THE BENEFITS OF BUSINESS-TO-BUSINESS ARBITRATION
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May 10, 2017

1. INTRODUCTION.

a. **Purpose of this presentation** is to equip lawyers who attend the luncheon with more information about the advantages of arbitration as an alternative dispute resolution process and to provide lawyers with more tools they can use in arbitration proceedings.

i. Summary of Texas General Arbitration Act. Tex. Civ. Prac. & Rem. Code ch. 171; *Rachal v. Reitz*, 403 S.W.3d 840 (Tex. 2013).

1. Tex. Civ. Prac. & Rem. Code Ann. §171.021(b) calls for a "summary proceeding" to determine existence of arbitration agreement and claim within the scope of the arbitration agreement.[1]

2. Award under Tex. Civ. Prac. & Rem. Code Ann. §171.081-.098 **must** be confirmed unless it is vacated, modified, or corrected under certain limited grounds.[2]

3. Hoskins v. Hoskins, 497 S.W.3d 490 (Tex. 2016)(exclusive statutory grounds for vacatur in TGAA).

ii. Summary of the Federal Arbitration Act. 9 U.S.C. §1 et seq.; *Hall Street Associates, LLC v. Mattel, Inc.*, 552 U.S. 576 (2008).

1. State court contract principles determine if an arbitration agreement exists, reviewed *de novo* by appellate court.

2. Whether claim is within scope of arbitration agreement is decided in light of the federal policy and presumption favoring arbitration under the FAA.[3]

3. Section 2 describes the contract to arbitrate. *See* Moses H. Cone below.

b. Well established and long-standing precedents and jurisprudence in both federal and state court cases applying the FAA.

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[1]Doe v. Columbia N. Hills Hosp. Subsidiary, L.P., 2017 Tex. App. LEXIS 2536 *1 (Tex. App. – Fort Worth, March 23, 2017, no pet.).
[2]Denbury Onshore, LLC v. Texcal Energy S. Tex., L.P., 2116 Tex. App. LEXIS 12895, **6-7 (Houston [14th Dist.] December 6, 2016, no pet.
[3]Bonded Builders Home Warranty Ass'n of Texas v. Rockoff, 2016 Tex. App. LEXIS 6431 (June 16, 2016), no pet.

i. Moses H. Cone Mem'l Hosp. v. Mercury Constr. Corp., 460 U.S. 1, 24, 103 S. Ct. 927, 941, 74 L. Ed. 2d 765, 785, 1983 U.S. LEXIS 17, *41, 51 U.S.L.W. 4156 (U.S. 1983) ("Section 2 is the primary substantive provision of the Act, declaring that a written agreement to arbitrate "in any maritime transaction or a contract evidencing a transaction involving commerce . . . shall be valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract." 9 U. S. C. § 2. Section 2 is a congressional declaration of a liberal federal policy favoring arbitration agreements, notwithstanding any state substantive or procedural policies to the contrary. The effect of the section is to create a body of federal substantive law of arbitrability, applicable to any arbitration agreement within the coverage of the Act.").

ii. Same FAA since 1925 (92 years to date).

iii. Numerous U.S. Supreme Court cases and recent cases.

1. Dean Witter Reynolds, Inc. v. Byrd, 470 U.S. 213 (1985 ("…goal of the Federal Act is the **expeditious resolution** of claims and **avoidance of cost and delay of litigation**.").

2. Southland Corp. v. Keating, 465 U.S. 1, 7, 104 S. Ct. 852, 856, 79 L. Ed. 2d 1, 10, 1984 U.S. LEXIS 2, *13, 52 U.S.L.W. 4131 (U.S. 1984) ("Contracts to arbitrate are not to be avoided by allowing one party to ignore the contract and resort to the courts. Such a course could lead to prolonged litigation, one of the very risks the parties, by contracting for arbitration, sought to eliminate. In *The Bremen* v. *Zapata Off-Shore Co*., 407 U.S. 1, 12 (1972), we noted that the contract fixing a particular forum for resolution of all disputes "was made in an arm's-length negotiation by **experienced and sophisticated businessmen**, and absent some compelling and countervailing reason it should be honored by the parties and enforced by the courts.").

3. Hall Street Associates, LLC v. Mattel, Inc., 552 U.S. 576 (2008).[4]

4. Stolt-Nielsen S.A. v. AnimalFeeds International Corp., 559 U.S. 662 (2010) ("…the **benefits** of private dispute resolution: lower costs, greater efficiency and speed, and the ability to choose expert adjudicators to resolve specialized disputes.").

5. AT&T Mobility LLC v. Concepcion, 131 S.Ct. 1740 (2011) ("…allows for **efficient, streamlined procedures** tailored to the type of dispute.").

[4]FAA §§10 and 11 are exclusive and judicial review of awards cannot be expanded by parties' contract to arbitrate. *But see* Nafta Traders, Inc. v. Quinn, 339 S.W.3d 84, 87 (Tex. 2011) for different view under the Texas Arbitration Act.

6. the principal **advantage** of **arbitration** — its **informality**. D.R. Horton, Inc. v. NLRB, 737 F.3d 344, 360, 2013 U.S. App. LEXIS 24073, *35, 197 L.R.R.M. 2637, 164 Lab. Cas. (CCH) P10,658, 2013 WL 6231617 (5th Cir. 2013).

c. Both the Uniform Arbitration Act and the Revised Uniform Arbitration Act have provided a coherent arbitration law for state legislatures.

d. Arbitration experience of the presenter.

e. Distinguish business-to-business and commercial arbitration versus consumer arbitration. *See* "Arbitration Agreements," Proposed Rule by Consumer Financial Protection Bureau, 81 FR 32830 (May 24, 2016).

f. Distinguish international commercial arbitration versus U.S. domestic business and commercial arbitration.

   i. 9 U.S.C. §201.000 *et seq.* (the New York Convention).

   ii. Scherk v Alberto-Culver Co., 417 U.S. 506, 94 S.Ct. 2449, 41 L.Ed.2d 270 (1974).

g. AAA's study of 1,000 Fortune 500 companies that showed that the majority of the surveyed companies prefer to resolve their business disputes with arbitration because the **time to resolution** is quicker than litigation and the **cost of resolution** is less than litigation – called "dispute wise" companies.

h. College of Commercial Arbitrators Protocols for Expeditious Cost-Effective Commercial Arbitration" (2010).

i. A more recent study of forty AAA arbitrators produced the following "10 Ways to Make Arbitration Faster and More Cost Effective."

   i. Pay attention to your arbitration clause.

   ii. Select attorneys experienced in arbitration.

   iii. Request and enforce budgets.

   iv. Choose the "right" arbitrator.

   v. Limit discovery to what is essential for the arbitrator.

   vi. Participate in the Preliminary Hearing.

   vii. Limit Motion Practice.

   viii. Remain open to settlement.

ix. Trust the expertise of the arbitrator.

x. Present the case efficiently and professionally.

j. All the studies demonstrate that arbitrators **do not split the baby**.

2. **Examples of business disputes** that I have arbitrated – either as advocate or as neutral arbitrator.

a. Business owner disputes;

b. Business break-ups (including medical practice group break-ups);

c. Partnership disputes and break-ups;

d. Business/Vendor disputes;

e. Employer/Employee disputes;

f. On-the-job injuries (worker's compensation non-subscribers);

g. Healthcare disputes;

h. Healthcare Provider/Payor disputes;

i. Aviation disputes;

j. Construction disputes;

k. Real Estate disputes;

l. Oil and gas disputes;

m. Insurer/Insured disputes;

n. Landlord/Tenant disputes (commercial real estate);

o. Creditor/Debtor disputes;

p. Intellectual property disputes;

q. Producer/Distributor disputes;

r. Bank/Bank Customer disputes; and

s. Securities Industry disputes – FINRA.

3. Almost all these disputes were arbitrated because of **pre-dispute arbitration clauses** in underlying contracts between the parties.

   a. Arbitration is a **creature of contract**.

   b. Arbitration agreement is **separate agreement** from underlying contract – the separability doctrine.[5]

   c. The disputing parties have agreed – usually in a pre-dispute agreement – to arbitrate versus litigate their disputes.

   d. The **parties** to the dispute control what kind of arbitration the parties get!

4. We often assist clients with the **negotiation and drafting of arbitration clauses** in their underlying contracts – but not the focus of today's discussion.

   a. An arbitration agreement can be as short as one sentence or as long as the parties desire with all kinds of provisions controlling the arbitration process.

   b. Arbitration is a private process controlled principally by the parties' arbitration agreement.

5. Why do businesses **prefer to arbitrate** their disputes? (24 reasons)

   a. To protect goodwill;

   b. To preserve an existing business relationship;

   c. To maintain the privacy and confidentiality of the dispute and its resolution;

   d. To get a "final" resolution of the dispute:

      i. *Hall Street v. Mattel*, 552 U.S. 576 (2008) (FAA §§10 and 11 are exclusive standards for judicial review of arbitration awards.). (U.S. Supreme Court) – Federal Arbitration Act;

      ii. Citigroup Global Mkts. Inc. v. Bacon, 562 F.3d 349, 352-353, 2009 U.S. App. LEXIS 4543, *8-9 (5th Cir. Tex. 2009) ("The Supreme Court observed that ***HN5*** § 9 of the FAA, which states that upon the application for an order confirming an arbitration award the court "must grant such an order unless the award is vacated, modified, or corrected as prescribed in sections 10 and 11 ...," suggests that judicial review is constrained by the statute. There "is nothing malleable about

[5]Prima Paint Corp. v. Flood & Conklin Mfg., 388 U.S. 395, 402-06 (1967).

> `must grant,' which unequivocally tells courts to grant confirmation in all cases, except when one of the `prescribed' exceptions applies." *Id.* at 1405. *Hall Street* also found that [**9] the Act's legislative history indicated that ***HN6*** Congress intended the statutory grounds for **vacatur** and modification to be the **exclusive** means for setting aside or changing an arbitration award challenged under the FAA. In a brief submitted to the House and Senate Subcommittees of the Committees on the Judiciary, one of the primary drafters of the Act said, "The grounds for vacating, modifying, or correcting an award are limited. If the award [meets a condition of § 10], then and then only the award may be vacated. ... If there was [an error [*353] under § 11], then and then only it may be modified or corrected . . . ." *Id.* at 1406 n. 7 (citing Arbitration of Interstate Commercial Disputes, Joint Hearings before the Subcommittees of the Committees on the Judiciary on S. 1005 and H. R. 646, 68th Cong., 1st Sess., 34 (1924)) (additions and omissions in *Hall Street*); and

iii. *Hoskins v. Hoskins,* 497 S.W.3d 490 (Tex. 2016). (Texas Supreme Court) –Texas Arbitration Act.[6]

e. To be able to select or have input in the selection of the decision-maker for the dispute;

f. To get a decision-maker with specific industry-knowledge and experience;

g. To determine the limits, if any, of the decision-maker's authority;

h. To get the opportunity to tell the decision-maker the whole story (no formal rules of evidence);

i. To control or structure the dispute resolution process;

j. To limit the kind of damages recoverable in a dispute (e.g. punitive damages and consequential damages);

k. To determine what arbitration rules apply to the process;

l. To determine what arbitration law applies to the process;

m. For flexibility in the dispute resolution process ("fit the forum to the fuss");

n. For informality in the dispute resolution process;

o. To save time;

p. To save money;

[6]"Our holding that the TAA's vacatur grounds are exclusive establishes that manifest disregard and, for all practical purposes, all other common law doctrines are no longer viable with regard to arbitrations governed by the TTA." (Justice Willett, Concurring). 497 S.W.3d at 498.

q. To cut down on the discovery efforts and costs, especially the effort and cost related to the discovery of Electronically Stored Information ("ESI");

r. To protect trade secrets and other confidential and proprietary information involved in the business and the dispute;

s. To prevent class actions;

t. To arbitrate class actions;

u. To lower discovery costs;

v. Fewer pretrial motions and responses;

w. Limited right of appeal;

x. More expedited nature of arbitration.

6. **PRACTICAL CONSIDERATIONS.**

a. Where to arbitrate?

b. What to arbitrate?

c. When to arbitrate?

d. What kind of arbitrator?

e. One or three arbitrators?

f. Private or administered arbitration?

g. Presentation of the evidence?

h. Stenographic record?

i. Exhibits and demonstrative exhibits?

j. Form of award?

k. Deadlines and enforcement of deadlines?

7. **CONCLUSION.**

a. Parties get to choose their dispute resolver.

b. Parties can control costs of their dispute resolution.

c. Parties can keep the dispute resolution private and confidential.

d. Arbitration allows parties to be “dispute wise” in the dispute resolution process.

e. Arbitration can be a flexible process fitted to the dispute.

f. Arbitration can be informal and less rigid process.

g. Arbitration permits the parties to work as hard and as long as they want.

h. Arbitration allows the parties to keep their clothes on.