

**THE USE OF ARBITRATION, FORUM-SELECTION,  
AND JURY-WAIVER CLAUSES IN  
TRUST AND ESTATE LITIGATION IN TEXAS**

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# THE USE OF ARBITRATION, FORUM-SELECTION, AND JURY- WAIVER CLAUSES IN TRUST AND ESTATE LITIGATION IN TEXAS

## I. INTRODUCTION

Individuals execute trusts and wills to determine how certain assets are to be managed and distributed. Those same individuals may want to have some control over the dispute resolution process for any conflicts that arise in the future. Specifically, an individual may want to require that disputes be resolved in arbitration. Arbitration has many benefits and detriments. The largest benefit is that the process is confidential and outside the prying eyes of the public. An individual may also want dictate the forum for any dispute resolution, whether in arbitration or in the court system. A forum-selection clause can dictate the forum for dispute resolution. Finally, the individual may desire to keep disputes in the court system, but want to waive all parties' rights to a jury trial. A jury-waiver clause can potentially waive a party's right to a jury trial and require that all disputes be resolved by a judge. These clauses have all been enforced in Texas in contract-related disputes. There are issues, however, in enforcing these clauses in trust and estate litigation where all of the relevant parties rarely sign a document that contains the clause. This article addresses some of the main issues involving attempts to enforce arbitration, forum-selection, and jury-waiver clauses in trust and estate litigation in Texas.

## II. ARBITRATION CLAUSES

### A. Introduction

Parties have increasingly resorted to the use of arbitration clauses in a number of contexts. That is not surprising as there are federal and state statutes that support and encourage the use of arbitration for dispute resolution. Correspondingly, Federal and Texas courts have been very willing to assist parties in enforcing arbitration agreements, even against those that do not sign the contract.

A party seeking to enforce an arbitration agreement should file a motion to compel arbitration. Typically, when the motion is granted, the trial court abates all proceedings and orders that the claimant initiate arbitration proceedings. Once in arbitration, the parties have limited discovery and agree that either a single arbitrator or a panel of arbitrators decide issues of fact and law. Therefore, by agreeing to arbitrate, the parties agree to waive their right to a jury trial. Once the arbitrator renders a decision, the prevailing party files the decision with the trial court for enforcement. Unless they expressly contract to the contrary, the

parties generally have very little opportunity for appellate review over the arbitrator's decision.

An individual may want to use an arbitration clause as a dispute resolution process in his or her trust document or will to resolve future potential disputes. There are perceived cost savings associated with arbitration, and arbitration can be quicker than normal litigation. One of the main benefits is that the proceeding is confidential. A settlor or testator may genuinely not want the world to know about the estate or trust, its assets, or the executor's or trustee's actions in administering the estate or trust. Should the testator's or settlor's desire that all disputes be resolved in arbitration be enforced? Does a beneficiary that never signs a trust document automatically lose his or her constitutional right to jury trial because such a clause is in a trust document? As discussed below, the Texas Supreme Court has enforced an arbitration clause in a trust dispute where the beneficiaries were suing the trustee for trust administration issues.

### B. Forms For Arbitration Clause

[], Arbitration.

Mandatory clause that is broad:

The Parties shall resolve any of the following in arbitration in [location]: disputes (including, but not limited to, any potential contract, tort, equitable, statutory or other claims) arising from, concerning or related to (i) the interpretation of this document, (ii) the rights and obligations of any Party hereunder, or (iii) the relationship of the Parties.

Mandatory clause that is narrow:

The Parties shall resolve any dispute regarding the interpretation of this document or any breach thereof in binding arbitration.

Sending initial issues to arbitrator for determination:

The Parties agree that any issue arising from or related to the validity, enforceability, and scope of this arbitration clause shall solely be determined by the arbitrator in an arbitration proceeding. All disputes under this arbitration agreement shall be settled by arbitration in accordance with the rules then in effect of the American Arbitration Association.

**Selection of arbitrators:**

If arbitration is required to resolve a dispute among the Parties, the Parties shall agree on three arbitrators. If the Parties cannot agree on the three arbitrators, then they will each select one arbitrator and then those two arbitrators shall select the third arbitrator.

Or

Either Party will notify AAA and request AAA to select one arbitrator approved by both Parties to act as the arbitrator for resolution of the dispute.

**Discovery/Rules of Arbitration:**

The arbitrator(s) selected will establish the rules for proceeding with the arbitration of the dispute and such rules will be binding upon all parties to the arbitration proceeding. The arbitrator(s) may use the rules of the AAA for commercial arbitration but is encouraged to adopt such rules as the arbitrator(s) deems appropriate to accomplish the arbitration in the quickest and least expensive manner possible. In any event, the arbitrator(s) (1) shall permit each side no more than [\_\_\_\_\_] depositions (including the deposition of experts), which depositions may not exceed four hours each, one set of ten interrogatories (inclusive of sub parts) and one set of twenty-five document requests (inclusive of sub parts), (2) shall permit fifty requests for admissions, (3) shall limit the hearing, if any, to [\_\_\_\_\_] days, (4) set the final arbitration hearing date for a date no more than 90 days after the filing of the arbitration, and (5) shall render their/his or her decision within 120 days of the filing of the arbitration. All arbitration proceedings shall be confidential.

**Costs of Arbitration:**

The arbitrator(s) will have the authority to determine and award costs of arbitration and the costs incurred by any party for their attorneys, advisors and consultants, though the arbitrator shall be bound by the Agreement's attorney's fees clause.

**Award of Arbitrator:**

Any award made by the arbitrator(s) shall be binding on the Parties and shall be enforceable to the fullest extent of the law. The arbitrator(s) shall issue a written opinion discussing all material legal and factual issues necessary for resolution of the dispute.

**Governing Law and Actual Damages in Arbitration:**

In reaching any determination or award, the arbitrator(s) will apply the laws of the State of [\_\_\_\_\_] without giving effect to any principles of conflict of laws under the laws of the State of [\_\_\_\_\_]. The arbitrator's award will be limited to actual damages and will not include punitive or exemplary damages. Nothing contained in this document will be deemed to give the arbitrator any authority, power or right to alter, change, amend, modify, add to or subtract from any of the provisions of this document. All privileges under state and federal law, including, without limitation, attorney client, work product and party communication privileges, shall be preserved and protected. All experts engaged by a party must be disclosed to the other party within thirty (30) days after the date of notice and demand for arbitration is given.

**Right to Appeal:**

The Parties agree that the Arbitrator(s)'s decision may be corrected for legal or factual errors via an appeal to a state or federal court in [location], and then, if necessary, to appellate courts. The Parties will create a record of the arbitration hearing so that a court may review the arbitrator(s)'s decision. This arbitration provision is solely controlled by and construed under the Texas Arbitration Act and not the Federal Arbitration Act.

**C. Enforcement Of Arbitration Clauses**

Arbitration is a contractual proceeding by which the parties, in order to obtain a speedy and inexpensive final disposition of disputed matters, consent to submit the controversy to arbitrators for determination. *Porter & Clements, L.L.P. v. Stone*, 935 S.W.2d 217, 221 (Tex. App.—Houston [1st Dist.] 1996, no pet.). Federal and state law strongly favors arbitration. *Cantella & Co. v. Goodwin*, 924 S.W.2d 943, 944 (Tex. 1996).



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. *See, e.g., Royston, Rayzor, Vickery & Williams, LLP v. Lopez*, 467 S.W.3d 494 (Tex. 2015) (enforcing arbitration clause in attorney/client agreement). In Texas, arbitration agreements are interpreted under general contract principles. *See In re Kellogg Brown & Root*, 166 S.W.3d 732, 738 (Tex. 2005); *J.M. Davidson, Inc. v. Webster*, 128 S.W.3d 223, 227 (Tex. 2003). 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. *In re Oakwood Mobile Homes, Inc.*, 987 S.W.2d 571, 573 (Tex. 1999). There are no special defenses to an arbitration agreement other than normal contract defenses such as fraud, duress, and unconscionability.

#### **D. Procedure For Compelling Arbitration**

A motion to compel arbitration is procedurally akin to a motion for summary judgment and is subject to the same evidentiary standards. *In re Jebbia*, 26 S.W.3d 753, 756-57 (Tex. App.—Houston [14th Dist.] 2000, orig. proceeding). Thus, the party alleging an arbitration agreement must present summary proof that an agreement to arbitrate requires arbitration of the dispute. *In re Jim Walter Homes, Inc.*, 207 S.W.3d 888, 897 (Tex. App.—Houston [14th Dist.] 2006, orig. proceeding); *Jebbia*, 26 S.W.3d at 757. The party resisting may then contest the opponent's proof or present evidence supporting the elements of a defense to enforcement. *Jim Walter Homes, Inc.*, 207 S.W.3d at 897; *Jebbia*, 26 S.W.3d at 757. Only where a material issue of fact is raised, is there a need for an evidentiary hearing. *Jim Walters Homes, Inc.*, 207 S.W.3d at 897.

The elements of a valid arbitration agreement are: (1) an offer; (2) acceptance in strict compliance with the terms of the offer; (3) a meeting of the minds; (4) each party's consent to the terms; and (5) execution and delivery of the contract with the intent that it be mutual and binding. *Advantage Physical Therapy, Inc. v. Cruse*, 165 S.W.3d 21, 24 (Tex. App.—Houston [14th Dist.] 2005, no pet.). The term "meeting of the minds" refers to the parties' mutual understanding and assent to the expression of their agreement. *Principal Life Ins. Co. v. Revalen Dev., LLC*, 358 S.W.3d 451, 454 (Tex. App.—Dallas 2012, pet. denied). Contracts require mutual assent to be enforceable. *Baylor Univ. v. Sonnichsen*, 221 S.W.3d 632, 635 (Tex. 2007). Evidence of mutual assent in written contracts generally consists of signatures of the parties and delivery with the intent to bind. *Id.* By signing a contract, a party is presumed to have read and

understood its contents. *In re Prudential Ins. Co. of Am.*, 148 S.W.3d 124, 134 (Tex. 2004).

#### **E. Scope of An Arbitration Clause**

A plaintiff can assert that his or her claims fall outside of the scope of the dispute resolution clause. *Lost Maples Gen. Store, LLC v. Ascentium Capital, LLC*, No. 14-18-00215-CV, 2019 Tex. App. LEXIS 3549, 2019 WL 1966671 (Tex. App.—Houston [14th Dist.] May 2, 2019, no pet.) (party argued that claims fell outside of scope of contractual jury waiver). Courts may require a party to submit a dispute to arbitration only if the party has agreed to do so. *Seven Hills Commer., LLC v. Mirabal Custom Homes, Inc.*, 442 S.W.3d 706, 714 (Tex. App.—Dallas 2014, pet. denied). A party seeking to compel arbitration must establish a valid arbitration agreement exists and that the claims asserted are within the scope of the agreement. *Id.* at 715.

To determine whether claims fall within the scope of an arbitration agreement, a court must focus on the factual allegations rather than the legal claims asserted. *In re FirstMerit Bank, N.A.*, 52 S.W.3d 749, 754 (Tex. 2001); *Prudential*, 909 S.W.2d at 900. When considering an arbitration agreement, a court must give "due regard" to the federal policy favoring arbitration. *Webb v. Investacorp., Inc.*, 89 F.3d 252, 258 (5th Cir. 1996). A court should construe an arbitration clause broadly, and when a contract contains an arbitration clause, there is a presumption of arbitrability. *AT&T Tech., Inc. v. Commc's Workers of Am.*, 475 U.S. 643, 650 (1986).

Any doubts as to arbitrability are to be resolved in favor of coverage. *In re FirstMerit Bank N.A.*, 52 S.W.3d at 754. Likewise, a court should resolve any doubts about the scope of the arbitration agreement in favor of coverage. *Id.* The court should not deny arbitration "unless it can be said with positive assurance that an arbitration clause is not susceptible of an interpretation which would cover the dispute at issue . . . ." *Commerce Park at DFW Freeport v. Mardian Constr. Co.*, 729 F.2d 334, 338 (5th Cir. 1984); *Metropolitan Property v. Bridewell*, 933 S.W.2d 358, 361 (Tex. App.—Waco 1996, no writ).

Arbitration agreements containing phrases such as "relating to" are interpreted broadly. *See Pennzoil Exploration & Prod. Co. v. Ramco Energy Ltd.*, 139 F.3d 1061, 1065 (5th Cir. 1998); *In re Bank One, N.A.*, 216 S.W.3d 825, 826-27 (Tex. 2007) (resolving doubt as to scope of arbitration agreement covering disputes "arising from or relating in any way to this Agreement" in favor of coverage); *In re Jim Walter Homes, Inc.*, 207 S.W.3d 888, 896 (Tex. App.—Houston [14th Dist.] 2006, orig. proceeding) (in context of arbitration clause, Court recognized that the use of language "any" dispute "arising out of or related to" as broad language

that expressly includes tort and other claims); *In re Guggenheim Corp. Funding, LLC*, 380 S.W.3d 879, 887 (Tex. App.—Houston [14th Dist.] 2012, orig. proceeding); *TMI Inc. v. Brooks*, 225 S.W.3d 783, 791 (Tex. App.—Houston [14th Dist.] 2007, orig. proceeding) (holding that phrase “arising out of and/or related to” in arbitration agreement is “broad form in nature, evidencing the parties’ intent to be inclusive rather than exclusive.”). The phrase “relates to” is a very broad term. *Schwarz v. Pully*, No. 05-14-00615, 2015 Tex. App. LEXIS 8115 (Tex. App.—Dallas August 3, 2015, no pet.). A claim “relates to” a contract if it has a significant relationship with or touches matters covered by the contract. *Kirby Highland Lakes Surgery Ctr., L.L.P. v. Kirby*, 183 S.W.3d 891, 898 (Tex. App.—Austin 2006, no pet.).

Broad arbitration clauses embrace “all disputes between the parties having a significant relationship to the contract, regardless of the label attached to the dispute.” *Pennzoil*, 139 F.3d at 1067. One court has held that an arbitration clause using a phrase such as “any dispute . . . relating to, arising from, or connected in any manner to this Agreement” is broad and “embrace[s] all disputes between the parties having a significant relationship to the contract regardless of the label attached to the dispute.” *FD Frontier Drilling (Cyprus), Ltd. v. Didmon*, 438 S.W.3d 688, 695 (Tex. App.—Houston [1st Dist.] 2014, pet. denied). “If the facts alleged ‘touch matters,’ have a ‘significant relationship’ to, are ‘inextricably enmeshed’ with, or are ‘factually intertwined’ with the contract containing the arbitration agreement, the claim is arbitrable.” *Id.*; *Cotton Commercial USA, Inc. v. Clear Creek ISD*, 387 S.W.3d 99, 108 (Tex. App.—Houston [14th Dist.] 2012, no pet.); *Pennzoil Co. v. Arnold Oil Co.*, 30 S.W.3d 494, 498 (Tex. App.—San Antonio 2000, orig. proceeding).

Additionally, broad language has been construed to extend not only to claims that literally arise under the contract, but to all disputes arising out of the parties’ relationship. *Didmon*, 438 S.W.3d at 695 (citing *Nauru Phosphate Royalties, Inc. v. Drago Daic Interests, Inc.*, 138 F.3d 160, 164-65 (5th Cir. 1998) (claims on a promissory note were arbitrable due to a development agreement’s arbitration clause); *Hale-Mills Constr. Ltd. v. Willacy County*, No. 13-15-00174-CV, 2016 Tex. App. LEXIS 340 (Tex. App.—Corpus Christi January 14, 2016, no pet.); *Valentine Sugars, Inc. v. Donau Corp.*, 981 F.2d 210, 213 n.2 (5th Cir. 1993).

Although both Texas and federal policy strongly favor arbitration, that policy “cannot serve to stretch a contractual clause beyond the scope intended by the parties or to allow modification of the plain and unambiguous provisions of an agreement.” *In re EGIL Eagle Gidall Logistics, L.P.*, 89 S.W.3d 761, 764 (Tex.

*App.* — Houston [1st Dist] 2002, orig. proceeding). Where the clause states that it resolves disputes under the agreement, it is a narrow clause and will not include every claim that touches upon the document. *All. Family of Cos. & Justin Magnuson v. Nevarez*, No. 05-18-00622-CV, 2019 Tex. App. LEXIS 2728 (Tex. App.—Dallas April 4, 2019, no pet.) (narrow arbitration clause did not include causes of action for assault, sexual assault, and battery); *RSR Corp. v. Siegmund*, 309 S.W.3d 686, 701 (Tex. App.—Dallas 2010, no pet.) (explaining that phrase “under the agreement,” in context of forum selection clause, suggests direct relationship between agreement and dispute and limits application to actions that arose as result of agreement).

#### **F. Right To Appeal Decision On Motion To Compel Arbitration**

Because the main purpose of arbitration is cost-savings and the avoidance of prolonged delay, in the Texas Arbitration Act, the Texas Legislature provided that a trial court’s denial of a motion to arbitrate is immediately appealable: “A party may appeal a judgment or decree entered under this chapter or an order: (1) denying an application to compel arbitration.” Tex. Civ. Prac. & Rem. Code § 171.098(a)(1). Similarly, the Texas Legislature enacted Texas Civil Practice and Remedies Code section 51.016 that provides courts of appeals with jurisdiction to decide an appeal from an interlocutory order on a motion to compel arbitration under the Federal Arbitration Act:

In a matter subject to the Federal Arbitration Act (9 U.S.C. Section 1 et seq.), a person may take an appeal or writ of error to the court of appeals from the judgment or interlocutory order of a district court, county court at law, or county court under the same circumstances that an appeal from a federal district court’s order or decision would be permitted by 9 U.S.C. Section 16.

Tex. Civ. Prac. & Rem. C. Ann. § 51.016. This section is effective for any case filed on or after September 1, 2009. *See id.* at cmts.

However, the opposite is not true; an order granting a motion to compel arbitration is not immediately appealable. For example, in *Fletcher v. Edward Jones Trust Co.*, a party sued a trust company for inappropriately distributing funds from an account, and the trial court granted the trust company’s motion to compel the dispute to arbitration. No. 11-19-00017-CV, 2019 Tex. App. LEXIS 1280 (Tex. App.—Eastland February 21, 2019, Decided; February 21, 2019, no pet.). The plaintiff attempted to appeal the

order granting the motion to compel arbitration. The court of appeals requested briefing from the parties regarding whether the court had jurisdiction over the appeal. The court noted that there was a statute that allowed interlocutory appeals from orders that deny arbitration, not from orders that compel arbitration. Tex. Civ. Prac. & Rem. Code Ann. § 171.098; *Chambers v. O'Quinn*, 242 S.W.3d 30, 31 (Tex. 2007). The court noted that the plaintiff filed a response that cited several cases involving mandamus proceedings, rather than direct appeals. The court held that it did not have jurisdiction over an appeal:

Unless specifically authorized by statute, appeals may be taken only from final judgments. Section 171.098 authorizes an interlocutory appeal from an order “denying an application to compel arbitration” and an order “granting an application to stay arbitration.” The order from which Appellant attempts to appeal is not a final judgment, nor is it an order staying arbitration or denying an application to compel arbitration. An interlocutory appeal from an order granting a motion to compel arbitration is not authorized. Because an interlocutory appeal is not authorized in this case and because a final, appealable order has not been entered, we lack jurisdiction and must dismiss this appeal.

*Id.* (internal citations omitted).

This case highlights the complete inequity involved in appellate courts' review of orders on motions to compel arbitration. An order denying a motion to compel arbitration can be appealed immediately, but an order granting same cannot. Apparently, the cost and expense of participating in a needless trial is unfair to a party seeking arbitration, but the cost and expense of participating in a needless arbitration is not unfair to a party fighting arbitration. The potential of a loss of contractual rights outweighs the loss of constitutional rights.

There is an alternative method to seek appellate review of a trial court's order granting arbitration: mandamus relief. Where a trial court abuses its discretion in ruling on a matter and an appeal is inadequate, a court of appeals should grant mandamus relief. Potentially, a court of appeals could grant mandamus relief to reverse a trial court's order granting arbitration. But even where a trial court clearly abuses its discretion in granting a motion to compel arbitration, the Texas Supreme Court generally would deny mandamus relief: “In the context of orders compelling arbitration, even if a petitioner can meet the first requirement, mandamus is generally unavailable

because it can rarely meet the second. If a trial court compels arbitration when the parties have not agreed to it, that error can unquestionably be reviewed by final appeal.” *In re Gulf Expl., LLC*, 289 S.W.3d 836, 842 (Tex. 2009) (orig. proceeding); *See also In re Vantage Drilling Int'l*, 555 S.W.3d 629 (Tex. App.—Houston [1st Dist.] 2018, orig. proceeding) (appellate court denied a request for mandamus relief of a trial court's order compelling arbitration because the petitioner had adequate remedy by appeal). Therefore, in most cases, mandamus relief will also not be available.

Because of the statutes at play, the Texas Supreme Court could not hold that an appellate court has jurisdiction over an appeal from an order granting arbitration, but it certainly could hold that an appellate court could grant mandamus relief. Indeed, the Texas Supreme Court formerly held that an appellate court could grant mandamus relief to correct a trial court's error in denying arbitration, denying a motion to dismiss due to a forum-selection clause, or denying the impact of a contractual jury-waiver clause. It is not clear why the Texas Supreme Court is so ready to assist defendants in enforcing litigation-altering contractual clauses, but is so reluctant to support a plaintiff's constitutional rights, such as due process, due course, and the right to a jury trial.

### **G. Delegation of Enforcement Issues To An Arbitrator**

Courts have held that parties can agree to delegate to the arbitrator the power to resolve gateway issues regarding the validity, enforceability, and scope of an arbitration agreement. *Rent-A-Center, West, Inc. v. Jackson*, 561 U.S. 63, 68 (2010) (“We have recognized that parties can agree to arbitrate ‘gateway’ questions of ‘arbitrability,’ . . . An agreement to arbitrate a gateway issue is simply an additional, antecedent agreement the party seeking arbitration asks the federal court to enforce, and the FAA operates on this additional arbitration agreement just as it does on any other.”). Numerous circuit courts have also followed suit.<sup>1</sup> *AT&T Technologies, Inc. v. Communications.*

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<sup>1</sup> *See, e.g., Fallo v. High-Tech Inst.*, 559 F.3d 874, 878 (8th Cir. 2009) (“[W]e conclude that the arbitration provision's incorporation of the AAA Rules . . . constitutes a clear and unmistakable expression of the parties' intent to leave the question of arbitrability to an arbitrator.”); *Qualcomm Inc. v. Nokia Corp.*, 466 F.3d 1366, 1372-73 (Fed. Cir. 2006) (concluding that agreement's incorporation of AAA rules clearly and unmistakably showed parties' intent to delegate issue of determining arbitrability to arbitrator); *Contec Corp. v. Remote Solution, Co.*, 398 F.3d 205, 208 (2d Cir. 2005) (“[W]hen . . . parties explicitly incorporate rules that empower an arbitrator to decide issues of arbitrability, the incorporation serves as clear and unmistakable evidence of the parties' intent to delegate such issues to an arbitrator.”);

*Workers*, 475 U.S. 643 (1986) (holding parties may agree to arbitrate arbitrability); *First Options of Chicago, Inc. v. Kaplan*, 514 U.S. 938, 943 (1985) (holding question of primary power to decide arbitrability “turns upon what the parties agreed about that matter”).

An arbitration provision can state that any dispute shall be settled by arbitration in accordance with the rules then in effect of the American Arbitration Association. Rule 7(a) of the Commercial Arbitration Rules of the AAA grants an arbitrator “the power to rule on his or her own jurisdiction, including any objections with respect to the existence, scope or validity of the Arbitration Agreement.” Commercial Rules Of The American Arbitration Association, Rule 7(a) (<http://adr.org/aaa/faces/rules>).

Federal courts have concluded that an arbitration agreement’s incorporation of rules empowering an arbitrator to decide arbitrability and scope issues clearly and unmistakably evidences the parties’ intent to allow the arbitrator to decide those issues. *See, e.g., Petrofac, Inc. v. DynMcDermott Petroleum Operations Co.*, 687 F.3d 671 (5th Cir. 2012) (“We agree with most of our sister circuits that the express adoption of these rules presents clear and unmistakable evidence that the parties agreed to arbitrate arbitrability.”); *Fallo v. High-Tech Inst.*, 559 F.3d 874, 878 (8th Cir. 2009) (“[W]e conclude that the arbitration provision’s incorporation of the AAA Rules . . . constitutes a clear and unmistakable expression of the parties’ intent to leave the question of arbitrability to an arbitrator.”); *Qualcomm Inc. v. Nokia Corp.*, 466 F.3d 1366, 1372-73 (Fed. Cir. 2006) (concluding that agreement’s incorporation of AAA rules clearly and unmistakably showed parties’ intent to delegate issue of determining arbitrability to arbitrator); *Terminix Int’l Co., LP v. Palmer Ranch Ltd. P’ship*, 432 F.3d 1327, 1332-33 (11th Cir. 2005) (holding that by incorporating AAA Rules into arbitration agreement, parties clearly and unmistakably agreed that arbitrator should decide whether arbitration clause was valid); *Contec Corp. v. Remote Solution, Co.*, 398 F.3d 205, 208 (2d Cir. 2005) (“[W]hen . . . parties explicitly incorporate rules that empower an arbitrator to decide issues of arbitrability, the incorporation serves as clear and unmistakable evidence of the parties’ intent to delegate such issues to an arbitrator.”); *Citifinancial, Inc. v. Newton*, 359 F. Supp. 2d 545, 549-52 (S.D. Miss. 2005) (holding that by agreeing to be bound by procedural rules of AAA, including rule giving arbitrator power to rule on his or

her own jurisdiction, defendant agreed to arbitrate questions of jurisdiction before arbitrator); *Sleeper Farms v. Agway, Inc.*, 211 F. Supp. 2d 197, 200 (D. Me. 2002) (holding arbitration clause stating that arbitration shall proceed according to rules of AAA provides clear and unmistakable delegation of scope-determining authority to arbitrator).

In Texas, generally, courts have held that as between parties to a contract, the incorporation of the AAA rules does delegate arbitrability issues to the arbitrator. *Gilbert v. Rain & Hail Ins.*, No. 02-16-00277-CV, 2017 Tex. App. LEXIS 1542, 2017 WL 710702, at \*4 (Tex. App.—Fort Worth Feb. 23, 2017, pet. filed) (mem. op.) (concluding arbitrator properly determined arbitrability because policy incorporated American Arbitration Association’s commercial arbitration rules); *Schlumberger Tech. Corp. v. Baker Hughes Inc.*, 355 S.W.3d 791, 803 (Tex. App.—Houston [1st Dist.] 2011, no pet.) (“There are no provisions in the Resolution or Procedure Agreements that negate the arbitrators’ power under AAA Rule 7(a) to determine the arbitrability of a defense raised in arbitration. Thus, we conclude that this issue of contract interpretation was a question for the AAA panel, not the trial court and not this court.”); *Haddock v. Quinn*, 287 S.W.3d 158, 172 (Tex. App.—Fort Worth 2009, pet. denied) (“The majority of courts have concluded that express incorporation of rules empowering the arbitrator to decide arbitrability (including ruling upon his or her own jurisdiction) clearly and unmistakably evidences the parties’ intent to delegate issues of arbitrability to the arbitrator.”); *Saxa Inc. v. DFD Architecture Inc.*, 312 S.W.3d 224, 230 (Tex. App.—Dallas 2010, pet. denied) (“[The parties] incorporated the Rules into their contract, giving the arbitration panel the power to rule on its own jurisdiction, including any objections to the existence, scope or validity of the arbitration agreement.”); *Petrofac, Inc. v. DynMcDermott Petroleum Ops. Co.*, 687 F.3d 671 (5th Cir. 2012) (“We agree with most of our sister circuits that the express adoption of these rules presents clear and unmistakable evidence that the parties agreed to arbitrate arbitrability.”).

In *Crawford Prof. Drugs, Inc. v. CVS Caremark Corp.*, the Fifth Circuit was faced with arguments relating to the question of who decides the arbitrability of the plaintiff’s claims – the arbitrator or the court. 748 F.3d 249, 262 (5th Cir. 2014). The arbitration agreement at issue provided that the arbitration would be conducted in accordance with the Rules of the AAA. *Id.* The court noted that the AAA Rules for arbitration provide that the arbitrator has the power to rule on his or her own jurisdiction, including “any objections with respect to the existence, scope, or validity of the arbitration agreement or to the

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*Sleeper Farms v. Agway, Inc.*, 211 F. Supp. 2d 197, 200 (D. Me. 2002) (holding arbitration clause stating that arbitration shall proceed according to rules of AAA provides clear and unmistakable delegation of scope-determining authority to arbitrator).

arbitrability of any claim or counterclaim.” *Id.* The court held that “express incorporation of the same AAA Rules constitutes clear and unmistakable evidence that the parties agreed to arbitrate arbitrability.” *Id.*

In *T.W. Odom Mgmt. Servs. v. Williford*, the court of appeals reversed a trial court’s decision denying a motion to compel arbitration in an employee injury suit where the employment agreement clearly provided that the AAA rules would apply. No. 09-16-00095, 2016 Tex. App. LEXIS 9353 (Tex. App.—Beaumont August 25, 2016, no pet.). The court stated:

The 2013 agreement states that “[t]he arbitration will be held under the auspices of the American Arbitration Association (“AAA”)[,]” and “shall be in accordance with the AAA’s then-current employment arbitration procedures.” The agreement also references the AAA National Rules for Resolution of Employee Disputes. Under the AAA’s Employment Arbitration Rules, Rule 6, the “arbitrator shall have the power to rule on his or her own jurisdiction, including any objections with respect to the existence, scope or validity of the arbitration agreement.” ... [The parties] agreed that any arbitration would be conducted in accordance with the AAA’s employment arbitration procedures, and the agreement references the AAA’s National Rules for Resolution of Employee Disputes. The parties agreed to a broad arbitration clause that expressly incorporated rules giving the arbitrator the power to rule on its own jurisdiction and to rule on any objections with respect to the existence, scope, or validity of the agreement.

*Id.* at \*12-13. The court therefore ordered that the trial court should have ruled that the arbitrator could make the decision on the scope and enforceability of the clause. *Id.*

More recently, in *Kyani, Inc. v. HD Walz II Enterprises*, parties appealed a trial court’s order denying arbitration under a distributor agreement. No. 05-17-00486-CV, 2018 Tex. App. LEXIS 5610 (Tex. App.—Dallas July 24, 2018, no pet.). The arbitration provision did not expressly delegate arbitrability to the arbitrator; however, it stated that “arbitration shall be in accordance with the FAA and the Commercial Arbitration Rules of the AAA.” *Id.* at \*20-21. The court of appeals held that the incorporation of the AAA rules was clear and unmistakable evidence of the parties’ intent to allow the arbitrator to decide the scope issue as to arbitrability:

“[T]he express incorporation of rules that empower the arbitrator to determine arbitrability—such as the AAA Commercial Arbitration Rules—has been held to be clear and unmistakable evidence of the parties’ intent to allow the arbitrator to decide such issues.” *Schlumberger Tech. Corp. v. Baker Hughes Inc.*, 355 S.W.3d 791, 802 (Tex. App.—Houston [1st Dist.] 2011, no pet.). When the parties agree to a broad arbitration clause, purporting to cover all claims, disputes and other matters arising out of or relating to the contract, and explicitly incorporate rules that empower an arbitrator to decide issues of arbitrability, the incorporation serves as clear and unmistakable evidence of the parties’ intent to delegate such issues to an arbitrator. *Saxa Inc. v. DFD Architecture Inc.*, 312 S.W.3d 224, 230 (Tex. App.—Dallas 2010, pet. denied). We conclude that the arbitration provision evidences a clear and unmistakable intention that the arbitrators have the authority to determine the scope of arbitration with respect to Walz’s claims against Kyani.

*Id.*

Recently, in *Jody James Farms, JV v. Altman Grp., Inc.*, the Texas Supreme Court refused to rule on whether the incorporation of AAA rules in an arbitration clause would send arbitrability issues to the arbitrator. 547 S.W.3d 624 (Tex. 2018). The Court, however, held that such an incorporation did *not* send arbitrability issues to the arbitrator as between *nonsignatories* to an agreement. *Id.* The Court stated:

While such deference may be the consequence of incorporating the AAA rules in disputes between signatories to an arbitration agreement, to the text of the note which we need not decide, the analysis is necessarily different when a dispute arises between a party to the arbitration agreement and a non-signatory. As to that matter, Texas courts differ about whether an arbitration agreement’s mere incorporation of the AAA rules shows clear intent to arbitrate arbitrability. We hold it does not. Even when the party resisting arbitration is a signatory to an arbitration agreement, questions related to the existence of an arbitration agreement with a non-signatory are for the court, not the arbitrator.

The involvement of a non-signatory is an important distinction because a party cannot be forced to arbitrate absent a binding agreement to do so. The question is not whether Jody James agreed to arbitrate with someone, but whether a binding arbitration agreement exists between Jody James and the Agency. What might seem like a chicken-and-egg problem is resolved by application of the presumption favoring a judicial determination. A contract that is silent on a matter cannot speak to that matter with unmistakable clarity, so an agreement silent about arbitrating claims against non-signatories does not unmistakably mandate arbitration of arbitrability in such cases.

*Id.* at \*8-9. Accordingly, the Texas Supreme Court held that where a signatory is attempting to enforce the clause against a nonsignatory, a court will determine the issue of enforceability and scope notwithstanding the incorporation of the AAA rules.

This is a significant ruling for parties attempting to enforce arbitration clauses in trusts and wills. Normally, in this circumstance, the beneficiary has not signed the trust or will. The party attempting to enforce the arbitration clause will be attempting to enforce it against a nonsignatory, and therefore, the incorporation of the AAA rules in such a clause will not affect a delegation to the arbitrator of enforceability or scope issues.

Finally, it should be noted that a party wanting to rely on the AAA rules to delegate the enforceability or scope issues to the arbitrator should raise that issue in the trial court or else face waiver. *Gray v. Ward*, No. 05-18-00266-CV, 2019 Tex. App. LEXIS 6992 (Tex. App.—Dallas August 9, 2019, no pet.). Further, a party relying on the AAA rules should offer those rules into evidence during the motion to compel arbitration hearing or else face waiver. *PER Group, L.P. v. Dava Oncology, L.P.*, 294 S.W.3d 378, 386 (Tex. App.—Dallas 2009, no pet.) (concluding arbitrability issue not preserved because AAA rules were not admitted into evidence).

#### H. Conspicuousness Requirement

In Texas, there is a presumption that parties who sign contracts have read and understood the contracts' provisions. See *Cantella & Co. v. Goodwin*, 924 S.W.2d 943 (Tex. 1996). There is no requirement that the party relying on the arbitration agreement prove that it is conspicuous. For example, an arbitration clause can be incorporated by reference into another contract. *In re Bank One*, 216 S.W.3d 825, 826 (Tex. 2007). In *Bank One*, the Court enforced an arbitration agreement that was contained in a lengthy depository

agreement that had been incorporated by reference into an account signature card. See *id.* Certainly, a clause that is not expressly set out in an agreement is not conspicuous.

It should be noted that there are narrow statutory exceptions: the Texas Property Code requires that arbitration clauses in new home contracts be conspicuous, and the Texas Business and Commerce Code requires that an arbitration clause in certain contracts requiring arbitration in another jurisdiction be conspicuous. See Tex. Prop. Code Ann. § 420.003; Tex. Bus. & Com. Code Ann. § 35.53(b).

#### I. Enforcing An Arbitration Clause Against Nonsignatories

Generally, “an arbitration clause cannot be invoked by a non-party to the arbitration contract.” *G.T. Leach Builders, LLC v. Sapphire V.P., LP*, 458 S.W.3d 502, 524 (Tex. 2015); see also *Jody James Farms, JV* 547 S.W.3d at 632 (“The involvement of a non-signatory is an important distinction because a party cannot be forced to arbitrate absent a binding agreement to do so.”). However, if required by principles of contract law and agency, “a person who has agreed to arbitrate disputes with one party may be required to arbitrate related disputes with non-parties.” *Jody James Farms, JV*, 547 S.W.3d at 629. Further, a signatory may potentially enforce an arbitration clause against a non-signatory.

A non-signatory may enforce an arbitration provision's terms only if there is a valid agreement to arbitrate. *Id.* at 633. Whether a claim involving a non-signatory must be arbitrated is a “gateway matter” for the trial court which is subject to de novo review on appeal. *Id.* at 629. Texas courts have recognized six theories that allow non-signatories to enforce arbitration agreements: (1) incorporation by reference; (2) assumption; (3) agency; (4) alter ego; (5) equitable estoppel; and (6) third-party beneficiary. See *id.* at 633; *In re Kellogg Brown & Root, Inc.*, 166 S.W.3d 732, 738 (Tex. 2005). Under the Federal Arbitration Act, “‘background principles’ of state contract law, when relevant, ‘allow a contract to be enforced by or against nonparties to the contract through assumption, piercing the corporate veil, alter ego, incorporation by reference, third-party beneficiary theories, waiver and estoppel.’” *Crawford Prof'l Drugs, Inc. v. CVS Caremark Corp.*, 748 F.3d at 257 (emphasis added) (quoting *Arthur Andersen LLP v. Carlisle*, 556 U.S. 624, 631, 129 S. Ct. 1896, 173 L. Ed. 2d 832 (2009)); see also *Hays v. HCA Holdings, Inc.*, 838 F.3d 605, 609 & n.1 (5th Cir. 2016) (applying Texas law of direct benefits estoppel).

Under the doctrine of “direct benefits estoppel,” a non-signatory party who seeks the benefits of a contract or who seeks to enforce the terms of a contract

“is estopped from simultaneously attempting to avoid the contract’s burdens, such as the obligation to arbitrate disputes.” *Rachal v. Reitz*, 403 S.W.3d 840, 846 (Tex. 2013). “[T]he doctrine recognizes that a party may be estopped from asserting that the lack of his signature on a written contract precludes enforcement of the contract’s arbitration clause when he has consistently maintained that other provisions of the same contract should be enforced to benefit him.” *Id.*

For example, in *FirstMerit Bank*, the non-signatory plaintiffs sued the signatory defendant for, among other things, breach of contract, revocation of acceptance, and breach of warranty. 52 S.W.3d at 752-53, 755. By bringing the breach-of-contract and breach-of-warranty claims, the plaintiffs sought benefits that stemmed directly from the contract’s terms. The Texas Supreme Court concluded that, by seeking to enforce the contract, the non-signatory plaintiffs “subjected themselves to the contract’s terms, including the Arbitration Addendum.” *Id.* at 756.

The Court has subsequently repeatedly used direct-benefits estoppel in the context of arbitration clauses. See *Rachel v. Reitz*, 403 S.W.3d 840 (Tex. 2013); *Meyer v. WMCO-GP LLC*, 211 S.W.3d 302 (Tex. 2006) (applying direct benefits estoppel to allow a non-signatory defendant to enforce arbitration clause against a signatory plaintiff); *In re Vesta Insurance Group, Inc.*, 192 S.W.3d 759 (Tex. 2006). *But see In re Kellogg Brown & Root, Inc.*, 166 S.W.3d 732, 741 (Tex. 2005) (holding that estoppel did not apply to facts of case).

The Texas Supreme Court held that the direct-benefits estoppel theory may apply to allow a non-signatory to enforce an arbitration clause or to enforce an arbitration clause against a non-signatory. “[A] litigant who sues based on a contract subjects him or herself to the contract’s terms.” *In re FirstMerit Bank*, 52 S.W.3d at 755. Therefore, a party is estopped from suing “based on the contract” and at the same time ignoring an arbitration clause contained in that contract. This is likely the most popular method to enforce an arbitration clause against a nonsignatory.

Both Texas and Federal law recognize that there are two types of direct-benefits estoppel. First, a non-signatory who uses the litigation process to sue based on a contract subjects him or herself to the contract’s terms. *In re FirstMerit Bank, N.A.*, 52 S.W.3d at 755. The second way in which direct benefits estoppel may be applied to bind a non-signatory to an arbitration agreement is when the non-signatory “seek[s] or obtain[s] direct benefits from a contract by means other than a lawsuit.” *Weekley Homes*, 180 S.W.3d at 132. Under this application of the doctrine, a non-signatory may be compelled to arbitrate if he or she deliberately seeks and obtains substantial benefits from the contract

during the performance of the agreement. *Id.* at 132-33. As stated by the Texas Supreme Court: “While Von Barga never based her personal injury claims on the contract, her prior exercise of other contractual rights and her equitable entitlement to other contractual benefits prevents her from avoiding the arbitration clause.” *Id.*

Federal courts also recognize that a non-signatory party that benefits from a contract during the course of performance of the contract cannot avoid its arbitration clause. Direct-benefit estoppel “involve[s] non-signatories who, during the life of the contract, have embraced the contract despite their non-signatory status but then, during litigation, attempt to repudiate the arbitration clause in the contract.” *E.I. DuPont de Nemours & Co. v. Rhone Poulenc Fiber & Resin Intermediates*, S.A.S., 269 F.3d 187, 200 (3d Cir. 2001); *American Bureau of Shipping v. Tencara Shipyard S.P.A.*, 170 F.3d 349, 353 (2d Cir. 1999); *Deloitte Noraudit v. Deloitte Huskens*, 9 F.3d 1060 (2d Cir. 1993) (obtaining benefits under a contract binds a party to the arbitration clause); *CMH Mfg. v. Hensel Phelps*, 2014 U.S. Dist. LEXIS 28484 (W.D. Tex. 2014) (where non-signatory directly benefitted from contract containing arbitration clause, direct benefit estoppel prevented non-signatory from avoiding its obligation to arbitrate); *UFCW, Local 464A v. Foodtown, Inc.*, 317 F.Supp.2d 522 (D.C. N.J. 2004).

There is little question that a party can be estopped to deny the existence and application of an arbitration clause in a document where the party has directly benefited from the document. But estoppel is an equitable theory, and a party fighting arbitration can attack the use of the equitable doctrine. A party asserting estoppel has the burden of proving the essential elements of estoppel and the failure to prove any element is fatal. *Barfield v. Howard M. Smith Co. of Amarillo*, 426 S.W.2d 834, 838 (Tex. 1968). There can be no estoppel from acceptance of the benefits by a person who did not have knowledge of all material facts. *Clark v. Cotten Schmidt, L.L.P.*, 327 S.W.3d 765 (Tex. App.—Fort Worth 2010, no pet.) (citing *Frazier v. Wynn*, 472 S.W.2d 750, 753 (Tex. 1971)). For example, in *Murdock v. Trisun Healthcare, LLC*, a defendant alleged that the plaintiff’s claims should be compelled to arbitration because she accepted benefits under a plan. No. 03-10-00711-CV, 2013 Tex. App. LEXIS 5638, 2013 WL 1955767, at \*3 (Tex. App.—Austin May 9, 2013, pet. denied). The court of appeals overruled that issue because there was no evidence that the plaintiff had knowledge of the arbitration clause in the plan’s document: “Trisun additionally asserts that Murdock is estopped from denying the Plan’s arbitration agreement because she received benefits under the Plan. Before the acceptance of benefits can be said to trigger estoppel, it must be

shown that the benefits were accepted with “knowledge of all material facts.” *Id.* Trisun did not submit evidence showing Murdock received benefits under the Plan or that the benefits were accepted with knowledge of all material facts—including the existence of a binding arbitration agreement covering the claims at issue. As such, we overrule this issue.” *Id.* at n. 5. Accordingly, a beneficiary who does not know the terms of the trust document, may not have all material facts at the time that he or she accepts distributions to establish an estoppel defense. To make sure that the beneficiaries have sufficient knowledge, a trustee should send a copy of the trust document, or at least an excerpt of the trust with the dispute resolution provision, to the beneficiaries.

### **J. Parties Can Draft Clause To Allow For Appellate Review**

One of the main concerns that litigants have about arbitration is that there is very little appellate review. The fear of a “run-away” arbitrator with no real judicial review of an award has resulted in parties taking out arbitration clauses and inserting jury waiver clauses in their contracts.

As background, the United States Supreme Court held that the Federal Arbitration Act’s grounds for vacatur and modification “are exclusive” and cannot be “supplemented by contract.” *Hall Street Associates, L.L.C. v. Mattel, Inc.*, 552 U.S. 576, 578 (2008). Under that decision, parties’ attempts to contract for expanded judicial review of an arbitrator’s award are unenforceable.

The Texas Supreme Court held the opposite regarding the Texas General Arbitration Act (“TAA”). In *Nafta Traders, Inc., v. Quinn*, an employee sued her employer for sex discrimination in violation of state law. 339 S.W.3d 84 (Tex. 2011). The dispute was sent to arbitration, where the employee prevailed. The employer challenged the award in court, arguing that it contained damages that were either not allowed or unsupported by the evidence. The arbitration agreement stated that “The arbitrator does not have authority (i) to render a decision which contains a reversible error of state or federal law, or (ii) to apply a cause of action or remedy not expressly provided for under existing state or federal law.” *Id.* The employer alleged that the arbitrator exceeded his authority in making the award. The trial court confirmed the award, and the court of appeals held that the employer could not assert its complaints citing the *Hall Street* opinion.

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., to exclude making awards that contain errors of law or fact, then the parties can provide for further and more detailed

judicial review of the award. The Texas Supreme Court stated: “We must, of course, follow *Hall Street* in applying the FAA, but in construing the TAA, we are obliged to examine *Hall Street’s* reasoning and reach our own judgment.” *Id.* The Court then concluded:

Under the TAA (and the FAA), an arbitration award must be vacated if the arbitrator exceeds his powers. Generally, an arbitrator’s powers are determined by agreement of the parties. Can the parties agree that the arbitrator has no more power than a judge, so that his decision is subject to review, the same as a judicial decision? *Hall Street* answers no, based on an analysis of the FAA’s text that ignores the provision that raises the problem, and a policy that may be at odds with the national policy favoring arbitration. With great respect, we are unable to conclude that *Hall Street’s* analysis of the FAA provides a persuasive basis for construing the TAA the same way.... Accordingly, we hold that the TAA presents no impediment to an agreement that limits the authority of an arbitrator in deciding a matter and thus allows for judicial review of an arbitration award for reversible error.

*Id.* The Court then held that the FAA would not preempt the TAA’s allowance of expanded judicial review for an arbitration award enforceable under both the FAA and the TAA. The Court then remanded the case to the court of appeals for further review of the employer’s grounds.

There are several practice tips that arise from this decision. First, parties are the masters of their own arbitration agreements and the judicial review that may result. The parties should take time to carefully consider the type of language to use. Second, parties can select the law that will control an arbitration agreement. So, parties that want to enlarge judicial review of an award should expressly state that the arbitration clause will be construed under the TAA. If that is done, there will be little argument that the arbitration clause should not be construed under the TAA and solely under the FAA. Third, arbitration proceedings are often informal, where the parties have no record of the hearing and where the rules of evidence and procedure are relaxed. If a party desires to seek judicial review of an arbitration award, it will need to be able to show a court a record that establishes a reversible error. So, parties should make a record of all proceedings and should invoke rules of evidence and procedure as appropriate to preserve error. Otherwise, as in state court, an arbitrator will be presumed to have made the correct ruling.



## K. Texas Authority on Arbitration Clauses in Trust Documents

The Texas Supreme Court has affirmed the use of arbitration clauses in trust disputes, relying heavily on the direct-benefits estoppel theory. In *Rachal v. Reitz*, a beneficiary sued a trustee for failing to provide an accounting and otherwise breaching fiduciary duties. 347 S.W.3d 305 (Tex. App.—Dallas 2011), *rev'd*, 403 S.W.3d 840 (Tex. 2013). The trustee filed a motion to compel arbitration of those claims due to an arbitration provision in the trust instrument. After the trial court denied that motion, the trustee appealed.

The court of appeals affirmed the trial court's refusal to compel arbitration. The court of appeals held that arbitration is a matter of contract law, and that the trustee had the burden to establish the existence of an enforceable arbitration agreement. The court noted that it was undisputed that neither the trustee nor the beneficiary signed the trust document. Further, the court held that the trust document solely expressed the settlor's intent and not the intent of the trustee or beneficiary. The court stated: "Rachal did not establish how the settlor's expression of intent satisfied all of the required elements of a contract or how this expression of the settlor's intent transformed the trust provision into an agreement to arbitrate between Rachal and Reitz." *Id.* at 309-10.<sup>2</sup>

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<sup>2</sup> The Arkansas court of appeals has described the difference between a contract and a trust:

Trusts are distinguishable from contracts in that the parties to a contract may decide to exchange promises, but a trust does not rest on an exchange of promises and instead merely requires a trustor to transfer a beneficial interest in property to a trustee who, under the trust instrument, relevant statutes, and common law, holds that interest for the beneficiary. The undertaking between the settlor and trustee is not properly characterized as contractual and does not stem from the premise of mutual assent to an exchange of promises. Although the trustee's duties may derive from the trust instrument, they initially stem from the special nature of the relation between trustee and beneficiary, and thus, the trustee's undertakings or promises in a trust instrument are normally not contractual. A trust is also distinguishable from a contract in that a trust is a fiduciary relationship with respect to property. The relation ordinarily created by a contract is that of promisor and promisee, obligor and obligee, or debtor and creditor; in most contracts of hire, a special confidence is reposed in each other by the parties, but more than that is required to establish a fiduciary relation. An essential aspect of a trust is that the putative trustee has received property under conditions that impose a fiduciary duty to

The Texas Supreme Court reversed the court of appeals and held that the arbitration clause was enforceable. *Rachel v. Reitz*, 403 S.W.3d 840 (Tex. 2013). The Court did so for two primary reasons: 1) the settlor determines the conditions attached to her gifts, which should be enforced on the basis of the settlor's intent; and 2) the issue of mutual assent can be satisfied by the theory of direct-benefits estoppel, so that a beneficiary's acceptance of the benefits of a trust constitutes the assent required to form an enforceable agreement to arbitrate. *See id.*

The Court stated that generally in Texas courts strive to enforce trusts according to the settlor's intent, which courts should divine from the four corners of unambiguous trusts. The Court noted that the settlor intended for all disputes to be arbitrated via the following language: "Despite anything herein to the contrary, the sole and exclusive remedy" for "any dispute of any kind involving this Trust or any of the parties or persons connected herewith (e.g., beneficiaries, Trustees)" was arbitration. *Id.*

The Court then looked to the Texas Arbitration Act, which provides that a "written agreement to arbitrate is valid and enforceable if the agreement is to arbitrate a controversy that: (1) exists at the time of the agreement; or (2) arises between the parties after the date of the agreement." *Id.* (citing Tex. Civ. Prac. & Rem. Code § 171.001(a)). The Court noted that the statute also uses the term "contract" in another provision, and that the Legislature intended for the terms to be different. As the statute does not define the term "agreement," the Court defined it as "a mutual assent by two or more persons." *Id.* Thus, a formal contract is not required to have a binding agreement to arbitrate.

The Court resolved the issue of mutual assent by looking to the theory of direct-benefits estoppel. Because the plaintiff had accepted the benefits of the trust for years and affirmatively sued to enforce certain provisions of the trust, the Court held that the plaintiff had accepted the benefits of the trust such that it indicated the plaintiff's assent to the arbitration

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the grantor or a third person; a mere contractual obligation, including a contractual promise to convey property, does not create a trust. One of the major distinctions between a trust and contract is that in a trust, there is always a divided ownership of property, the trustee having usually a legal title and the beneficiary an equitable one, whereas in contract, this element of division of property interest is entirely lacking.

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*Gibbons v. Anderson*, No. CV-18-367, 2019 Ark. App. 193, 575 S.W.3d 144, 2019 Ark. App. LEXIS 203 (Ark. Ct. App. April 3, 2019, pet. denied). (citing 76 Am. Jur. 2d Trusts § 12 (2019)).

agreement. The Court ordered the trial court to grant the trustee's motion to compel arbitration.

In *Saks v. Rogers*, a beneficiary of a trust challenged a trial court's enforcement of an arbitration decision. No. 04-16-00286-CV, 2017 Tex. App. LEXIS 6923 (Tex. App.—San Antonio July 26, 2017, no pet.). The parties entered into a mediated settlement agreement (MSA) that included an arbitration agreement for "disputes aris[ing] with regard to the interpretation and/or performance of [the MSA] or any of its provisions, including the form of further documents to be executed . . ." *Id.* Although not present at the mediation, the beneficiary provided another a power of attorney to act on her behalf for the MSA. Later, a party filed a motion to compel arbitration. The dispute went to arbitration, and the arbitrator issued certain findings and conclusions. The beneficiary then challenged the arbitrator's decision because allegedly her complaints were not within the scope of the arbitration clause. The trial court enforced the arbitrator's decision, and the beneficiary appealed.

The court of appeals concluded that the use of the language "disputes arise with regard to the interpretation and or performance of this Agreement or any of its provisions," speaks to the broad nature of the arbitration agreement and that it was not limited to claims that literally arose under the agreement, but instead embraced all disputes between the parties that have a significant relationship with the agreement. *Id.* The court then found that the beneficiary's claims fell within the scope of the arbitration clause:

The MSA's primary goal was the execution of documents regarding properties owned by the trust. At the heart of Landen's dispute is the distribution of the trust's corpus. In the previous appeal, Landen did not dispute the probate court's order that she was a party to the MSA. Whether a conflict of interest exists regarding Appellees' procurement of Landen's power of attorney turns on any benefits Appellees might receive under the MSA. Similarly, whether any payment of monies to Appellees, under the MSA, involved elements of fraud also requires an evaluation of any monies owed under the MSA or the distribution of benefits stemming from the MSA. The probate court's order, about which Landon complains, required her to execute documents under the trust. We conclude Landen failed to prove that her claims stand-alone from the MSA and that they are not "inextricably enmeshed" with, or are 'factually intertwined'" with the MSA and distributions from the trust.

*Id.* The court of appeals affirmed the trial court's order enforcing the arbitrator's opinion.

In *Archer v. Archer*, the trust stated that: "We request that any questions or disputes that may arise during the administration of this trust be resolved by mediation and if necessary, arbitration in accordance with the Uniform Arbitration Act." No. 05-13-013410-CV, 2014 Tex. App. LEXIS 6551 (Tex. App.—Dallas June 17, 2014). The Beneficiaries sued the trustee for breach of fiduciary duty, and the trustee sought to compel arbitration, which was denied. The court of appeals held that it was clear that mandatory arbitration clauses in trust documents are enforceable. *Id.* (citing *Rachal v. Reitz*, 403 S.W.3d 840, 843 (Tex. 2013)). After reviewing the trust in whole, the court held that the provision was precatory and not mandatory and affirmed the trial court's refusal to compel arbitration. *Id.*

#### **L. Other Jurisdictions Treatment Of Arbitration Clauses In Trust Documents**

In 2004, the American College of Trusts and Estate Counsel formed a task force to address the inclusion of arbitration provisions in testamentary instruments. *Gibbons v. Anderson*, No. CV-18-367, 2019 Ark. App. 193, 575 S.W.3d 144, 2019 Ark. App. LEXIS 203 (Ark. Ct. App. April 3, 2019, pet. denied). The task force concluded that legislative action is the most expeditious and effective way for states to ensure the enforceability of their citizens' trust arbitration provisions. *Id.* The task force proposed a Model Act with suggested statutory provisions, for adoption by states. *Id.* The Model Act included two key elements. First, it made trust and will provisions requiring arbitration of disputes between, or among, trustees and beneficiaries, enforceable. *Id.* Second, it limited the scope of enforceable trust arbitration provisions. *Id.* The Model Act enforced only arbitration provisions requiring arbitration of disputes regarding the interpretation of the trust and the fiduciary duty of the trustee. *Id.* The Model Act would not enforce arbitration provisions that sound to govern disputes relating to the validity of the trust. *Id.*

In 2007, following the guidance of the Model Act, Florida became the first state to enact a law expressly governing enforcement of mandatory arbitration clauses in trust agreements. Florida's statute provides that: "A provision in a will or trust requiring the arbitration of disputes, other than disputes of the validity of all or a part of a will or trust, between or among the beneficiaries and a fiduciary under the will or trust, or any combination of such persons or entities, is enforceable." Fla. Stat. Ann. § on 731.401. Thereafter, Arizona followed suit and enacted a provision in its trust code authorizing a trust agreement to "provide mandatory, exclusive and reasonable

procedures to resolve issues between the trustee and interested persons or among interested persons with regard to the administration or distribution of the trust.” A.R.S. § 14-10205 (2008). Otherwise, most states’ statutes do not address arbitration clauses in trust or estate documents.

Some jurisdictions have enforced arbitration clauses in trust documents. *See, e.g., Whipple v. Whipple (In re Kent & Jane Whipple Trust)*, 399 P.3d 332 (S. Ct. Nv. Jun 28, 2017) (court ordered trial court to compel arbitration arising from trust agreement); *FPE Found. v. Cohen*, 801 F.3d 25, (1st Cir. 2015); *Diggs v. Lingo*, No. W2014-00525-COA-R3-CV, 2014 Tenn. App. LEXIS 869, 2014 WL 7431466 (Tenn. Ct. App. Dec. 30, 2014) (refused to compel arbitration against a nonparty to the trust agreement but held that beneficiaries could be held to the arbitration clause); *Syncora Guarantee Inc. v. HSBC Mex., S.A.*, 861 F. Supp. 2d 252, 261 (S.D.N.Y. 2012) (court granted motion to compel arbitration under trust document).

Other jurisdictions are not as apt to enforce arbitration clauses in trust documents. *See, e.g., Schoneberger v. Oelze*, 208 Ariz. 591, 96 P.3d 1078, (Ariz. Ct. App. 2004), superseded by A.R.S. § 14-10205. The Arizona Court of Appeals held that “a trust is not a ‘written contract’ requiring arbitration.” *Id.* The Arizona court explained that “arbitration is a creature of contract law . . . [and] an inter vivos trust is not a contract.” *Id.* at 1082. The court stated:

Arbitration rests on an exchange of promises. Parties to a contract may decide to exchange promises to substitute an arbitral for a judicial forum. Their agreement to do so may end up binding (or benefitting) nonsignatories. In contrast, a trust does not rest on an exchange of promises. A trust merely requires a trustor to transfer a beneficial interest in property to a trustee who, under the trust instrument, relevant statutes and common law, holds that interest for the beneficiary. The undertaking between trustor and trustee does not stem from the premise of mutual assent to an exchange of promises and is not properly characterized as contractual.

*Schoneberger*, 96 P.3d at 1083 (internal quotation marks and citations omitted). *See also United Islamic Soc’y v. Masjed Abubakr Al-Seddiq, Inc.*, 2016 Minn. App. Unpub. LEXIS 843 (Minn. Ct. App. August 29, 2016) (court refused to enforce a trust’s arbitration clause because the defendant waived its enforcement by litigation conduct); *E. Prop. Dev. LLC v. Gill*, 2011 U.S. Dist. LEXIS 148354 (M.D. Ga., Dec. 27, 2011); *In re Calomiris*, 894 A.2d 408, 408 (D.C. 2006). For

example, a California court held that a party’s claims of undue influence and mental competence regarding the creation of a trust were not to be compelled to arbitration. *McArthur v. McArthur*, 224 Cal. App. 4th 651, 168 Cal. Rptr. 3d 785, 2014 Cal. App. LEXIS 222 (Cal. App. 1st Dist. 2014). The court distinguished the *Rachal* opinion by holding that the party in *Rachal* could not attempt to enforce the trust document and challenge the arbitration clause, whereas the party in *McArthur* did not attempt to enforce any aspect of the trust document:

Here, Pamela has not accepted benefits under the 2011 Trust nor has she attempted to enforce rights under the amended trust instrument. Instead, Pamela argues the 2011 Trust is invalid and seeks to have it set aside. *Rachal* acknowledges that a “beneficiary may disclaim an interest in a trust. [Citations.] And a beneficiary is also free to challenge the validity of a trust: conduct that is incompatible with the idea that she has consented to the instrument. Thus, beneficiaries have the opportunity to opt out of the arrangement proposed by the settlor” and consequently to not be bound by the arbitration provision. We agree.

*Id.* at 658. Therefore, there is not much precedent from other jurisdictions that supports the enforcement of arbitration clauses in trust and estate litigation.

The Arkansas court of appeals followed the *McArthur* court’s approach and held that an arbitration clause in a trust is not effective as to undue influence and mental competence claims. *Gibbons v. Anderson*, No. CV-18-367, 2019 Ark. App. 193, 575 S.W.3d 144, 2019 Ark. App. LEXIS 203 (Ark. Ct. App. April 3, 2019, pet. denied). The court held:

It is important to understand that the dispute we are deciding in this appeal is not whether the Co-Trustees are acting contrary to the provisions of the Trust or Amendment or to the detriment of the beneficiaries. Rather, this dispute concerns the testamentary capacity of the grantor and the validity of the Trust or the Amendment itself. On appeal, the narrow issue is, where there is an allegation of undue influence or incompetency of the grantor in the execution of a trust agreement or an amendment thereto, whether the validity of the trust must be determined by arbitration. We hold that under these circumstances, it cannot. We acknowledge that the Trust and the Amendment to the Trust each contain an arbitration provision which could arguably

require arbitration of disputes and claims arising from the Trust, and we make no comment as to the enforceability of an arbitration provision to resolve those disputes or claims. However, we hold that the validity of the Trust and the Amendment to the Trust is within the province of the trial court irrespective of any arbitration provision contained therein. This is a developing area of the law, and there is sparse case law addressing the issue.

*Id.* The court noted that a trust agreement is not a contract and there is no requirement of a meeting of the minds. “Since a trust agreement is not a contract, we cannot carte blanche apply contract/arbitration principles, statutes, or precedent to this dispute. However, we can borrow some of that pertinent body of law.” *Id.* The court concluded: “Among the states that have addressed the issue, the common theme is that while a trust agreement may contain arbitration provision, the arbitration provision cannot compel arbitration to determine the validity of the trust itself. We conclude likewise and hold that an arbitration provision within a trust agreement cannot compel arbitration to determine the validity of the trust.” *Id.*

#### **M. An Arbitration Agreement In A Will May Apply To Estate Litigation**

The reasoning of the Texas Supreme Court’s opinion would seem to apply to estate disputes as well. A beneficiary of a will may be compelled to arbitrate disputes with an estate representative if the beneficiary accepts any benefits from the estate or sues to enforce a provision of the will where the will contains a sufficiently broad arbitration provision. Claims dealing with the formation of the document containing the arbitration clause should be litigated in the trial court before arbitration, i.e., the enforceability of the clause. This concept is discussed in more detail below. Therefore, claims such as mental incompetence or undue influence should be litigated in the trial court before the case is sent to arbitration. If a claim involved in a will dispute does not involve the formation of the will, and otherwise falls within the scope of the clause, then a court may enforce arbitration where direct-benefits estoppel or some other similar theory applies.

One Texas court has recently rejected the enforcement of an arbitration clause where the court determined that direct-benefits estoppel did not apply. In *Ali v. Smith*, a successor administrator of an estate sued the former executor for breach of fiduciary duties arising from his management of the finances of the estate, converting assets of the estate, and using estate funds. 554 S.W.3d 755 (Tex. App.—Houston [14th

Dist.] 2018, no pet.). The defendant filed a motion to compel arbitration based on an arbitration provision contained in the will. The will provided:

If a dispute arises between or among any of the beneficiaries of my estate, the beneficiaries of a trust created under my Will, the Executor of my estate, or the Trustee of a trust created hereunder, or any combination thereof, such dispute shall be resolved by submitting the dispute to binding arbitration. It is my desire that all disputes between such parties be resolved amicably and without the necessity of litigation.

*Id.* The trial court denied the motion, and the defendant appealed.

On appeal, the defendant argued that the trial court erred by not enforcing the will’s arbitration clause because the arbitration clause was enforceable under the doctrine of direct-benefits estoppel as the plaintiff had (1) “enforced the will” and brought claims against defendant “for failing to comply with the will” and (2) “received appointee fees.” *Id.*

The court of appeals held that the party asserting a right to arbitration has to prove a binding arbitration agreement. “Typically, a party manifests its asset by signing an agreement.” *Id.* The parties agreed that they were not signatories to the will. “But the Texas Supreme Court has ‘found assent by nonsignatories to arbitration provisions when a party has obtained or is seeking substantial benefits under an agreement under the doctrine of direct benefits estoppel.’” *Id.* (citing *Rachal v. Reitz*, 403 S.W.3d 840, 843 (Tex. 2013)). The court described direct-benefits estoppel thusly:

This doctrine precludes a plaintiff from seeking to hold a defendant liable based on the terms of an agreement that contains an arbitration provision while simultaneously asserting the provision lacks force because the plaintiff or defendant is a non-signatory. “When a claim depends on the contract’s existence and cannot stand independently—that is, the alleged liability arises solely from the contract or must be determined by reference to it—equity prevents a person from avoiding the arbitration clause that was part of that agreement.” On the other hand, “when the substance of the claim arises from general obligations imposed by state law, including statutes, torts and other common law duties, or federal law, direct-benefits estoppel is not implicated even if the claim refers to or relates to the contract or would not have arisen but for the contract’s

existence.” Additionally, a non-signatory may be compelled to arbitrate if they deliberately seek or obtain substantial benefits from the contract by a means other than the lawsuit itself. This analysis focuses on the non-signatory’s “conduct during the performance of the contract.” This doctrine will not apply if the benefits are either insubstantial or indirect.

*Id.* (internal citations omitted).

The court held that the plaintiff was not seeking any relief under the will, but was seeking relief under Texas statutes and common law and thus direct-benefits estoppel did not apply:

Smith alleges in the petition that Ali (1) “Failed to responsibly handle the finances of the estate”; (2) “Converted assets of the Estate to his own personal use”; and (3) “Used estate funds in violation and dereliction of his fiduciary duties.” Unlike the beneficiary in *Rachal* who alleged violations of the trust terms, Smith does not allege in the petition that Ali violated any terms of the will. Rather, Smith contends that her claims are based on common law and statutory provisions such as Sections 351.001 and 351.101 of the Estates Code: “The rights, powers, and duties of executors and administrators are governed by common law principles to the extent that those principles do not conflict with the statutes of this state. An executor or administrator of an estate shall take care of estate property as a prudent person would take of that person’s own property . . . .” An executor such as Ali also has a statutory duty to deliver the property of the estate to a successor representative such as Smith. And, Smith alleges in the petition that this action was brought pursuant to Section 361.153, which provides that a successor representative is “entitled to any order or remedy that the court has the power to give to enforce the delivery of the estate property” to the successor representative.

...

The plain language of the statutes impose duties on both executors and administrators, but executors and administrators are not the same. An executor is named in a will, while an administrator with will annexed is not. The source of the executor’s power to act is the will. The source of an administrator’s

power to act is the statutes and the court. Nothing in Smith’s petition indicates that Ali’s liability need be determined by reference to the will, even though he would not have been an executor “but for” the will. The substance of the claims arise from general duties imposed by statutes and the common law. Smith has not alleged that Ali violated any terms of the will, so this theory of direct-benefits estoppel is inapplicable.

...

Under the second avenue for proving direct-benefits estoppel, Ali contends that Smith has obtained a benefit from the will by collecting “appointee fees” from the estate. Smith contends that she was entitled to the fees by statute, not the will. We agree with Smith. The trial court’s order authorizing Smith to collect appointee fees does not state that Smith collected a benefit under the will. And, the authorizing statute does not make a distinction based on the existence of a will. Because the trial court awarded fees and expenses to Smith without reference to the will, Ali has not shown that Smith deliberately sought or obtained substantial benefits from the will by a means other than the lawsuit.

*Id.* (internal citations omitted). The court of appeals affirmed the trial court’s order denying the motion to compel arbitration.

There was a dissenting justice who would have reversed the order and compelled the case to arbitration. That justice would hold that both parties agreed to the arbitration clause by accepting an appointment to administer the estate:

It is self-evident that neither Ali nor Smith physically signed Sultan’s will at the time it was executed. However, it can hardly be said that they are strangers to the will. Their acceptance of appointments to serve as executors of the will (and all its provisions) constitutes the assent required to form an enforceable agreement to arbitrate under the Texas Arbitration Act. Texas jurisprudence regarding non-signatories to an arbitration agreement, therefore, should not be applied to this dispute. Because the majority has done so, I respectfully dissent.

*Id.* (Jamison, J. dissenting). The dissenting justice continued: “Smith agreed to her appointment, which

was to carry out Sultan's clearly expressed intent in his will, including the intention for disputes to be arbitrated. As Smith's counsel stated in oral argument, "[The administrator] does not get to re-write the will." Exactly." *Id.*

Therefore, where appropriate, an arbitration clause in a will may apply and require that claims by or against a representative be adjudicated in arbitration. However, there will need to be a detailed review of what, if any, benefits that the claimant has obtained from the will before direct-benefits estoppel is available. Absent that theory, it may be difficult to enforce such a clause.

### **III. FORUM-SELECTION CLAUSES**

#### **A. Form**

The following is a potential form for a forum-selection clause that a drafting attorney can use in a will or trust:

All suits, actions, proceedings, or disputes, whether litigation or arbitration, that arise out of or relate to this document or the parties' relationship, whether the claims arise from contract or tort, and whether the claims are legal or equitable in nature, will be litigated exclusively in [forum].

#### **B. Introduction**

A forum-selection clause is a clause in a contract or other document that provides that any dispute between the parties shall be filed in a particular jurisdiction. Otherwise stated, a "mandatory forum-selection clause" is a provision that requires certain claims to be decided in a forum or forums other than the forum in which the claims have been filed. *Deep Water Slender Wells, Ltd. v. Shell Int'l Exploration & Prod., Inc.*, 234 S.W.3d 679, 687 n.3 (Tex. App.—Houston [14th Dist.] 2007, pet. denied). Forum selection clauses are presumptively valid in contract disputes. *In re Laibe Corp.*, 307 S.W.3d 314, 316 (Tex. 2010) (per curiam).

Of course, disputes arise when a party simply disregards the forum-selection clause and files suit in a forum that violates the controlling document. If a dispute arises, and a party files suit in Texas, the defendant may want to hold the plaintiff to the forum-selection clause. The defendant would then file a motion to dismiss the suit. A motion to dismiss is the proper procedural mechanism for enforcing a forum-selection clause that a party to the agreement has violated in filing suit. *In re AIU Ins. Co.*, 148 S.W.3d 109, 111-21 (Tex. 2004). Allowing a lawsuit to proceed in a forum that contradicts a forum-selection clause promotes forum shopping with its attendant judicial inefficiency, waste of judicial resources, delays

of adjudication of the merits, and skewing of settlement dynamics. *In re Lisa Laser USA, Inc.*, 310 S.W.3d 880, 883 (Tex. 2010) (per curiam); *In re Freightquote.com*, No. 05-18-01028-CV, 2019 Tex. App. LEXIS 1594 (Tex. App.—Dallas March 1, 2019, original proceeding). Once dismissed, the plaintiff would then have to file suit in the jurisdiction specified in the forum-selection clause.

#### **C. Permissive Vs. Mandatory Forum-Selection Clause**

"A forum-selection clause is a creature of contract." *Phoenix Network Techs. (Europe) Ltd. v. Neon Sys., Inc.*, 177 S.W.3d 605, 611 (Tex. App.—Houston [1st Dist.] 2005, no pet.). Whether a trial court must dismiss a case may depend on whether the forum-selection clause is mandatory or permissive. *See Ramsay v. Texas Trading Co., Inc.*, 254 S.W.3d 620 (Tex. App.—Texarkana 2008, pet. denied) (court determined that trial court correctly dismissed suit based on a mandatory clause; however, a dissenting justice would have found the clause to be permissive and reversed). Courts have recognized that clauses in which parties merely "consent" or "submit" to the jurisdiction of a particular forum will not justify dismissing a suit that is filed in a different forum. *See, e.g., Dunne v. Libbra*, 330 F.3d 1062, 1063 (8th Cir. 2003); *Keaty v. Freeport Indonesia, Inc.*, 503 F.2d 955, 956-57 (5th Cir. 1974). *See also In re Wilmer Cutler Pickering Hale And Door LLP*, No. 05-08-01395-CV, 2008 Tex. App. LEXIS 9692 (Tex. App.—Dallas Dec. 31, 2008, orig. proceeding) (part of forum-selection clause dealing with any and all claims was merely permissive and did not require a dismissal of plaintiff's fraud claim); *Apollo Property Partners, LLC v. Diamond Houston I, L.P.*, No. 14-07-00528-CV, 2008 Tex. App. LEXIS 5884 n. 4 (Tex. App.—Houston [14th Dist.] Aug. 5, 2008, no pet. hist.); *Sw. Intelecom, Inc. v. Hotel Networks Corp.*, 997 S.W.2d 322, 323-26 (Tex. App.—Austin 1999, pet. denied) (clause whereby parties "stipulate to jurisdiction [in] Minnesota, as if this Agreement were executed in Minnesota" was not a mandatory forum-selection clause); *Weisser v. PNC Bank, N.A.*, 967 So. 2d 327, 330 (Fla. Dist. Ct. App. 2007) (distinguishing mandatory forum-selection clauses from permissive clauses that "constitute nothing more than a consent to jurisdiction and venue in the named forum and do not exclude jurisdiction or venue in any other forum"). Simply consenting to one jurisdiction does not mean that the party agreed that there was only one appropriate forum. To the contrary, a mandatory clause provides that there is only one appropriate forum for dispute resolution, and a trial court should dismiss a suit filed a forum that conflicts with the agreed-upon forum. *See In re AIU Insurance Co.*, 148 S.W.3d 109,

111 (Tex. 2004) (the clause stated: “all litigation, arbitration or other form of dispute resolution shall take place . . .”).

#### D. Scope of Forum-Selection Clause

A court should first review whether a plaintiff’s claims are within the scope of the forum-selection clause before determining whether that provision is enforceable. *See Deep Water Slender Wells, Ltd. v. Shell Int’l Exploration & Prod., Inc.*, 234 S.W.3d 679, 687-88 (Tex. App.—Houston [14th Dist.] 2007, pet. denied) (analyzing scope before enforceability); *Braspetro Oil Servs. Co. - Brazil v. Modec (USA), Inc.*, 240 Fed. Appx. 612, 616 (5th Cir. 2007) (“Before we can consider enforcing a forum-selection clause, we must first determine ‘whether the clause applies to the type of claims asserted in the lawsuit.’”).

Review of Texas case law illustrates that forum-selection clauses are broadly enforced when “any and all” claims that “relate to” or “arise from” the contract are referenced. *Pinto Tech. Ventures, L.P. v. Sheldon*, 526 S.W.3d 428 (Tex. 2017); *RSR Corporation v. Siegmund*, 309 S.W.3d 686 (Tex. App.—Dallas 2010, no pet.). *See, e.g., In re Jim Walter Homes, Inc.*, 207 S.W.3d 888, 896 (Tex. App.—Houston [14th Dist.] 2006, orig. proceeding) (in context of arbitration clause, Court recognized that the use of language “any” dispute “arising out of or related to” as broad language that expressly includes tort and other claims).

A forum-selection clause does not govern claims that fall outside of its scope. *See, e.g., Major Help Ctr. v. Ivy, Crews & Elliott, P.C.*, 2000 WL 298282 (Tex. App.—Austin Mar. 23, 2000, no pet.) (DTPA claim was held to be independent of agreement, and forum-selection clause did not apply); *Busse v. Pacific Cattle Feeding Fund #1, Ltd.*, 896 S.W.2d 807, 813 (Tex. App.—Texarkana 1995, writ denied) (FSC did not apply to claims based on fraudulent inducement where rights and liabilities under the contract were not at issue); *Pozero v. Alfa Travel, Inc.*, 856 S.W.2d 243, 245 (Tex. App.—San Antonio 1993, no writ) (forum-selection clause in cruise ticket contract did not apply to claims not based on the contract). *See also, Southwest Telecom, Inc. v. Hotel Networks Corp.*, 997 S.W.2d 322, 324-25 (Tex. App.—Austin 1999, pet. denied) (applying contractual interpretation principles to analysis of forum-selection clause).

#### E. Historic Enforcement Of Forum-Selection Clauses In Texas

Texas courts, like others across the country, had historically invalidated forum-selection clauses for violating public policy. *In re AIU Ins. Co.*, 148 S.W.3d 109, 111 (Tex. 2004). *See also M/S Bremen v. Zapata Off-Shore Co.*, 407 U.S. 1, 9 (1972). However, since the United States Supreme Court’s landmark decision

in *M/S Bremen*, and its later decision in *Carnival Cruise Lines, Inc. v. Shute*, 499 U.S. 585, 595-96 (1991), Texas courts have begun enforcing forum-selection clauses. *See In re AIU Ins. Co.*, 148 S.W.3d at 111-12.

Historically, Texas courts and federal courts used different analyses to determine the enforceability of mandatory forum-selection clauses. *Phoenix Network Techs. (Europe) Ltd. v. Neon Sys., Inc.*, 177 S.W.3d 605, 611-14 (Tex. App.—Houston [1st Dist.] 2005, no pet.). Under the test of *M/S Bremen* and *Shute*, forum-selection clauses “are prima facie valid and should be enforced unless enforcement is shown by the resisting party to be ‘unreasonable’ under the circumstances.” *M/S Bremen*, 407 U.S. at 10; *see Shute*, 499 U.S. at 588. The clause’s opponent has a “heavy burden” to make a “strong showing” that the forum-selection clause should be set aside. *M/S Bremen*, 407 U.S. at 15. This burden includes “clearly” showing that enforcement would be “unreasonable and unjust”; that the clause was “invalid for such reasons as fraud or overreaching”; that “enforcement would contravene a strong public policy of the forum in which suit is brought, whether declared by statute or by judicial decision”; or that “the contractual forum will be so gravely difficult and inconvenient” that the opponent “will for all practical purposes be deprived of his day in court.” *Id.* at 15, 18, 92 S. Ct. at 1916, 1917.

In contrast, most Texas courts of appeals had recognized a two-part test to determine whether a forum-selection clause was valid and enforceable: the clause was enforceable if (1) the parties contractually consented to submit to the exclusive jurisdiction of another jurisdiction and (2) the other jurisdiction generally recognized the validity of such provisions. *See Satterwhite Aviation Serv. v. Int’l Profit Assocs.*, No. 01-07-00053-CV, 2008 Tex. App. LEXIS 674 (Tex. App.—Houston [1st Dist.] Jan. 31, 2008, no pet.) (court cited historical standard as correct standard even after Texas Supreme Court opinions); *My Cafe-CCC, Ltd. v. Lunchstop, Inc.*, 107 S.W.3d 860, 864-65 (Tex. App.—Dallas 2003, no pet.); *Holeman v. Nat’l Bus. Inst., Inc.*, 94 S.W.3d 91, 97 (Tex. App.—Houston [14th Dist.] 2002, pet. denied); *Barnett v. Network Solutions, Inc.*, 38 S.W.3d 200, 203 (Tex. App.—Eastland 2001, pet. denied); *Mabon Ltd. v. Afri-Carib Enters., Inc.*, 29 S.W.3d 291, 296-97 (Tex. App.—Houston [14th Dist.] 2000, no pet.); *Southwest Telecom, Inc. v. Hotel Networks Corp.*, 997 S.W.2d 322, 324 (Tex. App.—Austin 1999, pet. denied); *Accelerated Christian Educ., Inc. v. Oracle Corp.*, 925 S.W.2d 66, 70 (Tex. App.—Dallas 1996, no writ); *Greenwood v. Tillamook Country Smoker, Inc.*, 857 S.W.2d 654, 656 (Tex. App.—Houston [1st Dist.] 1993, no writ). *See also In re GNC Franchising, Inc.*, 22 S.W.3d 929 (Tex. 2000) (Hecht, J. dissenting from

denial of petition for writ of mandamus). Even if these two threshold criteria were met, however, a forum-selection clause would not bind a Texas court if the interests of witnesses and public policy strongly favored that the suit be maintained in a forum other than the one to which the parties had agreed. *My Cafe-CCC, Ltd.*, 107 S.W.3d at 865; *Holeman*, 94 S.W.3d at 97; *Southwest Intelecom, Inc.*, 997 S.W.2d at 324; *Accelerated Christian Educ., Inc.*, 925 S.W.2d at 71; *Greenwood*, 857 S.W.2d at 656.

One court has held that the principal differences between the *M/S Bremen* and *Shute* test and the Texas courts-of-appeals test were:

- (1) the *M/S Bremen* and *Shute* test views the forum-selection clause as prima facie valid and enforceable, while the Texas test requires the clause's proponent to establish, as a threshold matter, that the forum that the parties selected recognizes the validity of the general type of forum-selection clause and
- (2) the *M/S Bremen* and *Shute* test allows the opponent to defeat the forum-selection clause if, among other things, its enforcement would be unreasonable or unjust, while the Texas test does not expressly recognize this enforcement exception.

*Phoenix Network Techs. (Europe) Ltd.*, 177 S.W.3d at 611-14.

#### **F. Current Test For Enforcement of Forum-Selection Clause**

The Texas Supreme Court clarified that the test for enforcement in Texas was the same as the federal test. In *In re AIU Insurance*, AIU, a New York corporation, provided pollution-liability coverage for, among other entities, a Delaware corporation ("Dreyfus") with its principal place of business in Texas. 148 S.W.3d 109, 110-11 (Tex. 2004). Dreyfus sued AIU in Texas for breach of contract, statutory, and tort claims regarding whether certain environmental claims against it were covered by the policy. *See id.* at 111. AIU moved to dismiss the suit because the policy contained a forum-selection clause providing for suit in New York. *See id.* The trial court denied AIU's dismissal motion, the court of appeals denied a writ of mandamus, and the Texas Supreme Court granted writ. *See id.* at 110-11.

The Court noted that this was the first case where it addressed the validity of a forum-selection clause. *See id.* at 111. Historically, forum-selection clauses were not favored because they were viewed as "ousting" a court of jurisdiction. *See id.* However, the Court noted that the United States Supreme Court had held that such clauses should be given full effect

"absent fraud, undue influence, or overweening bargaining power." *Id.* (quoting *Bremen v. Zapata Off-Shore Co.*, 407 U.S. 1 (1972)). The United States Supreme Court held that such a clause should control absent a strong showing that it should be set aside," and that "the correct approach [is] to enforce the forum clause specifically unless [the party opposing it] could clearly show that enforcement would be unreasonable and unjust, or that the clause was invalid for such reasons as fraud or overreaching." *Id.* A clause may come under one of these exceptions "if enforcement would contravene a strong public policy of the forum" where the suit was filed, or "when the contractually selected forum would be seriously inconvenient for trial." *Id.*

The Texas Supreme Court held that the forum-selection clause was enforceable and rejected Dreyfus's arguments that certain of the factors established in *M/S Bremen* and *Shute* made the clause unenforceable. *See id.* at 111-16. The Court placed the burden on Dreyfus, the party opposing enforcement of the forum-selection clause, to carry its "heavy burden" of showing that the forum-selection clause should not be enforced under the *M/S Bremen* and *Shute* test. *Id.* at 113-14. The Court found that Dreyfus did not meet its burden: "In the present case, the State of New York is not a 'remote alien forum.' There is no indication that AIU or Dreyfus chose New York as a means of discouraging claims. Nor is there any evidence of fraud or overreaching." *Id.* at 114. The Court held that it was certainly foreseeable to Dreyfus that it would have to litigate in New York, and that Dreyfus had not shown that litigating in New York would essentially deprive it of its day in court. *Id.* at 113. After a lengthy discussion about whether AIU had an adequate remedy at law, the Court granted its petition for writ of mandamus.

Currently, "Texas state courts employ the federal standard for analyzing forum selection clauses; thus, our analysis under federal law is substantively similar to state law, and we apply Texas procedural rules." *In re Omega Protein, Inc.*, NO. 01-08-00656-CV, 2009 Tex. App. LEXIS 419 (Tex. App.—Houston [1st Dist.] Jan. 20, 2009, orig. proceeding) (citing *Michiana Easy Livin' Country, Inc. v. Holten*, 168 S.W.3d 777, 793 (Tex. 2005)). One court has come to at least two conclusions. "First, the Texas Supreme Court has expressly adopted the *M/S Bremen* and *Shute* test, including who has the burden to show that the forum-selection clause should not be enforced and of what that burden consists." *Phoenix Network Techs. (Europe) Ltd.*, 177 S.W.3d at 611-14. "Second, the Texas Supreme Court has implicitly adopted the presumption from *M/S Bremen* and *Shute* that forum-selection clauses are prima facie valid." *Id.* The Texas Supreme Court's implicit adoption of the federal



presumption supplants the threshold requirement that the clause's proponent establish that the forum that the parties selected recognizes the validity of forum-selection provisions. *See id.*

The Texas Supreme Court has narrowly applied defenses to the enforcement of a forum-selection clause. In *In re Lyon Financial Services Inc.*, a Texas imaging company ("MNI") entered into a lease with Lyon for the use of imaging equipment. 257 S.W.3d 228 (Tex. 2008) (per curiam). The lease agreement contained a forum-selection clause that provided that the state and federal courts of Pennsylvania had jurisdiction over all matters arising out of the lease, but that Lyon had the right to file suit in any jurisdiction where MNI, a surety, or the collateral resided or were located. Furthermore, there were three related schedules all incorporating by reference the equipment lease and a subsequent restructuring agreement incorporating the previous lease. The agreements also specified that Pennsylvania law would be used for interpretation. After a dispute arose concerning whether Lyon had improperly charged MNI for equipment, MNI sued Lyon in Texas state district court for usury and unjust enrichment. Lyon filed a motion to dismiss and asserted that the forum-selection clause mandated that MNI file suit in Pennsylvania. The trial court denied the motion, and the court of appeals denied Lyon's petition for writ of mandamus.

The Texas Supreme Court first stated that forum-selection clauses are presumptively enforceable. It then addressed MNI's arguments as to why the clause should not be enforced. First, MNI argued that the clause was a product of fraudulent misrepresentations. The Court held that fraudulent inducement to sign an agreement containing a forum-selection clause will not bar enforcement of that provision unless the specific forum-selection clause was the product of fraud or coercion. MNI had an affidavit from its representative that stated he was misled that the forum-selection clause only applied to a schedule that he was not suing upon. The Court determined that this was insufficient because the agreements contained clauses that represented that they were the entire agreements between the parties and that there were no prior representations not contained in the agreements. The Court stated that a party who signs an agreement is presumed to know its contents, and that includes documents specifically incorporated by reference. Further, MNI's representative failed to state that he would not have signed the agreement absent the alleged misrepresentation. The Court found that there was no evidence that the forum-selection clause was secured by a misrepresentation or fraud.

Second, MNI argued that the clause should not be enforced because there was a disparity in bargaining power in that MNI's representative did not have legal

advice, had no formal business school training, was not aware of the clause when he signed the agreement, and that the agreements were presented on a take-it-or-leave-it basis. The Court determined that these facts did not show unfairness or overreaching. The Court held that the agreements were not a result of unfair surprise or oppression because the forum-selection clause was in all capital letters. The Court also found that the clause was not unfair simply because the clause allowed Lyon to file suit in Texas or Pennsylvania and required MNI to solely file suit in Pennsylvania because these types of clauses do not require mutuality of obligation so long as adequate consideration is exchanged.

Third, MNI argued that Pennsylvania was an inconvenient forum and that enforcing the provision would produce an unjust result. MNI produced evidence that it was a small business and did not have the ability to pursue claims in Pennsylvania. The Court stated that by entering into the agreements both parties effectively represented to each other that the agreed forum was not so inconvenient that enforcing the clause would deprive either party of their day in court. The Court then held that Pennsylvania is not a "remote alien forum," and that there was no proof that an unjust result would occur in enforcing the clause.

Fourth, MNI argued that it would be unjust to enforce the clause because Pennsylvania does not allow a corporation to sue for usury. The Court held that MNI's inability to assert its usury claim does not create a public policy reason to deny enforcement of the clause. Texas law in an area does not establish public policy that would negate a contractual forum-selection clause, absent a statute requiring suit to be brought in Texas. Further, MNI made no showing that even using Pennsylvania law, that Pennsylvania would not apply Texas law in determining the parties' rights. Therefore, the Court conditionally granted the petition and ordered the trial court to grant the motion to dismiss.

There are several interesting points raised by *In re Lyon Financial Services Inc.* First, the Texas Supreme Court will make it very difficult for a plaintiff to argue that he was defrauded into entering into a forum-selection (or arbitration) clause where the agreement contains language that it is the final agreement and that there are no other representations outside of the agreement. This language is typical in most agreements and seemingly trumps a plaintiff's affidavit evidence to the contrary. Second, the Court seems to be very unwilling to find that a forum-selection clause is not enforceable simply because the plaintiff did not read it, it is contained in an "adhesion" contract, and/or it would be expensive for the plaintiff to litigate in the forum of choice.

In *In re International Profit Associates, Inc.*, the plaintiff entered into two-page consultation agreements with the defendants whereby the defendants would provide business consulting services. 274 S.W.3d 672 (Tex. 2009). There was a forum-selection clause above the signature line of the agreements that stated: “It is agreed that exclusive jurisdiction and venue shall vest in the Nineteenth Judicial District of Lake County, Illinois, Illinois law applying.” *Id.* The defendants then recommended that the plaintiff hire an individual named David Salinas to help increase sales. Allegedly, Salinas then embezzled large sums of money from the plaintiff. The plaintiff sued the defendants in Texas state court based on negligence, fraud, negligent misrepresentations, and a breach of good faith and fair dealing. The defendants filed a motion to dismiss the suit based on the forum-selection clauses contained in the agreements.

The plaintiff argued that the clauses were unenforceable because (1) they were ambiguous; (2) they were procured through overreaching and fraud; (3) the interests of the defendants’ witnesses and the public favored litigating the case in Texas; and (4) enforcement of the clauses would effectively deprive the plaintiff of its day in court. The Texas Supreme Court disagreed with each of these, and, in a per curiam opinion, conditionally granted the petition and ordered the trial court to grant the defendants’ motion to dismiss.

The Court started its analysis with the following statement: “Forum-selection clauses are generally enforceable, and a party attempting to show that such a clause should not be enforced bears a heavy burden.” *Id.* In discussing the ambiguity argument, the Court stated that just because the clauses did not mention “litigation” did not mean that they were ambiguous:

A contract is ambiguous when it is susceptible to more than one reasonable interpretation. The forum-selection clauses in this case are not susceptible to more than one reasonable interpretation. Each clause specifies that exclusive jurisdiction and venue shall vest in [Illinois]. The only reasonable interpretation is that the clauses fix jurisdiction and venue for judicial actions between the parties in a specific location and court in Illinois.

*Id.* The plaintiff also argued that the clauses were ambiguous as to whether they applied to contract and tort claims, and therefore its tort claims should not be dismissed. The Court refused to answer that question because it found that all of the plaintiff’s factual claims arose from the contract. The Court drew heavily from arbitration and federal precedent regarding whether a

claim sounded in tort or contract. Specifically, the Court cited to its prior opinion in *In re Weekley Homes, L.P.*, where the court found that certain tort claims sounded solely in contract and were controlled by an arbitration clause. 180 S.W.3d 127, 131-32 (Tex. 2005). The Court stated that:

whether claims seek a direct benefit from a contract turns on the substance of the claim, not artful pleading. We said that a claim is brought in contract if liability arises from the contract, while a claim is brought in tort if liability is derived from other general obligations imposed by law.

*Id.* at 678. The Court stated that “determining whether a contract or some other general legal obligation establishes the duty at issue and dictates whether the claims are such as to be covered by the contractual forum-selection clause should be according to a common-sense examination of the substance of the claims made.” *Id.*

In analyzing the pleadings of the case, the Court stated that the plaintiff’s claims all arose out of the consulting agreements because the defendants recommended Salinas in the course of their consulting work and because the agreements did not limit the scope of the defendants’ consulting work. The Court determined that the plaintiff’s claims were within the scope of the forum-selection clauses.

The Court then turned to the plaintiff’s argument that the forum-selection clauses were not enforceable because they were procured by fraud and overreaching. The plaintiff supported that allegation by arguing that its representative did not know about the clauses and that the defendants did not point those clauses out to her at a time when all of the communications were going on in Texas. The Court disagreed. Because the clauses were in two page contracts, were in the same font style and size as the other terms of the contract, and were located near the signature lines, the defendants had no duty to affirmatively point them out to the plaintiff.

Finally, the Court dismissed the plaintiff’s arguments regarding the interests of the witnesses and public, convenience of litigation, and deprivation of the plaintiff’s day in court. The Court stated that the plaintiff could have foreseen litigation in Illinois, which is not a remote alien forum. Further, the fact that there may be two suits – one in Texas against other defendants not parties to the agreements and one in Illinois against the defendants – did not deprive the plaintiff of its day in court. The Court concluded: “[the plaintiff] presented no evidence to overcome the presumption that the forum-selection clauses are valid.” *Id.*

The Texas Supreme Court has also been reluctant to find that a party waived its right to a forum-selection clause by court related conduct. *See, e.g., In re Nationwide Ins. Co. of Am.*, 494 S.W.3d 708 (Tex. 2016).

The end conclusion from a review of these cases is that the party opposing the enforcement of a forum-selection clause truly has a heavy burden in defeating enforcement of such a clause.

### **G. Conspicuousness Requirement**

The Texas Supreme Court determined that, like arbitration clauses, there is no conspicuousness requirement for the enforcement of a forum-selection clause. In *In re International Profit Associates Inc.*, Riddell Plumbing Inc. hired International Profit Associates (“IPA”) to provide business consulting services. 286 S.W.3d 921 (Tex. 2009). The parties’ contract contained a forum-selection clause selecting Illinois as the forum for any contract dispute. The forum-selection clause was on the first page of a four-page contract. However, Riddell sued IPA in Dallas County, Texas. IPA filed a motion to dismiss the case based on the forum-selection clause. At the hearing, Riddell’s president testified that IPA never presented the first page containing the forum-selection clause to him. The trial court denied the motion to dismiss, and explained that IPA did not prove the page containing the forum-selection clause was ever presented to Riddell. The court of appeals denied IPA’s petition for writ of mandamus. IPA filed a petition with the Texas Supreme Court.

The issue in the case is whether a party seeking to enforce a forum-selection clause has to prove the other party was shown the clause when the contract was formed. The Texas Supreme Court held that the party challenging the forum-selection clause must prove its invalidity, and that party “bears a heavy burden of proof.” *Id.* at 923 The burden is not on the party seeking to enforce the clause. The Court stated the following standard:

A trial court abuses its discretion in refusing to enforce the forum-selection clause, unless the party opposing enforcement of the clause can clearly show that: (1) enforcement would be unreasonable or unjust, (2) the clause is invalid for reasons of fraud or overreaching, (3) enforcement would contravene a strong public policy of the forum where the suit was brought, or (4) the selected forum would be seriously inconvenient for trial.

*Id.* Under this standard, the Court determined that the trial court abused its discretion in refusing to enforce the clause.

The Court first acknowledged that evidence that a party concealed a forum-selection clause combined with evidence proving that concealment was part of an intent to defraud a party may be sufficient to invalidate the clause. However, a party who signs a document is presumed to know its contents including documents specifically incorporated by reference. “[S]imply being unaware of a forum-selection clause does not make it invalid.” *Id.* at 924. Further, “parties to a contract have an obligation to protect themselves by reading what they sign and, absent a showing of fraud, cannot excuse themselves from the consequences of failing to meet that obligation.” *Id.*

Each of the three pages Riddell’s officer admitted that he reviewed was labeled as “one of four” and the page he signed noted just above his signature that the agreement was four pages. He had notice of a missing first page and was under an obligation to review it: “he could have asked for the missing page.” *Id.* at 923. The Court concluded that Riddell’s inattention is not evidence of fraud or overreaching:

Scott Riddell’s inattention to page one of the contract is not evidence of fraud or overreaching because there is no evidence that IPA made any misrepresentations about or fraudulently concealed the existence of page one or any other portion of the contract. To the contrary, the existence of page one is referenced on every page of the agreement that Scott Riddell read and endorsed. If we were to determine otherwise, it would require a party seeking to enforce a forum-selection clause to prove that the opposing party was separately shown each provision of every contract sought to be enforced and was subjectively aware of each clause. Parties who sign contracts bear the responsibility of reading the documents they sign.

*Id.* at 924. The Court, in a per curiam opinion, then conditionally granted IPA’s petition and directed the trial court to grant the motion to dismiss.

It should be noted that the Texas Supreme Court held that transaction participant theory, whereby employees of signatories could potentially be held to a forum-selection clause, did not apply where the contract expressly stated: “This Agreement . . . shall inure to the benefit of and be binding upon, the successors, permitted assigns, legatees, distributees, legal representatives and heirs of each party and is not intended to confer upon any person, other than the parties and their permitted successors and assigns, any rights or remedies hereunder.” *Pinto Tech. Ventures, L.P. v. Sheldon*, 526 S.W.3d 428, 445 (Tex. 2017).

As with arbitration agreements, there is no conspicuousness requirement for forum-selection clauses. Rather, the hiding of such a provision must rise to the level of fraud before it is a defense.

#### **H. Direct-Benefits Estoppel**

Texas courts have applied direct-benefits estoppel to determine whether non-signatories may rely upon a forum-selection clause. *Bundy v. Houston*, No. 01-17-00863-CV, 2018 Tex. App. LEXIS 9472, 2018 WL 6053602 (Tex. App.—Houston [1st Dist.] Nov. 20, 2018, no pet.); *Carlile Bancshares, Inc. v. Armstrong*, No. 02-14-00014-CV, 2014 Tex. App. LEXIS 8690, 2014 WL 3891658, at \*8 (Tex. App.—Fort Worth Aug. 7, 2014, no pet.); *Phoenix Network Techs. (Europe) Ltd. v. Neon Sys., Inc.*, 177 S.W.3d 605, 622-24 (Tex. App.—Houston [1st Dist.] 2005, no pet.). Specifically, several courts of appeals hold that equitable estoppel may permit a non-signatory to enforce a forum-selection clause where either of the following two circumstances were present: (1) “under ‘direct benefits-estoppel,’ a non-signatory may enforce an arbitration agreement when the signatory plaintiff sues it seeking to derive a direct benefit from the contract containing the arbitration provision” and (2) “[e]stoppel theory also applies when a signatory plaintiff sues both signatory and non-signatory defendants based upon substantially interdependent and concerted misconduct by all defendants.” *Phoenix*, 177 S.W.3d at 622. See also *In re Wilmer Cutler Pickering Hale And Door LLP*, No. 05-08-01395-CV, 2008 Tex. App. LEXIS 9692 (Tex. App.—Dallas Dec. 31, 2008, orig. proceeding); *Deep Water Slender Wells, Ltd.*, 234 S.W.3d at 693-94. Note that the Texas Supreme Court has since disapproved of the “concerted misconduct” theory to allow a non-signatory to enforce an arbitration clause. See *In re Merrill Lynch Trust Co. FSB*, 235 S.W.3d 185 (Tex. 2007). See also *Pinto Tech. Ventures, L.P. v. Sheldon*, 526 S.W.3d 428 (Tex. 2017) (refusing to address concerted misconduct in forum-selection clause case).

#### **I. Right To Mandamus Relief If Court Refuses To Enforce Forum-Selection Clause**

The Texas Supreme Court has repeatedly held that mandamus relief is available to enforce a forum-selection clause in a contract if a trial court errs in not enforcing same. See, e.g., *In re Lisa Laser USA, Inc.*, 310 S.W.3d 880, 883 (Tex. 2010) (orig. proceeding); *In re Laibe Corp.*, 307 S.W.3d 314, 316 (Tex. 2010) (orig. proceeding) (per curiam); *In re ADM Investor Servs., Inc.*, 304 S.W.3d 371, 374 (Tex. 2010) (orig. proceeding); *In re Int’l Profit Assocs.*, 286 S.W.3d 921, 922 (Tex. 2009) (orig. proceeding) (per curiam); *In re Int’l Profit Assocs.*, 274 S.W.3d 672, 674 (Tex. 2009) (orig. proceeding) (per curiam); *In re AutoNation, Inc.*,

228 S.W.3d 663, 665 (Tex. 2007) (orig. proceeding); *In re AIU Ins. Co.*, 148 S.W.3d 109, 115-19 (Tex. 2004) (orig. proceeding).

#### **J. Waiver Of Forum-Selection Clauses**

Like other contractual rights, such as an arbitration clause, a forum-selection clause may be waived, and it would ordinarily be “unreasonable or unjust” for a court to enforce a forum-selection clause after it has been waived. *In re Nationwide Ins. Co. of Am.*, 494 S.W.3d 708, 712-13 (Tex. 2016); *In re ADM Inv’r Servs., Inc.*, 304 S.W.3d 371, 374 (Tex. 2010). Generally, “waiver” consists of the intentional relinquishment of a known right or intentional conduct inconsistent with claiming that right. *Jernigan v. Langley*, 111 S.W.3d 153, 156 (Tex. 2003) (per curiam). In this instance, however, courts have borrowed a different standard from the jurisprudence applicable to arbitration clauses, an analogous type of forum-selection clause. *In re Automated Collection Techs., Inc.*, 156 S.W.3d 557, 559 (Tex. 2004) (citing *In re Bruce Terminix Co.*, 988 S.W.2d 702, 704 (Tex. 1998)). That test embodies aspects of estoppel and provides: “A party waives a forum-selection clause by substantially invoking the judicial process to the other party’s detriment or prejudice.” *ADM Inv’r Servs.*, 304 S.W.3d at 374. Substantial invocation and resulting prejudice must both occur to waive the right. *Perry Homes v. Cull*, 258 S.W.3d 580, 593 (Tex. 2008); *Automated Collection Techs.*, 156 S.W.3d at 559. Whether litigation conduct is “substantial” depends on context and is determined on a case-by-case basis from the totality of the circumstances. *Perry Homes*, 258 S.W.3d at 591-93.

A totality-of-the-circumstances test necessarily implies that a multitude of factors must be considered and evidence must be carefully weighed. *Perry Homes*, 258 S.W.3d at 590. The court articulated several factors to be considered, “such as: when the movant knew of the [forum-selection] clause; how much discovery has been conducted; who initiated it; whether it related to the merits . . . ; how much of it would be useful in [another forum]; and whether the movant sought judgment on the merits.” *Id.* at 591-92. In *Perry Homes v. Cull*, the Court acknowledged that applying the abuse-of-discretion standard in the context of a totality-of-the-circumstances test, which “presumes a multitude of potential factors and a balancing of evidence on either side,” is decidedly different than applying the standard in other contexts where courts are guided by detailed rules. *Id.* The Court recognized the need for flexibility, because “if appellate courts must affirm every time there is some factor that was not negated or some evidence on either side, then no ruling based on the totality-of-the-

circumstances could ever be reversed” and that would be the equivalent of “no review at all.” *Id.*

In *In re Nationwide*, the Texas Supreme Court granted mandamus relief to enforce a forum-selection clause and disregarded a waiver argument. 494 S.W.3d 708, 712-13 (Tex. 2016). The Court described the defendant’s conduct thusly:

Nationwide served answers and a counterclaim, filed special exceptions and two Rule 91a motions to dismiss specific claims, served written discovery, and obtained an agreed confidentiality and protective order. But the parties’ interaction with the trial court was minimal. Although the court sustained Nationwide’s special exceptions and signed the agreed protective order, it made no dispositive rulings even though Nationwide moved to dismiss some of Besch’s causes of action as baseless.

*Id.* at 713. The plaintiff also made the argument that the he would lose his contract claim because the statute of limitations had already run:

Besch argues that this delay was part of Nationwide’s litigation strategy, suggesting that Nationwide participated in the Texas litigation only long enough for the contract claim to become barred in Ohio. And, although Nationwide promptly agreed to waive limitations so that the contract claim could proceed in the proper forum, Besch discounts the concession as inconsequential because, under Besch’s reading of *Perry Homes*, prejudice in this context does not require a showing of “irretrievable loss.”

*Id.* The Court concluded:

As we said in *Perry Homes*: “In cases of waiver by litigation conduct, the precise question is not so much when waiver occurs as when a party can no longer take it back.” *Id.* at 595. Explaining further, we observed that the test for waiver in this context is “quite similar” to estoppel, “a defensive theory barring parties from asserting a claim or defense when their representations have induced ‘action or forbearance of a definite and substantial character’ and ‘injustice can be avoided only by enforcement.’” *Id.* at 593 (quoting *Trammel Crow Co. No. 60 v. Harkinson*, 944 S.W.2d 631, 636 (Tex. 1997)). Applying that test for waiver here, we conclude that Besch never actually

suffered the prejudice of which he complains. The assumed loss of his contract claim, once theoretical, does not exist because of Nationwide’s voluntary waiver of the contractual-limitations period. The trial court accordingly abused its discretion in refusing to enforce the forum-selection clause on the basis of this alleged prejudice.

*Id.* There was a dissent, and the dissenting justices would have found that the trial court was within its discretion to find harm based on the fact that the defendant may not live up to its word on the statute of limitations defense. *Id.*

### K. Forum-Selection Clauses in Trust And Estate Documents

Courts in other jurisdictions have generally enforced forum-selection clauses in trust documents. *See, e.g., Kluge v Subotnick*, 656325/2017, 2019 N.Y. Misc. LEXIS 1621 (S.Ct.N.Y. Mar. 26, 2019); *In re: Harrier Trust*, 18-667, 259 So. 3d 402, 2018 La. App. LEXIS 2071 (La.App. 3 Cir. Oct. 17, 2018); *LVAR, L.P. v. Bermuda Commercial Bank Ltd.*, No. 13-CV-9148 (AT), 2015 U.S. Dist. LEXIS 35333, 2015 WL 1267368, at \*5 (S.D.N.Y. Mar. 18, 2015) (forum-selection clause in trust was enforced and was broad enough to cover plaintiff’s claims); *N. Am. Airlines v. Wilmington Trust Co.*, 602985-2009, 2010 N.Y. Misc. LEXIS 2319 (S.Ct. N.Y. May 21, 2010); *Grossman v. Grossman*, 2009 U.S. Dist. LEXIS 13774, 2009 WL 449133 (E.D. Pa. Feb. 23, 2009); *Priest v. Lynn*, CV020189311, 2002 Conn. Super. LEXIS 3472, 2002 WL 31513553 (2002); *Simon v. Navellier Series Fund*, 2000 Del. Ch. LEXIS 150, 2000 WL 1597890 (Del. Ch. Oct. 19, 2000); *Argonaut Partnership, L.P. v. Bankers Trustee Co., Ltd.*, 96 Civ. 1970 (MBM), 96 Civ. 2222 (MBM), 1997 U.S. Dist. LEXIS 1092, 1997 WL 45521 at \*5 (S.D.N.Y. 1997); *Clinton v. Janger*, 583 F. Supp. 284 (N.D. Ill. 1984) (forum selection clause in trust agreement governed resolution of contract); *see also Compass Bank v. Williams*, No. 5:12-CV-186, 2015 U.S. Dist. LEXIS 184191 (S.D. Tex. Jan. 20, 2015) (granting dismissal based on forum non conveniens but referencing forum selection clause in trust as support for that ruling).

There are a number of courts that have rejected forum-selection clause arguments arising from trusts for a number of varying reasons. *See, e.g., United Bhd. of Carpenters Pension Plan v. Fellner*, C.A. No. 9475-VCN 2015 Del. Ch. LEXIS 53, n. 13 (Ct. Chanc. Del. February 26, 2015) (Forum-selection clause in trust did not apply because state statute provided: “while a beneficial owner [of a trust] . . . may consent to be subject to the nonexclusive jurisdiction of the courts of . . . a specified jurisdiction[,] . . . a beneficial owner

who is not a trustee may not waive its right to maintain a legal action or proceeding in the courts of the State [of Delaware] with respect to matters relating to the organization or internal affairs of a statutory trust.” 12 Del. C. § 3804(e). The Court held: “This dispute relates to “the organization or internal affairs of a statutory trust.” Accordingly, the forum-selection clause does not require that this dispute be litigated elsewhere.”); *Jackson v. Mercantile Safe Deposit & Trust Co.*, 2008 U.S. Dist. LEXIS 128955 (D.C. S.C. February 13, 2008) (rejected forum-selection clause argument in context of motion to transfer venue trust dispute); *Costas v. Deposit Guar. Nat’l Bank*, 138 Fed. Appx. 605, 607(5th Cir. 2005) (court held that forum-selection clause in trust was not mandatory and did not restrict the party from filing claims in federal court); *Beaubien v. Cambridge Consol., Ltd.*, 652 So. 2d 936 (Fla. 5th DCA 1995) (holding that it was error to dismiss complaint against individual defendants who had acted as agents of corporate trustee: “We further conclude that the forum selection clause in the trust document, which provided for exclusive jurisdiction in the Cayman Islands, is not determinative. Forum selection provisions which have been obtained through freely negotiated agreements are valid, unless shown by the resisting party to be unreasonable or unjust. Where a trial in the contractual forum will be so gravely difficult and inconvenient that a party will for all practical purposes be deprived of his day in court, the forum selection clause is unenforceable. Here, neither the beneficiaries, Cambridge, nor Carr signed the trust agreement. Cambridge is a dissolved corporation and Carr is a resident of the United States; thus there is no resident or entity to bring an action against in the Cayman Islands. To enforce the forum selection clause in the these circumstances would effectively deprive the parties of their day in court.”); *Sec. Mut. Life Ins. Co. v. Shapiro*, 2009 U.S. Dist. LEXIS 82934 (D.C. N.Y. Sept. 11, 2009)(denied motion to dismiss on forum-selection clause in trust where defendant had removed case to federal court and court held that removal was a waiver of clause).

For example, the complaint filed in *Clinton* challenged the administration of three trust agreements, which were executed in 1968 (“Trust One”), 1979 (“Trust Two”), and 1981 (“Trust Three”). *Clinton v. Janger*, 583 F. Supp. 284 (N.D. Ill. 1984). Each of the agreements named a different trustee, and each contained a unique forum-selection clause. *Id.* at 286. Trust One purported to establish venue in the Bahama Islands; Trust Two in Jersey, Channel Islands; and Trust Three in Guernsey, Channel Islands. *Id.* The dispute in *Clinton* arose out of a “related series of occurrences,” spanning approximately 13 years. *Id.* The defendants in *Clinton*, which included former trustees, moved to dismiss the action based on the three

forum-selection clauses in their respective trust agreements. 583 F. Supp. at 286. In considering the motions to dismiss, the district court stated:

The only decision to be made now is whether any alternative forum is reasonable, not specifically whom can be brought into the forum finally chosen. If there is at least one foreign forum which is reasonable, the dispute should not be prosecuted in this District. The plaintiffs will remain free to reinstitute proceedings in that foreign forum, or anywhere else that they believe is proper. Whether there is jurisdiction over all defendants in the foreign forum selected by the plaintiffs will be a question for that court to decide.

583 F. Supp. at 289. The district court found that “at least one, if not all, of the forum selection causes [was] reasonable.” 583 F. Supp. at 290. Consequently, it dismissed the action “without prejudice to the right of the plaintiffs to attempt to refile it in another forum.” 583 F. Supp. at 290.

In *Kronenberg v. Kronenberg (In re Kronenberg Family Trust)*, the Washington court of appeals affirmed a trial court’s dismissal of an action due to a forum-selection clause in a trust. No. 43699-6-I, 2000 Wash. App. LEXIS 23 (Wa. Ct. App. 2000). The court of appeals rejected an argument that such a clause would not be enforceable in a trust because it is not a contract:

Equally unconvincing are the arguments that a forum selection clause will only be enforced when it is shown to have been “obtained through freely negotiated agreement” and that Donald Kronenberg’s consent was required for the forum selection clause to be enforceable. He is not a party to the trust instrument. Moreover, he fails to establish by evidence in the record before us that any party to the trust had unequal bargaining power. Thus, the cases that he cites in support of his position are inapposite.

*Id.* The court also rejected an argument that the suit could only be filed where the trustee was located. *Id.*

In *Priest v. Lynn*, the court dismissed a case based on a choice of law clause in the trust document. CV020189311, 2002 Conn. Super. LEXIS 3472, 2002 WL 31513553 (2002). The court held:

The current issue is whether this court has jurisdiction over Adam’s inter vivos trust and the powers to order an accounting and to

determine whether the trust assets were distributed properly. It is well-established that “the settlor [of an inter vivos trust] can select the laws of a state other than that of his domicile that will govern the validity and administration of the trust and thereby assure the ability of his trustee to act.” G. Bogert, *Trusts and Trustees* (2d Ed. 1992) § 233, p. 18. It follows that the settlor can select the laws of his domicile to govern the validity and administration of the trust, and, because “Connecticut case law is clear that the courts will uphold an agreement of the parties to submit to the jurisdiction of a particular tribunal”; *Phoenix Leasing, Inc. v. Kosinski*, 47 Conn. App. 650, 653, 707 A.2d 314 (1998); effect should be given to this selection.

This court concludes that the forum selection clause in Adam’s trust agreement confers exclusive jurisdiction over matters arising from the agreement, and interprets the provision to require not only that the agreement and trust created be governed by Florida law, but that the agreement and trust be interpreted in Florida’s courts. It is worthy to emphasize that the trust itself, not only the trust agreement, is to be governed by and interpreted in Florida’s courts. Because the language of the choice of law provision is broad and extends to the actual trust; *see Messler v. Barnes Group, Inc.*, Superior Court, judicial district of Hartford, 1999 Conn. Super. LEXIS 239, Docket No. CV960560004 (February 1, 1999, Teller, J.) (24 Conn. L. Rptr. 107); this court has no jurisdiction over Adam’s inter vivos trust and has no power to order an accounting for or distribution from the trust.

....

Because both Adam and Locia were residents of Florida when they died, and because the defendant, a Florida resident, was appointed either the sole or co-fiduciary of their estates, this court has no jurisdiction over these estates and has no power to order an accounting of or distributions from the estates. Additionally, because Adam, a resident of Florida, conveyed a parcel of land situated in Florida, this court has no jurisdiction over the conveyance. It follows, then, that because the court lacks subject

matter, count one and count two must be dismissed.

*Id.*

A Texas court has enforced a forum-selection clause in a trust dispute. In *In re JP Morgan Chase Bank, N.A.*, trust beneficiaries sued the trustee for alleged breaches of fiduciary duty in Dallas, Texas. No. 05-17-01174-CV, 2018 Tex. App. LEXIS 1883 (Tex. App.—Dallas March 14, 2018, original proceeding). The settlor executed the trust agreement in New York, and it included the following forum-selection clause: “The validity and effect of the provisions of this Agreement shall be determined by the laws of the State of New York, and the Trustee shall not be required to account in any court other than one of the courts of that state.” *Id.* The trustee filed a motion to dismiss the Texas suit due to the forum-selection clause, alleging that the beneficiaries had to file suit in New York. The trial court denied the motion, and the trustee filed a petition for writ of mandamus with the court of appeals.

In the court of appeals, the beneficiaries argued that the language of the forum-selection clause applied only to a claim for an accounting and did not apply to their breach-of-fiduciary-duty claim. The court of appeals disagreed, holding that the phrase “to account” was broader. After reviewing several definitions of the phrase, the court stated: “[W]e conclude ‘required to account in’ is used as a broad, unrestricted phrase and means relators may not be sued or otherwise required to explain alleged wrongdoing regarding the Trust or its administration in any state other than New York.” *Id.* The court also found support for its conclusion from the trust document in that “account” was used broadly in other portions of the trust. The court concluded the scope of the forum-selection clause included the beneficiaries’ claims for breach of fiduciary duty.

The beneficiaries also argued that trial court correctly denied the motion to dismiss because the mandatory venue statute in Texas Property Code Section 115.002(c) showed a strong public policy to keep the action in Texas. The court of appeals held that, although a venue-selection clause that was contrary to Section 115.002 would be unenforceable, the same was not true of a forum-selection clause. *Id.* (citing *Liu v. Cici Enters., LP*, No. 14-05-00827-CV, 2007 Tex. App. LEXIS 81, 2007 WL 43816, at \*2 (Tex. App.—Houston [14th Dist.] Jan. 9, 2007, no pet.) (mem. op.) (“The distinction between a forum-selection clause and a venue-selection clause is critical. Under Texas law, forum-selection clauses are enforceable unless shown to be unreasonable, and may be enforced through a motion to dismiss. In contrast, venue selection cannot be the subject of private

contract unless otherwise provided by statute.”)). Further, although the beneficiaries contended that proceeding in New York would be unreasonable and seriously inconvenient, they failed to present any evidence to support those contentions. The court held that the trial court abused its discretion in denying the motion to dismiss and granted mandamus relief. *See also In re Longoria*, No. 14-15-00261-CV, 2015 Tex. App. LEXIS 7349 (Tex. App.—Houston [14th Dist.] July 16, 2015, original proceeding) (court enforced forum-selection clause regarding claims of tortious interference with inheritance rights, breach of fiduciary duty and other claims that arose from a settlement agreement containing such a clause).

This is the first case in Texas to enforce a forum-selection clause contained in a trust document. “A forum-selection clause is a creature of contract.” *Phoenix Network Techs. (Europe) Ltd. v. Neon Sys., Inc.*, 177 S.W.3d 605, 611 (Tex. App.—Houston [1st Dist.] 2005, no pet.). Interestingly, the court of appeals in *In re JPMorgan Chase Bank, N.A.*, did not address an argument that the forum-selection clause should not be enforced because a trust is not a contract between the trustee and the beneficiary.

In 2013, the Texas Supreme Court enforced an arbitration clause that was contained in a trust document. *Rachel v. Reitz*, 403 S.W.3d 840 (Tex. 2013). The Court did so for two primary reasons: 1) the settlor determines the conditions attached to her gifts, which should be enforced on the basis of the settlor’s intent; and 2) the issue of mutual assent can be satisfied by the theory of direct-benefits estoppel, so that a beneficiary’s acceptance of the benefits of a trust constitutes the assent required to form an enforceable agreement to arbitrate. *Id.* The Court stated that generally Texas courts strive to enforce trusts according to the settlor’s intent, which courts should divine from the four corners of unambiguous trusts. The Court noted that the settlor intended for all disputes to be arbitrated via the trust language. *Id.* The Court then looked to the Texas Arbitration Act, which provides that a “written agreement to arbitrate is valid and enforceable if the agreement is to arbitrate a controversy that: (1) exists at the time of the agreement; or (2) arises between the parties after the date of the agreement.” *Id.* (citing Tex. Civ. Prac. & Rem. Code 171.001(a)). The Court noted that the statute uses the term “contract” in another provision, and that the Legislature intended for the terms “agreement” and “contract” to be different. As the statute does not define the term “agreement,” the Court defined it as “a mutual assent by two or more persons.” *Id.* Thus, a formal contract is not required to have a binding “agreement” to arbitrate. The Court resolved the issue of mutual assent by looking to the theory of direct-benefits estoppel. Because the plaintiff had

accepted the benefits of the trust for years and affirmatively sued to enforce certain provisions of the trust, the Court held that the plaintiff had accepted the benefits of the trust such that it indicated the plaintiff’s assent to the arbitration agreement. The Court ordered the trial court to grant the trustee’s motion to compel arbitration.

There is not a comparable statute that requires the enforcement of “agreements” for forum selection. There could be an issue of whether the *Rachel v. Reitz*/arbitration-clause analysis should apply to forum-selection clauses. However, there is precedent in Texas that arbitration clauses are a type of forum-selection clause. *St. Clair v. Brooke Franchise Corp.*, No. 2-06-216-CV, 2007 Tex. App. LEXIS 2805, 2007 WL 1095554, at \*4 (Tex. App.—Fort Worth Apr. 12, 2007, no pet.) (mem. op.). *See generally Vimar Seguros y Reaseguros, S.A. v. M/V Sky Reefer*, 515 U.S. 528, 534, 115 S. Ct. 2322, 2326, 132 L. Ed. 2d 462 (1995) (recognizing arbitration provisions are a subset of forum-selection clauses). Accordingly, the Texas Supreme Court may simply apply the arbitration statute and the *Rachel v. Reitz* analysis to forum-selection clauses.

#### **L. Venue-Selection Clauses**

There is a distinction between clauses that require a suit to be brought in another state—forum-selection clauses—and those that require a suit to be brought in a particular county in Texas—venue-selection clauses. “Forum” relates to the jurisdiction, generally a nation or State, where suit may be brought. *Liu v. CiCi Enters., LP*, No. 14-05-00827-CV, 2007 Tex. App. LEXIS 81, 2007 WL 43816, at \*2 (Tex. App.—Houston [14th Dist.] Jan. 9, 2007, no pet.) (mem. op.). “Venue,” on the other hand, generally refers to a particular county or a particular court. *Gordon v. Jones*, 196 S.W.3d 376, 383 (Tex. App.—Houston [1st Dist.] 2006, no pet.). Thus, a “forum”-selection agreement is one that chooses another state or sovereign as the location for trial, whereas a “venue”-selection agreement chooses a particular county or court within that state or sovereign.” *In re Great Lakes Dredge & Dock Co. L.L.C.*, 251 S.W.3d 68, 72-79 (Tex. App.—Corpus Christi 2008, orig. proceeding) (trial court properly refused to enforce agreement contracting away mandatory venue).

As shown herein, forum-selection clauses are generally enforceable. However, a court may not enforce a venue-selection clause if doing so is inconsistent with Texas’s venue statutes. *In re Great Lakes Dredge & Dock Co. L.L.C.*, 251 S.W.3d at 72-79. Venue-selection clauses are generally enforceable by statute if they arise out of “major transactions” as defined by the statute. Tex. Civ. Prac. & Rem. Code § 15.020; *In re Medical Carbon Research Inst., L.L.C.*,



No. 14-08-00104-CV, 2008 Tex. App. LEXIS 2518 (Tex. App.—Houston [14th Dist.] April 9, 2008, original proceeding) (agreement was not enforceable where it was entered into after suit was filed). Otherwise stated, venue-selection clauses are generally unenforceable in Texas unless the contract evinces a “major transaction” as defined in the venue rules. *See In re Tex. Ass’n of Sch. Bds.*, 169 S.W.3d 653, 660 (Tex. 2005) (venue-selection clause in contract that was not a major transaction unenforceable); *Yarber v. Iglehart*, 264 S.W.2d 474, 476 (Tex. Civ. App.—Dallas 1953, no writ) (real-estate agent committed no actionable wrong in contract or in tort by refusing to perform an unenforceable oral agreement).

Section 15.020 of the Civil Practice and Remedies Code is a mandatory venue provision. *In re Royalco Oil & Gas Corp.*, 287 S.W.3d 398, 399, n.2 (Tex. App.—Waco 2009, orig. proceeding). It provides that “[a]n action arising from a major transaction shall be brought in a county if the party against whom the action is brought has agreed in writing that a suit arising from the transaction may be brought in that county.” Tex. Civ. Prac. & Rem. Code Ann. § 15.020(b). Further, it defines a “major transaction” as “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.” *Id.* at § 15.020(a).

The Texas Supreme Court granted mandamus relief to enforce a valid venue-selection clause. *In re Fisher*, 433 S.W.3d 523 (Tex. 2014). It should be noted that the Texas Supreme Court also held that such a clause did apply to a case where the claims did not arise out of the agreement with the venue provision. *Pinto Tech. Ventures, L.P. v. Sheldon*, 526 S.W.3d 428, 445 (Tex. 2017).

One case enforced a venue-selection clause and addressed arguments concerning whether the clause was permissive or mandatory and whether fraud and unconscionability were defenses to the enforcement of the clause. *In Re Railroad Repair & Maintenance, Inc.*, No. 05-09-01035-CV, 2009 Tex. App. LEXIS 8404 (Tex. App.—Dallas November 2, 2009, orig. proceeding). The court held that the clause was mandatory because it used the term “exclusive” venue, and held that the fraud and unconscionability defenses were not applicable because there was no evidence to support them at the venue hearing. *See id.*

If a venue provision is enforceable, but a trial court does not grant a motion to transfer venue, then a party may seek mandamus relief. Indeed, “mandatory venue provisions trump permissive ones.” *Airvantage, L.L.C. v. TBAN Properties # 1, L.T.D.*, 269 S.W.3d 254, 257 (Tex. App.—Dallas 2008, no pet.). Where a party seeks to enforce a mandatory venue provision

under Chapter 15 of the Texas Civil Practices and Remedies Code, a party is not required to prove the lack of an adequate appellate remedy, and is only required only to show that the trial court abused its discretion by failing to transfer the case. *In re Tex. DOT*, 218 S.W.3d 74, 76 (Tex. 2007).

Regarding venue-selection clauses in trust documents, there is very little authority on the subject in Texas. Once again, in *In re JP Morgan Chase Bank, N.A.*, trust beneficiaries sued the trustee for alleged breaches of fiduciary duty in Dallas, Texas. No. 05-17-01174-CV, 2018 Tex. App. LEXIS 1883 (Tex. App.—Dallas March 14, 2018, original proceeding). The beneficiaries argued that trial court correctly denied the motion to dismiss because the mandatory venue statute in Texas Property Code Section 115.002(c) showed a strong public policy to keep the action in Texas. The court of appeals held that, although a venue-selection clause that was contrary to Section 115.002 would be unenforceable, the same was not true of a forum-selection clause. *Id.* This case would support the position that the venue statute (Texas Property Code Section 115.002) would control over any venue-selection clause in a trust document.

#### **IV. CONTRACTUAL JURY-WAIVER CLAUSES**

##### **A. Form**

A form for a party drafting a trust or will for a jury waiver is as follows:

**THE PARTIES, TO THE FULLEST EXTENT PERMITTED BY APPLICABLE LAW, HEREBY KNOWINGLY, INTENTIONALLY, IRREVOCABLY, UNCONDITIONALLY AND VOLUNTARILY, WITH AND UPON THE ADVICE OF COMPETENT COUNSEL, WAIVES, RELINQUISHES AND FOREVER FORGOES THE RIGHT TO A TRIAL BY JURY IN ANY ACTION OR PROCEEDING BASED UPON, ARISING OUT OF OR IN ANY WAY RELATING TO THIS AGREEMENT OR ANY CONDUCT, ACT OR OMISSION OF EITHER PARTY, WHETHER SOUNDING IN CONTRACT, TORT OR OTHERWISE.**

##### **B. Introduction**

A jury waiver is a provision that expressly states that the parties waive their right to a jury should a dispute arise between them. If a dispute arises, one party could sue the other in court, but neither party would have the option to request a jury to determine the outcome. The judge sits as the finder of fact. Of course, this would seem to conflict with a party’s

constitutional right to a jury trial. *See* Tex. Const. Art. I, § 15 (“The right of trial by jury shall remain inviolate.”); Tex. Const. Art. V, § 10 (granting right to jury trial in district courts). Yet, Texas courts, and almost all other jurisdictions, have held that contractual jury waivers are permissible and enforceable under certain circumstances.

A natural question is why a party would choose to use a contractual jury waiver as compared to an arbitration clause. Arbitration clauses may not be such a good idea for some disputes. There are multiple reasons for this, but a few are as follows. Arbitrations are not as inexpensive as advertised. The parties have to pay the arbitrator(s), and this can be very expensive depending on the expertise required. The parties still do discovery, and it is normally about as expensive as regular litigation. Moreover, arbitrators have an incentive to keep the arbitration going, and therefore, do not generally grant pre-hearing dispositive motions. Judges do not have that incentive, and at least in Texas, grant partial or complete summary judgments on a regular basis. So, if a party is in an arbitration, an evidentiary hearing will most likely be required, which will be expensive and uncertain in outcome. In a court of law, that may not be the case. Also, and importantly, in an arbitration there is basically no appellate review. An arbitrator’s decision is almost impossible to overturn no matter the facts or the law. In a court of law, there is an appellate remedy to correct the insufficiency of evidence and the incorrect application of law.

As a result, parties are turning to the alternative of the contractual jury waiver. These clauses are recognized in federal courts and most state courts. This eliminates the uncertainty of a runaway jury finding, but preserves other rights that exist in a court of law. When coupled with a forum-selection clause and venue provisions, a party may be able to eliminate the risk of being in an unfavorable jurisdiction or area of a jurisdiction as well.

### **C. The Texas Supreme Court Affirms Use Of Jury Waivers**

In *In re Prudential*, the Texas Supreme Court held that contractual jury waivers were enforceable. 148 S.W.3d 124 (Tex. 2004). The case involved a dispute over a restaurant lease where the lessees sued the lessor claiming a bad smell disrupted their business. The plaintiffs demanded a jury and paid the fee. *Id.* at 128. The defendants filed a motion to quash the jury demand relying on a jury-waiver clause in the lease. The trial court denied the motion, and the defendants sought mandamus relief.

The Texas Supreme Court first stated that nothing in the constitutional provisions or Texas Rules of Civil Procedure provided that any right to a jury trial could

not be waived by a party. The Court then addressed the defendants’ main contention: that jury waivers were void as against public policy because they would grant parties the private power to fundamentally alter the civil justice system. The Court found otherwise:

[P]arties already have power to agree to important aspects of how prospective disputes will be resolved. They can, with some restrictions, agree that the law of a certain jurisdiction will apply, designate the forum in which future litigation will be conducted, and waive in personam jurisdiction, a requirement of due process. Furthermore, parties can agree to opt out of the civil justice system altogether and submit future disputes to arbitration. State and federal law not only permit but favor arbitration agreements. ICP argues that while it does not offend public policy for parties to agree to a private dispute resolution method like arbitration, an agreement to waive trial by jury is different because it purports to manipulate the prescribed public justice system. We are not persuaded. Public policy that permits parties to waive trial altogether surely does not forbid waiver of trial by jury.

*Id.* Thus, the Court analogized contractual jury waivers to arbitration agreements and forum-selection clauses.

The plaintiffs argued that permitting contractual jury waivers could cause a party to take unfair advantage of another party. *Id.* at 132. The Court held that such an agreement would be unenforceable:

[A] waiver of constitutional rights must be voluntary, knowing, and intelligent, with full awareness of the legal consequences. 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.’ Under those conditions, however, a party’s right to trial by jury is afforded the same protections as other constitutional rights.

*Id.* Therefore, the Court found that a contractual jury waiver had to be entered into knowingly and voluntarily.

However, the Court then found that a contractual jury waiver was less of a deprivation of constitutional rights than an arbitration clause:

By agreeing to arbitration, parties waive not only their right to trial by jury but their right to appeal, whereas by agreeing to waive only the former right, they take advantage of the reduced expense and delay of a bench trial, avoid the expense of arbitration, and retain their right to appeal. The parties obtain dispute resolution of their own choosing in a manner already afforded to litigants in their courts. Their rights, and the orderly development of the law, are further protected by appeal. And even if the option appeals only to a few, some of the tide away from the civil justice system to alternate dispute resolution is stemmed.

*Id.*

The plaintiffs argued that the waiver was not entered into knowingly and voluntarily. The Court disagreed and cited factors such as: both sides had counsel, there were a number of changes to the lease, and the waiver was clear and unambiguous. The Court expressly commented that it was not ruling on whether a contractual jury waiver had to be conspicuous. Therefore, even though the Court found that a contractual jury waiver was less intrusive than an arbitration agreement, it found that it had to be voluntarily and knowingly entered into.

In *In re Palm Harbor Homes, Inc.*, the Texas Supreme Court held that when a contractual jury waiver provision is subsumed within an arbitration agreement, the procedural and substantive rules concerning arbitration apply. 195 S.W.3d 672, 675 (Tex. 2006). In that circumstance, a court should apply the arbitration rules and analysis. *Id.*

The Texas Supreme Court once again addressed contractual jury waivers in *In re GE Capital*, where the court granted mandamus relief to enforce a contractual jury waiver. 203 S.W.3d 314, 316-17 (Tex. 2006). The Court first addressed the plaintiff's argument that the defendant had waived the contractual jury waiver and found that the defendant did not waive its right to enforce the contractual jury waiver by immediately filing a motion to quash the demand.

The Court then addressed whether the contractual jury waiver was enforceable. The plaintiff contended that the trial court correctly refused to enforce the contractual jury waiver because the defendant did not present evidence that the waiver was entered into knowingly and voluntarily as required to enforce such a waiver. The waiver provision was written in capital letters and bold print. The court disagreed with the plaintiff's argument:

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. [The plaintiff] did not challenge the jury waiver provision in the trial court and only summarily contends here that the provision is invalid. . . Finding no evidence that the provision was invalid or that [the defendant] knowingly waived its contractual right to a non-jury trial, we conclude that the trial court abused its discretion in failing to enforce the provision.

*Id.* (internal citations omitted). Accordingly, the Court found that a voluntary and knowing waiver was still a requirement, but placed the burden on the plaintiff to prove that it was not a voluntary or knowing waiver where the provision was conspicuous.

#### **D. Mandamus Relief Is Available To Correct Error In Failing To Enforce Jury Waiver**

If the trial court fails to enforce a valid contractual jury waiver, mandamus relief is appropriate directing the trial court to enforce the agreement because the remedy by appeal is not considered adequate. *In re Prudential Ins. Co. of Am.*, 148 S.W.3d 124, 135-140 (Tex. 2004); *In re Wells Fargo Bank Minn. N.A.*, 115 S.W.3d 600, 606-608 (Tex. App.—Houston [14th Dist.] 2003, orig. proceeding) (mandamus granted when trial court refused to enforce contractual jury waiver).

#### **E. Texas Intermediate Appellate Courts' View Of Jury Waivers**

Several courts of appeals that have addressed contractual jury waivers. Some courts treat jury waivers the same as arbitration and forum-selection clauses. One court has held that contractual jury waiver provisions are enforced like any other contractual clause, including an arbitration clause. *In re Wild Oats Mkts.*, No. 09-09-00031-CV, 2009 Tex. App. LEXIS 2316 (Tex. App. — Beaumont Apr. 2, 2009, orig. proceeding). That court stated: "In its response, Kuykendahl suggests arbitration cases are treated more favorably than other contractual jury waiver cases. We disagree." *Id.* at n. 1. Ultimately, the court denied the petition for writ of mandamus because the plaintiff was not a signatory to the agreement, and though potentially available, direct-benefits estoppel did not apply due to the facts of the case. *See id.*

More recently, courts of appeals have similarly treated contractual jury waivers the same as arbitration and forum-selection clauses. *Great Hans, LLC v. Liberty Bankers Life Ins.*, No. 05-17-01144-CV, 2019 Tex. App. LEXIS 2111, 2019 WL 1219110 (Tex. App.—Dallas Mar. 15, 2019, no pet.); *In re MCO Mgmt., LLC*, No. 05-17-00882-CV, 2018 Tex. App. LEXIS 2180 (Tex. App.—Dallas March 27, 2018,

original proceeding) (all clauses construed the same); *In re Guggenheim Corp. Funding, LLC*, 380 S.W.3d 879, 885–887 (Tex. App.—Houston [14th Dist.] 2012, orig. proceeding) (court decided that both enforcement and scope of jury waiver should be determined in same manner as other dispute resolution agreements, such as forum selection clauses and arbitration clauses); *In re Key Equipment Fin. Inc.*, 371 S.W.3d 296, 301 (Tex. App.—Houston [1st Dist.] 2012, orig. proceeding) (contractual jury waiver deserves no more scrutiny than agreement to waive judicial forum and arbitrate future dispute).

One aspect of enforcing such a claim is to make sure that the claim falls within the scope of the jury waiver. *Lost Maples Gen. Store, LLC v. Ascentium Capital, LLC*, No. 14-18-00215-CV, 2019 Tex. App. LEXIS 3549, 2019 WL 1966671 (Tex. App.—Houston [14th Dist.] May 2, 2019, no pet.) (contractual jury waiver clause’s scope was not limited to just common-law claims and also included statutory claims: “EFA’s jury-waiver provision does not identify any claims at all, whether they be contractual or statutory. Thus, there is no textual basis for concluding that Lost Maples waived its right to a jury trial in one type of claim, but not another.”).

Other older courts of appeals’s opinions have not been as friendly to the enforcement of contractual jury waivers. For example, in *Mikey’s Houses, LLC v. Bank of America, N.A.*, the Fort Worth Court of Appeals found that a trial court erred in enforcing a contractual jury waiver because the defendant did not prove that it was entered into voluntarily and knowingly. 232 S.W.3d 145 (Tex. App.—Fort Worth 2007, no pet.), *rev’d by mandamus*, *In re Bank of America, N.A.*, 278 S.W.3d 342, 344–346 (Tex. 2009). The court found that contractual jury waivers were very different from arbitration agreements. It found that “public policy favors arbitration; the same cannot be said of the waiver of constitutional rights;” “although statutes generally require courts to compel contractual arbitration, no comparable statutory mandate directs courts to enforce contractual jury trial waivers;” “application of the standards for enforcing arbitration clauses would conflict with the Brady ‘knowing and voluntary’ standard that the Texas Supreme Court adopted in *In re Prudential*”; and “a distinction exists between an agreement to resolve disputes out of court and an agreement to resolve disputes in court but to waive constitutional aspects of that in-court resolution.” *Id.* at 151-52.

The court found that contractual jury waivers are only enforceable if the waiver is made knowingly, voluntarily, and intelligently “with sufficient awareness of the relevant circumstances and likely consequences.” *Id.* at 149. 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. The court then set out seven factors that a court may look to in determining whether a party has rebutted the presumption against waiver:

- (1) the parties’ experience in negotiating the particular type of contract signed,
- (2) whether the parties were represented by counsel,
- (3) whether the waiving party’s counsel had an opportunity to examine the agreement,
- (4) the parties’ negotiations concerning the entire agreement,
- (5) the parties’ negotiations concerning the waiver provision, if any,
- (6) the conspicuousness of the provision, and
- (7) the relative bargaining power of the parties.

*Id.* at 153. In applying those factors, the court cited the present facts of knowing waiver as follows:

The waiver here was not included in the Texas Real Estate Commission standard one-to-four family residential contract. Nor was it presented to Martin and Powell concurrently with the sales contract. Instead, after the sales contract had been executed, Bank of America presented a two-page addendum to the contract to Martin and Powell for their signatures. No evidence exists in the record that the sales contract or the addendum were negotiated.

Paragraph thirteen, in the middle of the second page of the addendum, provides as follows: “Waiver of Trial by Jury. 13 Seller and Buyer knowingly and conclusively waive all rights to trial by jury, in any action or proceeding relating to this Contract.” This paragraph is not set forth any differently than the other paragraphs in the addendum; that is, the entire paragraph is not printed in larger font, not printed in a different color, not bracketed or starred, does not have blanks beside it for the Seller and Buyer to place their initials, nor does it possess any unique features to distinguish it or make it stand out from the other twenty paragraphs in the addendum, as seen in Appendix A. Martin testified that Mikey’s Houses was not represented by counsel. She did not recall reading the jury waiver paragraph and testified that it was not discussed or explained. She said that she did not understand that by signing the addendum she was waiving her constitutional right to trial

by a jury. She said that she did not understand the consequences of the provision.

*Id.* at 154. Based on this evidence and the factors set forth above, the court determined that on the record before it, there was no evidence showing that the plaintiffs had knowingly and voluntarily waived their right to a jury trial. *Id.* at 155. The court reversed the trial court's ruling granting the defendant's motion to enforce the jury trial waiver.

In *In re Credit Suisse First Boston Mortgage Capital, L.L.C.*, the Houston Fourteenth Court of Appeals similarly refused to enforce a contractual jury waiver. 257 S.W.3d 486 (Tex. App.—Houston [14th Dist.] 2008, orig. proceeding). This case involved a dispute over a loan agreement where a non-signatory defendant attempted to enforce a contractual jury waiver against a signatory plaintiff. The defendant alleged that the plaintiff relied on the loan agreement as the basis of its claims and was therefore equitably estopped from denying the application of the jury-waiver clause. The defendant cited to precedent that would support such an argument in the arbitration context. The trial court denied the request to apply the jury waiver by the non-signatory defendant.

On mandamus review, the court of appeals first directly contrasted arbitration and jury-waiver clauses:

Unlike arbitration agreements, which are strongly favored under Texas law, the right to a jury trial is so strongly favored that contractual jury waivers are strictly construed and will not be lightly inferred or extended. Before a jury waiver will be enforced, such waiver must be found to be a voluntary, knowing, and intelligent act that was done with sufficient awareness of the relevant circumstances and likely consequences.

*Id.* The court then analyzed the provision that expressly stated that the lender and borrower agreed to it. The court stated that because the clause expressly only applied to the signatories, the non-signatory defendant could not enforce the provision. The court then held that it would not apply equitable estoppel in the context of contractual jury waivers:

We decline to recognize direct-benefits estoppel as a vehicle by which a jury waiver clause may be applied to claims against a party that did not sign the contract containing the clause. We are unaware of any court, in Texas or elsewhere, that has applied direct-benefits estoppel to a jury waiver provision.

*Id.* The court then stated that arbitration clauses are different from and implicate different policy issues than jury waivers:

We recognize that Texas courts have occasionally referenced arbitration principles in deciding jury-waiver issues. However, these occasional references do not signal a departure from the longstanding principle that jury waivers are disfavored in Texas. Nor can *Prudential* or *Wells Fargo* be read as placing jury-waiver provisions on the same footing as arbitration clauses. These mechanisms cannot be treated interchangeably merely because they both lead to decisions by factfinders other than jurors. Jury waiver provisions and arbitration clauses implicate significantly different policies and principles. In upholding parties' freedom to contract, the Texas Supreme Court noted that arbitration agreements—which are strongly favored—allow parties to contractually opt out of the civil justice system altogether. The use of arbitration as an example of contractual waiver should not be read as a statement that, henceforth, jury waivers are to be analyzed interchangeably with arbitration agreements.

*Id.* The court concluded that it would “not use equitable estoppel as a vehicle to circumvent the required “knowing and voluntary” waiver standard.” *Id.* See also *Paracor Finance, Inc. v. General Elec. Capital Corp.*, 96 F.3d 1151, 1166 (9th Cir. 1996) (contractual jury waiver provision could not be invoked by a non-party); *Adelphia Recovery Trust v. Bank of America, N.A.*, 2009 U.S. Dist. LEXIS 63375, 2009 WL 2031855, at \*5-\*7 (S.D.N.Y. July 8, 2009) (cautioning against application of state law contract principles in view of the doctrine that jury waivers are to be narrowly construed).

In a later decision, also styled, *In re Credit Suisse First Boston Mortg. Capital, L.L.C.*, the Houston Court once again denied a petition for writ of mandamus on a trial court's denial of a motion to enforce a contractual jury waiver. No. 14-08-00819-CV, 2008 Tex. App. LEXIS 9299 (Tex. App.—Houston [14th Dist.] December 11, 2008, orig. proceeding). This was a subsequent proceeding from the case that was just discussed. In the first opinion, the court declined to consider the movant's agency argument. The movant then filed a motion for reconsideration with the trial court based on agency and argued that because the defendant was an agent of a signatory, it should be allowed to enforce the contractual jury waiver. The trial court denied the motion for reconsideration. The

movant then filed another petition for writ of mandamus with the court of appeals.

The court held that “when a valid contractual jury waiver applies to a signatory corporation, the waiver also extends to nonsignatories that seek to invoke the waiver as agents of the corporation.” *Id.* The court acknowledged that the plaintiff had alleged that the defendant was an agent of the signatory. However, the court determined that allegations alone were not sufficient: “we further hold that a nonsignatory may not invoke a jury waiver merely because it is alleged to be an agent of the signatory.” *Id.* The court then held that because the defendant did not provide proof that it was an agent, the trial court did not abuse its discretion in denying the motion for reconsideration:

Because Texas law does not presume that an agency relationship exists, the party alleging agency has the burden to prove it. An enforceable contract requires a “meeting of the minds” between both parties. Absent proof of CSFB’s agency relationship with Mortgage Capital, we cannot assume that the parties intended to include CSFB in their contractual jury waiver.

Therefore, we hold that the trial court did not abuse its discretion by declining to extend the jury waiver on the basis of allegations alone. Because the right to a jury trial implicates constitutional guarantees, we will not lightly infer or extend a contractual jury waiver absent proof that the parties intended it to include claims against nonsignatories.

*Id.*

**F. Texas Supreme Court Addresses Which Party Has Burden To Establish Knowing and Voluntary Waiver And Whether The Clause Should Be Treated Differently From Other Clauses**

In *In Re Bank Of America, N.A.*, the Texas Supreme Court granted mandamus relief and ordered the court of appeals to enforce the trial court’s order enforcing the contractual jury waiver. 278 S.W.3d 342 (Tex. 2009). The Court disagreed with the court of appeals’s inference that a contractual jury waiver was not enforceable. *Id.*

The Court first held that a presumption against waiver would violate the parties’ freedom to contract. 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.* Courts presume that “a party who signs a contract knows its contents.” *Id.* Therefore, the Court concluded that “as long as there is a conspicuous waiver provision, Mikey’s Houses is presumed to know what it is signing.” *Id.*

The Court then addressed what the test was for determining whether there was a conspicuous contractual jury waiver:

Section 1.201(b)(10) of the Texas Business and Commerce Code provides that “[c]onspicuous . . . means so written, displayed, or presented that a reasonable person against which it is to operate ought to have noticed it.” In *Prudential*, we noted that the waiver provision was “crystal clear” because “it was not printed in small type or hidden in lengthy text” and “[t]he paragraph was captioned in bold type.” 148 S.W.3d at 134.

*Id.* The Court reviewed the contract at issue and found that the contractual jury waiver was conspicuous:

In this case, the addendum is only two pages long, and each of the twenty provisions are set apart by one line and numbered individually. Five of the twenty provisions included bolded introductory captions similar to the waiver provision in *Prudential*, and the “Waiver of Trial By Jury” caption is one of the five. Furthermore, the introductory caption is hand-underlined, as is the word “waiver” and the words “trial by jury” within the provision. This bolded, underlined, and captioned waiver provision is no less conspicuous than those contractual waivers that we upheld in both *Prudential* and *General Electric*, and therefore serves as prima facie evidence that the representatives of Mikey’s Houses knowingly and voluntarily waived their constitutional right to trial by jury.

*Id.* 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.

Interestingly, 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: “As for the extent of the allegation that would be necessary to shift the burden to Bank of America to prove knowledge and voluntariness, an allegation

could be sufficient to shift the burden if there is fraud alleged in the execution of the waiver provision itself.” *Id.*

Finally, the Court noted that the court of appeals’s presumption was contrary to the fact that contractual jury waivers were similar to arbitration agreements:

We also note the similarity between arbitration clauses and jury-waiver provisions to clarify that a presumption against contractual jury waivers is antithetical to *Prudential’s* jurisprudence with regard to private dispute resolution agreements. In *Prudential*, we agreed with the United States Supreme Court that “arbitration and forum-selection clauses should be enforced, even if they are part of an agreement alleged to have been fraudulently induced, as long as the specific clauses were not themselves the product of fraud or coercion.” Since *Prudential* indicates that the same dispute resolution rule expressed by the United States Supreme Court in *Scherk* should apply to contractual jury-waiver provisions, the court of appeals’ analysis errs by distinguishing jury waivers from arbitration clauses, thereby imposing a stringent initial presumption against jury waivers. Statutes compel arbitration if an arbitration agreement exists, and more importantly, “Texas law has historically favored agreements to resolve such disputes by arbitration.” We see no reason why there should be a different rule for contractual jury waivers.

*Id.* The court then conditionally granted the petition for writ of mandamus, holding that that trial court’s enforcement of the contractual jury waiver provision was correct.

Most recently, the Texas Supreme Court held in *In re Frank Kent Motor Co.*, that an employer can require an employee to sign a jury waiver in fear of termination without that constituting coercion. 361 S.W.3d 628 (Tex. 2012). The Court held:

There is no reason to treat the effect of the at-will employment relationship on a waiver of jury trial differently from its effect on an arbitration agreement. Arbitration removes the case from the court system almost altogether, and is every bit as much of a surrender of the right to a jury trial as a contractual jury waiver. Additionally, refusing to allow the enforcement of jury trial waivers in the context of the at-will

employment relationship would create a practical problem. Since employers can fire at-will employees for almost any reason, employers could resort to firing all employees when they wanted to implement new dispute resolution procedures and rehiring only those employees who signed the waiver.

*Id.* at 632. The Court concluded: “An employer’s threat to exercise its legal right [to fire an employee for any reason] cannot amount to coercion that invalidates a contract.” *Id.*

There is no question that contractual jury waivers are enforceable in Texas under the right circumstances. The issue facing Texas courts is whether the clause is something different from an arbitration clause or a forum-selection clause and thus should be judged by different standards. Does Texas law require a conspicuous jury waiver clause? Does the clause have to be entered into by both parties on a knowing and voluntary basis? If so, whose burden is it to prove a knowing and voluntary waiver? Are there any presumptions in favor of or against jury waivers? What factors will Texas Courts look to in determining a voluntary and knowing waiver?

The opinion in *In re Bank of America* could be read narrowly. Just as the Court determined in *In re General Electric*, the jury-waiver clause was conspicuous, and therefore, the burden was on the party opposing the waiver to prove that it was not entered into knowingly and voluntarily. The Court did not deal with a non-conspicuous clause and did not expressly hold that the party opposing a non-conspicuous clause would have that initial burden of proving a knowing and voluntary waiver. Further, the holding in *In re Frank Kent Motor Co.*, that jury waivers should be treated the same as arbitration clauses specially dealt with the issue of whether an employer coerced an employee by requiring the employee to sign the agreement containing the clause in order to maintain employment. The Court did not address with the issue of conspicuousness or burden to prove a knowing and voluntary waiver. Therefore, there is still a question as to whether the burden of proving a knowing and voluntary waiver is on the party attempting to enforce a non-conspicuous jury-waiver clause.

### **G. Jury-Waiver Clauses in Trust and Estate Litigation**

One Texas court enforced a contractual jury waiver in a trust document, largely on the basis that the beneficiary waived her complaint. *Laven v. THBN, LLC*, No. 14-13-00440-CV, 2014 Tex. App. LEXIS 13281, 2014 WL 6998098 (Tex. App.—Houston [14th

Dist.] Dec. 11, 2014, no pet.) (mem. op.). In this case, the plaintiff anticipated difficulty making mortgage payments on her recently-purchased suburban home. She and an entity executed multiple documents which accomplished the following: created a land trust; transferred the home into the trust, subject to the existing mortgage; assigned her interest in the trust to the entity; and gave an individual power of attorney relative to the property. The entity and its representative, both individually and as trustee, filed suit requesting a declaratory judgment that the documents were valid and enforceable. The defendant filed a counterclaim, alleging fraud, breach of fiduciary duty, negligence and gross negligence, violations of the Texas Deceptive Trade Practice Act and Texas Real Estate Licensing Act, conspiracy, and conversion. The defendant timely filed a jury demand. The plaintiff moved to strike the demand on the ground that the defendant contractually waived her right to a jury trial. The trial court signed an order striking the jury demand as to the entire case. Therefore, trial was to the bench. After hearing evidence, the trial court signed a judgment, declaring the documents are valid and enforceable and awarding attorney's fees to appellees and also denying relief on the counterclaims. The defendant appealed on the basis that the trial court improperly enforced the jury waiver in the trust document.

The court of appeals held:

Parties may contractually agree to waive their constitutional right to a jury trial. *In re Prudential Ins. Co. of Am.*, 148 S.W.3d 124, 132 (Tex. 2004). A contractual jury waiver is enforceable as long as the waiver is voluntary, knowing, and made with full awareness of the legal consequences. *Id.*

*Id.* The court noted:

The provision on which appellees relied as a contractual jury waiver is contained in only one of the documents executed during the transaction, entitled "Agreement and Declaration of Trust," which created the trust and appointed Arnold as trustee and Laven as original beneficiary. Only Laven and Arnold, as trustee, signed that document. It was executed immediately before other pertinent documents transferring Laven's interest in the trust to THBN and transferring the property into the trust. The following language is included within a section of the "Agreement and Declaration of Trust" entitled "Governing Law": "The parties herein waive trial by jury . . . ."

*Id.*

The defendant contended that (1) the trial court erred by striking the jury demand as to "THBN and Arnold individually because they were not signatories to the 'Agreement and Declaration of Trust,'" and (2) the jury waiver was unenforceable as to all appellees because she was not fully aware of its legal consequences when she signed the "Agreement and Declaration of Trust." *Id.* In support of her second issue, she argued that she was a teacher at the time of the transaction (although she subsequently became a lawyer), there was a disparity in bargaining power, she was not given the opportunity to negotiate terms or consult counsel, and the jury waiver was inconspicuous.

The court of appeals did not decide these issues, rather, it concluded that the defendant failed to preserve error on her appellate complaints because she did not present them to the trial court. The court noted: "In her response, Laven did make a specific objection, but it was distinctly different than the complaint she raises on appeal. The objection did not in any manner inform the trial court that Laven opposed enforcement of the jury waiver because it was applicable to Arnold as trustee only, nor was such a complaint apparent from the context." *Id.* She first advanced such complaints in a motion for new trial, but the court concluded "that her presenting this new ground to attack enforcement of the contractual jury waiver after the trial court had conducted a bench trial was not a timely objection." *Id.*

With respect to her second issue, the court held:

Texas law does not impose a presumption against contractual jury waivers; therefore, the party seeking enforcement does not bear the burden to prove that the opposing party agreed to waive its constitutional right to a jury trial knowingly, voluntarily, and with full awareness of the legal consequences. A conspicuous jury waiver in an agreement shifts the burden to the opposing party to rebut that the waiver was made voluntarily, knowingly, and with full awareness of the legal consequences.

In response to the motion to strike, Laven did not assert the jury waiver was inconspicuous and thus that appellees failed to meet their burden to enforce the provision. Moreover, Laven failed to complain in her response that the jury waiver was not knowing or voluntary and she did not understand its legal effects, much less present evidence supporting such a contention. As stated above, the only ground on which Laven opposed enforcement of the



jury waiver was the timing of the motion to strike.

*Id.* In summary, because she did not preserve error on her appellate challenges to enforcement of the jury waiver, the court of appeals overruled her appellate issues and affirmed the trial court's judgment.

An important note about this case is that the beneficiary actually signed the trust document. This was not a typical private trust, but rather was a part of a business transaction. The trustee and beneficiary signed a number of documents, including the trust document. So, the many issues involving a trustee attempting to enforce the jury waiver against non-signatory beneficiary was simply not present in the case.

#### **V. SHOULD THE ENFORCEMENT OF JURY-WAIVER CLAUSES DIFFER FROM ARBITRATION AND FORUM-SELECTION CLAUSES?**

Arbitration, forum-selection, and jury-waiver clauses all fundamentally alter a party's right to dispute resolution. They can all waive a party's right to a jury trial. However, those clauses seemingly have different tests for their enforcement.

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. *J.M. Davidson, Inc. v. Webster*, 128 S.W.3d 223, 227 (Tex. 2003). 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. *In re Oakwood Mobile Homes, Inc.*, 987 S.W.2d 571, 573 (Tex. 1999). Further, there are instances where Texas courts have enforced arbitration agreements against nonparties under the theory of estoppel. *See, e.g., In re Weekley Homes*, 189 S.W.3d 127 (Tex. 2005); *In re Kellog, Brown & Root*, 166 S.W.3d 732 (Tex. 2005). Absent narrow exceptions, 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. In addition to a strong presumption in favor of an arbitration clause, the enforcement of an arbitration clause is a mere contract-based analysis with normal contract-based defenses.

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. *See In re AIU Ins. Co.*, 148 S.W.3d at 112. Though there is ostensibly an

“unreasonable and unjust” exception to enforcing a forum-selection clause that does not exist for arbitration agreements, the Texas Supreme Court has seemingly enforced forum-selection clauses the same as arbitration agreements. Courts have not held that there has to be any showing of a knowing or voluntary agreement to enforce a forum-selection clause. Moreover, courts have applied estoppel so that non-signatories can enforce forum-selection clauses. *Phoenix Network Techs. (Europe) Ltd.*, 177 S.W.3d 605, 622-24. Moreover, Texas courts apply arbitration precedent to forum-selection clauses. The Supreme Court's forum-selection clause cases liberally cite to and refer to arbitration precedent.

Contractual jury waivers are clauses in contracts that state that the parties waive the right to a jury and will submit their disputes to the court. However, a plaintiff still gets to have its choice of Texas as the jurisdiction for dispute resolution and is still entitled to full discovery, cross examination, and, importantly, appellate review of the trial court's decision. The same cannot be said of arbitration, and may not be able to be said for forum-selection clauses depending on the forum. Because contractual jury waivers are less intrusive than arbitration or forum-selection clauses, common sense would lead to the conclusion that they are enforced with the same contractual analysis and are at least as easily enforced as arbitration or forum-selection clauses.

However, contractual jury waivers are not enforced under the same standards as arbitration or forum-selection clauses, parties have a more difficult burden to enforce jury waivers. In, *In re Prudential*, the Texas Supreme Court for the first time held that contractual jury waivers were enforceable. 148 S.W.3d 124 (Tex. 2004). The Court held that such an agreement may be unenforceable where it was not entered into voluntarily, knowingly, and intelligently. *Id.* Oddly, despite creating a “voluntary, knowing, and intelligent” requirement, the Court acknowledged that a contractual jury waiver was less of a deprivation of constitutional rights than an arbitration clause. *Id.*

Texas intermediate courts of appeals have been understandably conflicted on the meaning and use of the “voluntary, knowing, and intelligent” requirement. *See, e.g., See In re Wild Oats Mkts.*, No. 09-09-00031-CV, 2009 Tex. App. LEXIS 2316 (Tex. App.—Beaumont Apr. 2, 2009, orig. proceeding) (contractual jury waiver treated the same as arbitration clause); *In re Credit Suisse First Boston Mortgage Capital, L.L.C.*, No. 14-08-00132-CV, 2008 Tex. App. LEXIS 4661 (Tex. App.—Houston [14th Dist.] June 17, 2008, orig. proceeding) (court would “not use equitable estoppel as a vehicle to circumvent the required ‘knowing and voluntary’ waiver standard.”); *Mikey's Houses, LLC v. Bank of Am., N.A.*, 232 S.W.3d 145

(Tex. App.—Fort Worth 2007, no pet.) (presumption against enforcement of contractual jury waiver); *In re Wells Fargo*, 115 S.W. 3d 600 (Tex. App.—Houston [14th Dist.] 2003, orig. proceeding).

The Texas Supreme Court has not discussed why there are different standards for contractual jury waivers than for arbitration agreements or forum-selection clauses. However, in *In re Prudential* the Court clearly stated that contractual jury waivers were less intrusive than arbitration agreements and forum-selection clauses. One reason that arbitration clauses are favorably viewed is that there are federal and state statutes extolling arbitration's virtue while there is no such statute for jury waivers. Of course, a statute should not be able to trump a constitutional right.

But that begs the main question – why does a party fighting a contractual jury waiver have a “knowing and voluntary” defense when similar parties fighting arbitration and forum-selection clauses do not? If the “knowing and voluntary” requirement is constitutional, it should apply to arbitration agreements notwithstanding statutory enactments. *See, e.g., Walker v. Ryan's Family Steak Houses, Inc.*, 400 F.3d 370, 381 (6th Cir. 2005) (holding arbitration agreement waiver of jury right to “knowing and voluntary” standard); *Prudential Ins. Co. of Am. v. Lai*, 42 F.3d 1299, 1305 (9th Cir. 1994) (concluding that “a Title VII plaintiff may only be forced to forego her statutory remedies and arbitrate her claims if she has knowingly agreed to submit such disputes to arbitration”). *See also, e.g.,* Jean R. Sternlight, *Mandatory Binding Arbitration and the Demise of the Seventh Amendment Right to a Jury Trial*, 16 OHIO ST. J. ON DISP. RESOL. 669, 675 (2001) (arguing for harmonization under the knowing and voluntary standard of waiver); *accord* Edward Brunet, *Arbitration and Constitutional Rights*, 71 N.C. L. REV. 81, 102-08 (1992); Richard Reuban, *Constitutional Gravity: A Unitary Theory of Alternative Dispute Resolution and Public Civil Justice*, 47 UCLA L. REV. 949, 1019-34 (2000); Richard E. Speidel, *Contract Theory and Securities Arbitration: Whither Consent?*, 62 BROOK. L. REV. 1335, 1352 n.63 (1996). *But see* Andrew M. Kepper, *Contractual Waiver of Seventh Amendment Rights: Using the Public Rights Doctrine To Justify a Higher Standard of Waiver for Jury-Waiver Clauses than for Arbitration Clauses*, 91 IOWA L. REV. 1345, 1365 (2006) (arguing that harmonization of differing standards for enforceability between arbitration and jury waivers is not necessary); Stephen J. Ware, *Arbitration Clauses, Jury-Waiver Clauses, and Other Contractual Waivers of Constitutional Rights*, 67 LAW & CONTEMP. PROBS. 167, 167-97 (2004) (arguing for harmonization under the contract-law standard of waiver).

Yet, most courts have held that the “knowing and voluntary” requirement does not apply to arbitration

clauses. *See, e.g., Morales v. Sun Constructors, Inc.*, 541 F.3d 218 (3rd Cir. 2008) (knowing and voluntary requirement does not apply to arbitration agreements); *accord Caley v. Gulfstream Aero. Corp.*, 428 F.3d 1359 (11th Cir. 2005) (same); *American Heritage Life Ins. Co. v. Orr*, 294 F.3d 702, 711 (5th Cir. 2002) (same); *Sydnor v. Conseco Fin. Servs. Corp.*, 252 F.3d 302, 307 (4th Cir. 2001) (same); *Koveleskie v. SBC Capital Mkts., Inc.*, 167 F.3d 361, 368 (7th Cir. 1999) (same). Indeed, the Fort Worth Court of Appeals held that the application of the standards for enforcing arbitration clauses would conflict with the *Brady* “knowing and voluntary” standard that the Texas Supreme Court adopted in *In re Prudential*. *Mikey's Houses LLC v. Bank of America, N.A.*, 232 S.W.3d at 151.

Is there any reason to apply arbitration precedent and presumptions to forum-selection clauses and not to contractual jury waivers? Certainly, litigating in other countries of the world has a huge impact on parties' constitutional rights. Few countries provide a right to a jury. Moreover, there are other rights that may be limited such as the examination of witnesses, presentation of evidence, and right to appellate relief. Why is there a lesser standard for enforcing these provisions than for jury waivers? There is no good reason. For example, in *In re Palm Harbor Homes, Inc.*, the Texas Supreme Court held that when a contractual jury-waiver provision is subsumed within an arbitration agreement, the procedural and substantive rules concerning arbitration apply. 195 S.W.3d 672, 675 (Tex. 2006). Why should a different, more strenuous, standard apply when jury waiver clauses are not included in arbitration agreements?

Arbitration, forum-selection, and jury waiver clauses should all be judged by the same standard. They all deprive a party of constitutional rights – however, as courts acknowledge, a party can waive those rights. They should all be judged either under the contract/mutual assent standard of arbitration agreements or by some higher “knowing and voluntary” standard. There is no logical difference between them.

In the author's view, courts are too ready to enforce arbitration, forum-selection, and jury-waiver clauses. The right to a trial by jury is “one of our most precious rights,” and holds “a sacred place” in our history. *General Motors Corp. v. Gayle*, 951 S.W.2d 469, 476 (Tex. 1997) (orig. proceeding). Restrictions placed on that right will therefore be subject to “utmost scrutiny.” *Bell Helicopter Textron, Inc. v. Abbott*, 863 S.W.2d 139, 141 (Tex. App.—Texarkana 1993, writ denied); *Jones v. Jones*, 592 S.W.2d 19 (Tex. Civ. App.—Beaumont 1979, no writ); *Rayson v. Johns*, 524 S.W.2d 380 (Tex. Civ. App.—Texarkana 1975, writ ref'd n.r.e.); *Silver v. Shefman*, 287 S.W.2d 316 (Tex.

Civ. App.—Austin 1956, writ ref'd n.r.e.). Respectfully, the Texas Supreme Court has not done a very good job of requiring “utmost scrutiny” in allowing a defendant to deny a plaintiff their day in court (a Texas court). The words “knowing and voluntary” waiver should mean something and should apply to arbitration, forum-selection, and jury-waiver clauses.

## **VI. IMPACT OF CHOICE-OF-LAW CLAUSES**

Another issue is the application of choice-of-law clauses on the interpretation and enforcement of other dispute resolution clauses. For example, it is not uncommon for dispute resolution clauses to also provide that all of the contractual clauses will be construed by a foreign jurisdiction’s law. For example, a clause may state: “The validity, construction, interpretation, and effect of this Contract will be governed in all respects by the law of England.”

The issue then becomes whether the clause should be governed by the law chosen by the parties. Does the foreign law control the enforcement of the clause (who can enforce) and does the foreign law control the interpretation of the clause (i.e., scope)?

After suit is filed in Texas, a court must determine the law to follow in interpreting the trust. A court must first determine if the applicable laws of the two jurisdictions differ. *Duncan v. Cessna Aircraft Co.*, 665 S.W.2d 414, 419 (Tex. 1984). If they do not differ, the court will ordinarily apply Texas law. *Citizens Ins. Co. of Am. v. Daccach*, 217 S.W.3d 430, 443 (Tex. 2007); *Compaq Computer Corp. v. Lapray*, 135 S.W.3d 657, 672 (Tex. 2004) (“[W]e must first decide whether Texas law conflicts with the laws of other interested states, as there can be no harm in applying Texas law if there is no conflict.”). If the court determines that the laws differ, then it decides the appropriate law to apply by using the Restatement (Second) of Conflict of Laws in the context of the subject matter of the particular substantive issue to be resolved. *Hughes Wood Prods., Inc. v. Wagner*, 18 S.W.3d 202, 205 (Tex. 2000); *Engine Components, Inc. v. A.E.R.O. Aviation Co., Inc.*, No. 04-10-00812-CV, 2012 Tex. App. LEXIS 1528, 2012 WL 666648, at \*2 (Tex. App.—San Antonio Feb. 29, 2012, pet. denied). For example, in *Wilson v. Smith*, the court of appeals referred to the Restatement of Conflict of Laws in determining that Texas law should apply to the construction of a trust where the settlor resided in Texas, the trustee was in Texas, and the real estate in the trust was in Texas. 373 S.W.2d 514 (Tex. App.—San Antonio 1963, no writ); see also *Interfirst Bank-Houston, N.A. v. Quintana Petroleum*, 699 S.W.2d 864 (Tex. App.—Houston [1st Dist.] 1985, writ ref'd n.r.e.).

The Restatement (Second) of Conflict of Laws provides that “[t]he chief purpose in making decisions

as to the applicable law is to carry out the intention of the creator of the trust in the disposal of the trust property.” Restatement (Second) Of Conflict Of Laws, Trust, Scope (“Restatement”). Under the Restatement, in general, the law of the state with a more significant relationship should govern. Restatement Second of Conflict of Law Section 222.

Regarding trusts of interests in movables, the Restatement states that the document should first be construed in accordance with the rules of construction designated for this purpose. Restatement, § 268. Where there is no designation, administrative matters are construed in accordance with laws where the trust is administered, and non-administrative matters are construed in accordance with laws the settlor would probably have desired to be applicable. Restatement, § 268. The notes of this provision provide that questions dealing with class gifts do not relate to the administration of the trust but to the disposition of the trust property. Restatement, § 268, cmt. e. The Restatement provides: “As to the rules of construction which relate to the disposition of the trust property rather than to the administration of the trust, the will is ordinarily construed in the case of movables in accordance with the rules of construction of the state of the testator’s domicile, even though the trust is to be administered in some other state.” Restatement, § 268, cmt. f.

Regarding a document creating a trust of an interest in land, it is construed in accordance with the rules of construction of the state designated for this purpose in the document. *Id.* at § 277. In the absence of such a designation, the document is construed in accordance with the rules of construction that would be applied by the courts of the situs. *Id.* A comment notes that regarding intervivos trusts, the “settlor probably intended that the rules of construction prevailing at the situs of the land should be applicable, rather than the rules of his domicile.” *Id.* at cmt. c.

Texas courts generally respect the parties’ contractual choice-of-law and apply the law that the parties choose. *Ill. Tool Works, Inc. v. Harris*, 194 S.W.3d 529 (Tex. App.—Houston [14th Dist.] 2006, no pet.) (“The parties contractually agreed to apply the law of Illinois to this contract. Texas courts will respect that choice and apply the law the parties choose.”). Specifically, Texas courts uphold choice-of-law provisions in the context of the enforceability of arbitration provisions. See, e.g., *In re Raymond James & Assocs., Inc.*, 196 S.W.3d 311, 321 (Tex. App.—Houston [1st Dist.] 2006, no pet.); *In re Jim Walter Homes, Inc.*, 207 S.W.3d 888, 896 (Tex. App.—Houston [14th Dist.] 2006, orig. proceeding); *In re Citigroup Global Mkts., Inc.*, 202 S.W.3d 477, 480-81 (Tex. App.—Dallas 2006, no pet.); *In re Alamo Lumber Co.*, 23 S.W.3d 577, 579 (Tex. App.—San

Antonio 2000, orig. proceeding). *See also West Tex. Positron, Ltd. v. Cahill*, No. 07-05-0297-CV 2005 WL 3526483, at \*2 (Tex. App.—Amarillo 2005, no pet.) (parties' choice of Texas law pointed to Texas interpretation of waiver). *See also ASW Allstate Painting & Constr. Co. v. Lexington Ins. Co.*, 188 F.3d 307 (5th Cir. Tex. 1999) (parties can choose state arbitration law via a choice-of-law clause).

Where the issue has been raised, some courts hold that dispute resolution clauses are to be construed under the law of the forum on which the parties have contractually agreed. *See, e.g., Martinez v. Bloomberg LP*, 740 F.3d 211, 222(2d Cir. 2014) (“[Q]uestions of enforceability are resolved under federal law, while interpretive questions—questions about the meaning and scope of a forum selection clause—are resolved under the substantive law designated in an otherwise valid contractual choice-of-law clause.”); *Huffington v. T.C. Grp., LLC*, 637 F.3d 18, 21 (1st Cir. 2011)(the court held that “[u]nder the choice of law clause, the agreement itself—necessarily including the forum selection clause—is . . . governed by Delaware law.”); *Dunne v. Libbra*, 330 F.3d 1062, 1064 (8th Cir. 2003); *Lambert v. Kysar*, 983 F.2d 1110, 1118 (1st Cir. 1993); *Nutter v. New Rents, Inc.*, 1991 U.S. App. LEXIS 22952 (4th Cir. 1991); *Instrumentation Assocs. v. Madsen Elecs.*, 859 F.2d 4, 7 (3d Cir. 1988); *Gen. Eng'g Corp. v. Martin Marietta Alumina, Inc.*, 783 F.2d 352, 357-58 (3d Cir. 1986); *AVC Nederland B.V. v. Atrium Inv. P'ship*, 740 F.2d 148 (2d Cir. 1984); *Eisaman v. Cinema Grill Sys. Inc.*, 87 F.Supp.2d 446 (D. Md. 1999); *Triple Quest Inc. v. Cleveland Gear Co.*, 627 N.W.2d 379, 384 (N.D. 2001); *Jacobson v. Mailboxes, Etc. U.S.A., Inc.*, 419 Mass. 572, 575 (1995). *See also Lost Maples Gen. Store, LLC v. Ascentium Capital, LLC*, No. 14-18-00215-CV, 2019 Tex. App. LEXIS 3549, 2019 WL 1966671 (Tex. App.—Houston [14th Dist.] May 2, 2019, no pet.) (contractual jury waiver); *Hooks Indus., Inc. v. Fairmont Supply Co.*, No. 14-00-00062-CV, 2001 Tex. App. LEXIS 2568 (Tex. App.—Houston [14th Dist.] April 19, 2001, pet. denied) (not designated for publication) (court interpreted contract with forum-selection clause under law designated by parties); Kevin W. Bufford, *Threshold or Procedural Issue: The Order of Interpretation Required by Contractual Choice-of-Law Provisions Versus the Law of the Forum Where the Suit Is Commenced*, 40 AM. J. TRIAL ADVOC. 131 (2016). *But Manetti-Farrow, Inc. v. Gucci Am., Inc.*, 858 F.2d 509, 513 (9th Cir. 1988) (citation omitted) (“[T]he federal rule announced in *The Bremen* controls enforcement of forum clauses in diversity cases. Moreover, because enforcement of a forum clause necessarily entails interpretation of the clause before it can be enforced, federal law also applies to interpretation of forum selection clauses.”).

Commentators suggest different approaches. *See, e.g., Kevin M. Clermont, Governing Law on Forum-Selection Agreements*, 66 HASTINGS L.J. 643, 643 (2015) (suggesting that courts apply *lex fori* to enforceability of a forum selection clause while applying the parties' chosen law to the clause's interpretation); *Jason Webb Yackee, Choice of Law Considerations in the Validity & Enforcement of International Forum Selection Agreements: Whose Law Applies?*, 9 UCLA J. INT'L L. & FOREIGN AFF. 43, 46, 84-88 (2004) (arguing that the parties' chosen law should govern enforceability and validity of a forum selection clause).

The parties' choice of law should determine the interpretation (scope) of the clause. For example, in *Felman Products v. Bannai*, the plaintiff sued the non-signatory defendant for fraud and unjust enrichment based on a contract containing an arbitration clause and also containing an English choice-of-law clause. 476 F. Supp. 2d 585 (S.D. W. Va. 2007). The plaintiff asserted that the defendant could not enforce the arbitration agreement because English law controlled the scope of the clause, and under that law, the plaintiff's claims did not fall within the scope. Based on plaintiff's expert declaration that the scope of the clause under English law would not include the plaintiff's claims, the court concluded: “The arbitration clause, under the choice of law provision, does not extend to claims by [plaintiff] against [defendant] under the [contract].” *Id.* at 589.

Further, the parties' choice of law should determine whether a non-signatory can enforce such a clause. For example, in *Motorola Credit Corporation v. Uzan*, the defendants sought to compel arbitration pursuant to agreements that had been signed by plaintiffs and by certain companies controlled by the defendants' family, but to which the defendants themselves were not parties. 388 F.3d 39, 42-43, 49 (2nd Cir. 2004). Relying on federal common law, the defendants asserted that they could enforce the arbitration clause under estoppel and agency theories. However, the agreements in question contained Swiss choice-of-law clauses. The trial court denied the motion to compel arbitration on an alternative basis of unclean hands. On appeal, the court of appeals held that “if defendants wish to invoke the arbitration clauses in the agreements at issue, they must also accept the . . . choice-of-law clauses that govern those agreements.” *Id.* The court described why honoring a choice-of-law clause was important:

[W]here the parties have chosen the governing body of law, honoring their choice is necessary to ensure uniform interpretation and enforcement of that agreement and to avoid forum shopping. This is especially true

of contracts between transnational parties, where applying the parties' choice of law is the only way to ensure uniform application of arbitration clauses within the numerous countries that have signed the New York Convention. Furthermore, respecting the parties' choice of law is fully consistent with the purposes of the FAA.

*Id.* Based on the plaintiffs' expert evidence that Swiss law strictly interpreted privity of contract and would not allow third parties to enforce the arbitration clause, the court concluded "that under Swiss law ... defendants, as nonsignatories, have no right to invoke those agreements." 388 F.3d at 53. Similarly, another court denied a motion to compel arbitration because the English law concept of privity of contract precluded a non-signatory from enforcing an arbitration clause. Once again, in *Felman Products v. Bannai*, the plaintiff submitted expert evidence that the defendant could not enforce the arbitration agreement because English law would not allow a non-party to do so. 476 F. Supp. 2d 585 (S.D. W. Va. 2007). The court stated: "English arbitration law is governed by the Arbitration Act of 1996. Plaintiffs' experts state that it is a general principle of arbitration law that the agreement only binds the parties to the agreement to arbitration." *Id.* The court concluded: "Under English law [the defendant] lacks standing to compel arbitration." *Id.*

In *Yavuz v. 61 MM, Ltd.*, the court of appeals dealt with how to interpret a forum-selection clause when the contract contained a choice-of-law provision. 465 F.3d 418, 426-32 (10th Cir. 2006). The court stated that there were several issues that had to be addressed: "(1) Is the forum-selection clause provision mandatory? ... (2) Are all of Mr. Yavuz's claims governed by the provision, or only some? ... (3) Does the clause bind Mr. Yavuz with respect to claims against all the defendants, or with respect to only his claims against FPM, or perhaps only those against FPM and Mr. Adi?" *Id.* at 427. The last issue dealt with which parties could enforce the forum-selection clause. The court then analyzed in depth what law controlled and concluded that these issues should be determined under the law chosen by the parties. *See id.* at 430-31.

Determining how a foreign country would interpret or enforce a clause may require the admission of evidence. Under Texas Rule Evidence 203, a trial court may consider affidavits in determining the law of a foreign nation. Tex. R. Evid. 203; *Dankowski v. Dankowski*, 922 S.W.2d 298, 302-03 (Tex. App.—Fort Worth 1996, writ denied). A trial court will likely not abuse its discretion in believing one credible expert witness over another. *See Phoenix Network Techs. Ltd.*

*v. Neon Sys., Inc.*, 177 S.W.3d 605, 618 n. 15 (Tex. App.—Houston [14th Dist.] 2005, no pet.) (in the context of whether a foreign jurisdiction would enforce a forum-selection clause, a trial court did not abuse discretion in being advised on foreign law by one party expert's affidavit over the opponent's expert's affidavit).

## **VII. POTENTIAL DEFENSES TO ARBITRATION, FORUM-SELECTION, AND JURY-WAIVER CLAUSES IN TRUST AND ESTATE LITIGATION**

A party that wants to fight for his or her right to a jury trial and fight an arbitration, forum-selection, or jury waiver clause may have several different defenses.

### **A. Enforceability of Clause: Mental Competence And Undue Influence**

As mentioned above, a party may allege that an arbitration, forum-selection, or jury-waiver clause should not be enforced because the settlor or testator did not have mental capacity or was unduly influenced. For example, in *Oak Crest Manor Nursing Home, LLC v. Barba*, a plaintiff sued a nursing home for negligently allowing a patient with mental disorders to leave the facility and jump from a bridge in an attempt to commit suicide. No. 03-16-00514-CV, 2016 Tex. App. LEXIS 12710 (Tex. App.—Austin December 1, 2016, no pet.). The nursing home filed a motion to compel arbitration based on a facility admission agreement that the patient signed. The plaintiff's response contended that due to the patient's psychological and mental disorders, he lacked capacity to enter into an enforceable contract and, therefore, the agreement and its arbitration provision were unenforceable and void. The court denied the motion to compel, and the defendant sought an interlocutory appeal.

The court of appeals noted that it was the plaintiff's burden to prove that the patient did not have the requisite mental capacity. The court held that "[t]o establish mental capacity to execute a contract, a party 'must have had sufficient mind and memory at the time of execution to understand the nature and effect of [his] act.'" *Id.* The court reviewed evidence that the patient was mentally incompetent around the time of his admission to the home. It also reviewed the defendant's evidence that he was competent on the day he signed the agreement. The court held that "While the time of execution of a contract is indeed the relevant time for ascertaining competency to contract, evidence of competency from other periods is probative to establish competency at the time of execution if there is evidence that the later mental condition had some probability of being the same

condition at the time of execution.” *Id.* The court concluded:

Dr. McRoberts’s report, issued only 49 days after the Agreement’s execution, is probative of Frank’s mental condition on the date of execution in light of the other evidence in the record indicating that Frank’s psychiatric diagnoses were already present and were the same as when Dr. McRoberts examined him. We conclude that the record contains legally sufficient evidence to support the probate court’s implied determination that Frank did not possess the requisite capacity to contract when he signed the Agreement.

*Id.* The court also held that the patient’s mental incompetency made the agreement void: “the supreme court has held that when the issue of mental capacity to contract is raised, ‘the very existence of a contract is at issue,’ as with other contract-formation issues, and therefore the court’s determination that a party lacked the capacity to contract would render that contract non-existent and void rather than merely voidable.” *Id.* Finally, the court determined that because there was no contract to begin with, the defendant could not rely on other theories such as direct-benefits estoppel to enforce the arbitration clause. The court affirmed the order denying the motion to compel arbitration.

In *Spahr v. Secco*, the plaintiff complained that he was mentally incompetent to enter into the contract, and thus that the contract and the arbitration clause contained therein were void. 330 F.3d 1266 (10th Cir. 2003). The court found that this was an issue which went to the “making” of the contract as referred to in 9 U.S.C. § 4, and was proper for resolution by the court, and not the arbitrator. *Id.* The court reasoned that there was a difference between challenging a contract on the basis of the party’s status, (i.e., mental incapacity) and challenging a contract based on behavior/conduct of the party, (i.e., fraudulent inducement). *Id.* Most circuits have agreed with *Spahr* in holding that contracts which are void or nonexistent cannot be the basis for arbitration, and that the question of whether the contract exists or is void must be determined by the court. See *Sphere Drake Ins. Ltd. v. All Am. Ins. Co.*, 256 F.3d 587, 590-91 (7th Cir. 2001); *Burden v. Check Into Cash of Ky., LLC*, 267 F.3d 483 (6th Cir. 2001); *Sandvik AB v. Advent Int’l Corp.*, 220 F.3d 99, 107 (3d Cir. 2000); *Three Valleys Mun. Water Dist. v. E.F. Hutton*, 925 F.2d 1136 (9th Cir. 1991); *Chastain v. Robinson-Humphrey Co., Inc.*, 957 F.2d 851, 855 (11th Cir. 1992); *I.S. Joseph Co. v. Mich. Sugar Co.*, 803 F.2d 396, 400 (8th Cir. 1986); *Rhymer v. 21st Mortg. Corp.*, 2006 Tenn. App. LEXIS 800, 2006 WL 3731937 (Tenn. Ct. App. Dec. 19, 2006). One

exception is the Fifth Circuit, where the court concluded that the arbitrator should decide a defense of mental incapacity because it is not a specific challenge to the arbitration clause but rather goes to the entire agreement. See *Primerica Life Ins. Co. v. Brown*, 304 F.3d 469 (5th Cir. 2002) (which holds the issue of incompetency was for the arbitrator). The United States Supreme Court has not yet settled this conflict but rather expressly reserved the question in *Buckeye Check Cashing, Inc. v. Cardegna*, 546 U.S. 440, 444 n.1, 126 S. Ct. 1204, 163 L. Ed. 2d 1038 (2006).

The Texas Supreme Court agreed with the majority view expressed above and disagreed with the Fifth Circuit. In *In re Morgan Stanley & Co.*, the Court denied mandamus relief to a defendant attempting to compel arbitration where the plaintiff alleged that she was mentally incompetent. 293 S.W.3d 182 (Tex. 2008). The Court concluded: “it is apparent to us that the formation defenses identified in *Buckeye* are matters that go to the very existence of an agreement to arbitrate and, as such, are matters for the court, not the arbitrator.” *Id.*

Some courts have similarly held that undue influence claims should be resolved by a court and not an arbitrator because it goes to the formation of the agreement. *Adkins v. Sogliuzzo*, 2010 U.S. Dist. LEXIS 11107, 2010 WL 502980 (D.N.J. Feb. 9, 2010); *Milon v. Duke Univ.*, 145 N.C. App. 609, 551 S.E.2d 561, 2001 N.C. App. LEXIS 738 (N.C. Ct. App. 2001), *rev’d on other grounds*, 559 S.E.2d 789 (N.C. S. Ct. 2002). See also *Tweedy v. GE Capital Retail Fin.*, 2014 U.S. Dist. LEXIS 1744 (S.D. Ohio Jan. 6, 2014) (resolved undue influence claim before compelling arbitration); *Fitzhugh v. Am. Income Life Ins. Co.*, 2011 U.S. Dist. LEXIS 156855 (N.D. Ohio Nov. 3, 2011) (same). *But see Lake Erie Towing v. Walter*, 2007 U.S. Dist. LEXIS 73982, 2007 WL 2907496 (N.D. Ohio Oct. 3, 2007) (“[I]t is for the arbitrator to decide whether the contract generally fails because of undue influence.”).

Similarly, whether a party has mental competence to execute a will or trust is a threshold issue that may need to be decided by a court (or jury) before a party can be compelled to arbitration or before a court enforces a forum-selection clause or jury waiver. In *Day v. Seblatnigg*, the court ignored a forum-selection clause in a trust document holding that “First State Fiduciaries also claims that the forum selection clause in the trust instrument, designating Delaware as the situs for resolving all disputes, is controlling here. If the Delaware irrevocable trust is void ab initio and unenforceable, however, the forum selection clause would be inapplicable in any event.” No. FSTCV146021170S, 2015 Conn. Super. LEXIS 3125 (Sup. Ct. Conn. December 23, 2015).

Finally, it should be noted that parties can agree to binding arbitration of will contest claims after the claims have been raised. *See Petorovski v. Nestorovski (In re Estate of Nestorovski)*, 283 Mich. App. 177, 769 N.W.2d 720, 2009 Mich. App. LEXIS 725 (Mich. Ct. App. 2009) (arbitration award affirmed after both parties agreed to stipulated order requiring arbitration of will contest claims). *See also Estate of Flournoy v. Risner*, No. 06-13-00071-CV, 2014 Tex. App. LEXIS 189 (Tex. App.—Texarkana Jan. 9, 2014, pet. denied) (parties submitted mental competence claim to arbitration arising from execution of deed).

### B. Waiver of Clause

The Texas Supreme Court has been reluctant to find that a party waived its right to arbitration by court-related conduct. *See, e.g., RSL Funding, LLC v. Pippins*, 2016 Tex. LEXIS 616 (Tex. July 1, 2016); *G.T. Leach Builders, LLC v. Sapphire V.P., L.P.*, 458 S.W.3d 502 (Tex. 2015); *Richmont Holdings, Inc. v. Superior Recharge Sys., L.L.C.*, 455 S.W.3d 573 (Tex. 2014); *Kennedy Hodges, L.L.P. v. Gobellan*, 433 S.W.3d 542 (Tex. 2014).

The person asserting waiver has the burden to establish her waiver defense to the motion to compel arbitration. *Williams Indus., Inc. v. Earth Dev. Sys. Corp.*, 110 S.W.3d 131, 134 (Tex. App.—Houston [1st Dist.] 2003, no pet.). There is a strong presumption against waiving a right to arbitration. *In re Serv. Corp. Int'l*, 85 S.W.3d 171, 174 (Tex. 2002). A party asserting waiver as a defense has the burden to prove that (1) the other party has “substantially invoked the judicial process,” which is conduct inconsistent with a claimed right to compel arbitration, and (2) that the inconsistent conduct has caused it to suffer detriment or prejudice. *Id.* at 174 (“[m]erely taking part in litigation is not enough unless a party ‘has substantially invoked the judicial process to its opponent’s detriment.’”); *see also Perry Homes v. Cull*, 258 S.W.3d 580, 587—92 (Tex. 2008); *In re Vesta Ins. Group, Inc.*, 192 S.W.3d 759, 763 (Tex. 2006) (holding that party who litigated in the trial court for two years did not substantially invoke the judicial process to their opponent’s detriment because the party engaged in minimal discovery, and party opposing arbitration failed to demonstrate sufficient prejudice to overcome the strong presumption against waiver).

“Merely taking part in litigation is not enough.” *In re D. Wilson Constr. Co.*, 196 S.W.3d 774, 783 (Tex. 2006). *See also G.T. Leach Builders, LLC v. Sapphire V.P., L.P.*, 458 S.W.3d 502 (Tex. 2015) (holding that movant did not waive arbitration rights by filing counterclaims, filing motions for relief, and participating in pretrial discovery); *Richmont Holdings*, 455 S.W.3d at 576 (holding that movant did not waive arbitration rights by initiating lawsuit, invoking forum-

selection clause, moving to transfer venue, propounding request for disclosure, and waiting nineteen months after being sued to move for arbitration); *In re Fleetwood Homes of Texas, L.P.*, 257 S.W.3d 692, 694 (Tex. 2008) (holding that movant did not waive arbitration rights by noticing deposition, serving written discovery, and waiting eight months to move for arbitration); *In re Bruce Terminix, Co.*, 988 S.W.2d 702, 703-04 (Tex. 1998) (holding that movant did not waive arbitration rights by propounding requests for production and interrogatories and waiting six months to seek arbitration); *EZ Pawn Corp. v. Mancias*, 934 S.W.2d 87, 88-89 (Tex. 1996) (holding that movant did not waive arbitration rights by propounding written discovery, noticing deposition, agreeing to reset trial date, and waiting nearly a year to move for arbitration).

Rather, that conduct must demonstrate that the party “has substantially invoked the judicial process to [its] opponent’s detriment.” *Id.* The Texas Supreme Court declined to find waiver of the right to arbitrate when a movant filed cross-actions. *D. Wilson Constr.*, 196 S.W.3d at 783. Whether a movant sought “disposition on the merits” is a key factor in deciding waiver. *Richmont Holdings, Inc. v. Superior Recharge Sys., L.L.C.*, 455 S.W.3d 573, 575 (Tex. 2014). A “heavy burden of proof” is required to establish waiver of arbitration rights, and the court must resolve all doubt in favor of arbitration. *In re Bruce Terminix Co.*, 988 S.W.2d 702, 705 (1998). A party does not substantially invoke the judicial process merely by participating in discovery. *See In re Bruce Terminix Co.*, 988 S.W.2d 702, 704 (Tex. 1998).

Further, the party asserting waiver must also establish that it has been harmed by the opposing party’s conduct. *In re Serv. Corp. Int'l*, 85 S.W.3d 171, 174 (Tex. 2002) (quoting *Prudential Securities Inc. v. Marshall*, 909 S.W.2d 898-99 (Tex. 1995) (“[A] party does not waive a right to arbitration merely by delay; instead the party urging waiver must establish that any delay resulted in prejudice.”); *In re Bath Junkie Franchise, Inc.*, 246 S.W.3d 356, 368 (Tex. App.—Beaumont 2008, orig. proceeding) (holding party opposing arbitration was not prejudiced when party requesting arbitration waited 14 months to request arbitration after answering the lawsuit, filing counterclaims, and engaging in discovery).

In *Henry v. Cash Biz, LP*, a borrower sued a lender for the lender reporting the borrower’s bad checks to the district attorney’s office. 551 S.W.3d 111 (Tex. 2018). The borrower left checks as security for the loans. When the borrower defaulted, the lender attempted to cash the checks, and the checks were denied or insufficient funds. The lender then reported the bad checks to legal authorities. The borrower then sued the lender for improperly using the district

attorney's office. The parties' agreement stated: "all disputes . . . shall be resolved by binding arbitration only on an individual basis with you." *Id.*

The trial court denied the lender's motion and agreed with the borrower that (1) their allegations related solely to the lender's use of the criminal justice system so the arbitration clause was inapplicable, and (2) the lender waived its right to arbitration by substantially invoking the judicial process. The court of appeals reversed.

The Texas Supreme Court affirmed the court of appeals's decision. The Court first held that the claims were within the scope of the clause. The Court stated: "the arbitration agreement applies to 'all disputes' and specifies that 'dispute and disputes' are given the broadest possible meaning and include, without limitation . . . all claims, disputes, or controversies arising from or relating directly or indirectly to the signing of this Arbitration Provision." *Id.* The Court stated:

Given the presumption favoring arbitration and the policy of construing arbitration clauses broadly as noted above, it follows that the arbitration clause here applies—just as it says—to all disputes, even those relating only indirectly to the loan agreements. The Borrowers asserted that after they missed payments, Cash Biz deposited their postdated checks; the checks were returned for insufficient funds; Cash Biz threatened the Borrowers with criminal prosecution unless the loans were repaid; and when the Borrowers failed to pay, Cash Biz indeed pursued charges for issuance of bad checks. The Borrowers allege that when Cash Biz entered into the loan agreements, it failed to disclose the possibility that if the personal checks were presented to the banks for payment and were not paid, criminal prosecutions would follow. The Borrowers' claims are not for breach of any specific obligations under the loan contracts. Nevertheless, their claims are based on the manner in which Cash Biz pursued collection of loans and are at least indirectly related to the contracts the Borrowers signed obligating them to repay the loans. Therefore, we agree with Cash Biz that the Borrowers' claims are within the scope of the arbitration provision.

*Id.* The Court then addressed the argument that the lender had waived the clause by seeking relief from the district attorney's office. The Court held that simply reporting the bad checks to the district attorney's office was not sufficient to waive arbitration rights.

Interestingly, in doing so, the Court expressly disagreed with the Fifth Circuit:

[I]n *Vine v. PLS Financial Services, Inc.*, 689 F. App'x 800 (5th Cir. 2017) (per curiam). There, as did Cash Biz here, a short-term lender had borrowers sign postdated checks, which were presented for payment after the borrowers defaulted. *Id.* at 801. When the checks were not paid, the lender submitted the unpaid checks and affidavits to the local district attorneys. *Id.* The *Vine* court declined to follow the decision of the court of appeals in this case. *Id.* at 806. Rather, it concluded that the lender's actions in submitting affidavits to prosecuting attorneys waived its right to enforce the arbitration agreement. *Id.*

With due respect, and recognizing that it is important for federal and state law to be as consistent as possible in this area where we have concurrent jurisdiction, we agree with the dissenting justice in *Vine*. *Id.* at 807 (Higginson, J., dissenting). We conclude, as he did, that although some lenders may be "gaming the system" by taking actions like the lenders took there and as Cash Biz took here, more is required for waiver of a contractual right to arbitrate. *Id.*

*Id.* The Court affirmed the court of appeals's order compelling arbitration.

The waiver analysis for arbitration and forum-selection clauses is basically the same. However, the waiver analysis is necessarily different for jury-waiver clauses. A party does not waive a jury-waiver clause by simply pursuing litigation in Texas state court because that is consistent with both a trial to the court or a jury. Rather, a party must promptly urge the existence of a contractual waiver in response to a jury demand or it may be ineffective. *Rivercenter Assocs. v. Rivera*, 858 S.W.2d 366, 367–368 (Tex. 1993) (contractual waiver was ineffective when party waited more than four months after jury demand before moving to quash). A party who has not received notice of a jury demand, however, does not lose the right to assert a contractual waiver merely by failing to notice that the case has been moved to the jury docket. *In re GE Capital Corp.*, 203 S.W.3d 314, 315–316 (Tex. 2006) (failure to notice change in form letter showing case had been moved to jury docket did not constitute intentional relinquishment of right to assert contractual waiver or intentional conduct inconsistent with intent to rely on that right); *In re Key Equip. Fin. Inc.*, 371 S.W.3d 296, 300–301 (Tex. App.—Houston [1st Dist.] 2012, orig. proceeding) (party did not relinquish right



to assert jury waiver when party presented reasons for delay and opposing party was not prejudiced).

### **C. Unclean Hands**

Because trustees and beneficiaries normally do not sign trust documents, courts have to rely on equity to enforce arbitration, forum-selection, and jury-waiver clauses in those documents. *Rachel v. Reitz*, 403 S.W.3d 840 (Tex. 2013). “[U]nder certain circumstances, principles of contract law and agency may bind a non-signatory to an arbitration agreement.” *In re Kellogg Brown & Root, Inc.*, 166 S.W.3d 732, 738 (Tex. 2005). There are at least six theories recognized by federal courts in which a non-signatory may be bound to an arbitration agreement: (1) incorporation by reference; (2) assumption; (3) agency; (4) alter ego; (5) equitable estoppel; and (6) third-party beneficiary. *Id.* at 739.

Specifically, the Texas Supreme Court relied on direct-benefits estoppel to enforce the arbitration clause in a trust document. *Rachel v. Reitz*, 403 S.W.3d 840 (Tex. 2013). Under estoppel, when a party knowingly and consistently insists that others treat it as a party, it cannot later turn its back on the portions of a contract, such as an arbitration clause, that it finds distasteful. *In re Weekley*, 180 S.W.3d 127 (Tex. 2005). A party cannot have its contract and defeat it too. *Id.* Accordingly, courts have fashioned a doctrine of estoppel to prevent those parties from denying the impact of an arbitration clause.

Another element is that the party attempting to invoke the doctrine of estoppel must have “clean hands.” *Ford Motor Co. v. Motor Vehicle Bd.*, 21 S.W.3d 744, 758 (Tex. App.—Austin 2000, pet. denied); *Chang v. Yu-Ru Chen Huang*, No. 01-97-00538-CV, 1998 Tex. App. LEXIS 2710 (Tex. App.—Houston [1st Dist.] May 7, 1998, pet. denied) (not design. for pub.) (party charged with breach of fiduciary duty could not rely on estoppel due to unclean hands doctrine); *Texas Workers’ Compensation Ins. Facility v. Personnel Servs., Inc.*, 895 S.W.2d 889, 894 (Tex. App.—Austin 1995, no writ) (party could not utilize estoppel theory to shield itself from its fraudulent conduct due to unclean hands doctrine); *El Paso Nat’l Bank v. Southwest Numismatic Inv. Group, Ltd.*, 548 S.W.2d 942, 948-49 (Tex. Civ. App.—El Paso 1977, no writ) (unclean hands doctrine defeated equitable claim of estoppel). *See also Traco, Inc. v. Arrow Glass Co., Inc.*, 814 S.W.2d 186, 190-91 (Tex. App.—San Antonio 1991, writ denied); *Douglas v. Aztec Petroleum Corp.*, 695 S.W.2d 312, 317 (Tex. App.—Tyler 1985, no writ); *Hughes v. Aycock*, 598 S.W.2d 370, 375 (Tex. Civ. App.—Houston [14th Dist.] 1980, writ ref’d n.r.e.); *Foxwood Homeowners Ass’n v. Ricles*, 673 S.W.2d 376, 379 (Tex. App.—Houston [1st Dist.] 1984, writ ref’d n.r.e.) (to obtain

equitable remedy, party must have clean hands); *Village Medical Center, Ltd. v. Apolzon*, 619 S.W.2d 188, 191 (Tex. Civ. App.—Houston [1st Dist.] 1981, no writ) (“To obtain equity a party must come into court with clean hands.”).

One who seeks an equitable remedy must do equity and come to court with clean hands. *Truly v. Austin*, 744 S.W.2d 934, 938 (Tex. 1988). One court stated as follows:

The doctrine of estoppel is for the protection of innocent persons, and only the innocent may invoke it. There is, in the very nature of the doctrine, some element of the maxim that one must come into a court of equity with clean hands.... A person may not predicate an estoppel in his favor on, or assert such estoppel for the purpose of making effective, obtaining the benefit of, or shielding himself from the results of, his own fraud, and, similarly, he may not do so with respect to his own dereliction of duty, violation of law, wrongful act, or other inequitable conduct in the transaction in question.

*El Paso Nat’l Bank*, 548 S.W.2d at 948-49. Further, the party asserting estoppel has the burden to establish its clean hands. *See id.* A party with “unclean hands” cannot seek equitable relief if its “own conduct in connection with the same matter or transaction has been unconscientious, unjust or marked by a want of good faith, or one who has violated the principles of equity and righteous dealing.” *In Re Jim Walter Homes, Inc.*, 207 S.W. 3d 888, 899 (Tex. App.—Houston [14th Dist.] 2006, orig. proceeding). In other words, “the doctrine of estoppel is for the protection of innocent persons, and only the innocent may invoke it.” *El Paso Nat’l Bank v. Southwest Numismatic Inv. Group, Ltd.*, 548 S.W.2d 942, 949 (Tex. Civ. App.—El Paso 1977, no writ); *Texas Workers’ Compensation Ins. Facility v. Personnel Services, Inc.*, 895 S.W.2d 889, 894 (Tex. App.—Austin 1995, no writ) (citing *El Paso Nat’l Bank* and holding that where party had duty to be honest in its dealings, it is not in position to use the equitable doctrine of estoppel to shield itself from the results of its dishonesty).

Specifically, a trustee that breaches its fiduciary duty can be guilty of unclean hands and may not be entitled to equitable relief. *Steves v. United Services Automobile Ass’n*, 459 S.W.2d 930 (Tex. Civ. App.—Beaumont 1970, writ ref’d n.r.e.) (when a trustee purchased real property from the trust and later sought specific performance of a contract for sale against a third-party purchaser, the court denied specific performance based on the equitable doctrine of unclean hands). *See also Chang v. Yu-Ru Chen Huang*, No. 01-

97-00538-CV, 1998 Tex. App. LEXIS 2710 (Tex. App.—Houston [1st Dist.] May 7, 1998, pet. denied) (not design. for pub.) (party charged with breach of fiduciary duty could not rely on estoppel due to unclean hands doctrine).

A party's unclean hands can bar her attempt to use equity to enforce an arbitration clause. For example, one Texas court found that a party was not allowed to enforce an arbitration clause in a settlement agreement because that party had unclean hands due to its misrepresentations that related to the very agreement containing the arbitration clause. *Anco Insurance Services of Houston v. Romero*, 27 S.W. 3d 1, 6 (Tex. App.—San Antonio 2000, pet. denied). Similarly, another court found that the trial court correctly denied the application of estoppel to enforce an arbitration clause due to the equitable defense of laches: "The linchpin for equitable estoppel is equity - fairness. As an equitable theory, equitable estoppel is subject to traditional equitable defenses." *Texas Enters. v. Arnold Oil Co.*, 59 S.W.3d 244 (Tex. App.—San Antonio 2001, no pet.). Importantly, the Texas Supreme Court enforced an arbitration clause in a trust based on direct-benefits estoppel but expressly noted: "Reitz has not asserted, and we thus need not decide, whether the doctrine of unclean hands bars Rachal from relying on the equitable doctrine of direct benefits estoppel." *Rachal v. Reitz*, 403 S.W.3d 840, n. 7 (Tex. 2013).

Federal courts have also recognized unclean hands as a defense to an attempt to enforce an arbitration clause by an estoppel theory. In *Hawkins v. KPMG LLP*, the court found that the defendant could not rely on an equitable estoppel argument to enforce an arbitration provision where it had unclean hands from making fraudulent statements concerning the agreement containing the provision:

Even if defendants were able to make a prima facie showing that equitable estoppel might apply, the doctrine of unclean hands would preclude the court from applying equitable estoppel in this case. "The unclean hands doctrine closes the doors of a court of equity to one tainted with inequitableness or bad faith relative to the matter in which he seeks relief."

The relief sought by defendants in this case is enforcement of the terms of the Warrant against plaintiff. Defendants' invocation of the Warrant is tainted by bad faith in a number of ways. First, defendant KPMG has stipulated on the public record that the Warrant agreement was fraudulent. Second, as the parties discussed at oral argument, Harbourtowne itself was created for the sole

purpose of facilitating the tax shelter at issue in this case – a tax shelter which KPMG has acknowledged to be in violation of federal tax laws. Third, defendants had ample opportunity to choose arbitration in their own engagement letters with plaintiff but failed to do so. What defendants ask this court to do – enforce an arbitration clause in a fraudulent contract, not signed by defendants, involving a phantom, now-defunct company, and bearing only an incidental relationship to the dispute at the heart of this lawsuit – would make a mockery of this court's equitable powers.

423 F. Supp. 2d 1038 (N.D. Ca. 2006) (emphasis added).

Similarly, in *Motorola Credit Corp. v. Uzan*, the district court held that the defendants could not use estoppel to enforce an arbitration agreement due to the unclean hands doctrine where their conduct was marked by fraud:

Second, the estoppel doctrine invoked by defendants is rooted in equity, and is therefore subject to the equitable maxim that "he who comes into equity must come with clean hands." From the very outset of this case, plaintiffs have demonstrated that defendants have acted fraudulently, a showing they made even before defendants sought to compel arbitration. Thereafter, defendants, through inconsistencies, omissions, false representations, and tactical diversions, effectively carried their fraud right into the courtroom. A court faced with such conduct is constrained to deny the equitable relief of estoppel that defendants here seek to invoke in aid of arbitration.

274 F. Supp. 2d 481, 2003 U.S. Dist. LEXIS 13212 (S.D.N.Y. 2003) (internal citation omitted), *aff'd in part, rev'd in part on other grounds*, 388 F.3d 39 (2nd Cir. 2004).

Where the party asserting a right to arbitrate that is solely founded on equity has committed unclean hands, the party fighting arbitration may use that theory as a defense.

#### **D. Unconscionability**

An arbitration, forum-selection, or jury-waiver clause may be unenforceable where it is unconscionable. Unconscionable contracts are not enforceable under Texas law. *In re Poly-America, L.P.*, 262 S.W.3d 337, 348 (Tex. 2008). "Substantive unconscionability" refers to the general fairness of the

arbitration provision itself, whereas, “procedural unconscionability” refers to the fairness of the circumstances surrounding adoption of the arbitration provision. *In re Palm Harbor Homes, Inc.*, 195 S.W.3d 672, 677 (Tex. 2006). The question of whether an arbitration clause is substantively unconscionable turns on whether “given the parties’ general commercial background and the commercial needs of the particular trade or case, the clause involved is so one-sided that it is unconscionable under the circumstances existing when the parties made the contract.” *In re First Merit Bank, N.A.*, 52 S.W.3d 749, 757 (Tex. 2001) (orig. proceeding). Procedural unconscionability relates to the making or inducement of the contract, focusing on the facts surrounding the bargaining process. *TMI, Inc. v. Brooks*, 225 S.W.3d 783, 792 (Tex. App.—Houston [14th Dist.] 2007, pet. denied).

“Absent a duty to disclose, such as in a confidential or fiduciary relationship, an agreement is not unconscionable or fraudulent merely because one party was not informed as to the arbitration provisions.” *Nexion Health at Omaha, Inc. v. Martin*, No. 06-10-00017-CV, 2010 Tex. App. LEXIS 5171 (Tex. App.—Texarkana July 7, 2010, no pet.). So, where there is a confidential or fiduciary relationship, an agreement may be unconscionable where the principal is not informed about the arbitration provision. For example, spouses owe each other fiduciary duties *Izzo v. Izzo*, 03-09-00395-CV, 2010 Tex. App. LEXIS 3623, 2010 WL 1930179, at \*3, 10-12 (Tex. App.—Austin May 14, 2010, pet. denied); *Toles v. Toles*, 113 S.W.3d 899, 916 (Tex. App.—Dallas 2003, no pet.). A fiduciary “occupies a position of peculiar confidence towards another” and owes a duty of full disclosure. *Kinzbach Tool Co. v. Corbett-Wallace Corp.*, 138 Tex. 565, 160 S.W.2d 509, 512-13 (Tex. 1942). “[T]he marital relationship between spouses is a fiduciary relationship. That special relationship is of course more than the sum of discrete actions taken by one spouse toward another. . . . The effect of that conduct on the special relationship of trust and confidence between spouses may continue and change over time.” *Ditta v. Conte*, 298 S.W.3d 187, 191 (Tex. 2009). The fiduciary duty between spouses extends to a duty to disclose material information in transactions, as one Texas court has held that where spouses signed an agreement covering the disposition of their stock in a company, the spouse had a fiduciary duty to deal fairly with the other spouse in acquiring from her any rights in the stock, including a duty to disclose the true value of the company. *Izzo v. Izzo*, 2010 Tex. App. LEXIS 3623 (citing *Miller v. Miller*, 700 S.W.2d 941, 945-46 (Tex. App.—Dallas 1985, writ ref’d n.r.e.)).

Further, other family members can have confidential relationships depending on the facts and

circumstances of the parties’ relationship. *See Young v. Fawcett*, 376 S.W.3d 209, 216 (Tex. App.—Beaumont 2012, no pet.) (granddaughter owed grandmother fiduciary duties). A fiduciary duty may arise from an informal relationship “‘where one person trusts in and relies upon another, whether the relation is a moral, social, domestic, or purely personal one.’” *Fitz-Gerald v. Hull*, 150 Tex. 39, 237 S.W.2d 256, 261 (Tex. 1951) (quoting “Sec. 225, 54 Am. Jur., ‘Trusts’, p. 173.”). Specifically, family relationships—where a person trusts in and relies upon a close member of her core family unit—may give rise to a fiduciary duty when equity requires. *See Mills v. Gray*, 147 Tex. 33, 210 S.W.2d 985, 986-89 (Tex. 1948) (mother-son fiduciary relationship). “When the societal relationship is one of loving family members or close personal friends, the justification for and reasonableness of reposing trust one in the other is readily understandable.” Roy Ryden Anderson, *The Wolf at the Campfire: Understanding Confidential Relationships*, 53 SMU L. Rev. 315, 366 (2000).

An arbitration clause in an agreement between parties that have an existing fiduciary duty (as opposed to a future one) should only be enforceable if the principal was made aware of the advantages and disadvantages of arbitration to him and had sufficient information to make an informed decision as to whether to include the clause. *See, e.g., Op. Tex. Ethics Comm’n No. 586* (2008). There is no question that a constitutional right to a jury trial is an important right and that the ability to appeal a fact-finder’s determination on legal grounds and on factual sufficiency grounds is an important due process right. Where the evidence shows that despite a duty to disclose, a defendant did not disclose to the plaintiff that such a clause was in the trust or how it might be used in the future.

In doing so, a defendant may breach a duty to disclose and commit constructive fraud. Constructive fraud is the breach of a legal or equitable duty that the law declares fraudulent because it violates a fiduciary relationship. *Archer v. Griffith*, 390 S.W.2d 735, 740 (Tex. 1964). It does not require an intent to defraud. *Jean v. Tyson-Jean*, 118 S.W.3d 1, 9 (Tex. App.—Houston [14th Dist.] 2003, pet. denied). An arbitration agreement may be vacated if the agreement to arbitrate was itself fraudulently induced. *In re First Merit Bank*, 52 S.W.3d 749, 756 (Tex. 2001); *Hearthshire Braeswood v. Bill Kelly Co.*, 849 S.W.2d 380 (Tex. App.—Houston [14th Dist.] 1993, writ denied); *Gulf Interstate Eng’g v. Pecos Pipeline*, 680 S.W.2d 879 (Tex. App.—Houston [1st Dist.] 1984, writ dismissed). Accordingly, a court may not enforce an arbitration clause where it is unconscionable to do so.

### E. Accounting Claims

A plaintiff's accounting claim may not be subject to the arbitration provision for two reasons: (1) the Texas legislature has specifically enacted law that prohibits trusts from amending the right to a statutory accounting; and (2) the right to an accounting is a statutory right, independent of both the Trust and any dispute between the parties. Turning to the first basis, the Texas legislature has barred any contractual modification of the right to seek an accounting, highlighting the uniqueness of an accounting demand in the fiduciary context. In 2002, the Texas Supreme Court issued a decision in *Texas Commerce Bank v. Grizzle*, S.W.3d 240, 249 (Tex. 2002). The issue in that case was whether a trust document could limit a trustee's liability for claims brought by a beneficiary through an exculpatory clause. The Court held that it could, stating "while the Trust Code imposes certain obligations on a trustee—including all duties imposed by the common law—the Trust Code also permits the settlor to modify those obligations in the trust instrument." *Id.* at 249. Accordingly, a trust could exonerate a trustee for self-dealing. *Id.* at 250.

In response to *Grizzle*, the Texas legislature amended the Texas Trust Code to limit a settlor's ability to restrict a trustee's obligations and liability. House Comm. on Judiciary, Bill Analysis, Tex. H.B. 1190, 79th Leg., R.S. (2005). Among those amendments was the addition of Texas Property Code section 111.0035, which provides:

The terms of a trust prevail over any provision of this subtitle, except that the terms of a trust may not limit . . . a trustee's duty with regard to an irrevocable trust, to respond to a demand for an accounting made under § 113.151 if the demand is from a beneficiary.

Tex. Prop. Code § 111.0035(b)(4)(A). Accordingly, the right to demand an accounting is statutorily protected. It cannot be abridged or limited by any term in a trust. As one of the very few statutory rights that cannot be modified by contract, the right to an accounting is not dependent on any term in a trust.

Turning to the second basis, the unique nature of an accounting demand may exclude it from arbitration. A fiduciary's duty to provide an accounting does not stem from the terms of any trust document. Rather, a fiduciary's duty to provide an accounting is an inherent obligation arising from the fiduciary relationship under Texas law. No Texas case has addressed the discrete question of whether an accounting demand is arbitrable. Texas courts have granted motions to compel disputes to arbitration that included accounting demands with other claims, such as breach of fiduciary

duty. *See e.g., Rachal v. Reitz*, 403 S.W.3d 840, 842 (Tex. 2013) (holding that beneficiary could not avoid arbitration of trust-related claims for misappropriation of trust assets and an accounting demand because the beneficiary did not sign the trust). None of those cases, however, raised the discrete issue of whether an accounting demand, as opposed to the broader trust dispute, was arbitrable.

Other jurisdictions that have directly addressed this discrete issue held that accounting demands are not arbitrable. *Univ. Nursing Assoc., PLLC v. Phillips*, 842 So. 2d 1270, 1280 (Miss. 2003); *Hotcaveg v. Lightman*, 27 Misc. 2d 573, 574 (N.Y. Sup. Ct. 1960) (holding that right to demand an accounting by a shareholder in a derivative suit was not subject to an arbitration clause in pre-incorporation agreement between stockholders); *Schacht v. Hartford Fire Ins. Co.*, No. 91 C 2228, 1991 U.S. Dist. LEXIS 12145, at \*13 (N.D. Ill. Aug. 30, 1991) (mem. op.) (holding that accounting claim was non-arbitrable, but abating the litigation pending an outcome in arbitration because the arbitrable and non-arbitrable issues were inherently intertwined); *see also Hinnar v. Am. Ingenuity, LLC*, 554 F. Supp. 2d 576, 585 (E.D. Penn. 2008) (holding that accounting demand was not arbitrable as the right to an accounting was not based on the contract in which the arbitration clause appeared, but was the result of the party's relationship and equity). In *Phillips*, the Mississippi Supreme Court held that "performance of an accounting is not subject to arbitration," because "[a]n accounting does not involve any dispute except for whether the person seeking an accounting is entitled to one." 842 So. 2d at 1280. The theme in *Phillips* and the other cases set forth above is that the right to accounting does not arise out of any specific term in a contract or trust agreement. Even if one could properly characterize resistance to an accounting as a dispute, the dispute does not arise out of a contract or trust agreement. Rather, it arises out of the unique fiduciary relationship of the parties. In Texas, the duty to account is not only unrelated to the terms of any given trust or contract; the duty to account exists in spite of terms that might otherwise attempt to destroy that right.

Finally, the Texas Supreme Court's decision in *Rachal v. Reitz*, holds that a non-signatory beneficiary of a trust, who accepts benefits of a trust, is bound by an arbitration provision pursuant to the direct-benefits estoppel doctrine. 403 S.W.3d at 846. That is, a non-signatory, third-party beneficiary of a contract or trust that seeks to claim a right derived from the terms of the instrument is bound by an applicable arbitration clause in that agreement, but not if the right "arises from general obligations imposed by law." *In re Vesta Ins. Group, Inc.*, 192 S.W.3d 759, 761 (Tex. 2006) (citing *In re Weekley*, 180 S.W.3d 127, 134 (Tex. 2005)

(holding that a non-party to a contract is not bound to arbitrate tort claims against a party to contract based on a direct-benefits estoppel theory)). Accordingly, where a claim does not rely on the terms of a trust or contract or require interpretation of that trust or contract, it is not subject to the instrument's arbitration provision. *Carr v. Main Carr Dev., LLC*, 337 S.W.3d 489, 498 (Tex. App.—Dallas 2011, pet. denied) (holding breach-of-fiduciary-duty claims arose under general legal obligations outside of a contract's terms, and so the claim brought by a non-signatory was not arbitrable); *G.T. Leach Builders, LLC v. Sapphire V.P., L.P.*, 458 S.W.3d 502, 530 (Tex. 2015) (equitable estoppel did not required non-parties to a contract to arbitrate tort claims based on direct-benefits estoppel); *accord Brewer & Pritchard, P.C. v. AMKO Res. Int'l, LLC*, No. 14-13-00113-CV, 2014 Tex. App. LEXIS 7627, at \*36 (Tex. App.—Houston [14th] July 25, 2014, no pet.).

Accordingly, there are good arguments for why a court should not enforce an arbitration clause regarding an accounting claim.

### VIII. NEGOTIATION/MEDIATION CLAUSES

Courts routinely enforce negotiation and mediation clauses. A potential clause may state:

No party to this Agreement shall institute a proceeding in any court, arbitration, or administrative agency to resolve a dispute between the Parties arising out of or related to this Agreement before that Party has sought to resolve the dispute through direct negotiations with the other Party. If the dispute is not resolved within three (3) weeks after a demand for direct negotiation, the Parties shall attempt to resolve the dispute through mediation in [location], administered by the American Arbitration Association under its commercial mediation rules and procedures then in effect. If the mediator is unable to facilitate a settlement of the dispute within a reasonable period of time, as determined by the mediator, the mediator shall issue a written statement to the Parties to that effect and the aggrieved Party may then seek relief in the [forum, i.e., state or federal courts or arbitration] located in [location].

It should be noted that a court may dismiss a suit or deny a motion to compel arbitration due to the fact that a party has not complied with a contractual requirement of a negotiation and mediation before the filing of suit. "Courts routinely uphold agreements to mediate in good faith as a condition precedent to

arbitration or litigation." *Pazol v. Tough Mudder Inc.*, 100 F.Supp. 3d 74 (D.C. Mass. 2015), *rev'd on other grounds*, 819 F.3d 548 (1st Cir. 2016) (citing *HIM Portland, LLC v. Devito Builders, Inc.*, 317 F.3d 41, 43-44 (1st Cir. 2003)). *See, e.g., Allen v. Apollo Group, Inc.*, No. H-04-3041m, 2004 U.S. Dist. LEXIS 26750 (S.D. Tex. November 9, 2004) (denied arbitration because party failed to follow grievance procedure); *Ziarno v. Gardner Carton & Douglas, LLP*, 2004 U.S. Dist. LEXIS 7030, No. 03-3880, 2004 WL 838131, at \*3 (E. D. Pa. April 8, 2004) (holding court lacked subject matter jurisdiction because the parties failed to submit their dispute to contractually mandated mediation/arbitration); *Darling's v. Nissan N. Am., Inc.*, 117 F. Supp. 2d 54, 61 (D. Me. 2000) (holding plaintiff was required to make written demand for nonbinding mediation as a prerequisite to filing its lawsuit); *Bill Call Ford, Inc. v. Ford Motor Co.*, 48 F.3d 201, 208 (6th Cir. 1995) (holding that claim that franchisor did not adequately reimburse franchisee for warranty repairs was barred by franchisee's failure to seek mediation); *DeValk Lincoln Mercury, Inc. v. Ford Motor Co.*, 811 F.2d 326, 336 (7th Cir. 1987) (substantial compliance with dispute resolution provisions did not excuse the plaintiff's failure to present claim to defendant's policy board as condition precedent to suit); *HIM Portland, LLC v. DeVito Builders, Inc.*, 317 F.3d 41, 44 (1st Cir. 2003) (the court held that owner could not compel arbitration where neither party had requested mediation because the contracting parties conditioned an arbitration agreement upon the request by either party for mediation); *Kemiron Atlantic, Inc. v. Aguakem Intern., Inc.*, 290 F.3d 1287, 1291 (11th Cir. 2002) (under the contract, to invoke the arbitration provision, either party had to request mediation and provide notice of the request to the other party, where neither condition was met, arbitration was precluded); *Mortimer v. First Mount Vernon Indus. Loan Ass'n*, 2003 U.S. Dist. LEXIS 24698, No. 03-1051, 2003 WL 23305155, at \*2 (D. Md. May 19, 2003) (dismissing plaintiff's claim when plaintiff failed first to submit to mediation in accordance with the contract); *Ponce Roofing, Inc. v. Roumel Corp.*, 190 F. Supp. 2d 264, 267 (D.P.R. 2002) (court dismissed suit where parties failed to first mediate as required by the contract); *Ventre v. Ventre*, 2001 Conn. Super. LEXIS 187, No. 377148S, 2001 WL 100326, at \*1 (Conn. Super. Ct. Jan. 9, 2001) (dismissing case where court found mediation was a condition precedent for bringing suit); *Gould v. Gould*, 240 Ga. App. 481, 523 S.E.2d 106, 108 (Ga. App. 1999) (determining that relief was precluded by mother's failure to comply with provision in divorce decree requiring parties to submit disputes concerning their minor children to mediator or family counselor before litigating); *Absher Constr. Co. v. Kent Sch. Dist.*

*No. 415*, 77 Wn. App. 137, 890 P.2d 1071, 1076 (Wash. Ct. App. Div. 1 1995) (finding that the contract provided a mandatory procedure to resolve claims for extra work caused by deficient plans and specifications and found the plaintiff waived the claim by failing to follow those procedures).

Accordingly, a party wanting to arbitration a trust or estate dispute and enforce such a clause in the document should be very careful to comply with the other dispute-resolution requirements in the document, like negotiation or mediation.

## **IX. CONCLUSION**

Arbitration, forum-selection, and jury-waiver clauses all fundamentally alter the dispute resolution process. These clauses can alter a plaintiff's right to select the forum for dispute resolution and can remove a plaintiff's constitutional right to a jury trial. Courts have readily enforced these clauses in contractual disputes because, before a dispute arises, the parties have agreed to these provisions. However, in trust and estate disputes, a beneficiary rarely agrees to any dispute resolution terms because they do not sign or even review the trust or will before the settlor or testator executes same. Should the same rules apply for trust and estate litigation as for contractual disputes? Are there any unique defenses and considerations to take into account in trust and estate litigation?

This article attempted to address the general standards for enforcing arbitration, forum-selection, and jury-waiver clauses, discuss relevant Texas trust and estate precedent dealing with these clauses, and also address the aforementioned questions.

Until some of these issues are decided, attorneys that draft trusts and wills may want to attempt other methods to enforce arbitration, forum-selection, or jury waiver clauses. One method may be to require beneficiaries to sign an arbitration agreement, which may be attached to the trust document as an exhibit, before the beneficiary can receive any distributions from the trust. Another method might be to include a no-contest clause that provides that a beneficiary who refuses to arbitrate a dispute or contests a forum-selection clause or jury-waiver clause forfeits the right to receive anything under the trust or will. The author hopes that this article is some assistance to practitioners who face these interesting issues.