

ARBITRATION, FORUM-SELECTION, AND THE CONTRACTUAL JURY WAIVER CLAUSES: WHY DIFFERING STANDARDS FOR ENFORCEABILITY?

BY DAVID F. JOHNSON, Winstead PC

In Texas, there are differing standards for enforcing arbitration, forum-selection, and contractual-jury-waiver clauses. Texas courts liberally enforce arbitration clauses, notwithstanding the fact that a party waives its constitutional right to a jury trial and has a very limited right to appeal an arbitrator's decision. In Texas, arbitration agreements are interpreted under general contract principles, and, to enforce an arbitration clause, a party must merely prove the existence of an arbitration agreement and also prove that the claims asserted are within the scope of the agreement. Texas courts have not limited arbitration precedent solely to arbitration—they also apply it to forum-selection clauses. The Supreme Court of Texas has issued three opinions dealing with the enforceability of forum-selection clauses and in doing so has cited and referred to arbitration precedent. Enforcement of forum-selection clauses is mandatory unless the party opposing enforcement clearly shows that enforcement would be unreasonable and unjust or that the clause is invalid for such reasons as fraud or overreaching. The party opposing the clause's enforcement has the burden to prove that the clause is invalid. Courts have not held that there has to be any showing of a knowing or voluntary agreement to a forum-selection clause. Moreover, courts have applied estoppel so that non-signatories can enforce arbitration and forum-selection clauses.

However, Texas courts have not viewed contractual-jury-waiver clauses as favorably as arbitration and forum-selection clauses. The Texas Supreme Court has issued two decisions enforcing such provisions, and the Court's language in those decisions suggests a liberal enforcement of the provisions. But the Court's requirement that the parties must have voluntarily and knowingly entered into the agreement doesn't apply to arbitration or forum-selection clauses. Two Texas courts of appeals have furthered that requirement and held that the burden

is on the party attempting to enforce a jury-waiver provision to prove a voluntary and knowing waiver, and there is a presumption against enforcement of such a provision. Additionally, one court has held that non-signatories cannot enforce jury waiver provisions under estoppel theories that apply to arbitration and forum-selection clauses.

The Texas Supreme Court has not discussed why the standards are different for contractual jury waivers than for arbitration or forum-selection clauses. However, it has clearly conceded that contractual jury waivers are less intrusive than arbitration agreements and forum-selection clauses. One reason that arbitration clauses are favorably viewed is that there are federal and state statutes extolling arbitration's virtues, but there are no such statutes for jury waivers. Of course, a statute should not trump a constitutional right. If the "knowing and voluntary" requirement is constitutional, then it should apply to arbitration agreements, notwithstanding statutory enactments—but it does not. Arbitration agreements are judged as contractual clauses, and there merely has to be a showing of mutual assent. Such agreements are valid and enforceable without any showing of a voluntary and knowing waiver, and there is no conspicuousness requirement. Further, there are no statutes that extol the virtues of forum-selection clauses, yet those clauses are seemingly viewed as favorably as arbitration agreements. Both arbitration and forum-selection clauses are often enforced against and by parties that were not even signatories to the agreements.

Is there any reason to apply arbitration precedent and presumptions to forum-selection clauses and not to contractual jury waivers? Certainly, litigating in other countries of the world has a huge impact on parties' constitutional rights, and few countries provide a right to a jury. Moreover, there are other rights, such as the examination of witnesses, presentation of evidence, and right to

appellate relief, that may be limited. Why is there a lesser standard for enforcing these provisions than for jury waivers? There is no good reason.



Arbitration, forum-selection, and jury-waiver clauses should all be judged by the same standard. They all deprive a party of constitutional rights—but, as courts acknowledge, a party can waive those rights. They should all be judged by either the contract/mutual-assent standard of arbitration agreements or by some higher "knowing and voluntary" standard. Further, estoppel should apply to all of these clauses or none of them. There is no logical difference between them.

There is no question that contractual jury waivers are enforceable in Texas under the right circumstances. The issue facing Texas courts is whether the clause is something different from an arbitration clause or a forum-selection clause, so that it should be judged more strictly. Does Texas law require a jury-waiver clause to be conspicuous? Does the clause have to be knowingly and voluntarily entered into by both parties? If so, whose burden is it to prove a knowing and voluntary waiver? Are there any presumptions in favor of or against jury waivers? What factors will Texas courts look to in determining a voluntary and knowing waiver? Is the scope of the jury waiver viewed broadly or narrowly? Until the Texas Supreme Court weighs in on more contractual-jury-waiver cases, there will be some uncertainty, and there will likely be conflicts among the Texas courts of appeals on the above questions.

David F. Johnson is board certified in civil-appellate law and personal-injury trial law by the Texas Board of Legal Specialization. Mr. Johnson is a shareholder in Winstead's Fort Worth office and is a founding member of Winstead's appellate-practice group and is also a member of the insurance-industry-practice group.