Enforcing Your Arbitration Agreement: Where and How

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A dispute has arisen between you and one of your customers, employees, or someone else with whom you do business. Worse, your opponent has opened the hostilities by suing you in state or federal court. You believe there's an agreement that requires the dispute to be resolved in arbitration. But how do you enforce that agreement? And where, in what forum? Thinking about these issues and planning ahead in preparing and executing an arbitration agreement can help avoid uncertainty and costly delays in getting your dispute resolved as you intended.

Who decides "arbitrability"—that is, whether your dispute will be decided by the arbitrators or by a court?

When parties disagree about whether a matter must be arbitrated, there are two "gateway issues" that must be resolved at the outset: (1) whether there is an arbitration agreement, and if so, (2) whether the dispute at issue is covered by that agreement. But who decides those "gateway issues"? It's a tougher question than you might think.

Generally speaking, both "gateway issues" and any sub-issues are presumed to be questions for the court to decide before it will compel the parties to resolve their dispute in arbitration. But both federal and Texas state courts recognize that, because arbitration is favored and is a creature of contract, the parties can alter this normal procedure in their arbitration agreement. That is, they can agree to have the arbitrators, rather than the court, determine questions of "arbitrability."

Obviously, there's a bit of a chicken-and-egg problem: How can arbitrators be authorized to determine arbitrability if there's a question about whether there should be any arbitration (or arbitrators) in the first place? Most jurisdictions, state and federal, have resolved this logical conundrum by (1) having the court determine the threshold question about whether there is any arbitration agreement at all, but then (2) allowing the arbitrators to decide all other issues of arbitrability ***if*** there is "clear and unmistakable evidence" that the parties intended to

delegate those issues to the arbitrators. Whether there exists such “clear and unmistakable evidence” is itself an issue for the court.

So, how do you make sure your arbitration agreement expresses “clear and unmistakable” intent to delegate questions of arbitrability to the arbitrators and not the court? Probably the most common method, recognized by Texas and federal courts, is to explicitly incorporate by reference into the parties’ arbitration agreement the AAA Commercial Rules. That’s because Commercial Rule 7 provides that an 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 or to the arbitrability of any claim or counterclaim.” Even that approach, however, has its limits. For example, a party may be held to have waived its right to arbitrate if that party has “substantially invoke[d] the judicial process to the detriment or prejudice of the other party” before seeking to compel arbitration. The U.S. Fifth Circuit Court of Appeals very recently held, in *International Energy Ventures Management v. United Energy Group* (2021), that a court and not the arbitrator should decide whether such a “litigation-conduct waiver” has occurred, even where the AAA rules were incorporated into the parties’ agreement. In addition, care must be taken not to make any delegation language subject to “carve-outs” or exceptions—circumstances that have led to lengthy and expensive court battles over who decides issues of arbitrability. Decide for yourself whether to delegate those threshold issues to the arbitrators or leave them with the court. But be clear about your choice. Avoid uncertainty, because that can lead to costly preliminary litigation, rather than quick referral of the dispute to arbitration for resolution on the merits.

Prepare to prove the parties and claims are subject to arbitration

Once you’ve established an arbitration agreement exists, you still need to prove that (1) the parties and (2) the claims are subject to that agreement, whether that question is raised before a trial court or the arbitrators. These two inquiries seem simple, but can run into practical real-world problems.

First, what happens if the employee, customer, or other party simply denies that they signed the agreement? Did anyone in your office actually see the person sign it? Was the signature electronic? Where’s the original? You can set up fairly simple processes to avoid this proof conundrum and help ensure your arbitration agreement will be enforced.

If you’re having parties physically sign the arbitration agreement, be sure to establish an HR protocol that ensures that every person signs at the beginning of the relationship, and then have an employee staffed with the job of collecting each original agreement. These agreements can then either be stored alphabetically in one place or be housed with each person’s employment or account file. Knowing where these agreements are stored is essential to efficiently locating each agreement during tight litigation deadlines, should the need arise. If possible, the same person should be in charge of collecting signatures and storing the executed agreements. This allows that person to sign an affidavit “proving up” the agreement—swearing to the court or arbitrators that the arbitration agreement

was signed by the employee and filed in the company's ordinary course of business. If you have multiple offices, consider having one central location where all the signed agreements are kept. And, just to be safe, scan all the paper documents for electronic storage in case the hard copy goes missing, can't be found, or is destroyed.

Electronic signatures present their own unique issues. Relying on the Texas Uniform Electronic Transactions Act, the Supreme Court of Texas in *Aerotek, Inc. v. Boyd* (2021) recently bolstered parties' ability to rely on e-signatures and digital agreements, even when one party denies having electronically "signed" such an agreement. (A discussion of *Aerotek*, with a link to the decision itself, is available ***here***.) Still, how do you prove that the opposing party (and not someone else) actually consented to having their signature electronically placed on the arbitration agreement? As in *Aerotek*, you need to be able to track how the electronic agreement was sent, how it was accessed by the signer, when it was electronically signed, and then where on the computer server it is stored. One way to prevent someone from later denying they electronically executed the agreement is to forward the fully executed agreement by email back to the person after they've signed it. If they don't object at that time, it will be harder for them to deny the electronic signature in the future.

Remember, courts will not necessarily rely on affidavits from an HR employee explaining the customary practices that the business takes when onboarding an employee or vendor. Just because it's the *usual* practice to have someone sign an arbitration agreement on their first day doesn't necessarily prove this particular person signed the agreement, especially if that person denies that they did. You need to set up a provable system that allows you to establish that each employee signed the arbitration agreement, whether by hand or electronically.

Last, the claims asserted in the dispute must fall within the scope of the arbitration provision. Here, the drafter of the agreement can be its best proponent. Both Texas law and federal law strongly favor arbitration and presume that an agreement to arbitrate exists. Therefore, broad language that encompasses all possible disputes between the parties will likely prevail, even if the particular dispute was not foreseen at the time the arbitration agreement was signed. Once the claims asserted touch on the parties' agreement—such as "all claims arising between the parties"—the trial court lacks discretion to refuse to compel arbitration. And if the court doesn't compel, you can seek immediate appellate relief, a remedy the party opposing arbitration does not have if the case is sent to the arbitrators by the court.