



Arbitration, Forum-Selection, and Contractual Jury Waiver Clauses: Why Differing Standards For Enforceability?

By

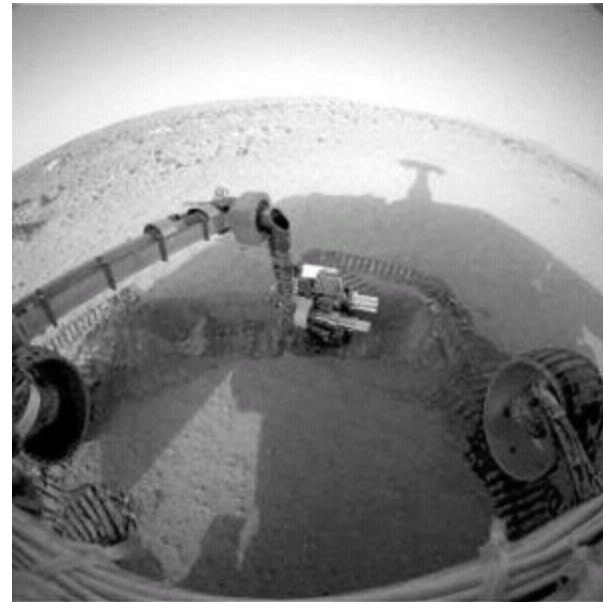
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Introduction

- Business Transactions Are More Sophisticated
- Parties Enter Into Global Transactions
- Parties Negotiate How Disputes Will Be Resolved – The Arbitration Clause, Forum-Selection Clause (“FSC”), and Jury Waiver Clause

Areas To Explore

- Standards For Enforcement of Arbitration Clauses, Forum-Selection Clauses, and Jury Waiver Clauses
- Why Is There A Difference?
- Impact of Choice of Law Clause



Arbitration Clauses

- Texas Courts Liberally Enforce Arbitration Clauses Notwithstanding The Fact That A Party Waives Its Constitutional Right To A Jury Trial And Has A Very Limited Right To Appeal An Arbitrator's Decision.
- In Texas, Arbitration Agreements Are Interpreted Under General Contract Principles.



Arbitration Clauses

- To Enforce An Arbitration Clause, A Party Must Merely Prove The Existence Of An Arbitration Agreement And That The Claims Asserted Fall Within The Scope Of The Agreement.
- Further, There Are Instances Where Texas Courts Have Enforced Arbitration Agreements Against Nonparties Under Various Theories.

Arbitration Clauses

- There Is No Requirement That The Party Relying On The Arbitration Agreement Prove That It Is Conspicuous Or That All Parties Entered Into The Agreement Voluntarily Or Knowingly.

Forum-Selection Clause

- Historically, Not Enforced
- Now, They Are Enforced
- “Enforcement Of Forum-Selection Clauses Is Mandatory Unless The Party Opposing Enforcement Clearly Shows That Enforcement Would Be Unreasonable And Unjust, Or That The Clause Was Invalid For Such Reasons As Fraud Or Overreaching.”
In re AIU Ins. Co., 148 S.W.3d 109 (Tex. 2004).

Forum-Selection Clause

- FSC Does Not Have To Be Conspicuous, Parties Can Incorporate Them From Other Documents
- Nonparties Can Enforce FSC Under Various Theories



Contractual Jury Waiver

- A Contractual Jury Waiver Is A Contractual Provision That Expressly States That The Parties To The Contract Waive Their Right To A Jury Should A Dispute Arise Between Them.



Contractual Jury Waiver

- “We Echo The United States Supreme Court's Admonition That ‘Waivers Of Constitutional Rights Not Only Must Be Voluntary But Must Be Knowing, Intelligent Acts Done With Sufficient Awareness Of The Relevant Circumstances And Likely Consequences.’” *In Re Prudential*, 148 S.W.3d 124 (Tex. 2004).
- But, Who Has Burden To Establish Knowing And Voluntary?

Contractual Jury Waiver

- “Such A Conspicuous Provision Is Prima Facie Evidence Of A Knowing And Voluntary Waiver And Shifts The Burden To The Opposing Party To Rebut It.”
In re GE Capital, 203 S.W.3d 314, 316-17 (Tex. 2006).
- If Conspicuous, Burden Is On Party Wanting Jury Trial To Prove Not Voluntary or Knowing.

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Contractual Jury Clause

- Two Courts Of Appeals Have Placed Burden On Movant To Establish Knowing And Voluntary Waiver.
- *Mikey's Houses, LLC v. Bank of America, N.A.*, 232 S.W.3d 145 (Tex. App.—Fort Worth 2007, no pet.).
- The Court First Found That The Burden Was On The Party Attempting To Enforce The Clause And That There Was A Rebuttable Presumption Against Enforcing The Waiver.

Contractual Jury Waivers

- *In re Credit Suisse First Boston Mortgage Capital, L.L.C.*, 257 S.W.3d 486 (Tex. App.—Houston [14th Dist.] 2008, orig. proceeding).
- Adopted Fort Worth Court's Presumption.
- Held That Direct Benefits Estoppel Did Not Allow Non-Signatory To Enforce A Jury Waiver Provisions.



Contractual Jury Waivers

- In *In re Bank Of America, N.A.*, the Texas Supreme Court granted mandamus relief against the Fort Worth Court of Appeals, and ordered it to enforce the trial court's order enforcing the contractual jury waiver. 278 S.W.3d 342 (Tex. 2009).
- Odd Procedural History



Contractual Jury Waivers

- The Court held that "a presumption against contractual jury waivers wholly ignores the burden-shifting rule" previously found by the Court that "a conspicuous provision is prima facie evidence of a knowing and voluntary waiver and shifts the burden to the opposing party to rebut it."



Contractual Jury Waiver

- Because the contractual jury waiver was conspicuous, the Court found that the bank did not have the burden to establish a knowing and voluntary waiver.
- The Court noted that if the party opposing the jury waiver had alleged fraud with regard to the jury waiver provision, that it would have shifted the burden to the party seeking to enforce the jury waiver to establish a knowing and voluntary waiver.



Contractual Jury Waiver

- With Jury Waiver, There Is A Knowing And Voluntary Defense That Does Not Exist In Arbitration And FSC Cases.
- The Burden Seems To Be On The Movant If The Clause Is Not Conspicuous, Which Is Not The Case For Arbitration Or FSC.
- Fraud Allegation Places Burden On Movant, Which Is Not The Case For Arbitration Or FSC.

Why Different Standards?

- Easy To Enforce Arbitration And FSC In Texas.
- Burdens Are Heavily In Favor Of Clauses And There Is No Requirement Of Showing Of Conspicuousness Or Knowing And Voluntary Waiver.
- Even Non-signatories Can Be Bound To The Clauses And Enforce Them.

Why Different Standards?

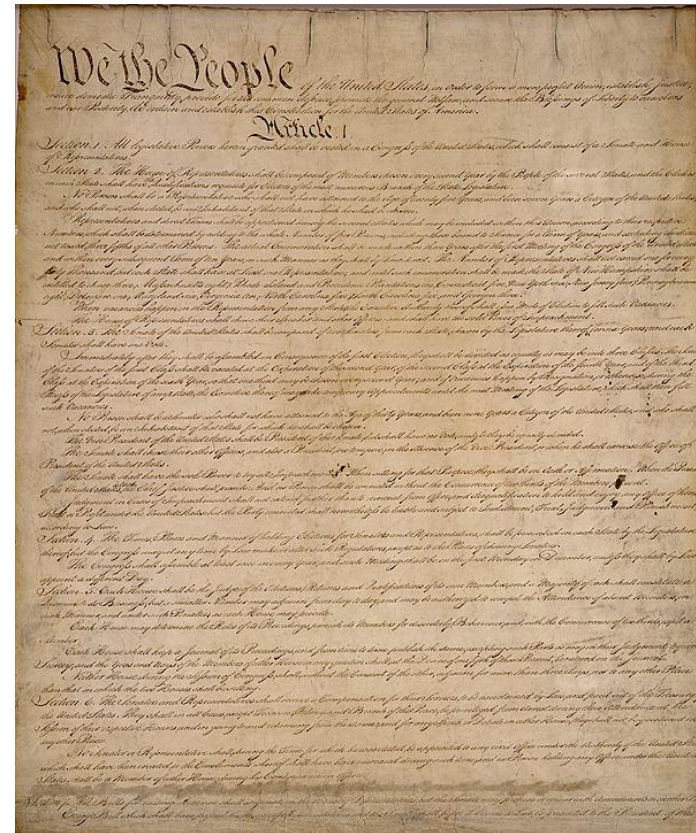
- Texas Supreme Court Set Out Different Test For Contractual Jury Waivers.
- Knowing And Voluntary Test Comes From Criminal Law Context Where Defendant Waives Right To Jury Trial.
- However, Jury Waivers Are Much Less Intrusive Than Arbitration Or FSC.

Why Different Standards?

- Arbitration Has No Access To Courts, Limited Discovery, Limited Or No Appellate Relief, And No Jury.
- FSC Could Allow A Party To Remove The Dispute From The US Altogether.
- Other Countries Do Not Have Right To Jury, Limited Right To Present Evidence Or Cross Examine Witnesses, And Little Or No Appellate Relief.

Why Different Standards?

- So, Why Do Arbitration And FSC Have Such An Easier Time Of It Than Contractual Jury Waivers?
- No Good Reason.
- Bad Reason – Arbitration Statutes – But Statutes Cannot Trump Constitutional Protections.



Choice-of-Law Clause

- Another Issue Is The Application Of Choice-of-Law Clauses On Dispute Resolution Clauses.
- It Is Not Uncommon For Contracts To Also Provide That All Of The Contractual Clauses Will Be Construed By A Foreign Jurisdiction's Law.
- This May Impact Scope Of Clause And Test For Enforceability And Who Can Enforce It.

Choice-of-Law Clause

- In *In re Lehman Brothers Merchant Banking Partners IV L.P.*, Investors In The Limited Partnership Sued In Dallas County To Dissolve The Partnership. No. 05-09-00508-CV, 2009 Tex. App. LEXIS 5872 (Tex. App.—Dallas July 30, 2009, orig. proceeding).
- The Court Of Appeals Acknowledged That The Partnership Agreement Had A Choice-Of-Law Provision That Designated That It Would Be Construed By The Laws Of The State Of Delaware And Then Used Delaware Law To Construe The Forum-Selection Law.

Conclusion

- Use Of Contractual Jury Waiver And FSC Will Continue To Increase
- Arbitration May Not Be As Used
- Courts Will Look To Arbitration Precedent Regarding FSC
- Courts Will Be Very Favorable To The Enforcement Of The FSC
- Courts Will Likely End Up Enforcing Contractual Jury Waivers In Similar Fashion Although The Test Will Be Worded Differently