

Contractual jury waiver is an alternative to arbitration, Fort Worth Business Press

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Due to various reasons, businesses have sought an alternative to arbitration in determining disputes and have turned to the contractual jury waiver clause. A contractual jury waiver is a contractual clause that expressly states that the parties to the contract waive their right to a jury should a dispute arise between them. An example of such a provision is: "The parties hereby unconditionally waive their right to a jury trial of any and all claims or causes of action arising from or relating to their relationship. The parties acknowledge that a right to a jury is a constitutional right, that they have had an opportunity to consult with independent counsel, and that this jury waiver has been entered into knowingly and voluntarily by all parties to this agreement. In the event of litigation, this agreement may be filed as a written consent to a trial by the court."

If a dispute arises, one party would 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. 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 would a party choose to use a contractual jury waiver as compared to an arbitration clause. Generally, arbitration clauses are a good idea for consumer contracts such as a depositor agreement. The initial filing fees for arbitration are normally prohibitive for consumers, and the clause will ward off some claims. However, arbitration clauses may not be such a good idea for other contracts. 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 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, are granting partial or complete summary judgments on a regular basis. So, if a party is in an arbitration, it will pretty much have to have an evidentiary hearing, 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, including Texas. 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 a bad state or area of a state as well.

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