

# ARBITRATION AGREEMENTS:

## WHAT DID YOU AGREE TO UNDER THE CONTRACT?

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# Arbitration vs Litigation

- Both are decided by a third-party: arbitrator(s), judge, or jury.
- The decision will be binding (most likely).
- There will be a winner and a loser.
- Biggest Difference: right to appeal.

# 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

# Disadvantages of Arbitration

- Finality of the award. Limited recourse for review/appeal of the arbitrator's award.
- Risks relating to the decision-maker
- Costs: can be very expensive
- May not save that much time over litigation
- Not all parties to the dispute may be subject to or will participate in the arbitration
- Summary judgment may be more difficult to obtain.

# Why Remain in Court?

- Appellate review of the judge or jury's decision
- Jury trial
- Impartial judge who is not dependent on the parties hiring her again as an arbitrator
- Following established rules and procedures for discovery and evidence
- Enforcement of established legal precedent
- Easier to join all necessary parties

**IF THERE IS AN AGREEMENT  
TO ARBITRATE, DO YOU  
HAVE TO ARBITRATE?**

# Is There an Arbitration Clause in the Contract?

- Basic arbitration clause from the AAA:
- Any controversy or claim arising out of or relating to this contract, or the breach thereof, shall be settled by arbitration administered by the American Arbitration Association under its Construction Industry Arbitration Rules, and judgment on the award rendered by the arbitrator(s) may be entered in any court having jurisdiction thereof.

# Do You Have a Choice?

- Parties to a contract with an arbitration clause do not have to arbitrate if both parties agree to proceed with litigation.
- 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.
  - There is a strong presumption in favor of arbitration under Federal and Texas law.

# Non-Signatories to an Arbitration Agreement

- Generally, non-signatories to an arbitration agreement cannot be forced to arbitrate and cannot force a party to an arbitration agreement to arbitrate.
- Exceptions:
  - Equitable Estoppel: a non-signatory can compel arbitration if the plaintiff's claims are based upon the contract which contains the arbitration clause and the plaintiff is a signatory to the contract.
  - Third-Party Beneficiary of the Contract

# CONTRACTING FOR THE ARBITRATION YOU WANT

# 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?

# Defining the Arbitration Process

- The contract can define what claims are arbitrable, how the arbitrator will be selected, and how the arbitration will proceed.
- 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.

# The Scope of the Arbitration Clause

- What disputes will be subject to arbitration under the arbitration clause?
- The arbitration clause's reach is defined by the language used in the clause. The arbitration clause must encompass the dispute in order for the parties to be subject to arbitration.
  - Is the reach of the arbitration clause broad or narrow?
  - Are specific claims excluded?

# Private Arbitration

- The contract and/or the parties can control decisions about the arbitration to an extent such as:
  - How the arbitrator is selected,
  - How discovery will be conducted,
  - What is the applicable law, and
  - If the parties want to have an organization administer the arbitration and/or arbitrate under an organization's rules, i.e. the American Arbitration Association.

# 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

# The Arbitrator(s)

- How many arbitrators will there be? One or a panel?
- What qualifications must the arbitrator(s) have?
- Selection of the arbitrators:
  - Identify the arbitrator(s) in the contract
  - Define the selection process, i.e. nominations and striking

# Defining the Arbitration Process

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

# 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

# The Arbitration Award

- Reasoned award?
- Scope of the arbitrator's authority in awarding damages
  - What damages are recoverable?
  - Can attorney fees be awarded?
  - The scope of the award can be limited in the arbitration clause.
  - The arbitrator's authority and/or the award can also be defined by a third-party's rules, i.e. AAA
- Deadline by which an award must be rendered

# Appeal of an Arbitration Award

- Some third-party rules provide an appeal process within the framework of the organization.
- Parties are not allowed to contract for expanded judicial review of an award.
- 9 U.S.C. § 9 gives the court the power to confirm the arbitrator's award.
  - Exceptions can only be found in 9 U.S.C. § 10 (basis for vacating an award) & 9 U.S.C. § 11 (basis for correcting or modifying an award)

# 9 U.S.C. § 10(a): When Can an Arbitration Award Be Vacated?

- (1) where the award was procured by corruption, fraud, or undue means;
- (2) where there was evident partiality or corruption in the arbitrators, or either of them;
- (3) where 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; or
- (4) where the arbitrators exceeded their powers, or so imperfectly executed them that a mutual, final, and definite award upon the subject matter submitted was not made.

# 9 U.S.C. § 11: When Can an Award Be Modified or Corrected?

- (a) Where there was an evident material miscalculation of figures or an evident material mistake in the description of any person, thing, or property referred to in the award.
- (b) Where the arbitrators have awarded upon a matter not submitted to them, unless it is a matter not affecting the merits of the decision upon the matter submitted.
- (c) Where the award is imperfect in matter of form not affecting the merits of the controversy.

# The Arbitration Hearing

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