Arbitration, Forum-Selection, and Contractual Jury Waiver Clauses: Why Differing Standards For Enforceability?

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I. Introduction

Some courts view contractual jury waivers differently from, and more stringently than, arbitration clauses or forum-selection clauses. This is an important issue to parties conducting business in Texas as the use of contractual jury waivers has continued to increase. This article addresses the general standards for enforcing these clauses and whether those standards should be different. The article also addresses the impact of a choice-of-law clause on the interpretation and enforceability of these clauses.

II. Arbitration Clauses

Over the past few decades, parties have increasingly resorted to the use of arbitration clauses in a number of contractual contexts. That is not surprising as there are federal and state statutes that support and encourage the use of arbitration for dispute resolution. Correspondingly, courts have been very willing to assist parties in enforcing arbitration agreements.

A party seeking to enforce an arbitration agreement should file a motion to compel arbitration. Typically, when the motion is granted, the trial court abates all proceedings and orders that the claimant initiate arbitration proceedings. Once in arbitration, the claimants have limited discovery and agree that either a single arbitrator or a panel of arbitrators decide issues of fact and law. Therefore, by agreeing to arbitrate, the parties agree to waive their right to a jury trial. Once the arbitrator renders a decision, the prevailing party files the decision with the trial court for enforcement. The parties have very little opportunity for appellate review over the arbitrator's decision.

A. Enforcement of Arbitration 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. *See In re Kellogg Brown & Root*, 166 S.W.3d 732, 738 (Tex. 2005); *J.M. Davidson, Inc. v. Webster*, 128 S.W.3d 223, 227 (Tex. 2003). To enforce an arbitration clause, a party must merely prove the existence of an arbitration agreement and that the claims asserted fall within the scope of the agreement. *See In re Oakwood Mobile Homes, Inc.*, 987 S.W.2d 571, 573 (Tex. 1999). There are no special defenses to an arbitration agreement other than normal contract defenses such as fraud, duress, and unconscionability.

For example, in *In re Poly-America, L.P.*, the Texas Supreme Court compelled arbitration in a dispute between an employee and an employer, but found that certain provisions were unconscionable and not enforceable. 262 S.W.3d 337 (Tex. 2008). The employee's contract contained an arbitration provision that required the employee to split arbitration costs up to a capped amount, limited discovery, eliminated punitive damages and reinstatement damages available under the Texas Worker's Compensation Act, and imposed other conditions on the arbitration process. The employee was allegedly terminated for applying for worker's compensation benefits, and the employee sued his employer for retaliatory discharge. The employer filed a motion to compel arbitration of the dispute, and the trial court granted the motion. The court of appeals granted mandamus relief to the employee, finding that the arbitration agreement was not enforceable.

The Texas Supreme Court held that the arbitrator was the correct person to determine whether the cost-shifting and discovery limitations were conscionable and held that the provisions in the agreement precluding remedies under the Texas Worker's Compensation Act were

substantively unconscionable and void under Texas law. However, the Court held that those provisions were not integral to the parties' overall intended purpose to arbitrate their disputes, and pursuant to the agreement's severability clause, they were severable from the agreement. Therefore, the Court enforced the agreement and sent the dispute to arbitration.

In *In re Fleetwood Homes of Texas, L.P.*, a mobile home manufacturer and its dealer disputed the manufacturer's right to cancel their contract. 257 S.W.3d 692 (Tex. 2008). Notwithstanding the fact that the contract contained an arbitration clause, the dealer filed suit against the manufacturer in Texas state district court in October of 2005. The manufacturer answered the lawsuit and filed a motion to compel arbitration. However, the manufacturer did not immediately set that motion for hearing; rather, it discussed a trial setting with the dealer, served one set of written discovery, and defended several depositions. Eight months after filing its motion, the manufacturer set a hearing on its motion to compel arbitration. The trial court denied the motion. After the court of appeals denied mandamus relief, the manufacturer filed a petition for writ of mandamus with the Texas Supreme Court.

The Texas Supreme Court addressed two issues: 1) whether discussing a potential trial setting and serving written discovery intentionally or impliedly waived the manufacturer's arbitration rights; and 2) whether the arbitration clause was unconscionable because it limited discovery for both parties. The Supreme Court held that an email discussion of the trial setting was not an express waiver of the manufacturer's right to arbitration because the communication did not rise to the level of an express waiver. The Court did not decide whether express waiver and implied waiver were governed by different rules. The Court then found that under its previous precedents the manufacturer's conduct did not rise to the level that would support an implied waiver because there was no showing of any prejudice by the dealer.

The Court held that the arbitration clause was not unconscionable because it provided for streamlined discovery because discovery was limited for both parties. The Court determined that one of the most distinctive features of arbitration was its limited discovery and that accepting the dealer's argument would mean that almost all arbitration agreements would be unconscionable. The Court emphasized that the clause limited discovery for both parties. Therefore, the Court granted the manufacturer's petition and compelled arbitration.

In *In re U.S. Home Corp*., sellers' contracts and warranties for new homes contained arbitration agreements governed by the FAA. 236 S.W.3d 761 (Tex. 2007). The plaintiffs alleged that defective showers had caused mold growth and that the sellers' remediation plan was inadequate. The trial court found that the arbitration clauses were contracts of adhesion and thus procedurally unconscionable. The Texas Supreme Court held to the contrary, stating that although the sellers refused to enter into contracts with buyers who would not agree to arbitration, the agreements were not thereby rendered unconscionable. Further, although the arbitration clause was on the back of a single-sheet contract, its placement did not constitute fraud. The arbitration clauses were supported by mutual consideration because both parties agreed to arbitration and the sellers could not cancel the contracts at will. The evidence did not show that arbitration would be unduly burdensome and costly. No harm resulted from the sellers' failure to invoke mediation first. A clause that allowed either party to request arbitration was not ambiguous. Although only the builder signed the agreement, the arbitration clause also applied to its employees. The Court granted the sellers' petition for writ of mandamus and compelled the plaintiffs' claims to arbitration.

B. Conspicuousness Requirement

In Texas, there is a presumption that parties that sign contracts have read and understood the contracts' provisions. *See Cantella & Co. v. Goodwin*, 924 S.W.2d 943 (Tex. 1996). There is no requirement that the party relying on the arbitration agreement prove that it is conspicuous. For example, an arbitration clause can be incorporated by reference into another contract. *See In re Bank One*, 216 S.W.3d 825, 826 (Tex. 2007). In *Bank One*, the Court enforced an arbitration agreement that was contained in a lengthy depository agreement that had been incorporated by reference into an account signature card. *See id.* Certainly, a clause that is not expressly set out in an agreement is not conspicuous.

It should be noted that there are narrow statutory exceptions: the Texas Property Code requires that arbitration clauses in new home contracts be conspicuous, and the Texas Business and Commerce Code requires that an arbitration clause in certain contracts requiring arbitration in another jurisdiction be conspicuous. *See* TEX. PROP. CODE ANN. § 420.003, TEX. BUS. & COM. CODE ANN. § 35.53(b).

C. Direct-Benefits Estoppel Theory

The Texas Supreme Court held that the direct-benefits estoppel theory may apply to allow a non-signatory to enforce an arbitration clause or to enforce an arbitration clause against a non-signatory. "[A] litigant who sues based on a contract subjects him or herself to the contract's terms." *In re FirstMerit Bank*, 52 S.W.3d 749, 755 (Tex. 2001) (emphasis added). Therefore, a party is estopped from suing "based on the contract" and at the same time ignoring an arbitration clause contained in that contract.

In *FirstMerit Bank*, the non-signatory plaintiffs sued the signatory defendant for, among other things, breach of contract, revocation of acceptance, and breach of warranty. *See id*. at 752-53, 755. By bringing the breach-of-contract and breach-of-warranty claims, the plaintiffs sought benefits that stemmed directly from the contract's terms. The Texas Supreme Court concluded that, by seeking to enforce the contract, the non-signatory plaintiffs "subjected themselves to the contract's terms, including the Arbitration Addendum." *Id*. at 756.

The Court has subsequently repeatedly used direct-benefits estoppel in the context of arbitration clauses. *See Meyer v. WMCO-GP LLC*, 211 S.W.3d 302 (Tex. 2006) (applying direct benefits estoppel to allow a non-signatory defendant to enforce arbitration clause against a signatory plaintiff); *In re Vesta Insurance Group, Inc*., 192 S.W.3d 759 (Tex. 2006). *But see In re Kellogg Brown & Root, Inc*., 166 S.W.3d 732, 741 (Tex. 2005) (holding that estoppel did not apply to facts of case).

D. Conclusion On Arbitration Clauses

Texas courts liberally enforce arbitration clauses. There is a strong presumption in favor of enforcing arbitration clauses, and a party fighting arbitration has the burden to raise contractual defenses. An arbitration clause can be enforced against by or against a non-signatory. Absent narrow statutory exceptions, there is no conspicuousness requirement, and parties can even enter into enforceable arbitration agreements by incorporation. Courts seem to treat arbitration clauses like any other contractual clause.

III. Forum-Selection Clauses

As business deals become more and more complex and frequently involve parties that are citizens of different forums, the issue of contracting for dispute resolution in

a particular forum has become very common. Parties often spend much time and effort resolving this issue in the negotiation process that results in a contractual clause – a forum-selection clause – in their agreement. A forum-selection clause is a clause in a contract that provides that any dispute between the parties shall be filed in a particular jurisdiction. Otherwise stated, a "mandatory forum-selection clause" is a contractual provision that requires certain claims to be decided in a forum or forums other than the forum in which the claims have been filed. *See Deep Water Slender Wells, Ltd. v. Shell Int'l Exploration & Prod., Inc.*, 234 S.W.3d 679, 687 n.3 (Tex. App.—Houston [14th Dist.] 2007, pet. denied).

Of course, disputes arise when a party to the contract simply disregards the forum-selection clause and files suit in a forum that violates the parties' agreement. For example, the parties may choose to have their disputes resolved in states such as New York, Illinois, California, and Florida, or may choose a foreign country such as England, Germany, or Brazil. If a dispute arises, and a party files suit in Texas, the defendant may want to hold the plaintiff to their agreement and have the dispute resolved in the forum previously agreed upon. The defendant would then file a motion to dismiss the suit. A motion to dismiss is the proper procedural mechanism for enforcing a forum-selection clause that a party to the agreement has violated in filing suit. *See In re AIU Ins. Co.*, 148 S.W.3d 109, 111-21 (Tex. 2004). Once dismissed, the plaintiff would then have to file suit in the jurisdiction contained in the parties' agreement.

A. Historic Enforcement of Forum-Selection Clauses in Texas

Texas courts, like others across the country, had historically invalidated forum-selection clauses for violating public policy. *In re AIU Ins. Co.*, 148 S.W.3d 109, 111 (Tex. 2004). *See also M/S Bremen v. Zapata Off-Shore Co.*, 407 U.S. 1, 9, 92 S. Ct. 1907, 1913, 32 L. Ed. 2d 513 (1972). However, since the United States Supreme Court's landmark decision in *M/S Bremen*, and its later decision in *Carnival Cruise Lines, Inc. v. Shute*, 499 U.S. 585, 595-96, 113 L.Ed.2d 622, 111 S.Ct. 1522 (1991), Texas courts have begun enforcing forum-selection clauses. *See In re AIU Ins. Co.*, 148 S.W.3d at 111-12.

Historically, Texas courts and federal courts used different analyses to determine the enforceability of mandatory forum-selection clauses. *See Phoenix Network Techs. (Europe) Ltd. v. Neon Sys., Inc.*, 177 S.W.3d 605, 611-14 (Tex. App.—Houston [1st Dist.] 2005, no pet.). Under the test of *M/S Bremen* and *Shute*, forum-selection clauses "are prima facie valid and should be enforced unless enforcement is shown by the resisting party to be 'unreasonable' under the circumstances." *M/S Bremen*, 407 U.S. at 10, 92 S. Ct. at 1913; *see Shute*, 499 U.S. at 588, 111 S. Ct. at 1525. The clause's opponent has a "heavy burden" to make a "strong showing" that the forum-selection clause should be set aside. *M/S Bremen*, 407 U.S. at 15, 92 S. Ct. at 1916. This burden includes "clearly" showing that enforcement would be "unreasonable and unjust"; that the clause was "invalid for such reasons as fraud or overreaching"; that "enforcement would contravene a strong public policy of the forum in which suit is brought, whether declared by statute or by judicial decision"; or that "the contractual forum will be so gravely difficult and inconvenient" that the opponent "will for all practical purposes be deprived of his day in court." *M/S Bremen*, 407 U.S. at 15, 18, 92 S. Ct. at 1916, 1917.

In contrast, most Texas courts of appeals had recognized a two-part test to determine whether a forum-selection clause was valid and enforceable: the clause was enforceable if (1) the parties contractually consented to submit to the exclusive jurisdiction of another jurisdiction and (2)

the other jurisdiction generally recognized the validity of such provisions. *See Satterwhite Aviation Serv. v. Int'l Profit Assocs.*, No. 01-07-00053-CV, 2008 Tex. App. LEXIS 674 (Tex. App.—Houston [1st Dist.] January 31, 2008, no pet. h.) (court cited historical standard as correct standard even after Texas Supreme Court opinions); *My Cafe-CCC, Ltd. v. Lunchstop, Inc.*, 107 S.W.3d 860, 864-65 (Tex. App.—Dallas 2003, no pet.); *Holeman v. Nat'l Bus. Inst., Inc*., 94 S.W.3d 91, 97 (Tex. App.—Houston [14th Dist.] 2002, pet. denied); *Barnett v. Network Solutions, Inc*., 38 S.W.3d 200, 203 (Tex. App.—Eastland 2001, pet. denied); *Mabon Ltd. v. Afri-Carib Enters., Inc*., 29 S.W.3d 291, 296-97 (Tex. App.—Houston [14th Dist.] 2000, no pet.); *Southwest Intelecom, Inc. v. Hotel Networks Corp*., 997 S.W.2d 322, 324 (Tex. App.—Austin 1999, pet. denied); *Accelerated Christian Educ., Inc. v. Oracle Corp*., 925 S.W.2d 66, 70 (Tex. App.—Dallas 1996, no writ); *Greenwood v. Tillamook Country Smoker, Inc*., 857 S.W.2d 654, 656 (Tex. App.—Houston [1st Dist.] 1993, no writ). *See also In re GNC Franchising, Inc.*, 22 S.W.3d 929 (Tex. 2000) (Hecht, J. dissenting from denial of petition for writ of mandamus). Even if these two threshold criteria were met, however, a forum-selection clause would not bind a Texas court if the interests of witnesses and public policy strongly favored that the suit be maintained in a forum other than the one to which the parties had agreed. *See My Cafe-CCC, Ltd.*, 107 S.W.3d at 865; *Holeman*, 94 S.W.3d at 97; *Southwest Intelecom, Inc*., 997 S.W.2d at 324; *Accelerated Christian Educ., Inc.*, 925 S.W.2d at 71; *Greenwood*, 857 S.W.2d at 656.

One court has held that the principal differences between the *M/S Bremen* and *Shute* test and the Texas courts-of-appeals test were:

> (1) the M/S Bremen and Shute test views the forum-selection clause as prima facie valid and enforceable, while the Texas test requires the clause's proponent to establish, as a threshold matter, that the forum that the parties selected recognizes the validity of the general type of forum-selection clause and (2) the M/S Bremen and Shute test allows the opponent to defeat the forum-selection clause if, among other things, its enforcement would be unreasonable or unjust, while the Texas test does not expressly recognize this enforcement exception.

Phoenix Network Techs. (Europe) Ltd. v. Neon Sys., Inc., 177 S.W.3d at 611-14.

B. Current Test For Enforcement Of Forum-Selection Clause

The Texas Supreme Court clarified that the test for enforcement in Texas was the same as the federal test. In *In re AIU Insurance*, AIU, a New York corporation, provided pollution-liability coverage for, among other entities, a Delaware corporation ("Dreyfus") with its principal place of business in Texas. 148 S.W.3d 109, 110-11 (Tex. 2004). Dreyfus sued AIU in Texas for breach of contract, statutory, and tort claims regarding whether certain environmental claims against it were covered by the policy. *See id*. at 111. AIU moved to dismiss the suit because the policy contained a forum-selection clause providing for suit in New York. *See id.* The trial court denied AIU's dismissal motion, the court of appeals denied a writ of mandamus, and the Texas Supreme Court granted writ. *See id*. at 110-11.

The Court noted that this was the first case where it addressed the validity of a forum-selection clause. *See id*. at 111.

Historically, forum-selection clauses were not favored because they were viewed as "ousting" a court of jurisdiction. *See id.* However, the Court noted that the United States Supreme Court had held that such clauses should be given full effect "absent fraud, undue influence, or overweening bargaining power." *Id*. (quoting *Bremen v. Zapata Off-Shore Co.*, 407 U.S. 1, 32 L.Ed. 513, 92 S.Ct. 1907 (1972)). The United States Supreme Court held that such a clause should control absent a strong showing that it should be set aside," and that "the correct approach [is] to enforce the forum clause specifically unless [the party opposing it] could clearly show that enforcement would be unreasonable and unjust, or that the clause was invalid for such reasons as fraud or overreaching." *Id*. A clause may come under one of these exceptions "if enforcement would contravene a strong public policy of the forum" where the suit was filed, or "when the contractually selected forum would be seriously inconvenient for trial." *Id*.

The Texas Supreme Court held that the forum-selection clause was enforceable and rejected Dreyfus's arguments that certain of the factors established in *M/S Bremen* and *Shute* made the clause unenforceable. *See id*. at 111-16. The Court placed the burden on Dreyfus, the party opposing enforcement of the forum-selection clause, to carry its "heavy burden" of showing that the forum-selection clause should not be enforced under the *M/S Bremen* and *Shute* test. *Id*. at 113-14. The Court found that Dryfus did not meet its burden: "In the present case, the State of New York is not a 'remote alien forum.' There is no indication that AIU or Dreyfus chose New York as a means of discouraging claims. Nor is there any evidence of fraud or overreaching." *Id*. at 114. The Court held that it was certainly foreseeable to Dreyfus that it would have to litigate in New York, and that Dreyfus had shown that litigating in New York would essentially deprive it of its day in court. *Id*. at 113. After a lengthy discussion about whether AIU had an adequate remedy at law, the Court granted its petition for writ of mandamus.

Currently, "Texas state courts employ the federal standard for analyzing forum selection clauses; thus, our analysis under federal law is substantively similar to state law, and we apply Texas procedural rules." *In re Omega Protein, Inc.*, NO. 01-08-00656-CV, 2009 Tex. App. LEXIS 419 (Tex. App.—Houston [1st Dist.] January 20, 2009, orig. proceeding) (citing *Michiana Easy Livin' Country, Inc. v. Holten*, 168 S.W.3d 777, 793 (Tex. 2005)). One court has come to at least two conclusions. "First, the Texas Supreme Court has expressly adopted the *M/S Bremen* and *Shute* test, including who has the burden to show that the forum-selection clause should not be enforced and of what that burden consists." *See Phoenix Network Techs. (Europe) Ltd. v. Neon Sys., Inc.*, 177 S.W.3d at 611-14. "Second, the Texas Supreme Court has implicitly adopted the presumption from *M/S Bremen* and *Shute* that forum-selection clauses are prima facie valid." *Id*. The Texas Supreme Court's implicit adoption of the federal presumption supplants the threshold requirement that the clause's proponent establish that the forum that the parties selected recognizes the validity of forum-selection provisions. *See id*.

The Texas Supreme Court has narrowly applied defenses to the enforcement of a forum-selection clause. In *In re Lyon Financial Services Inc*., a Texas imaging company ("MNI") entered into a lease with Lyon for the use of imaging equipment. 257 S.W.3d 228 (Tex. 2008) (per curiam). The lease agreement contained a forum-selection clause that provided that the state and federal courts of Pennsylvania had jurisdiction over all matters arising out of the lease, but that Lyon had the right to file suit in any jurisdiction where MNI, a surety, or the collateral resided or were located. Furthermore, there were three related schedules all incorporating by reference the

equipment lease and a subsequent restructuring agreement incorporating the previous lease. The agreements also specified that Pennsylvania law would be used for interpretation. After a dispute arose concerning whether Lyon had improperly charged MNI for equipment, MNI sued Lyon in Texas state district court for usury and unjust enrichment. Lyon filed a motion to dismiss and asserted that the forum-selection clause mandated that MNI file suit in Pennsylvania. The trial court denied the motion, and the court of appeals denied Lyon's petition for writ of mandamus.

The Texas Supreme Court first stated that forum-selection clauses are presumptively enforceable. It then addressed MNI's arguments as to why the clause should not be enforced. First, MNI argued that the clause was a product of fraudulent misrepresentations. The Court held that fraudulent inducement to sign an agreement containing a forum-selection clause will not bar enforcement of that provision unless the specific forum-selection clause was the product of fraud or coercion. MNI had an affidavit from its representative that stated he was misled that the forum-selection clause only applied to a schedule that he was not suing upon. The Court determined that this was insufficient because the agreements contained clauses that represented that they were the entire agreements between the parties and that there were no prior representations not contained in the agreements. The Court stated that a party who signs an agreement is presumed to know its contents, and that includes documents specifically incorporated by reference. Further, MNI's representative failed to state that he would not have signed the agreement absent the alleged misrepresentation. The Court found that there was no evidence that the forum-selection clause was secured by a misrepresentation or fraud.

Second, MNI argued that the clause should not be enforced because there was a disparity in bargaining power in that MNI's representative did not have legal advice, had no formal business school training, was not aware of the clause when he signed the agreement, and that the agreements were presented on a take-it-or-leave-it basis. The Court determined that these facts did not show unfairness or overreaching. The Court held that the agreements were not a result of unfair surprise or oppression because the forum-selection clause was in all capital letters. The Court also found that the clause was not unfair simply because the clause allowed Lyon to file suit in Texas or Pennsylvania and required MNI to solely file suit in Pennsylvania because these types of clauses do not require mutuality of obligation so long as adequate consideration is exchanged.

Third, MNI argued that Pennsylvania was an inconvenient forum and that enforcing the provision would produce an unjust result. MNI produced evidence that it was a small business and did not have the ability to pursue claims in Pennsylvania. The Court stated that by entering into the agreements both parties effectively represented to each other that the agreed forum was not so inconvenient that enforcing the clause would deprive either party of their day in court. The Court then held that Pennsylvania is not a "remote alien forum," and that there was no proof that an unjust result would occur in enforcing the clause.

Fourth, MNI argued that it would be unjust to enforce the clause because Pennsylvania does not allow a corporation to sue for usury. The Court held that MNI's inability to assert its usury claim does not create a public policy reason to deny enforcement of the clause. Texas law in an area does not establish public policy that would negate a contractual forum-selection clause, absent a statute requiring suit to be brought in Texas. Further, MNI made no showing that even using Pennsylvania law, that Pennsylvania would not apply Texas law in determining the parties' rights. Therefore, the Court conditionally granted

the petition and ordered the trial court to grant the motion to dismiss.

There are several interesting points raised by *In re Lyon Financial Services Inc*. First, the Texas Supreme Court will make it very difficult for a plaintiff to argue that he was defrauded into entering into a forum-selection (or arbitration) clause where the agreement contains language that it is the final agreement and that there are no other representations outside of the agreement. This language is typical in most agreements and seemingly trumps a plaintiff's affidavit evidence to the contrary. Second, the Court seems to be very unwilling to find that a forum-selection clause is not enforceable simply because the plaintiff did not read it, it is contained in an "adhesion" contract, and/or it would be expensive for the plaintiff to litigate in the forum of choice.

In *In re International Profit Associates, Inc*., the plaintiff entered into two-page consultation agreements with the defendants whereby the defendants would provide business consulting services. 274 S.W.3d 672 (Tex. 2009). There was a forum-selection clause above the signature line of the agreements that stated: "It is agreed that exclusive jurisdiction and venue shall vest in the Nineteenth Judicial District of Lake County, Illinois, Illinois law applying." *Id*. The defendants then recommended that the plaintiff hire an individual named David Salinas to help increase sales. Allegedly, Salinas then embezzled large sums of money from the plaintiff. The plaintiff sued the defendants in Texas state court based on negligence, fraud, negligent misrepresentations, and a breach of good faith and fair dealing. The defendants filed a motion to dismiss the suit based on the forum-selection clauses contained in the agreements.

The plaintiff argued that the clauses were unenforceable because (1) they were ambiguous; (2) they were procured through overreaching and fraud; (3) the interests of the defendants' witnesses and the public favored litigating the case in Texas; and (4) enforcement of the clauses would effectively deprive the plaintiff of its day in court. The Texas Supreme Court disagreed with each of these, and, in a per curiam opinion, conditionally granted the petition and ordered the trial court to grant the defendants' motion to dismiss.

The Court started its analysis with the following statement: "Forum-selection clauses are generally enforceable, and a party attempting to show that such a clause should not be enforced bears a heavy burden." Id. In discussing the ambiguity argument, the Court stated that just because the clauses did not mention "litigation" did not mean that they were ambiguous:

> A contract is ambiguous when it is susceptible to more than one reasonable interpretation. The forum-selection clauses in this case are not susceptible to more than one reasonable interpretation. Each clause specifies that exclusive jurisdiction and venue shall vest in [Illinois]. The only reasonable interpretation is that the clauses fix jurisdiction and venue for judicial actions between the parties in a specific location and court in Illinois.

Id. The plaintiff also argued that the clauses were ambiguous as to whether they applied to contract and tort claims, and therefore its tort claims should not be dismissed. The Court refused to answer that question because it found that all of the plaintiff's factual claims arose from the contract. The Court drew heavily from arbitration and federal precedent regarding whether a claim sounded in tort or contract. Specifically, the Court cited to its prior opinion in *In re Weekley Homes, L.P.*, where the court found that certain tort claims sounded solely in contract and were controlled by an

arbitration clause. 180 S.W.3d 127, 131-32 (Tex. 2005). The Court stated that:

> whether claims seek a direct benefit from a contract turns on the substance of the claim, not artful pleading. We said that a claim is brought in contract if liability arises from the contract, while a claim is brought in tort if liability is derived from other general obligations imposed by law.

2009 Tex. LEXIS 5. The Court stated that "determining whether a contract or some other general legal obligation establishes the duty at issue and dictates whether the claims are such as to be covered by the contractual forum-selection clause should be according to a common-sense examination of the substance of the claims made." *Id*.

In analyzing the pleadings of the case, the Court stated that the plaintiff's claims all arose out of the consulting agreements because the defendants recommended Salinas in the course of their consulting work and because the agreements did not limit the scope of the defendants' consulting work. The Court determined that the plaintiff's claims were within the scope of the forum-selection clauses.

The Court then turned to the plaintiff's argument that the forum-selection clauses were not enforceable because they were procured by fraud and overreaching. The plaintiff supported that allegation by arguing that its representative did not know about the clauses and that the defendants did not point those clauses out to her at a time when all of the communications were going on in Texas. The Court disagreed. Because the clauses were in two page contracts, were in the same font style and size as the other terms of the contract, and were located near the signature lines, the defendants had no duty to affirmatively point them out to the plaintiff.

Finally, the Court dismissed the plaintiff's arguments regarding the interests of the witnesses and public, convenience of litigation, and deprivation of the plaintiff's day in court. The Court stated that the plaintiff could have foreseen litigation in Illinois, which is not a remote alien forum. Further, the fact that there may be two suits – one in Texas against other defendants not parties to the agreements and one in Illinois against the defendants – did not deprive the plaintiff of its day in court. The Court concluded: "[the plaintiff] presented no evidence to overcome the presumption that the forum-selection clauses are valid." *Id*.

The end conclusion from a review of these cases is that the party opposing the enforcement of a forum-selection clause truly has a heavy burden in defeating enforcement of such a clause.

C. Conspicuousness Requirement

The Texas Supreme Court has recently determined that, like arbitration clauses, there is no conspicuousness requirement for the enforcement of a forum-selection clause. In *In re International Profit Associates Inc*., Riddell Plumbing Inc. hired International Profit Associates ("IPA") to provide business consulting services. No. 08-0531, 2009 Tex. LEXIS 391 (Tex. June 12, 2009). The parties' contract contained a forum-selection clause selecting Illinois as the forum for any contract dispute. The forum-selection clause was on the first page of a four-page contract. However, Riddell sued IPA in Dallas County, Texas. IPA filed a motion to dismiss the case based on the forum-selection clause. At the hearing, Riddell's president testified that IPA never presented the first page containing the forum-selection clause to him. The trial court denied the motion to dismiss, and explained that IPA did not prove the page containing the forum-selection clause was ever presented to Riddell. The court of appeals denied IPA's petition for writ of

mandamus. IPA filed a petition with the Texas Supreme Court.

The issue in the case is whether a party seeking to enforce a forum-selection clause has to prove the other party was shown the clause when the contract was formed. The Texas Supreme Court held that the party challenging the forum-selection clause must prove its invalidity, and that party "bears a heavy burden of proof." *Id*. The burden is not on the party seeking to enforce the clause. The Court stated the following standard:

> A trial court abuses its discretion in refusing to enforce the forum-selection clause, unless the party opposing enforcement of the clause can clearly show that: (1) enforcement would be unreasonable or unjust, (2) the clause is invalid for reasons of fraud or overreaching, (3) enforcement would contravene a strong public policy of the forum where the suit was brought, or (4) the selected forum would be seriously inconvenient for trial.

Id. at *4-5. Under this standard, the Court determined that the trial court abused its discretion in refusing to enforce the clause.

The Court first acknowledged that evidence that a party concealed a forum-selection clause combined with evidence proving that concealment was part of an intent to defraud a party may be sufficient to invalidate the clause. However, a party who signs a document is presumed to know its contents including documents specifically incorporated by reference. "[S]imply being unaware of a forum-selection clause does not make it invalid." *Id*. *6-8. Further, "parties to a contract have an obligation to protect themselves by reading what they sign and, absent a showing of fraud, cannot excuse themselves from the consequences of failing to meet that obligation." *Id*.

Each of the three pages Riddell's officer admitted that he reviewed was labeled as "one of four" and the page he signed noted just above his signature that the agreement was four pages. He had notice of a missing first page and was under an obligation to review it: "he could have asked for the missing page." *Id*. The Court concluded that Riddell's inattention is not evidence of fraud or overreaching:

> Scott Riddell's inattention to page one of the contract is not evidence of fraud or overreaching because there is no evidence that IPA made any misrepresentations about or fraudulently concealed the existence of page one or any other portion of the contract. To the contrary, the existence of page one is referenced on every page of the agreement that Scott Riddell read and endorsed. If we were to determine otherwise, it would require a party seeking to enforce a forum-selection clause to prove that the opposing party was separately shown each provision of every contract sought to be enforced and was subjectively aware of each clause. Parties who sign contracts bear the responsibility of reading the documents they sign.

Id. The Court, in a per curiam opinion, then conditionally granted IPA's petition and directed the trial court to grant the motion to dismiss.

Similarly to arbitration agreements, there is no conspicuousness requirement for forum-selection clauses. Rather, the hiding of such a provision must rise to the level of fraud before it is a defense.

D. Direct-Benefits Estoppel

Though not addressed by the Texas Supreme Court, other Texas courts have applied direct-benefits estoppel to determine whether non-signatories may rely upon a forum-selection clause. *See Phoenix Network Techs. (Europe) Ltd. v. Neon Sys., Inc*., 177 S.W.3d 605, 622-24 (Tex. App.—Houston [1st Dist.] 2005, no pet.). Specifically, several courts of appeals hold that equitable estoppel may permit a non-signatory to enforce a forum-selection clause where either of the following two circumstances were present: (1) "under 'direct benefits-estoppel,' a non-signatory may enforce an arbitration agreement when the signatory plaintiff sues it seeking to derive a direct benefit from the contract containing the arbitration provision" and (2) "[e]stoppel theory also applies when a signatory plaintiff sues both signatory and non-signatory defendants based upon substantially interdependent and concerted misconduct by all defendants." *Phoenix*, 177 S.W.3d at 622. *See also In re Wilmer Cutler Pickering Hale And Door LLP*, No. 05-08-01395-CV, 2008 Tex. App. LEXIS 9692 (Tex. App.—Dallas December 31, 2008, orig. proceeding); *Deep Water Slender Wells, Ltd. v. Shell Int'l Exploration & Prod., Inc*., 234 S.W.3d at 693-94. Note that Texas Supreme Court has since disapproved of the "concerted misconduct" theory to allow a non-signatory to enforce an arbitration clause. *See In re Merrill Lynch Trust Co. FSB*, 235 S.W.3d 185 (Tex. 2007).

E. Conclusion On Forum-Selection Clauses

The Court liberally cites to arbitration precedent in enforcing forum-selection clauses. Like the arbitration clause, there is a heavy presumption in favor of forum-selection clauses. Further, like the arbitration clause, there is no requirement that a forum-selection clause be conspicuous and it can be enforced by or against a non-signatory. The Texas Supreme Court has announced some defenses to enforcement that do not exist for arbitration clauses, i.e., enforcement would contravene a strong public policy of the forum where the suit was brought or the selected forum would be seriously inconvenient for trial. Yet, the Court has placed a very high standard to establish these defenses.

IV. Contractual Jury Waivers

A contractual jury waiver is a contractual provision that expressly states that the parties to the contract waive their right to a jury should a dispute arise between them. If a dispute arises, one party could 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. See TEX. CONST. art. I, § 15 ("The right of trial by jury shall remain inviolate."); TEX. CONST. art. V, § 10 (granting right to jury trial in district courts). 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 very 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, an evidentiary hearing will most likely be required, 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. 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 an unfavorable jurisdiction or area of a jurisdiction as well.

A. The Texas Supreme Court Affirms Use of Jury Waivers

In *In re Prudential*, the Texas Supreme Court held that contractual jury waivers were enforceable. 148 S.W.3d 124 (Tex. 2004). The case involved a dispute over a restaurant lease where the lessees sued the lessor claiming a bad smell disrupted their business. The plaintiffs demanded a jury and paid the fee. *Id*. at 128. The defendants filed a motion to quash the jury demand relying on a jury waiver clause in the lease. The trial court denied the motion, and the defendants sought mandamus relief.

The Texas Supreme Court first stated that nothing in the constitutional provisions or Texas Rules of Civil Procedure provided that any right to a jury trial could not be waived by a party. The Court then addressed the defendants' main contention: that jury waivers were void as against public policy because they would grant parties the private power to fundamentally alter the civil justice system. The Court found otherwise:

> [P]arties already have power to agree to important aspects of how prospective disputes will be resolved. They can, with some restrictions, agree that the law of a certain jurisdiction will apply, designate the forum in which future litigation will be conducted, and waive in personam jurisdiction, a requirement of due process. Furthermore, parties can agree to opt out of the civil justice system altogether and submit future disputes to arbitration. State and federal law not only permit but favor arbitration agreements. ICP argues that while it does not offend public policy for parties to agree to a private dispute resolution method like arbitration, an agreement to waive trial by jury is different because it purports to manipulate the prescribed public justice system. We are not persuaded. Public policy that permits parties to waive trial altogether surely does not forbid waiver of trial by jury.

Id. Thus, the Court analogized contractual jury waivers to arbitration agreements and forum-selection clauses.

The plaintiffs argued that permitting contractual jury waivers could cause a party to take unfair advantage of another party. *Id*. at 132. The Court held that such an agreement would be unenforceable:

> [A] waiver of constitutional rights must be voluntary, knowing, and intelligent, with full awareness of the legal consequences. We echo the United States Supreme Court's admonition that 'waivers of constitutional rights not only must be voluntary but must be knowing, intelligent acts done with sufficient awareness of the relevant circumstances and likely consequences.' Under those conditions, however, a party's right to trial by jury is afforded the same protections as other constitutional rights.

Id. Therefore, the Court found that a contractual jury waiver had to be entered into knowingly and voluntarily.

However, the Court then found that a contractual jury waiver was less of a deprivation of constitutional rights than an arbitration clause:

> By agreeing to arbitration, parties waive not only their right to trial by jury but their right to appeal, whereas by agreeing to waive only the former right, they take advantage of the reduced expense and delay of a bench trial, avoid the expense of arbitration, and retain their right to appeal. The parties obtain dispute resolution of their own choosing in a manner already afforded to litigants in their courts. Their rights, and the orderly development of the law, are further protected by appeal. And even if the option appeals only to a few, some of the tide away from the civil justice system to alternate dispute resolution is stemmed.

Id.

The plaintiffs argued that the waiver was not entered into knowingly and voluntarily. The Court disagreed and cited factors such as: both sides had counsel, there were a number of changes to the lease, and the waiver was clear and unambiguous. The Court expressly commented that it was not ruling on whether a contractual jury waiver had to be conspicuous. Therefore, even though the Court found that a contractual jury waiver was less intrusive than an arbitration agreement, it found that it had to be voluntarily and knowingly entered into.

In *In re Palm Harbor Homes, Inc*., the Texas Supreme Court held that when a contractual jury waiver provision is subsumed within an arbitration agreement, the procedural and substantive rules concerning arbitration apply. 195 S.W.3d 672, 675 (Tex. 2006). In that circumstance, a court should apply the arbitration rules and analysis. *Id*.

The Texas Supreme Court once again addressed contractual jury waivers in *In re GE Capital*, where the court granted mandamus relief to enforce a contractual jury waiver. 203 S.W.3d 314, 316-17 (Tex. 2006). The Court first addressed the plaintiff's argument that the defendant had waived the contractual jury waiver and found that the defendant did not waive its right to enforce the contractual jury waiver

by immediately filing a motion to quash the demand.

The Court then addressed whether the contractual jury waiver was enforceable. The plaintiff contended that the trial court correctly refused to enforce the contractual jury waiver because the defendant did not present evidence that the waiver was entered into knowingly and voluntarily as required to enforce such a waiver. The waiver provision was written in capital letters and bold print. The court disagreed with the plaintiff's argument:

> Such a conspicuous provision is prima facie evidence of a knowing and voluntary waiver and shifts the burden to the opposing party to rebut it. [The plaintiff] did not challenge the jury waiver provision in the trial court and only summarily contends here that the provision is invalid. . . Finding no evidence that the provision was invalid or that [the defendant] knowingly waived its contractual right to a non-jury trial, we conclude that the trial court abused its discretion in failing to enforce the provision.

Id. (internal citations omitted). Accordingly, the Court found that a voluntary and knowing waiver was still a requirement, but placed the burden on the plaintiff to prove that it was not a voluntary or knowing waiver where the provision was conspicuous.

B. Some Texas Intermediate Appellate Courts View Jury Waivers Differently From Arbitration Clauses

Several courts of appeals that have addressed contractual jury waivers. The first case in Texas to substantively discuss the enforceability of contractual jury waivers was in 2003. In *In re Wells Fargo*, the plaintiff filed suit based on a note and guaranty where both agreements had jury waivers. 115 S.W. 3d 600 (Tex. App.—Houston [14th Dist.] 2003, orig. proceeding). Notwithstanding, the trial court denied plaintiff's motion to compel the jury waiver.

The court of appeals considered the defendant's argument that the jury waiver was not enforceable. It first noted that constitutional rights are not absolute; parties frequently waive their constitutional right to a jury by procedural errors. *Id*. at 606–07. The court then noted that contractual jury waivers were enforced in the majority of states and in the Federal system. *Id*. at 309. Interestingly, the court expressly compared contractual jury waivers to arbitration agreements:

> Although no Texas court has directly addressed the enforceability of contractual jury waivers, Texas allows parties to contractually waive the right to a jury trial by enforcing arbitration agreements. "It is clear that when a party agrees to have a dispute resolved through arbitration rather than judicial proceeding, that party has waived its right to a jury trial." Although parties agreeing to arbitrate waive considerably more than just the right to a jury trial, arbitration is strongly favored under Texas law.

Id. The court then considered the defendant's claim that the waiver was not entered into knowingly and voluntarily. *Id*. at 609. Without expressly holding that a knowing and voluntary assent was a requirement for enforcement, the court held that because the waiver stated on its face

that it was given knowingly and voluntarily, the burden shifted to the defendant to show that it was not. Even though the agreement was a standardized form, the court found no evidence to support the claim that the parties did not enter the clause on a knowing and voluntary basis. *Id*. at 610. The court conditionally granted the writ of mandamus and enforced the contractual jury waiver. In doing so, the court repeatedly looked to arbitration precedent and analogy for support.

In *In re C-Span Entertainment, Inc.*, the Dallas court of appeals found that a jury waiver was enforceable and was not waived. 162 S.W.3d 422 (Tex. App.—Dallas 2005, orig. proc.). The plaintiff requested a jury, and the defendant entered into several agreed scheduling orders that set the trial on the jury docket. Eventually, the defendant requested that the case be placed on the non-jury docket arguing that a contractual jury waiver required such a result. The trial court agreed with the defendant, quashed the jury demand, and the plaintiff filed a petition for writ of mandamus. *Id*. The court of appeals denied the plaintiff's petition, finding that the evidence did not prove as a matter of law that the defendant waived its contractual jury trial waiver agreement. The court of appeals found that the evidence, and the fact that the Texas Supreme Court had recently handed down the *In re Prudential* opinion, supported the trial court's finding of no waiver. *Id*. at 426.

Other courts have not been as friendly to the enforcement of contractual jury waivers. In *Mikey's Houses, LLC v. Bank of America, N.A.*, the Fort Worth Court of Appeals found that a trial court erred in enforcing a contractual jury waiver because the defendant did not prove that it was entered into voluntarily and knowingly. 232 S.W.3d 145 (Tex. App.—Fort Worth 2007, no pet.).

The court found that contractual jury waivers were very different from arbitration agreements. It found that "public policy favors arbitration; the same cannot be said of the waiver of constitutional rights;" "although statutes generally require courts to compel contractual arbitration, no comparable statutory mandate directs courts to enforce contractual jury trial waivers"; "application of the standards for enforcing arbitration clauses would conflict with the Brady 'knowing and voluntary' standard that the Texas Supreme Court adopted in *In re Prudential*"; and "a distinction exists between an agreement to resolve disputes out of court and an agreement to resolve disputes in court but to waive constitutional aspects of that in-court resolution." *Id.* at 151-52.

The court found that contractual jury waivers are only enforceable if the waiver is made knowingly, voluntarily, and intelligently "with sufficient awareness of the relevant circumstances and likely consequences." Id. at 149. The court first found that the burden was on the party attempting to enforce the clause and that there was a rebuttable presumption against enforcing the waiver. The court then set out seven factors that a court may look to in determining whether a party has rebutted the presumption against waiver:

> (1) the parties' experience in negotiating the particular type of contract signed, (2) whether the parties were represented by counsel, (3) whether the waiving party's counsel had an opportunity to examine the agreement, (4) the parties' negotiations concerning the entire agreement, (5) the parties' negotiations concerning the waiver provision, if any, (6) the conspicuousness of the provision, and (7) the relative bargaining power of the parties.

Id. at 153. The court cited the facts of knowing waiver as follows:

The waiver here was not included in the Texas Real Estate Commission standard one-to-four family residential contract. Nor was it presented to Martin and Powell concurrently with the sales contract. Instead, after the sales contract had been executed, Bank of America presented a two-page addendum to the contract to Martin and Powell for their signatures. No evidence exists in the record that the sales contract or the addendum were negotiated.

Paragraph thirteen, in the middle of the second page of the addendum, provides as follows: "Waiver of Trial by Jury. 13 Seller and Buyer knowingly and conclusively waive all rights to trial by jury, in any action or proceeding relating to this Contract." This paragraph is not set forth any differently than the other paragraphs in the addendum; that is, the entire paragraph is not printed in larger font, not printed in a different color, not bracketed or starred, does not have blanks beside it for the Seller and Buyer to place their initials, nor does it possess any unique features to distinguish it or make it stand out from the other twenty paragraphs in the addendum, as seen in Appendix A. Martin testified that Mikey's Houses was not represented by counsel. She did not recall reading the jury waiver paragraph and testified that it was not discussed or explained. She said that she did not understand that by signing the addendum she was waiving her constitutional right to trial by a jury. She said that she did not understand the consequences of the provision.

Id. at 154. Based on this evidence and the factors set forth above, the court determined that on the record before it, there was no evidence showing that the plaintiffs had knowingly and voluntarily waived their right to a jury trial. *Id*. at 155. The court reversed the trial court's ruling granting the defendant's motion to enforce the jury trial waiver.

There is an unusual subsequent history for *Mikey's Houses*, as the parties in that case perfected an interlocutory appeal to the court of appeals. *See* Act of May 17, 2001, 77th Leg., R.S., ch. 1389, § 1, 2001 TEX. GEN. LAWS 3575, 3575 (enacting TEX. CIV. PRAC. & REM. CODE Ann. § 51.014(f)), repealed by Act of May 27, 2005, 79th Leg., R.S., ch. 1051, § 2, 2005 Tex. Gen. Laws 3512, 3513 (repealing same). Although one justice dissented in *Mikey's Houses*, Bank of America did not file a petition for review with the Texas Supreme Court. *See* TEX. GOV'T CODE ANN. § 22.225(c) (Vernon 2004 & Supp. 2008) (granting supreme court appellate jurisdiction over interlocutory appeal when appellate court justice issues a dissent). Instead, after the court of appeals issued its mandate, Bank of America filed a mandamus with the Texas Supreme Court naming the court of appeals as the respondent and praying that the Supreme Court issue a mandamus directing the court of appeals to "vacate and withdraw the opinion and judgment" entered in the interlocutory appeal. The Texas Supreme Court issued the writ of mandamus earlier this year, and that opinion is discussed later in this article.

In *In re Credit Suisse First Boston Mortgage Capital, L.L.C.*, the Houston Fourteenth Court of Appeals similarly did not enforce a contractual jury waiver. 257 S.W.3d 486 (Tex. App.—Houston [14th Dist.] 2008, orig. proceeding). This case involved a dispute over a loan agreement where a non-signatory defendant attempted to enforce a contractual jury waiver against a signatory plaintiff. The defendant alleged that the plaintiff relied on the loan agreement as the basis of its claims and was therefore equitably estopped from denying the application of the jury waiver clause. The defendant cited to precedent that would support such an argument in the arbitration context. The trial court denied the request to apply the jury waiver by the non-signatory defendant.

On mandamus review, the court of appeals first directly contrasted arbitration and jury waiver clauses:

> Unlike arbitration agreements, which are strongly favored under Texas law, the right to a jury trial is so strongly favored that contractual jury waivers are strictly construed and will not be lightly inferred or extended. Before a jury waiver will be enforced, such waiver must be found to be a voluntary, knowing, and intelligent act that was done with sufficient awareness of the relevant circumstances and likely consequences.

Id. The court then analyzed the provision that expressly stated that the lender and borrower agreed to it. The court stated that because the clause expressly only applied to the signatories, the non-signatory defendant could not enforce the provision. The court then held that it would not apply equitable estoppel in the context of contractual jury waivers:

> We decline to recognize direct-benefits estoppel as a vehicle by which a jury waiver clause may be applied to claims against a party that did not sign the contract containing the clause. We are unaware of any court, in Texas or elsewhere, that has applied direct-benefits estoppel to a jury waiver provision.

Id. The court then stated that arbitration clauses are different from and implicate different policy issues than jury waivers:

> We recognize that Texas courts have occasionally referenced arbitration principles in deciding jury-waiver issues. However, these occasional references do not signal a departure from the longstanding principle that jury waivers are disfavored in Texas. Nor can Prudential or Wells Fargo be read as placing jury-waiver provisions on the same footing as arbitration clauses. These mechanisms cannot be treated interchangeably merely because they both lead to decisions by factfinders other than jurors. Jury waiver provisions and arbitration clauses implicate significantly different policies and principles. In upholding parties' freedom to contract, the Texas Supreme Court noted that arbitration agreements--which are strongly favored--allow parties to contractually opt out of the civil justice system altogether. The use of arbitration as an example of

> contractual waiver should not be read as a statement that, henceforth, jury waivers are to be analyzed interchangeably with arbitration agreements.

Id. The court concluded that it would "not use equitable estoppel as a vehicle to circumvent the required "knowing and voluntary" waiver standard." *Id*.

In *In re Credit Suisse First Boston Mortg. Capital, L.L.C.*, the Houston Court once again denied a petition for writ of mandamus on a trial court's denial of a motion to enforce a contractual jury waiver. NO. 14-08-00819-CV, 2008 Tex. App. LEXIS 9299 (Tex. App.—Houston [14th Dist.] December 11, 2008, orig. proceeding). This was a subsequent proceeding from the case that was just discussed. In the first opinion, the court declined to consider the movant's agency argument. The movant then filed a motion for reconsideration with the trial court based on agency and argued that because the defendant was an agent of a signatory, that it should be allowed to enforce the contractual jury waiver. The trial court denied the motion for reconsideration. The movant then filed another petition for writ of mandamus with the court of appeals.

The court held that "when a valid contractual jury waiver applies to a signatory corporation, the waiver also extends to nonsignatories that seek to invoke the waiver as agents of the corporation." *Id*. The court acknowledged that the plaintiff had alleged that the defendant was an agent of the signatory. However, the court determined that allegations alone were not sufficient: "we further hold that a nonsignatory may not invoke a jury waiver merely because it is alleged to be an agent of the signatory." *Id*. The court then held that because the defendant did not provide proof that it was an agent, the trial court did not abuse its discretion in denying the motion for reconsideration:

> Because Texas law does not presume that an agency relationship exists, the party alleging agency has the burden to prove it. An enforceable contract requires a "meeting of the minds" between both parties. Absent proof of CSFB's agency relationship with Mortgage Capital, we cannot assume that the parties intended to include CSFB in their contractual jury waiver.
>
> Therefore, we hold that the trial court did not abuse its discretion by declining to extend the jury waiver on the basis of allegations alone. Because the right to a jury trial implicates constitutional guarantees, we will not lightly infer or extend a contractual jury waiver absent proof that the parties intended it to include claims against nonsignatories.

Id.

The Second Court of Appeals has subsequently written on the topic of contractual jury waivers once more. In *In re Columbia Medical Center of Lewisville Subsidiary, L.P.*, the court granted mandamus relief to a tenant where a trial court had denied a motion to quash a jury demand in a lease dispute because the tenant successfully rebutted the presumption against a prelitigation contractual waiver of a jury trial, and the landlord offered no evidence to show that its waiver was not knowingly and voluntarily made. NO. 2-08-381-CV, 2009 Tex. App. LEXIS 146 (Tex. App.—Fort Worth, January 8, 2009). The court once again found that there was a presumption against a knowing and

voluntary waiver, and stated the factors as follows:

> Evidence of the following nonexclusive factors may be considered in determining whether the party seeking to enforce a contractual waiver of the right to a jury trial has rebutted the presumption against the waiver by prima facie evidence that the waiver was knowingly and voluntarily made: (1) the parties' experience in negotiating the particular type of contract signed; (2) whether the parties were represented by counsel; (3) whether the waiving party's counsel had an opportunity to examine the agreement; (4) the parties' negotiations concerning the entire agreement; (5) the parties' negotiations concerning the waiver provision, if any; (6) the conspicuousness of the provision; and (7) the relative bargaining power of the parties.

Id. (internal citation omitted). The movant presented evidence of a knowing and voluntary waiver:

> The evidence presented by Medical Center shows that CenterPlace was experienced in negotiating leases. CenterPlace was a landlord involved in leasing space in large commercial buildings. Section 30 of the lease executed by the parties indicates that when CenterPlace executed the lease containing the contractual jury waiver provision, it had already entered into leases with at least eleven other tenants in the same building. Although the record is silent as to whether CenterPlace was represented by counsel when the original lease was executed, the evidence conclusively establishes that CenterPlace was represented by counsel when the "First Amendment to Lease Agreement" was negotiated and executed. Numerous provisions of the original lease were modified by the amended lease, but the jury waiver provision was not. And the First Amendment to Lease Agreement ratified the unmodified portions of the original lease. Consequently, before CenterPlace entered into the lease amendment, counsel for CenterPlace did have the opportunity to review the jury waiver provision and did have the opportunity to make it part of the negotiations that occurred with respect to the amended lease. The parties' negotiations concerning both the original lease and the lease amendment were extensive. The original lease contains numerous handwritten interlineations made by Dr. Harpavat on behalf of CenterPlace. The lease amendment was negotiated by CenterPlace's counsel over a period of approximately four months. The record contains no indication that the jury waiver provision was specifically negotiated. The jury waiver provision set

> forth in section 24 of the original lease is not conspicuous. It is set forth in the exact same manner as each of the other thirty-eight sections of the lease. The relative bargaining power of the parties was fairly equal. Both were Texas limited partnerships. They were entering into a landlord-tenant relationship through a lease agreement.

Id.

The court held that the movant produced prima facie evidence on five of the seven nonexclusive factors rebutting the presumption against waiver of the constitutional right to trial by jury. "Weighing each of these factors, and viewing the totality of the circumstances surrounding the transaction as reflected in the record before us, Medical Center's evidence rebuts the presumption against the waiver." *Id.* Because the presumption was rebutted, the burden shifted to the non-movant to show that it was not knowing or voluntary. The court then reviewed the record and determined that the non-movant "did not meet the burden that shifted to it to establish that the waiver was not made knowingly and voluntarily." Therefore, the court found that the trial court abused its discretion by failing to enforce the contractual jury waiver provision and conditionally granted the petition for writ of mandamus.

Most recently, one court has held that contractual jury waiver provisions are enforced like any other contractual clause, including an arbitration clause. *See In re Wild Oats Mkts.*, No. 09-09-00031-CV, 2009 Tex. App. LEXIS 2316 (Tex. App. Beaumont Apr. 2, 2009, orig. proceeding). The court stated: "In its response, Kuykendahl suggests arbitration cases are treated more favorably than other contractual jury waiver cases. We disagree." *Id.* at n. 1. Ultimately, the court denied the petition for writ of mandamus because the plaintiff was not a signatory to the agreement, and though potentially available, direct-benefits estoppel did not apply due to the facts of the case. *See id.*

C. Texas Supreme Court Addresses Which Party Has Burden To Establish Knowing and Voluntary Waiver

In *In Re Bank Of America, N.A.,* the Texas Supreme Court granted mandamus relief against the Fort Worth Court of Appeals, and ordered it to enforce the trial court's order enforcing the contractual jury waiver. 278 S.W.3d 342 (Tex. 2009). The Court disagreed with the court of appeals' inference that a contractual jury waiver was not enforceable. *Id.*

The Court first held that a presumption against waiver would violate the parties' freedom to contract. The Court held that "a presumption against contractual jury waivers wholly ignores the burden-shifting rule" previously found by the Court that "a conspicuous provision is prima facie evidence of a knowing and voluntary waiver and shifts the burden to the opposing party to rebut it." *Id.* (quoting *In re Gen. Elec.*, 203 S.W.3d 314, 316 (Tex. 2006)). Courts presume that "a party who signs a contract knows its contents." *Id.* Therefore, the Court concluded that "as long as there is a conspicuous waiver provision, Mikey's Houses is presumed to know what it is signing." *Id.*

The Court then addressed what the test was for determining whether there was a conspicuous contractual jury waiver:

> Section 1.201(b)(10) of the Texas Business and Commerce Code provides that "[c]onspicuous . . . means so written, displayed, or presented that a reason-

> able person against which it is to operate ought to have noticed it." In *Prudential*, we noted that the waiver provision was "crystal clear" because "it was not printed in small type or hidden in lengthy text" and "[t]he paragraph was captioned in bold type." 148 S.W.3d at 134.

Id. The Court reviewed the contract at issue and found that the contractual jury waiver was conspicuous:

> In this case, the addendum is only two pages long, and each of the twenty provisions are set apart by one line and numbered individually. Five of the twenty provisions included bolded introductory captions similar to the waiver provision in *Prudential*, and the "Waiver of Trial By Jury" caption is one of the five. Furthermore, the introductory caption is hand-underlined, as is the word "waiver" and the words "trial by jury" within the provision. This bolded, underlined, and captioned waiver provision is no less conspicuous than those contractual waivers that we upheld in both Prudential and General Electric, and therefore serves as prima facie evidence that the representatives of Mikey's Houses knowingly and voluntarily waived their constitutional right to trial by jury.

Id. Because the contractual jury waiver was conspicuous, the Court found that the bank did not have the burden to establish a knowing and voluntary waiver.

Interestingly, the Court noted that if the party opposing the jury waiver had alleged fraud with regard to the jury waiver provision, that it would have shifted the burden to the party seeking to enforce the jury waiver to establish a knowing and voluntary waiver: "As for the extent of the allegation that would be necessary to shift the burden to Bank of America to prove knowledge and voluntariness, an allegation could be sufficient to shift the burden if there is fraud alleged in the execution of the waiver provision itself." *Id*.

Finally, the Court noted that the court of appeals' presumption was contrary to the fact that contractual jury waivers were similar to arbitration agreements:

> We also note the similarity between arbitration clauses and jury-waiver provisions to clarify that a presumption against contractual jury waivers is antithetical to *Prudential's* jurisprudence with regard to private dispute resolution agreements. In *Prudential*, we agreed with the United States Supreme Court that "arbitration and forum-selection clauses should be enforced, even if they are part of an agreement alleged to have been fraudulently induced, as long as the specific clauses were not themselves the product of fraud or coercion." Since *Prudential* indicates that the same dispute resolution rule expressed by the United States Supreme Court in *Scherk* should apply to contractual jury-waiver provisions, the court of appeals' analysis errs by

> distinguishing jury waivers from arbitration clauses, thereby imposing a stringent initial presumption against jury waivers. Statutes compel arbitration if an arbitration agreement exists, and more importantly, "Texas law has historically favored agreements to resolve such disputes by arbitration." We see no reason why there should be a different rule for contractual jury waivers.

Id. The court then conditionally granted the petition for writ of mandamus, holding that that trial court's enforcement of the contractual jury waiver provision was correct.

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 and thus should be judged by different standards. Does Texas law require a conspicuous jury waiver clause? Does the clause have to be entered into by both parties on a knowing and voluntary basis? 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?

The opinion in *In re Bank of America* could be read narrowly. Just as the Court determined in *In re General Electric*, the jury waiver clause was conspicuous, and therefore, the burden was on the party opposing the waiver to prove that it was not entered into knowingly and voluntarily. The Court did not deal with a non-conspicuous clause and did not expressly hold that the party opposing a non-conspicuous clause would have that initial burden of proving a knowing and voluntary waiver. Therefore, there is still a question as to whether the burden of proving a knowing and voluntary waiver is on the party attempting to enforce a non-conspicuous jury waiver clause.

V. Should The Enforcement of A Jury-Waiver Clause Differ From An Arbitration Clause and A Forum-Selection Clause?

Arbitration, forum-selection, and jury-waiver clauses all fundamentally alter a party's right to dispute resolution. They can all waive a party's right to a jury trial. However, those clauses seemingly have different tests for their enforcement.

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. *See J.M. Davidson, Inc. v. Webster*, 128 S.W.3d 223, 227 (Tex. 2003). To enforce an arbitration clause, a party must merely prove the existence of an arbitration agreement and that the claims asserted fall within the scope of the agreement. *See In re Oakwood Mobile Homes, Inc*., 987 S.W.2d 571, 573 (Tex. 1999). Further, there are instances where Texas courts have enforced arbitration agreements against nonparties under the theory of estoppel. *See, e.g., In re Weekley Homes*, 189 S.W.3d 127 (Tex. 2005); *In re Kellog, Brown & Root*, 166 S.W.3d 732 (Tex. 2005). Absent narrow exceptions, there is no requirement that the party relying on the arbitration agreement prove that it is conspicuous or that all parties entered into the agreement voluntarily or knowingly. In addition to a strong presumption in favor of an arbitration clause, the enforcement of an arbitration clause is a mere contract-based analysis with normal contract-based defenses.

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 was invalid for such reasons as fraud or overreaching. *See In re AIU Ins. Co.*, 148 S.W.3d at 112. Though there is ostensibly an "unreasonable and unjust" exception to enforcing a forum-selection clause that does not exist for arbitration agreements, the Texas Supreme Court has seemingly enforced forum-selection clauses the same as arbitration agreements.

Courts have not held that there has to be any showing of a knowing or voluntary agreement to enforce a forum-selection clause. Moreover, courts have applied estoppel so that non-signatories can enforce forum-selection clauses. *See Phoenix Network Techs. (Europe) Ltd. v. Neon Sys., Inc*., 177 S.W.3d 605, 622-24 (Tex. App.—Houston [1st Dist.] 2005, no pet.). Moreover, Texas courts apply arbitration precedent to forum-selection clauses. The Supreme Court's forum-selection clause cases liberally cite to and refer to arbitration precedent.

Contractual jury waivers are clauses in contracts that state that the parties waive the right to a jury and will submit their disputes to the court. However, a plaintiff still gets to have its choice of Texas as the jurisdiction for dispute resolution, is still entitled to full discovery, cross examination, and importantly, appellate review of the trial court's decision. The same cannot be said of arbitration, and may not be able to be said for forum-selection clauses depending on the forum. Because contractual jury waivers are less intrusive than arbitration or forum-selection clauses, common sense would lead to the conclusion that they are enforced with the same contractual analysis and are at least as easily enforced as arbitration agreements.

However, contractual jury waivers are not enforced under the same standards as arbitration or forum-selection clauses, parties have a more difficult burden to enforce jury waivers. In *In re Prudential*, the Texas Supreme Court for the first time held that contractual jury waivers were enforceable. 148 S.W.3d 124 (Tex. 2004). The Court held that such an agreement may be unenforceable where it was not entered into voluntarily, knowingly, and intelligently. *Id*. Oddly, despite creating a "voluntary, knowing, and intelligent" requirement, the Court acknowledged that a contractual jury waiver was less of a depravation of constitutional rights than an arbitration clause.

Texas intermediate courts of appeals have been understandably conflicted on the meaning and use of the "voluntary, knowing, and intelligent" requirement. *See, e.g., See In re Wild Oats Mkts*., No. 09-09-00031-CV, 2009 Tex. App. LEXIS 2316 (Tex. App.—Beaumont Apr. 2, 2009, orig. proceeding) (contractual jury waiver treated the same as arbitration clause); *In re Credit Suisse First Boston Mortgage Capital, L.L.C*., No. 14-08-00132-CV, 2008 Tex. App. LEXIS 4661 (Tex. App.—Houston [14th Dist.] June 17, 2008, orig. proceeding) (court would "not use equitable estoppel as a vehicle to circumvent the required "knowing and voluntary" waiver standard."); *Mikey's Houses, LLC v. Bank of Am., N.A.*, 232 S.W.3d 145 (Tex. App.—Fort Worth 2007, no pet.) (presumption against enforcement of contractual jury waiver); *In re Wells Fargo*, 115 S.W. 3d 600 (Tex. App.—Houston [14th Dist.] 2003, orig. proceeding).

The Texas Supreme Court has not discussed why there are different standards for contractual jury waivers than for arbitration agreements or forum-selection clauses. However, in *In re Prudential* the Court clearly stated that contractual jury waivers were 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 virtue while there is no such statute for jury waivers. Of course, a statute should not be able to trump a constitutional right.

But that begs the main question – why does a party fighting a contractual jury waiver have a "knowing and voluntary" defense when similar parties fighting arbitration and forum-selection clauses do not? If the "knowing and voluntary" requirement is constitutional, it should apply to arbitration agreements notwithstanding statutory enactments. *See, e.g., Walker v. Ryan's Family Steak Houses, Inc.*, 400 F.3d 370, 381 (6th Cir. 2005) (holding arbitration agreement waiver of jury right to "knowing and voluntary" standard); *Prudential Ins. Co. of Am. v. Lai*, 42 F.3d 1299, 1305 (9th Cir. 1994) (concluding that "a Title VII plaintiff may only be forced to forego her statutory remedies and arbitrate her claims if she has knowingly agreed to submit such disputes to arbitration"). *See also, e.g.,* Jean R. Sternlight, *Mandatory Binding Arbitration and the Demise of the Seventh Amendment Right to a Jury Trial*, 16 OHIO ST. J. ON DISP. RESOL. 669, 675 (2001) (arguing for harmonization under the knowing and voluntary standard of waiver); Edward Brunet, *Arbitration and Constitutional Rights*, 71 N.C. L. REV. 81, 102-08 (1992) (same); Richard Reuban, *Constitutional Gravity: A Unitary Theory of Alternative Dispute Resolution and Public Civil Justice*, 47 UCLA L. REV. 949, 1019-34 (2000) (same); Richard E. Speidel, *Contract Theory and Securities Arbitration: Whither Consent*?, 62 BROOK. L. REV. 1335, 1352 n.63 (1996) (same). *But see* Andrew M. Kepper, *Contractual Waiver of Seventh Amendment Rights: Using the Public Rights Doctrine To Justify a Higher Standard of Waiver for Jury-Waiver Clauses than for Arbitration Clauses*, 91 IOWA L. REV. 1345, 1365 (2006) (arguing that harmonization of differing standards for enforceability between arbitration and jury waivers is not necessary); Stephen J. Ware, *Arbitration Clauses, Jury-Waiver Clauses, and Other Contractual Waivers of Constitutional Rights*, 67 LAW & CONTEMP. PROBS. 167, 167-97 (2004) (arguing for harmonization under the contract-law standard of waiver).

Yet, most courts have held that the "knowing and voluntary" requirement does not apply to arbitration clauses. *See, e.g., Morales v. Sun Constructors, Inc.*, 541 F.3d 218 (3rd Cir. 2008) (knowing and voluntary requirement does not apply to arbitration agreements); *Caley v. Gulfstream Aero. Corp.*, 428 F.3d 1359 (11th Cir. 2005) (same); *American Heritage Life Ins. Co. v. Orr*, 294 F.3d 702, 711 (5th Cir. 2002) (same); *Sydnor v. Conseco Fin. Servs. Corp.*, 252 F.3d 302, 307 (4th Cir. 2001) (same); *Koveleskie v. SBC Capital Mkts., Inc.*, 167 F.3d 361, 368 (7th Cir. 1999) (same).

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. Few countries provide a right to a jury. Moreover, there are other rights that may be limited such as the examination of witnesses, presentation of evidence, and right to appellate relief. Why is there a lesser standard for enforcing these provisions than for jury waivers? There is no good reason. For example, in *In re Palm Harbor Homes, Inc.*, the Texas Supreme Court held that when a contractual jury waiver provision is subsumed within an arbitration agreement, the procedural and substantive rules concerning arbitration apply. 195 S.W.3d 672, 675 (Tex. 2006). Why should a different, more strenuous, standard apply when jury waiver clauses are not included in arbitration agreements?

Arbitration, forum-selection, and jury waiver clauses should all be judged by the same standard. They all deprive a party of constitutional rights – however, as courts acknowledge, a party can waive those rights. They should all be judged either under the contract/mutual assent standard of arbitration agreements or by some higher "knowing and voluntary" standard. Further, equitable estoppel should apply to all of

these clauses or to none of them. There is no logical difference between them.

VI. Impact of Choice-of-Law Clause On The Interpretation And Enforcement Of Arbitration/Forum-Selection/Jury Waiver Clauses.

Another issue is the application of choice-of-law clauses on the interpretation and enforcement of arbitration/forum-selection/jury waiver clauses. It is not uncommon for forum-selection clauses to also provide that all of the contractual clauses will be construed by a foreign jurisdiction's law. For example, a clause may state: "The validity, construction, interpretation, and effect of this Contract will be governed in all respects by the law of England."

The issue then becomes whether the arbitration/forum-selection/contractual jury waiver clause should be governed by the law chosen by the parties to the contract. Does the foreign law control the enforcement of the clause (who can enforce) and does the foreign law control the interpretation of the clause (i.e., scope)?

Texas has a strong policy of enforcing contracts as written. The freedom to contract is one of the founding principles of our legal system. *See Churchill Forge, Inc. v. Brown*, 61 S.W.3d 368, 370 (Tex. 2001). The freedom of contract is so important in Texas that it is expressly included in the state constitution. See TEX. CONST. art. I, § 16. The Texas Supreme Court has consistently recognized this state's strong public policy in favor of preserving the freedom of contract. *See Fairfield Ins. Co. v. Stephens Martin Paving, LP*, 246 S.W.3d 653, 664 (Tex. 2008); *Churchill Forge, Inc. v. Brown*, 61 S.W.3d at 371. The Court has recently noted this state's paramount public policy that contracts are sacred and shall be enforced as written:

> [Public policy requires that] men of full age and competent understanding shall have the utmost liberty of contracting, and that their contracts when entered into freely and voluntarily shall be held sacred and shall be enforced by Courts of justice. Therefore, you have this paramount public policy to consider-that you are not lightly to interfere with this freedom of contract.

Fairfield, 246 S.W.3d at 664 (quoting *Wood Motor Co. v. Nebel*, 150 Tex. 86, 238 S.W.2d 181, 185 (Tex. 1951)). A contract is an attempt by market participants to allocate risks and opportunities, and courts should enforce those allocations rather than redistributing them. WILLISTON ON CONTRACTS § 31:4 (4th ed. 1999 & Supp. 2008).

"The most basic policy of contract law is the protection of the justified expectations of the parties." *Clair v. Brooke Franchise Corp.*, No. 02-06-216-CV, 2007 Tex. App. LEXIS 2805 (Tex. App.—Fort Worth April 12, 2007, no pet.) (citing *DeSantis v. Wackenhut Corp.*, 793 S.W.2d 670, 677 (Tex. 1990)). Further, in construing a contract, a court must determine the parties' true intentions as expressed in the contract by examining the entire writing "in an effort to harmonize and give effect to all the provisions of the contract so that none will be rendered meaningless." *Valence Operating Co. v. Dorsett*, 164 S.W.3d 656, 662 (Tex. 2005).

Texas courts generally respect the parties' contractual choice-of-law and apply the law that the parties choose. *See Ill. Tool Works, Inc. v. Harris*, 194 S.W.3d 529 (Tex. App.—Houston [14th Dist.] 2006, no pet.) ("The parties contractually agreed to apply the law of Illinois to this contract. Texas courts will respect that choice and apply the

law the parties choose."). Specifically, Texas courts uphold choice-of-law provisions in the context of the enforceability of arbitration provisions. *See In re Raymond James & Assocs., Inc.*, 196 S.W.3d 311, 321 (Tex. App.—Houston [1st Dist.] 2006, no pet.); *In re Jim Walter Homes, Inc.*, 207 S.W.3d 888, 896 (Tex. App.—Houston [14th Dist.] 2006, orig. proceeding); *In re Citigroup Global Mkts., Inc*., 202 S.W.3d 477, 480-81 (Tex. App.—Dallas 2006, no pet.); *In re Alamo Lumber Co.*, 23 S.W.3d 577, 579 (Tex. App.—San Antonio 2000, orig. proceeding). *See also West Tex. Positron, Ltd. v. Cahill*, No. 07-05-0297-CV 2005 WL 3526483, at *2 (Tex. App.—Amarillo 2005, no pet.) (parties' choice of Texas law pointed to Texas interpretation of waiver). *See also ASW Allstate Painting & Constr. Co. v. Lexington Ins. Co.*, 188 F.3d 307 (5th Cir. Tex. 1999) (parties can choose state arbitration law via a choice-of-law clause).

Where the issue has been raised, some courts hold that forum-selection clauses are to be construed under the law of the forum with which the parties have contractually agreed. *See, e.g., Dunne v. Libbra*, 330 F.3d 1062, 1064 (8th Cir. 2003); *Lambert v. Kysar*, 983 F.2d 1110, 1118 (1st Cir. 1993); *Nutter v. New Rents, Inc.*, 1991 U.S. APP. LEXIS 22952 (4th Cir. 1991); *Instrumentation Assocs. v. Madsen Elecs*., 859 F.2d 4, 7 (3d Cir. 1988); *Gen. Eng'g Corp. v. Martin Marietta Alumina, Inc*., 783 F.2d 352, 357-58 (3d Cir. 1986); *AVC Nederland B.V. v. Atrium Inv. P'ship*, 740 F.2d 148 (2d Cir. 1984); *Eisaman v. Cinema Grill Sys. Inc.*, 87 F.Supp.2d 446 (D. Md. 1999); *Triple Quest Inc. v. Cleveland Gear Co.*, 627 N.W.2d 379, 384 (N.D. 2001); *Jacobson v. Mailboxes, Etc. U.S.A., Inc*., 419 Mass. 572, 575 (1995). *See also Hooks Indus., Inc. v. Fairmont Supply Co.*, No. 14-00-00062-CV, 2001 Tex. App. LEXIS 2568 (Tex. App.—Houston [14th Dist.] April 19, 2001, pet. denied) (not designated for publication) (court interpreted contract with forum-selection clause under law designated by parties).

The parties' choice of law should determine the interpretation (scope) of the arbitration/forum-selection/jury waiver clause. For example, in *Felman Products v. Bannai*, the plaintiff sued the non-signatory defendant for fraud and unjust enrichment based on a contract containing an arbitration clause and also containing an English choice-of-law clause. 476 F. Supp. 2d 585 (S.D. W. Va. 2007). The plaintiff asserted that the defendant could not enforce the arbitration agreement because English law controlled the scope of the clause, and under that law, the plaintiff's claims did not fall within the scope. Based on plaintiff's expert declaration that the scope of the clause under English law would not include the plaintiff's claims, the court concluded: "The arbitration clause, under the choice of law provision, does not extend to claims by [plaintiff] against [defendant] under the [contract]." *Id*. at 589.

Further, the parties' choice of law should determine whether a non-signatory can enforce an arbitration/forum-selection/jury waiver clause. For example, in *Motorola Credit Corporation v. Uzan*, the defendants sought to compel arbitration pursuant to agreements that had been signed by plaintiffs and by certain companies controlled by the defendants' family, but to which the defendants themselves were not parties. 388 F.3d 39, 42-43, 49 (2nd Cir. 2004). Relying on federal common law, the defendants asserted that they could enforce the arbitration clause under estoppel and agency theories. However, the agreements in question contained Swiss choice-of-law clauses. The trial court denied the motion to compel arbitration on an alternative basis of unclean hands. On appeal, the court of appeals held that "if defendants wish to invoke the arbitration clauses in the agreements at issue, they must also accept the … choice-of-law clauses that govern those agreements." *Id*. The court described

why honoring a choice-of-law clause was important:

> [W]here the parties have chosen the governing body of law, honoring their choice is necessary to ensure uniform interpretation and enforcement of that agreement and to avoid forum shopping. This is especially true of contracts between transnational parties, where applying the parties' choice of law is the only way to ensure uniform application of arbitration clauses within the numerous countries that have signed the New York Convention. Furthermore, respecting the parties' choice of law is fully consistent with the purposes of the FAA.

Id. Based on the plaintiffs' expert evidence that Swiss law strictly interpreted privity of contract and would not allow third parties to enforce the arbitration clause, the court concluded "that under Swiss law … defendants, as nonsignatories, have no right to invoke those agreements." 388 F.3d at 53.

Similarly, another court denied a motion to compel arbitration because the English law concept of privity of contract precluded a non-signatory from enforcing an arbitration clause. Once again, in *Felman Products v. Bannai*, the plaintiff submitted expert evidence that the defendant could not enforce the arbitration agreement because English law would not allow a non-party to do so. 476 F. Supp. 2d 585 (S.D. W. Va. 2007). The court stated: "English arbitration law is governed by the Arbitration Act of 1996. Plaintiffs' experts state that it is a general principle of arbitration law that the agreement only binds the parties to the agreement to arbitration." *Id*. The court concluded: "Under English law [the defendant] lacks standing to compel arbitration." *Id*.

In *Yavuz v. 61 MM, Ltd*, the court of appeals dealt with how to interpret a forum-selection clause when the contract contained a choice-of-law provision. 465 F.3d 418, 426-32 (10th Cir. 2006). The court stated that there were several issues that had to be addressed: "(1) Is the forum-selection clause provision mandatory? … (2) Are all of Mr. Yavuz's claims governed by the provision, or only some? … (3) Does the clause bind Mr. Yavuz with respect to claims against all the defendants, or with respect to only his claims against FPM, or perhaps only those against FPM and Mr. Adi?" *Id*. at 427. The last issue dealt with which parties could enforce the forum-selection clause. The court then analyzed in depth what law controlled and concluded that these issues should be determined under the law chosen by the parties. *See id.* at 430-31.

Determining how a foreign country would interpret or enforce a forum-selection clause may require the admission of evidence. Under Texas Rule Evidence 203, a trial court may consider affidavits in determining the law of a foreign nation. *See* TEX. R. EVID. 203; *Dankowski v. Dankowski*, 922 S.W.2d 298, 302-03 (Tex. App.—Fort Worth 1996, writ denied). A trial court will likely not abuse its discretion in believing one credible expert witness over another. *See Phoenix Network Techs. Ltd. v. Neon Sys., Inc.*, 177 S.W.3d 605, 618 n. 15 (Tex. App.—Houston [14th Dist.] 2005, no pet.) (in the context of whether a foreign jurisdiction would enforce a forum-selection clause, a trial court did not abuse discretion in being advised on foreign law by one party expert's affidavit over the opponent's expert's affidavit).

VII. Conclusion

Arbitration clauses, forum-selection clauses, and contractual jury waiver clauses are essentially the same thing. They are

contractual agreements entered into by parties that limit the parties' rights regarding future disputes. Importantly, all three clauses often have the result of the parties waiving their constitutional right to a jury. Yet, because the legal development of the enforcement of the three clauses has not been consistent, there are differing tests for their enforcement. There is no logical reason for differing tests and rules for enforcing the clauses. Moreover, the interpretation and enforcement issue becomes even more complicated when a choice-of-law clause is thrown into the mix. The parties' choice of law should be respected, and the law chosen by the parties should govern the interpretation and enforcement of an arbitration/forum-selection/jury waiver clause.