parties compelled to arbitration will be forced to challenge the propriety of an arbitration order after the arbitration award has been rendered. This timeline, from the initial filing of the claim through arbitration and then confirmation of the award by the trial court could be between one to three years—a considerable investment of time and money if indeed the arbitration clause was improperly enforced in the first instance.

Setting Aside an Arbitration Award—is it Possible?

After an arbitration award is rendered, the parties traditionally return to the trial court for confirmation of the arbitration award. A court's review of an arbitration award is very narrow. The court must resolve all doubts in favor of upholding the award, and the court is limited in its ability to set aside or vacate an arbitration award. Federal and state statutes require a trial court to confirm the arbitration award unless: (1) the arbitrator exceeded his powers (a limited exception in light of recent court opinions); (2)(i) the lack of a valid arbitration agreement, (ii) the issue was not adversely determined in proceedings to stay the arbitration, and (iii) the complaining party did not participate in the arbitration hearing without raising the objection; or (3) the arbitrators were guilty of misconduct in refusing to postpone the hearing, upon sufficient cause shown, or in refusing to hear evidence pertinent and material to the controversy; or of any other misbehavior by which the rights of any party have been prejudiced. Courts have often characterized this last exception as instances where the arbitrator "manifestly disregards the law." The Fifth Circuit, whose jurisdiction includes Texas, Louisiana, and Mississippi, has held that "manifest disregard of the law" is no longer a viable means of overturning an arbitration decision, based upon the United States Supreme Court and its strict interpretation of the Federal Arbitration Act Sections 10 and 11 in *Hall Street Assoc. LLC v. Mattel, Inc.*, 128 S.Ct. 1396 (2008). It remains to be seen whether other circuit courts will follow the Fifth Circuit's lead. Regardless of the basis argued, trial courts rarely vacate arbitration awards and recent trends in the law indicate the highest courts in Texas and the United States favor an even more restrictive review.

Final Thoughts

Given the deference that the courts have shown toward the enforceability of arbitration agreements and the availability (or lack thereof) of adequate and cost-effective appellate remedies, parties to contracts should perform a careful cost-benefit analysis before signing any contract that requires binding arbitration. On the one hand, if neither side challenges the arbitration provision, arbitration may achieve its goal of streamlining the litigation process and promoting judicial economy. On the other hand, if parties agree to arbitration without being fully informed of the risks, there is likely little that can be done after a trial court judge orders arbitration or confirms an adverse arbitration award.

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