Arbitration Provisions:  
*Drafting the Best and Litigating Effectively Under the Worst*

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Agenda

- Selecting Arbitration
  - Is arbitration an option?
  - Does arbitration favor your client?
- Drafting the Arbitration Clause
- The Arbitration Process, Potential Pitfalls, and Strategies for Successful Resolution
  - Initiating Arbitration
  - Discovery Disputes
  - Hearing
Choosing to Arbitrate Rather than Litigate
What Is Arbitration?

- Process for resolving disputes outside of court system agreed to by the parties
- Heard by third-party neutral(s)
- Creates binding resolution of dispute
- Will apply law and/or procedures agreed upon by parties
Is Your Claim Arbitrable?

- Contract containing arbitration provision
- Arbitration Agreement
- If no existing agreement, can attempt to reach new written agreement with opposing party to arbitrate
- Court orders that parties arbitrate
- Statutory requirement to arbitrate
- Don’t give up just because your or your opponent is not a party to an arbitration agreement—there are certain instances when third parties can be compelled to arbitrate
  - For example, under Texas law, non-signatory beneficiaries in wrongful death suits can be compelled to arbitrate when the decedent was bound by an arbitration clause. *In re Labbatt Food Service, L.P.*, 279 S.W.3d 640 (Tex. 2009)
# Do You Want Arbitration or Litigation?

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<tr>
<th><strong>Pros of Arbitration</strong></th>
<th><strong>Cons of Arbitration</strong></th>
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<td>Allows expert analysis of complex issues</td>
<td>Very limited judicial review (no “appeal”)</td>
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<td>Faster</td>
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<td>Confidential</td>
<td>Uncertain rules and procedures</td>
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<td>Greater finality</td>
<td>Limited checks on arbitrator’s powers</td>
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<td>Neutrality (important in international arbitration)</td>
<td>Experience of arbitrators often differs widely</td>
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<td>No runaway juries</td>
<td>Pay cost of arbitrator’s time</td>
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<td><em>Control of the process by the parties</em></td>
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Does Arbitration Favor Your Client

- **Arbitration** is likely to be *best* if:
  - You want to force payment of money quickly
  - You may otherwise be exposed to an unfavorable judicial forum, such as:
    - A “deep pocket” facing jury trial in a dangerous venue
    - You would be a foreigner in a foreign court
    - You need confidentiality rather than public trial
  - You need careful analysis of complex issues
Or Would Litigation Be a Better Option

- **Litigation** is likely to be **best** if:
  - Your primary need is injunctive relief
  - You have a favorable “home court” forum
  - You do not want a speedy resolution
  - You need to rely on novel legal theories
  - Your opponent wants to avoid public trial
Drafting the Best Arbitration Clause: No Cookie Cutter Approach
How to Get the Best Arbitration Clause

- Many “standard” clauses are incomplete and unclear
- The clause should be tailored to ensure the features your client needs most. Examples:
  - For speed, select an established organization to administer: AAA, JAMS, ICC. (This administration will force progress on matter, so administrator can collect fees.)
  - Consider three neutrals rather than “I pick” and “you pick” clauses.
  - Consider “injunctive carve outs” (e.g., non-competes)
## Arbitration Agreements or Clauses
### Drafting Considerations

- Panel size (1 arbitrator? Panel of 3?)
- Who will administer (AAA, ICC, JAMS, etc.)
- Location, language & governing substantive law
- Thresholds for triggering of arbitration
- Special qualifications of the arbitrators
- Inclusion of provision allowing for emergency protection by either a court or an arbitrator
- Time limits & discovery
- Pre-hearing briefing
- Process for resolving pre-hearing disputes
- Format of the final hearing
<table>
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<td>■ Post-hearing briefing</td>
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<td>■ Timing and form of the award (range from written, reasoned opinion to simple award)</td>
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<td>■ Confidentiality</td>
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<td>■ Appeals</td>
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<td>■ In New York, a motion to confirm, vacate, or modify an arbitration award must be filed in the county specified in the agreement. N.Y. C.P.L.R. § 7502.</td>
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<td>■ In Texas and California, a motion to confirm, vacate, or modify an arbitration award must be filed in the same county where the agreement requires the arbitration be held. Tex. Civ. Prac. &amp; Rem. Code § 171.096(b); Cal. Civ. Proc. Code §1292.2.</td>
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<td>■ Under federal law, in the district court for the district in which the award was made. 9 U.S.C. §§ 10-11.</td>
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<td>■ Costs</td>
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Breadth of the Arbitration Agreement

- Know what you are agreeing to arbitrate
- Do you want a broad or narrow scope
  - Broad clause – “all disputes arising out of or relating to”
  - Narrow clause
    - Excluding specific claims (e.g., “The following matters are specifically excluded from arbitration...”)
Breadth of the Arbitration Agreement

- **Are Class Actions Arbitrable?**
  - The agreement can specifically state whether or not class claims are covered by arbitration.
  - Under contract and in most circumstances (including take it or leave it consumer contracts), parties can agree to waive any right to a class action arbitration. *AT&T Mobility LLC v. Concepcion*, 131 S. Ct. 1740 (2011).
  - When silent on whether class claims are arbitrable, arbitrators are not permitted to entertain class claims. *Stolt-Nielsen SA v. AnimalFeed Int’l Corp.*, 130 S. Ct. 1758 (2010).
    - However, better practice is to specifically state that class action arbitration is not permitted.
    - Moreover, incorporation of certain rules (i.e., AAA) that permit class arbitration may be the contractual hook arbitrators use to determine that an agreement is not silent, but instead permits class arbitration.
Arbitration Agreements or Clauses
Drafting Considerations

- Other factors that may make the arbitration agreement unenforceable:
  - Arbitration provision located in fine print
  - Inconvenient location of arbitration
  - Unfair selection of arbitrators
  - Unfair distribution of costs
  - Lack of mutuality of arbitration
- Individually may not prevent enforcement, but collectively can add up to unconscionability
  - The Texas Supreme Court has held that threatening to terminate an at-will employee if he does not sign an arbitration agreement is not coercion. *In re Frank Kent Motor Co.*, 361 S.W.3d 628 (Tex. 2012).
Arbitration Agreements or Clauses
Drafting Considerations

- Arbitral Institution/Rules
  - Why the choice is important:
    - Some institutions administer arbitrations (e.g., serve papers, resolve preliminary issues, appoint arbitrators) and can significantly expedite the arbitration in its initial stages.
    - Award rendered under the auspices of a recognized arbitrational institution may help ensure enforcement.
    - Rules provide needed structure for proceedings.
    - Choosing an institution may frustrate the goal of the parties to choose a subject matter expert.
# Arbitration Agreements or Clauses

## Drafting Considerations

- **Situs of Arbitration** (especially crucial for an international arbitration)
  - Why important:
    - Often determines location of some or all hearings
    - Determines procedural law of arbitration (unless parties provide otherwise)
    - Place of all challenges to award
  - Things to check for international arbitration
    - Signatory of New York Convention
    - Law of situs favors enforcement of arbitral awards
Terms of an Arbitration Agreement

- Interim or Conservatory (Injunctive) Relief
  - Provide for the emergency relief rules of the AAA or JAMS to apply
  - Provide for the arbitrator to have authority to order emergency relief
  - “Carve out” the right to seek emergency relief in the courts
What to Expect in an Arbitration
Managing the Dispute

- Initiating Arbitration
  - Normally starts with a letter that acts like a complaint would in federal court

- Road to Resolution
  - Selecting Arbitrators
  - Discovery
  - Dispositive Motion/Final Hearing
First Things First

- The First Call
  - Document retention
    - Once key players are identified, prevent those persons from destroying documents to avoid spoliation problems
  - Review agreements between parties relating to dispute to determine whether dispute is arbitrable
Road to Resolution

- Selecting the Arbitrator(s)
  - Will ultimately be determined by the procedures set forth in the arbitration provision
  - Ask around for suggestions
  - Review the arbitrator’s resume; make sure that the potential arbitrator has the experience necessary to handle the dispute
  - Ensure that any relationship between (a) the attorney and/or client and (b) the arbitrator is disclosed.
    - Challenges to lack of disclosure is one of the few areas for successful court review. See *Karlseng v. Cooke*, 346 S.W.3d 85 (Tex. App.—Dallas 2011, no pet.)
Road to Resolution

- A mediation in advance of the arbitration may be beneficial to your client
  - Successful mediation reduces uncertainty
  - Can provide a quicker/cheaper resolution
  - Can maintain a relationship with opposing party if necessary
  - Even if unsuccessful, can provide a valuable insight of opposing party’s strategy
Arbitration and Discovery

- Who can be compelled to testify or produce documents—and when?
- What is the scope of discovery in arbitration?
- What type of requests to make?
Arbitration and Discovery

- Discovery will be conducted as agreed by the parties in the Arbitration Clause
  - Per AAA or JAMS rules
  - Per specific discovery devices expressed in agreement
- If arbitration conducted by a panel, consider agreement to have one panelist handle all discovery issues
Arbitration and Discovery

For example, under the AAA Rules:

- Rule R-21. At the request of any party or at the discretion of the arbitrator, consistent with the expedited nature of arbitration, the arbitrator may direct (i) the production of documents and other information, and (ii) the identification of any witnesses to be called.

- In a large, complex case, there will be a preliminary hearing where the parties and the arbitrator will discuss, among other things, the discovery process (Rule L-3):

  - The arbitrator will take steps to manage discovery, including by requiring (a) the Parties to cooperate in exchange of documents/information consistent with a speedy resolution; (b) the Parties to conduct discovery as may be agreed by all parties, and establishing the extent of discovery if no agreement; and (c) the arbitrator may, in his discretion and upon good cause shown, order depositions or interrogatories to such persons who may have relevant information.
Arbitration and Discovery

Court are split on whether third-party discovery is permissible before the arbitral hearing:

- **Circuits prohibiting** non-party, pre-hearing discovery of documents:

- **Circuits permitting** non-party, pre-hearing discovery:
  - 8th Cir.: *Sec. Life Ins. Co. of Am. v. Duncanson & Holt*, 228 F.3d 865 (8th Cir. 2000).

- Recent trend is to *prohibit* non-party, pre-hearing discovery
Arbitration and Discovery

- FAA § 7 also likely governs third-party discovery in arbitration

  “The arbitrators . . . may summon in writing any person to attend before them . . . as a witness and in a proper case to bring with him or them any book, record, document, or paper which may be deemed material as evidence in the case. . . . Said summons . . . shall be served in the same manner as subpoenas to appear and testify before the court; if any person or persons so summoned to testify shall refuse or neglect to obey said summons, upon petition the United States district court for the district in which such arbitrators . . . are sitting may compel the attendance of such person or persons before said arbitrator.” 9 U.S.C. § 7.

- Arbitrator can compel attendance or production of documents at the arbitral hearing from any person within the subpoena range of the place of the hearing

- Under some case law, the place of the arbitral hearing may be moved depending on the location of witnesses, if necessary
Arbitration and Discovery

- Strategy regarding document requests
  - Consider whether broad or narrow document requests will provide greatest advantage to your client
  - If you plan on using an expert, make sure to discuss potential document requests with that expert
  - Arbitrators are more likely to enforce targeted document requests
  - Where one side wants broad discovery and the other side wants narrow discovery, the arbitrator is likely to set meaningful limitations
Dispositive Motions

- Parties can agree whether or not to utilize dispositive motions
  - If there is no agreement and you believe it will advance your position, ask the arbitrator for permission to file a dispositive motion
- Dispositive motions are often denied on the ground that they raise issues of fact or are inconsistent with the spirit of arbitration
- But if dispositive motions can sufficiently narrow the issues, setting an accelerated briefing schedule on those issues may be warranted
The Arbitration Hearing

- Similar to hearing or bench trial in court
  - Claimant presents its case
  - Respondent presents its case
- Will not have strict conformity with rules of evidence
- Arbitrator(s) will act as referee and fact finder
- Level of detail of decision will be based on contract or agreement of the parties
After The Arbitration Hearing

- Consider whether you need post-hearing briefing
- Timing of the arbitration decision should be dictated by the agreement
- Form of arbitration decision (reasoned v. ultimate answer) should be dictated by the agreement
- Appeals are limited
QUESTIONS?