

State Bar of Texas
Alternative Dispute Resolution Section

CONSUMER ARBITRATION IN TEXAS

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This first edition of Consumer Arbitration in Texas is sponsored and underwritten by the Alternative Dispute Resolution Section of the State Bar of Texas. This pamphlet was written by John K. Boyce, III who gratefully acknowledges the assistance of Kim Lawrence of the Better Business Bureau, Houston in its preparation.

INTRODUCTION

Like many Americans every day, you may have recently purchased a computer, sound system, or mobile home. You may have obtained a credit card. You may have had your car repaired, fixed your foundation or roof, installed siding, moved from one location to another, or even signed on with a new Internet service provider. That makes you a consumer. Often buried in all the fine print of the agreement or application you signed is what is referred to as an “arbitration” clause. This clause governs any disputes—from a claim for defective goods to a failure to pay—which arise under the agreement or application. It means that you will go to arbitration if there is a dispute.

The State Bar of Texas believes that arbitration is an appropriate way to resolve disputes for consumer transactions. When conducted with adequate safeguards, it offers consumers a fast and fair resolution of their dispute. The purpose of this brochure is to give you a basic understanding of what you can expect in the arbitration process.

What is Arbitration?

In a nutshell, arbitration is the process whereby a dispute is submitted to one or a panel of three individuals—the “arbitrators”—for a final and binding determination, known as the award. The panel conducts itself similarly to a judge. The arbitrators conduct the hearing, listen to opening and closing arguments, witnesses, experts and other testimony, weigh evidence, review the information provided by both parties, and render an award enforceable in court. The case is usually administered by a neutral arbitration service provider who provides the parties with a set of defined rules under which the arbitration will be conducted, as well as setting the fees for the arbitration.

Normally, for arbitration to take place there has to be an arbitration clause in a contract. Although parties may enter into such an arrangement either at the beginning of their contractual relationship or at some later date after the controversy has arisen, the former is more common.

What Is an Arbitration Clause?

An arbitration clause commits you to submitting to binding arbitration if a dispute arises. This prevents you from ever being able to take the company or business to court.

When to Look. Before you sign the contract! Once you have signed a contract, the arbitration clause is in full effect. Courts do uphold arbitration clauses.

Where to Look. The arbitration clause is typically located within the last five paragraphs of the contract or may be contained on a separate page. When you turn to the signature line, scan the last few paragraphs and look for a heading related to “Disputes”, “Dispute Resolution”, or “Arbitration”.

What It Should Contain. An arbitration clause should tell you what rules you must arbitrate under, where the arbitration is to be conducted, who the arbitration service provider is, and how you may contact that arbitration service provider for more information or to file a dispute. The service provider will set the fees.

How is Arbitration Different from Going to Court?

Arbitration is designed to be user-friendly. In comparing arbitration to formal courts, it is helpful to note these major features of arbitration:

Informal procedures. There are no formal rules of evidence in arbitration as in courts. All forms of evidence are acceptable, and it will be the arbitrator’s job to apply the appropriate weight to evidence presented. The arbitrator may curb any testimony that is irrelevant or repetitious. The parties are entitled to be represented by anyone of their choosing. Although they may choose an attorney, the parties are not limited to representation by an attorney. Both parties may make a personal presentation of their claim,

including testimony, witnesses, evidence, experts, and closing statements. Each party may question and rebut the other person's testimony, witnesses, and evidence.

Objective and knowledgeable neutrals serve as arbitrators. Unlike courts, where a judge is assigned to a case, arbitrators are selected by the parties for the specific cases because of their knowledge of the subject matter. They cannot be biased towards the business or consumer.

Arbitration Can Be Confidential. The parties may decide whether the hearings are closed and the proceedings are not a matter of public record.

Economy. The costs of arbitration proceedings are generally less than costs of formal courts.

Speed. Arbitration is much faster than going to court. Most consumer disputes are resolved in one day or less.

Final and binding awards. Arbitrators may grant any remedy or relief that the arbitrator deems just and equitable, and the award is binding and enforceable in court.

Is Arbitration Fair?

Realizing that arbitration clauses (as well as many other provisions) are seldom changed in “form” agreements or applications signed by consumers, the State Bar of Texas has adopted the fifteen guidelines at the end of this publication to assist courts and businesses to insure that arbitration is fair to the consumer.

What to Do if You Have a Dispute?

If you have a dispute with a business over an agreement that calls for arbitration, follow the procedures referenced in the agreement, notify the business, in writing, that you wish to resolve the dispute through arbitration, or contact the arbitration service provider referenced in the agreement. The most common providers in Texas are:

AAA–The American Arbitration Association– www.adr.org

BBB–The Better Business Bureau–www.bbb.org

JAMS–Judicial Arbitration and Mediation Services, Inc.–www.jamsadr.com

Council, Alternative Dispute Resolution Section, State Bar of Texas *

(The Council of the Alternative Dispute Resolution Section of the State Bar of Texas has general supervision and control of the affairs of the Section subject to the provisions of the charter and bylaws of the State Bar of Texas and the bylaws of the Section.)

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State Bar of Texas Fair Practice Guidelines

The best practices described below, adopted by the Alternative Dispute Section, State Bar of Texas, June, 2005, apply to pre-dispute agreements to arbitrate that are contained in contracts between a business and a consumer. A consumer is a person who enters into a transaction primarily for personal, household, or other family purposes.

1. Arbitration is a selection of a dispute resolution forum. An agreement to arbitrate is not the waiver of substantive legal rights but merely a change in the forum. Therefore, an arbitration agreement must provide a fair process with appropriate safeguards for due process.
2. The agreement to arbitrate should be mutual and reciprocal. If a consumer is required to arbitrate the consumer's claims, then the business must equally be bound to arbitrate its claims against the consumer. The business should not be given an "opt-out" right unless the same is granted to the consumer.
3. The arbitration clause must be conspicuous and sufficiently clear to notify the consumer of the terms and conditions relating to the arbitration. Ideally, the notice should specifically state that both parties are waiving any right to a jury trial.
4. Arbitrators must be neutral and independent. Arbitrators should be required to adhere to the Arbitrator Ethics Guidelines adopted by the American Bar Association and the Alternative Dispute Resolution Section of the State Bar of Texas. This includes the requirement that arbitrators should be required to disclose all former and current associations and relationships with the parties and attorneys in a case that are likely to affect partiality or relationships that would cause a reasonable person to conclude the arbitrator was partial to one party to the arbitration.
5. Arbitration service providers must be independent. When an arbitration agreement names an arbitration service provider in which the business is a member, the agreement should also provide the option for the consumer to choose another non-affiliated and independent service provider to administer the arbitration. Full disclosure of the relationship should be made when a party is affiliated with or a member of the arbitration service provider.

6. All parties to an arbitration agreement should be provided an equal opportunity to participate in the selection of the arbitrator.
7. Consumers forum access fees which include arbitration filing fees, administrative fees, and arbitrator expenses must be reasonable. One of the factors to consider in the determination of what is a reasonable charge, is the amount of filing fees and court fees which a party would be expected to pay to initiate litigation of the claim.
8. The arbitration agreement should not require a consumer who does not prevail in an arbitration to pay the attorney fees or arbitration expenses of the business unless such payment is expressly provided in an applicable state or federal statute.
9. Consumers and businesses should be provided adequate disclosures and, if necessary, discovery in order to allow each party reasonable opportunity to fully present its claims or defenses. The amount and scope of discovery should be subject to the direction of the arbitrator and should be consistent with the equal goals of providing each party an adequate opportunity to develop its claim or defense and to avoid the excessive costs incurred in civil litigation.
10. A consumer is entitled to an in person hearing, and is entitled to be represented.
11. The arbitration venue should be in reasonable proximity of a consumer's residence.
12. The arbitrator must be given the power to award any damages or other relief that the consumer would be entitled to recover under applicable federal or state law.
13. The award of the arbitrator should include a brief written statement of the basis of the award.
14. The arbitration agreement should provide that when the size of the claim is small, either party may elect to bring the claim in small claims court.
15. A predispute agreement to arbitrate should not require the arbitration award itself to be confidential, as there may be good reason to allow a synopsis of each award to be subject to public review or reporting. Normally, the proceeding is private. Subsequent to the occurrence of a dispute, the parties may mutually enter into an agreement providing that the arbitration hearing, arbitration award, or both will be confidential.

