

# **The Use of Arbitration, Forum- Selection, And Jury-Waiver Clauses in Trust and Estate Litigation In Texas**

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# Introduction

- Fiduciary litigation is an ever changing area of the law.
- The author reviews and reports on new cases regularly at his blog: Texas Fiduciary Litigator ([www.txfiduciarylitigator.com](http://www.txfiduciarylitigator.com))
- “The Intersection of Texas Courts and The Fiduciary Field.”
- You can sign up for email alerts!

# Introduction

- Individuals execute trusts and wills to control how certain assets are to be managed and distributed.
- Those same individuals may want to have control over the dispute resolution process for future conflicts.

# Areas To Explore

- What are arbitration, forum-selection and jury-waiver clauses?
- Why use those clauses?
- Standards for enforcement (in general and in trust and estate disputes)
- Why differing standards?
- Impact of choice-of-law clause



# Arbitration Clause



# Arbitration Clause

- An arbitration clause is a clause that usually requires the parties to pursue claims in an alternative arbitration forum and not in the court system.
- Procedure similar to summary judgments.
- Right to appeal motion to compel decision.
- Ability to appeal merits of arbitration opinion?

# Arbitration Clause

- To enforce an arbitration clause, a party must prove the existence of an arbitration agreement and that the claims asserted fall within the scope of the agreement.
- Delegation to arbitrator of enforceability and scope decisions.
- Further, there are instances where Texas courts have enforced arbitration agreements against non-parties under various theories.
- No conspicuousness requirement.

# Why Use Arbitration Clauses?

- Perceived cost savings.
- Arbitrations can be quicker.
- Proceedings are confidential.
- Strategy of eliminating runaway juries and local bias.
- Expert arbitrators.



# Arbitration In T&E Case

- Texas Supreme Court has enforced an arbitration clause in a trust dispute based on direct-benefits estoppel.
- Dallas court of appeals rejected such a clause where it was not mandatory.
- Houston court of appeals rejected such a clause in an estate dispute where direct-benefits estoppel did not apply.

# Arbitration In T&E Case

- Delegation to arbitrator of enforceability and scope issues may not be accomplished by incorporation of AAA rules.
- Law in other jurisdictions is mixed: typically allows arbitration of administration disputes but not formation disputes.

# Forum-Selection Clause



# Forum-Selection Clause

- A forum-selection clause generally does not take a dispute out of the courts.
- It requires that disputes be litigated in a particular forum.
- Can have some impact on personal jurisdiction challenges.
- Right to mandamus decision denying enforcement.

# Forum-Selection Clause

- Historically were not enforced
- Now, they are enforced
- *In re AIU Ins. Co.*, 148 S.W.3d 109 (Tex. 2004)
- “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.”

# Forum-Selection Clause

- Only claims that fall inside scope of clause should be dismissed – contract construction principles
- Permissive versus mandatory clauses
- FSC does not have to be conspicuous, parties can incorporate them from other documents
- Nonparties can enforce FSC under various theories
- Same general defenses as arbitration clauses

# Why Use FSC?

- Limit litigation risk by selecting forum.
- Chosen forum has better knowledge of substantive law.
- Chosen forum may be more convenient for defendant.
- Chosen forum may be less convenient for plaintiff and may increase costs.
- Chosen forum may have very different procedures that may impact litigation.

# FSC in T&E Disputes

- Other jurisdictions have generally enforced FSC in T&E disputes.
- Dallas court of appeals has enforced a FSC in a trust dispute.
- Court held that scope was sufficiently broad to include claims.
- Court distinguished venue statute.
- Court did not address the difference between a FSC and arbitration clause and the absence of FSC statutes.



# Jury Waiver Clause



# What Is A Jury-Waiver Clause?

- A jury waiver is a contractual provision that expressly states that the parties to the document waive their right to a jury should a dispute arise between them.
- The parties stay in the court system and the plaintiff's chosen forum, but agree to have the judge determine all fact issues.

# Texas Enforces Jury Waivers

- *In Re Prudential*, 148 S.W.3d 124 (Tex. 2004).
- 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.
- The defendant 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 defendant sought mandamus relief.

# Texas Enforces Jury Waivers

- Defendant's main contention: that jury waivers were void as against public policy because they grant parties the private power to fundamentally alter the civil justice system.
- Texas Supreme Court disagreed: parties can agree to opt out of the civil justice system altogether and submit future disputes to arbitration.
- “Public policy that permits parties to waive trial altogether surely does not forbid waiver of trial by jury.”

# Jury Waiver Standard

- “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.’”
- But, who has burden to establish knowing and voluntary?
- Conspicuousness determines burden.

# Jury Waiver Standard

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



# Contractual Jury Waivers

- Can non-parties enforce jury waivers?
- In *In re Credit Suisse First Boston Mortgage Capital, L.L.C.*, the court held that direct-benefits estoppel did not allow non-signatory to enforce a jury waiver provision. 257 S.W.3d 486 (Tex. App.—Houston [14th Dist.] 2008, orig. proceeding).
- Most courts hold that jury waivers are to be enforced the same as arbitration clauses.

# Jury Waivers in T&E Cases

- Only one case in Texas dealing with a jury waiver provision in a trust or estate.
- The Houston Court of Appeals enforced the jury waiver.
- However, the trust was in a business transaction and all parties signed it.
- So, many of the issues arising from nonsignatory trustees and beneficiaries were absent from the case.



# Why Use A Jury Waiver?

- Arbitrations are not as inexpensive as advertised.
- Arbitrators have an incentive to keep the arbitration going, and therefore do not generally grant pre-hearing dispositive motions.
- In an arbitration there is basically no appellate review.

# Contractual Jury Waiver

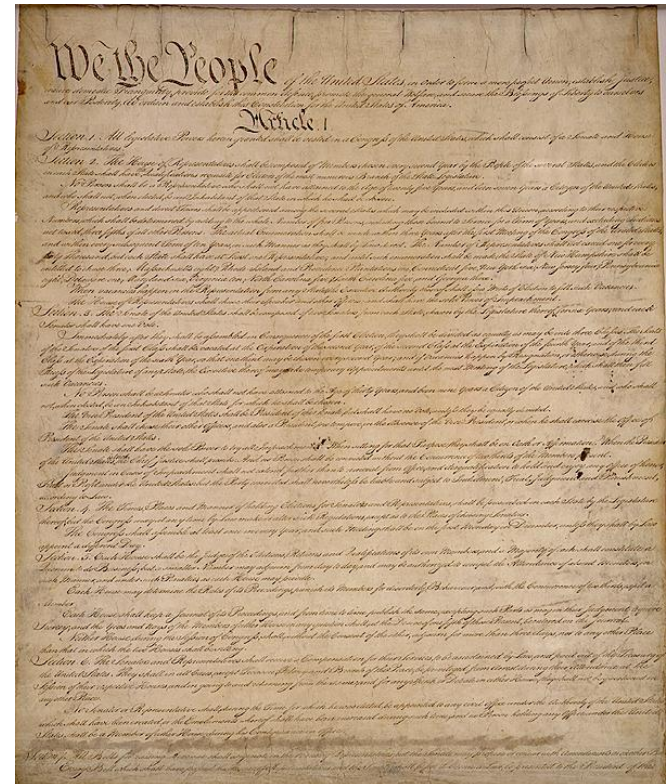
- With jury waiver, there is a knowing and voluntary defense that does not exist in arbitration and FSC cases.
- The burden seems to be on the movant if the clause is not conspicuous, which is not the case for arbitration or FSC.
- Fraud allegation places burden on movant, which is not the case for arbitration or FSC.

# Why Different Standards?

- Texas Supreme Court set out different test for contractual jury waivers.
- Knowing and voluntary test comes from criminal law context where defendant waives right to jury trial.
- However, jury waivers are much less intrusive than arbitration or FSC.

# Why Different Standards?

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



# Choice-of-Law Clause

Choice of Law  
Clause in Contract



# Choice-of-Law Clause

- Does a choice of law clause impact the enforcement and scope of a dispute resolution clause?
- In *In re Lehman Brothers Merchant Banking Partners IV L.P.*, the court acknowledged that the partnership agreement had a choice-of-law provision that designated that it would be construed by the laws of the state of Delaware and then used Delaware law to construe the forum-selection provision. No. 05-09-00508-CV, 2009 Tex. App. LEXIS 5872 (Tex. App.—Dallas July 30, 2009, orig. proceeding).
- May require evidence of the law of a foreign jurisdiction.

# Defenses



# Defenses

- Mental competence and undue influence
- Waiver
- Unclean hands
- Unconscionability



# Negotiation/Mediation Clauses



*Jameson, the mediator, uses his last remaining negotiating tool in an effort to break the stalemate.*

# Negotiation/Mediation Clauses

- Some documents require the parties to negotiate and/or mediate disputes before a party can file suit or initiate arbitration.
- Courts will enforce such clauses.
- Parties should be very careful to follow requirements as some courts hold that a party waives the right to arbitrate by failing to comply with these preliminary requirements.

# Conclusion

- Use of dispute resolution provisions will continue to increase in trust and estate disputes.
- 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?
- Courts have not analyzed many of the issues involved in the use of these clauses in trust and estate disputes.
- This will be an area for fruitful litigation in the foreseeable future.
- Important constitutional rights at issue.