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# Pratt's Energy Law Report

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# Choose Your Own Dispute Resolution Forum

***By Julia M. Haines and Theresa Wanat****

*For many years, companies have been told that arbitration is the quickest and cheapest way to solve disputes. For sure, there are many benefits to choosing arbitration over litigation. However, there are numerous negatives that also need to be weighed. The following article looks at potential dangers and the select advantages of arbitration as well as key considerations in drafting an arbitration provision.*

It is late on a Friday afternoon. The parties have been locked in high stakes negotiations for three days over a multi-million dollar, 20-year contract. With little sleep and, even less patience, the parties have one last clause to hash out: the dispute resolution provision. If a dispute arises in five, 10, or 20 years, should the conflict be determined by a traditional litigation forum or in arbitration? What are the pros/cons of each?

For decades, arbitration has been viewed by some as the proverbial panacea that would cure all the "issues" with traditional litigation. But, what are the potential risks of arbitration? The following article looks at the potential dangers and select advantages of arbitration as well as key considerations in drafting an arbitration provision.

## THERE ARE NUMEROUS REASONS WHY ARBITRATION MIGHT BE THE BETTER OPTION

### Privacy

Courtrooms are open forums, and there is a presumption that all aspects of the litigation (from document productions to depositions of corporate representatives) are open and available to anyone—including the media. For instance, Rule 76a of the Texas Rules of Civil Procedure states:

> court records may not be removed from court files except as permitted by statute or rule . . . [and] court records, as defined in this rule, are presumed to be open to the general public and may be sealed only upon a showing of all of the following "(a) a specific, serious and substantial interest which clearly outweighs: (1) this presumption of

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> openness; [and] (2) any probable adverse effect that sealing will have upon the general public health or safety; [and] (b) no less restrictive means than sealing records will adequately and effectively protect the specific interest asserted."

This is a high bar to overcome and will be applied to the least amount of information possible.[1]

Further, parties seeking to seal court records and keep them from the public eye, often have a series of hoops to jump through—in addition to potentially fighting the other side that may have an interest in having those records remain public. For instance, in order to seal documents in Texas, a movant must:

(1) file a motion for a temporary sealing order detailing specific facts shown by affidavit that "immediate and irreparable injury will result";
(2) set the temporary sealing motion for hearing;
(3) have the temporary sealing motion heard;
(4) file a motion for a permanent sealing order;
(5) schedule the hearing for permanent sealing;
(6) publicly post (and file photographic verification of the posting with the Texas Supreme Court) notice of the hearing; and
(7) hold a hearing, *that is open to the public* "as a matter of right."[2]

Further, if the motion is denied, the movant must appeal the ruling on an interlocutory basis to the appellate court or even the Texas Supreme Court. To add to the trouble, sealing records is not guaranteed.

This was clearly seen in the recent *Lady Gaga* and *Bill Cosby* litigation where portions of deposition testimony were originally sealed, but eventually *unsealed* because personal embarrassment or reputation are not a sufficient justification for protection.[3] This same scenario can happen with any information, such as corporate projections or financial records.

Protective orders and labeling documents "Confidential" or "Attorney's Eyes Only" can help, but ultimately all documents used at trial will become public. Sealing a proceeding, in whole or in part, is also an onerous process, which judges are loathe to approve.

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[1] *See In re Browning-Ferris Indus., Inc.*, 267 S.W.3d 508, 513 (Tex. App. – Houston [14th Dist.] 2008, no pet.) (sealing testimony pertaining to settlement details); *Eli Lilly & Co. v. Marshall*, 829 S.W.2d 157, 158 (Tex. 1992) (sealing trade secret information).

[2] *See* Tex. Rule Civ. Proc. 76a.

[3] *See Oberstein v. United States* (Fed. Cl. Mar. 12, 2013) ("The mere fact that the production of records may lead to a litigant's embarrassment, incrimination, or exposure to further litigation will not, without more, compel the court to seal its records").

Arbitration can offer the parties substantially more protection. As an initial matter, the case generally (including all motions and the final hearing) is only open to the specific parties involved and the arbitrator/arbitration panel because arbitration is a matter of contract.[4] No one from *The New York Times* will be sitting in the back of a courtroom. No deposition transcripts of the CEO will be filed on a readily accessible database that anyone can read and redistribute on social media. There is a presumption, if not an explicit rule, that with arbitration everything is protected and confidential.

**Control**

In traditional litigation, there is minimal ability to control the selection of the judge (except in those rare circumstances where a judge is recused or litigation is filed in a single judge district) or the jury. The person deciding complex disputed issues between business partners or the economic impact of a catastrophic loss, may/not have specialized knowledge of (or interest in) the subject matter.

In contrast, with arbitration, the parties can choose a specialized forum (whether it be the American Arbitration Association or the London Court of International Arbitration or the Singapore International Arbitration Centre) and specify the requisite qualifications of the arbitrator(s).If specialized knowledge about particular segments of the oil and gas industry is needed, then the arbitrator(s) can be found and retained. The arbitrator(s) can be investigated, researched, and essentially interviewed, which is certainly not the case with a state or federal judge. The parties pick their judge (so to speak). That being said, research will only reveal so much. Because arbitrations are private, information about an arbitrator's prior rulings, biases, and actual skill may be unavailable, there is still a distinct "roll of the dice" situation when selecting an arbitrator.

The control offered by arbitration is particularly important in international matters, where determining applicable law and venue might be problematic. Further, an arbitration clause should preclude competing and inconsistent litigation in multiple jurisdictions and may afford better opportunities for the collection of any awards, as the validity of a foreign judgment will not be challenged.

**Potentially Faster**

Although many courts and states offer an expedited process of some type,[5] traditional litigation often takes years. Arbitration, if the provision is properly

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[4] *See Rent-A-Center, West, Inc. v. Jackson*, 561 U.S. 63 (2010).

[5] For example, Rule 169 of the Texas Rules of Civil Procedure has an expedited litigation

drafted and not contested, can expedite the dispute resolution process. If the parties need a ruling on discovery disputes, which is always the case, a hearing will be held within days or weeks, *not months*, and at times convenient for counsel. Further, as the parties are paying the arbitrator(s), there is a clear and direct incentive for the arbitrators to read all the papers, to hear all arguments, and to render decisions promptly.

The overall timing of arbitration can also be expedited. For example, an arbitration clause can provide for an expedited schedule to appoint the arbitrations, conduct discovery and conclude the hearing. However, care should be taken in prescribing an expedited proceeding where the provision will apply to both simple and complex matters. While expedited discovery and hearing may be appropriate on a small construction repair issue, the same schedule may not be appropriate for an issue encompassing the overall operation of a facility.

Additionally, arbitration can address the entirety of an action rather than piecemeal litigation. In the recent U.S. Supreme Court decision, *Henry Schein, Inc., et al. v. Archer and White Sales,* the Court has overturned the "wholly groundless" exception to arbitrability. Namely, the U.S. Court of Appeals for the Fifth Circuit and others have previously held that gateway questions as to whether or not a matter should be submitted to arbitration would be decided by the Court even if the contract states otherwise. The Supreme Court has now ruled otherwise stating, "Under the Act, arbitration is a matter of contract, and courts must enforce arbitration contracts according to their terms. . . . The parties to such a contract may agree to have an arbitrator decide not only the merits of a particular dispute, but also 'gateway' questions of 'arbitrability.' "[6] There is a caveat to this, however, as recently ruled by the Supreme Court, the Court (not the arbitrator) will determine whether or not an exception, as defined under the Federal Arbitration Act, applies.[7] Accordingly, arbitration can potentially address the entirety of a parties' dispute.

## THERE ARE NUMEROUS REASONS WHY ARBITRATION MIGHT *NOT* BE THE BETTER OPTION

### No Procedural Law Applies

Arbitration can lack definitive rules and be the "wild, wild west." While the parties may agree that the substantive law of a certain jurisdiction applies, the arbitrators will likely not be bound to apply the procedural law of the selected

process where the case should be tried within months instead of years but one that also limits the amount of damages that can be recovered to a maximum of $100,000. *See* Tex. R. Civ. Pro. 169(a).

[6] *Henry Schein Inc. et al. v. Archer and White Sales Inc.*, — U.S. — (2019).

[7] *New Prime v. Oliveira*, 139 S. Ct. 532 (2019).

jurisdiction. Although some arbitration rules provide procedural guidelines, arbitrators frequently devise their own procedures. Arbitrators may consider the procedural law of the forum as "suggested" but not binding. Unlike in a traditional litigation forum, the parties cannot mandamus an arbitrator's discovery rulings and have limited options to set aside awards in egregious situations.

**Appeals May Be Limited or Precluded**

In state or federal court, the parties can always appeal an adverse decision and frequently do. From improper discovery to error-filled jury charges, there is a long list of plausible reasons to attack any final judgment in an appeal to a higher court.

With arbitration, however, there are a handful of reasons that can be used to appeal the final decision,[8] a limited period of time to raise them, and statistically speaking, the chances of overturning an arbitration ruling are small.[9] For instance, the strongest arguments are those that allege the arbitrators exceeded their powers, which have an approximately 20 percent success rate while unfairness of the arbitration proceeding has an approximately a 17 percent success rate.

**Arbitration is More Expensive**

Nothing is free in this world, including justice. From attorneys to document reviews, it is well known that the costs of litigation have been on the rise for years. This is especially the case with arbitration where the parties also pay for the arbitrator/arbitration panel and the arbitration association. Namely, the simple act of filing a demand (or even a counterclaim) has an associated cost. For instance, with the London Court of International Arbitration, the

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[8] Appeals under the Federal Arbitration Act can be overturned for the following limited reasons: (1) The award was procured by corruption, fraud, or undue means; (2) There was evident partiality or corruption in the arbitrators; (3) The arbitrators were guilty of misconduct in refusing to postpone the hearing, upon sufficient cause shown, or in refusing to hear evidence pertinent and material to the controversy, or of any other misbehavior by which the rights of any party have been prejudiced; or (4) The arbitrators exceeded their powers, or so imperfectly executed them that a mutual, final, and definite award upon the subject matter submitted was not made. 9 U.S.C. § 10(a). *See also* TEX. CIV. PRAC. & REM. CODE § 171.088(a)(1)–(4) (reading vacating a judgment under the Texas Arbitration Act).

[9] *See* Lawrence R. Mills & Thomas J. Brewer, 'Exceeded Powers': Exploring Recent Trends in Cases Challenging Tribunal Authority, 31 ALTS. TO HIGH COST LITIG. 113 (2013) at 121.

non-refundable registration costs is £1,750 ($2,222.82), and the administrative costs range from £150 per hour to £250 ($190.52 to $317.53).[10]

Although the parties choose their judge(s), so to speak, and are aware of that person's rates, there is little to no ability to question what an arbitrator ultimately charges. For instance, if the parties have a complicated discovery hearing with warring motions to compel before a three party arbitration panel, that one hearing could cost in the tens of thousands of dollars for just the arbitrators. Additionally, travel expenses for arbitrators can be a hidden cost especially if they want to call multiple live hearings with the parties. Further, there is no check on the arbitrator. If the arbitrator decides to review documents for eight hours when four would more than suffice, no one has the power to curtail the bill. There is no check so to speak on the power of the arbitrator.

Additionally, arbitration is more expensive because it is unlikely to end prior to the ultimate hearing. In federal and state court, there are multiple avenues that the parties can use to cease the litigation prior to trial (i.e. motions to dismiss under Rule 91a of the Texas Rules of Civil Procedure or Rule 12(b)(6) under the Federal Rules of Civil Procedure, motions for more definitive statement, motions for summary judgment). Frequently, arbitrations do not include these mechanisms, and to the extent they do exist, such motions are not commonly granted. Accordingly, if there is a frivolous lawsuit, it is highly unlikely that the case will be dismissed early, and the only means to appeal a denial of these motions is after the arbitration hearing when all the costs and headache have already been endured.

Further, given the nature of arbitration, arbitrators are frequently inclined to split the difference between the parties. It is highly unlikely that the parties will contest an award, and even less likely that a court will upend an arbitrator's award especially if the case is not summarily ended on dispositive motions.

**Arbitration May Not Apply To All Claims**

This is seen, for example, in a recent Supreme Court case regarding class action claims. In *Lamps Plus, Inc. et al. v. Varela,* the Supreme Court is wrestling with the question, among others: what does "any and all" really mean? Historically, the Supreme Court has held that under the Federal Arbitration Act, if an arbitration clause is silent on the issue of class action claims, then it cannot be presumed that the parties intended that class action claims would be brought in arbitration, and accordingly, such claims should proceed in the courts.[11]

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[10] http://www.lcia.org//Dispute_Resolution_Services/schedule-of-costs-lcia-arbitration.aspx.

[11] *Stolt-Nielsen, S.A. v. AnimalFeeds International*, 559 U.S. 662, 684 (2010).

In *Lamps Plus,* the arbitration clause was silent on the issue of whether or not the movant's class action claims, in regards to an employer's duty to protect employees from phishing scams and identity theft, were arbitable. The state and appellate courts determined that the claims could be brought in arbitration despite the silence in the agreement based on state law contract construction principles. This case is currently pending at the Supreme Court, and illustrates how careful drafting is key but certainly not litigation proof.

In summary, when negotiating a dispute resolution clause, take a step back and evaluate whether traditional litigation or arbitration is the best option. If arbitration is the right choice, carefully consider and research the details and parameters of the arbitration process that the parties will employ. Is there a standard forum with developed rules that is a good fit for the parties? Should something unique be developed to address a particular or recurrent issue (such as an audit process or review of construction costs or tiers of arbitration to allow quick and efficient resolution of small issues and complex proceedings for large issues)? Below is a checklist of issues to keep in mind when drafting or evaluating a proposed arbitration provision:

## KEY CONSIDERATIONS IN DRAFTING AN ARBITRATION PROVISION

- **Confidentiality/Privacy:**
    - Do you need or want a confidentiality and privacy for dispute resolution?
    - With regard to discovery, should confidentiality measures be specified ("attorneys' eyes only" designation for sensitive commercial information, the destruction/return of all documents after arbitration, experts required to sign confidentiality agreements)?
- **Time:**
    - Do you need to set time parameters around the arbitration, including the selection of the arbitrators, discovery period, mediation (if any), the hearing and time for the rendering of the decision?
    - Do you need different timing options for small and large matters?
    - Do you need to have a specific type of relief that can be obtained quickly and outside of arbitration such as emergency injunctive relief?
- **Discovery:**

- What types of discovery are permitted—written requests, interrogatories, requests for admission, depositions, and/or witness statements?
- Is there a limitation on each type of discovery (i.e. number of depositions, requests)?
- Is there a time limit for discovery?
- Is there a limitation on ESI? Who will bear the costs for ESI and discovery?

- **Limitations:**
  - Do you want to change the limitations period for specific causes of action? Can you change those time periods under the applicable law?
- **Causes of actions:**
  - Do you want to limit the types of actions that can be brought in arbitration? Should any be specifically reserved for litigation?
  - What are the triggers for potential causes of actions?
  - What if action is not immediately taken? Should a waiver clause be included?
  - Should different procedures be set for small or routinely anticipated matters? (e.g., single arbitrator, no discovery, an audit process, the issue is submitted to the arbitrator by motion or by limited witness statements)?
- **Law:**
  - What substantive law should be applied? What are the pros/cons of certain types of law?
  - What procedural law should be applied?
  - Should specific arbitration rules be adopted even if the arbitration proceeds with independent arbitrators?
- **Arbitration Association:**
  - What arbitration association (if any) should be invoked?
  - What are the benefits, resources, and limits of the arbitration group (e.g. industry specific, attorney and professional arbitrators, well qualified panel of arbitrators, located near the parties, languages)?
  - What are the costs of that association?

- Does the organization have a well-developed set of rules? Should those rules be limited or modified by agreement to fit the circumstances of the contract and anticipated disputes?
- Would the parties be better served (and avoid significant expense) by using an independent arbitrator? How should that person be chosen? What qualifications would be needed?

- **Location of the arbitration:**
  - Should an arbitration location be set in advance?
  - Should only one party have the right to choose the location?
  - Should it be a mutual decision (especially when litigation has started)? Should there be a default location if the parties cannot mutually agree on a location?
  - Who bears the cost of the venue (which can be significant in an extended arbitration proceeding)?
- **Arbitrators:**
  - What should be the number of arbitrators: one or three?
  - Is specialized knowledge or experience required?
  - May non-lawyer professionals serve as arbitrators?
  - Should a specific group of arbitrators be required?
  - Should a certain number of years of work experience in a certain field or training be required?
- **Damages:**
  - What types of damages can be awarded through arbitration? Special damages? Consequential damages? Punitive damages?
- **Costs:**
  - Who will initially bear the costs of the arbitration? Are all such costs recoverable?
  - Are attorney's fees recoverable as part of the award?
  - Are attorney's fees capped?
  - Are the costs of experts' fees recoverable?

- **Enforcement:**
  - What time period should apply to appeal/enforce the arbitration award? Are there substantive law limitations on what can be changed?
  - Where can the enforcement action be brought? State court? Federal court?
  - If litigation is filed to enforce the arbitration award, who should bear those costs?