

FINANCIAL SERVICES SEMINAR

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Contractual Clauses That Impact Disputes

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Introduction

- In the process of drafting contracts, parties can shape the process for resolving their future disputes.
- They can potentially select the forum for dispute resolution, the body that will resolve the disputes, the law that will be applied to their disputes, and the remedies that will be available to them.
- These clauses are so important that they can abrogate even constitutional rights.
- Yet, they are relegated to the “miscellaneous” clauses.

Areas To Explore

- Arbitration
- Forum Selection
- Jury Waiver
- Personal Jurisdiction
- Venue Selection
- Service of Process
- Negotiation/Mediation

Areas to Explore

- Choice of Law
- Indemnity
- Insurance Requirements
- Waiver of Reliance
- No Waiver
- SOL Shortening
- Remedies

Arbitration Clauses

- Basic purpose of arbitration.
- Texas courts liberally enforce arbitration clauses.
- In Texas, arbitration agreements are interpreted under general contract principles.
- Can elect to have arbitrator make enforcement and scope decisions.

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.
- No conspicuousness requirement.
- Can appeal denial of motion to compel arbitration.

Arbitration Clauses

- Under FAA, parties' attempts to contract for expanded judicial review of an arbitrator's award are unenforceable.
- The Texas Supreme Court held that under the TAA, parties can expand judicial review of an arbitrator's award. If the parties limit an arbitrator's authority to render awards, e.g., cannot make awards that contain errors of law or fact, then the parties can provide for further and more detailed judicial review of the award.

Forum-Selection Clause

- Basic purpose of forum-selection clauses.
- Historically, they were not enforced, but 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.
- Party can obtain mandamus relief from a trial court's refusal to enforce such a clause.

Contractual Jury Waiver

- Purpose: 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.
- “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.

Contractual Jury Waivers

- In *In re Bank Of America, N.A.*, the Texas Supreme Court granted mandamus relief and enforced a contractual jury waiver. 278 S.W.3d 342 (Tex. 2009).
- 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." *Id.*

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.

Why Different Standards?

- So, why do arbitration and FSC have such an easier time of it than contractual jury waivers?
- No good reason.
- One bad reason – arbitration statutes – but statutes cannot trump constitutional protections.

Personal Jurisdiction

- Personal jurisdiction is a waivable requirement.
- A contractual clause is one of several ways in which a litigant may expressly or impliedly consent to personal jurisdiction.
- Can be used to defeat a defendant's motion to dismiss due to lack of personal jurisdiction.

Venue Selection

- Distinction between forum selection and venue selection.
- Venue-selection clauses are generally enforceable if they arise out of “major transactions” as defined by the statute.
- “A transaction evidenced by a written agreement under which a person pays or receives, or is obligated to pay or entitled to receive, consideration with an aggregate stated value equal to or greater than \$ 1 million.”

Service of Process

- Contractual provision that defines effective service of process that may not otherwise comply with state law.
- One Texas court approved the use of a manner of service provision in a contract to effectuate service. *Nussbaum v. Builders Bank*, 2015 Tex. App. LEXIS 6883 (Tex. App.—Fort Worth, July 2, 2015).
- Other federal cases also support such a clause.

Negotiation/Mediation

- Parties may agree that before any litigation or arbitration is initiated, that they will undergo formal negotiation or mediation.
- Courts routinely uphold agreements to mediate in good faith as a condition precedent to arbitration or litigation.

Choice of Law

- Parties may want to agree on the law that will be used by the parties to interpret and enforce their agreement.
- Texas courts look to sections 187 and 188 of the Restatement (Second) of Conflict of Laws to determine what state's laws should judge a contract.

Choice of Law

- In a contract without an express choice-of-law clause, it is governed by the law of "the state which, with respect to that issue, has the most significant relationship to the transaction," applying the principles stated in Restatement section 6 to the contacts listed in Restatement section 188(2).
- A contract with an express choice-of-law clause is governed by the law chosen by the parties unless certain factors are present.

Choice of Law

- Parties cannot require that their contract be governed by the law of a jurisdiction that has no relation whatsoever to them or their agreement.
- Parties cannot thwart or offend the public policy of the state whose law would otherwise apply.

Choice of Law

- Another issue is the application of choice-of-law clauses on dispute resolution clauses.
- It is not uncommon for contracts to provide that all of the contractual clauses will be construed by a foreign jurisdiction's law.
- This may impact scope of the clause, the standard for enforcing it, and who can enforce it.

Indemnity Clauses

- An indemnity clause states that one party will indemnify the other from litigation or claims.
- Duty to defend vs. duty to indemnify.
- Indemnifying a party for its own negligence: express negligence and conspicuousness.
- No indemnity for gross negligence and intentional acts.

Insurance Requirements

- A party to a contract may want the other party to obtain and maintain insurance coverage for claims.
- If the party obligated to obtain insurance as provided in the agreement fails to do so, the other party could have a breach of contract action.

As-Is

- A valid “as is” clause negates the elements of causation and reliance, including but not limited to causes of action involving the DTPA, fraud, and negligence.
- A buyer who purchases property “as is” chooses to “rely *entirely* upon his own determination” of the property’s value and condition without any assurances from the seller.
- Court set factors for a court to review in determining whether to enforce an as-is clause.

As-Is

- In *Prudential*, the Texas Supreme Court stated: “A buyer is not bound by an agreement to purchase something ‘as is’ that he is induced to make because of a fraudulent representation or concealment of information by the seller.”
- “A seller cannot have it both ways: he cannot assure the buyer of the condition of a thing to obtain the buyer’s agreement to purchase ‘as is,’ and then disavow the assurance which procured the ‘as is’ agreement.”
- Examples where as-is will not be enforced.

Waiver Of Reliance

- The Texas Supreme Court has held that waiver-of-reliance clauses can prove no reliance on prior representations and can defeat fraud and misrepresentation claims.
- The Court suggested the following non-exclusive factors in analyzing whether to enforce a waiver clause: 1) the terms of the contract were negotiated, rather than boilerplate, and during negotiations the parties specifically discussed the issue that has become the topic of the subsequent dispute; (2) the complaining party was represented by counsel; (3) the parties dealt with each other in an arm's length transaction; (4) the parties were knowledgeable in business matters; and (5) the language was clear.

Waiver of Reliance

- What specificity is required?
- *Community Management* case holds that contract does not have to state that a party is relying on one's own judgment.
- *Carduco* case holds that a contract is not sufficient where it does not state that a party is relying on one's own judgment.
- Petitions for review have been filed in both cases.
- Merger clause is not sufficient.

No-Waiver Clause

- A defendant may argue that a plaintiff waived its rights under a contract.
- A contract may contain a clause that states that a party will not waive any right, unless it is done in writing.
- The presence of a non-waiver clause in a contract does not automatically preclude a party from asserting the affirmative defenses of waiver and estoppel.
- While a non-waiver clause may be "some evidence of nonwaiver, it may itself be waived like any other contractual provision."

SOL Shortening Clause

- Generally, the statute of limitations period for a breach of contract claim is four years.
- However, the parties to a contract may agree to shorten that time period.
- Texas Civil Practice and Remedies Code Section 16.070(a) provides that a person may not agree to a period shorter than two years.

Remedies Clauses

- Pro-Injunction Clauses.
- Some courts have held that contractual clauses that expressly provide for injunctive relief are evidence that there is no adequate remedy at law and will support an injunction.
- Other courts hold that the clauses were not sufficient to support a finding of irreparable harm.

Remedies Clauses

- Pro-Receivership Clauses.
- Some courts have held that by executing loan documents containing these types of clauses, all interested parties, in effect, have consented to the appointment of a receiver.
- Other courts hold that such a clause is only one factor that may support a court's order appointing a receiver.

Remedies Clauses

- Liquidated Damages.
- There are two indispensable findings a court must make to enforce contractual damages provisions: (1) the harm caused by the breach is incapable or difficult of estimation, and (2) the amount of liquidated damages called for is a reasonable forecast of just compensation.

Remedies Clauses

- Damage Limitation.
- May take many different forms: cap on liability, preclusion of types of damages, etc.
- A contractual provision setting an upper limit on the amount recoverable applies even to non-contract claims if the terms of the contract so provide.

Remedies Clauses

- These clauses will not be enforced if they violate public policy.
- Under that analysis, courts will consider the bargaining process (procedural unconscionability aspect) and the fairness of the contractual provision in controversy, by determining whether there are legitimate commercial reasons that justify its inclusion as part of the agreement (substantive unconscionability aspect).

Remedies Clauses

- Attorney's fees. Why have them?
- American Rule – each party pays their own fees.
- Texas Civil Practice and Remedies Code Chapter 38 has limitations.
- Can draft them as liberally or conservatively as the parties desire.

Remedies Clauses

- Clause is normally triggered by a finding of a party being a “prevailing party.”
- A prevailing party is the party “who successfully prosecutes the action or successfully defends against it, prevailing on the main issue, even though not to the extent of its original contention.”
- Absent express definition, a plaintiff needs an award of a remedy.
- Defendant is prevailing if plaintiff: 1) nonsuits with prejudice, or 2) nonsuits without prejudice where doing so was done to avoid an unfavorable ruling on the merits.

Conclusion

- Parties want to limit risk in drafting contracts.
- There are many different types of clauses that can impact how parties resolve disputes, what claims can be brought, and what damages can be sought.
- Often, these types of clauses can be fixed via forbearance agreements.
- The author hopes that his paper and this presentation are helpful for those who are drafting contracts and attempting to limit risk.