An Overview of the Arbitration of Employee Disputes in Texas

Arbitration is here to stay. Driven by what parties perceive as deficiencies of the formal judicial system, including expense, protracted length, gamesmanship, belligerency and wastefulness, arbitration has grown exponentially in the last ten years. Because of its confidentiality, empirical statistics are difficult to come by. Nonetheless, the American Arbitration Association, probably the largest administrator in the world, notes a 46% increase in total case filings 2007 to 2012 — i.e., from 127,729 to 187,596 cases per year (including commercial, employment, labor, construction and no-fault issues). The Financial Industry Regulatory Authority ("FINRA"), where arbitration is mandated in agreements with securities brokers, notes an average caseload of 6,822 case per year. *See* www.finra.org/ArbitrationandMediation/FINRADisputeResolution/AdditionalResources/Statistics/index.html.

Courts and legislatures, both federal and state, continue to sanction this trend. Given the $200 to $300 billion annual cost of civil litigation, arbitration's dramatic increase must be viewed as a seismic shift in the notions of justice in this America. Formal studies also confirm general public acceptance of the process. *See, e.g., Business-to-Business Arbitration in the United States: Perceptions of Corporate Counsel*, Rand Institute for Civil Justice (2011), www.rand.org/content/dam/rand/pubs/technical_reports/2011/RAND_TR781.pdf;

Dispute-Wise Management: Improving Economic and Non-Economic Outcomes in Managing Business Conflicts American Arbitration Association (2003).

A. An Overview of the Arbitration Process

1. Arbitration Generally

"Arbitration is a contractual proceeding by which the parties, in order to obtain a speedy and inexpensive final disposition of disputed matters, consent to submit the controversy to arbitrators for determination." *J.M. Davidson, Inc. v. Webster*, 49 S.W.3d 507, 512 (Tex. App. — Corpus Christi 2001), *rev'd on other grounds*, 128 S.W.3d 223 (Tex. 2003); *see also In re John M. O'Quinn, P.C.*, 2003 WL 11468619, * 3 (Tex. App. — Tyler June 25, 2003, orig. proceeding), *vacated as moot*, 2003 WL 21571427 (Tex. App. — Tyler July 10, 2003) (mem. op.). It is "founded on the consent of he parties to forgo their right to litigate, instead submitting disputes to a private decision-maker." *Ponderosa Pine Energy, LLC v. Tenaska Energy, Inc*., 376 S.W.3d 358, 368 (Tex. App. — Dallas 2012, pet. filed); *Kendall Bldrs., Inc. v. Chesson*, 149 S.W.3d 796, 803 (Tex. App. — Austin 2004, pet. denied).

Like a lawsuit, arbitration is a mechanism allowing parties to reach a binding resolution of their disputes, *Chambers v. O'Quinn*, 305 S.W.3d 141, 151 (Tex. App. — Houston [1st Dist.] 2009, pet. denied) *Porter & Clements, L.L.P. v. Stone*, 935 S.W.2d 217, 221 (Tex. App. — Houston [1st Dist.] 1996, orig. proceeding), by determining their respective rights and liabilities. *In re Allstate County Mut. Ins. Co.*, 85 S.W.3d 193, 195 (Tex.

2002) (orig. proceeding). However, unlike a lawsuit, this determination is made in an arbitral rather than a judicial forum. *In re American Homestar of Lancaster, Inc.*, 50 S.W.3d 480, 485 (Tex. 2001) (orig. proceeding); *In re Burton, McCumber & Cortez, L.L.P.*, 115 S.W.3d 235, 237 (Tex. App. — Corpus Christi 2003, orig. proceeding).

As is the case with other alternative dispute resolution proceedings, the overarching purpose of arbitration is to keep parties out of the courtroom. *Cayan. v. Cayan*, 38 S.W.3d 161, 165 (Tex. App. — Houston [14th Dist.] 2000, pet. denied). In fact, "the very purpose of arbitration is to avoid the time and expense of a trial," *In re Bruce Terminex Co.*, 988 S.W.2d 702, 704 (Tex. 1998) (orig. proceeding); *accord, In re MHI Partnership, Ltd.*, 7 S.W.3d 918, 921-22 (Tex. App. — Houston [1st Dist.] 1999, orig. proceeding), by transferring the case from a judicial forum to an arbitral one. *Dallas Cardiology Assoc., P.A. v. Mallick*, 978 S.W.2d 209, 213 (Tex. App. — Dallas 1998, pet. denied).

2. Perceived Benefits of Arbitration

A big part of the reason for the explosion in the growth of arbitration is that arbitration is seen by many to be a superior form of dispute resolution. Although parties who agree to arbitrate lose some benefits (including the procedural rigor employed by courts and appellate review of the outcome, *Stolt-Nielson, S.A. v. AnimalFeeds Int'l Corp*., ___ U.S. ___, 130 S.Ct. 1758, 1775 (2010)), they receive benefits other than avoiding having to find parking outside the courthouse. In addition to allowing parties to pick the forum where the dispute is resolved, parties may also (depending on the language of the arbitration agreement): (1)

have the right to pick their own arbitrators, *Porter & Clements*, 935 S.W.2d at 221; (2) determine the rules under which the arbitration is to be conducted, *J.D. Edwards World Solutions Co. v. Estes, Inc.*, 91 SW.3d 836, 842 (Tex. App. — Fort Worth 2002, pet. denied); and (3) keep matters they want to remain private out of the public eye because an arbitration (unlike a lawsuit) is not a public proceeding. Additionally, the consensual nature of arbitration means it is perceived as being (and in fact often is) far less expensive than a lawsuit, even after the additional costs associated with paying the arbitrator is factored in. *Porter & Clements*, 935 S.W.2d at 221. Finally, arbitrations are usually resolved far more quickly than lawsuits, which aids in keeping costs down and in bringing quick certainty to a situation. *Stolt-Nielson*, 130 S.Ct. at 1775.

In short, the ability to agree to arbitrate allows parties to either craft their own unique set of governing rules that will settle any disputes that arise between them or. However, if they do not want to go through the trouble of creating their own rules from scratch, they may chose from the array of "pre-packaged" rules that are available and commonly used. www.adr.org/aaa/ShowProperty?nodeId=/UCM/ADRSTG_004362&revision=latestreleased (AAA Employment Arbitration Rules).

3. Arbitration — The Darling of the Law

For all these reasons, "[t]he law strongly favors arbitration," *New Concept Constr. Co., Inc. v. Kirbyville Consolidated Indep. Sch. Dist.*, 119 S.W.3d 468, 471 (Tex. App. — Beaumont 2003, pet. denied), both state and federal. *Forest Oil Corp. v. McAllen*, 268

S.W.3d 51, 55-56 (Tex. 2008); *Prudential Securities, Inc. v. Marshall*, 909 S.W.2d 896, 898 (Tex. 1995) (orig. proceeding); *Skidmore Energy, Inc. v. Maxus (U.S.) Exploration Co.*, 345 S.W.3d 672, 677 (Tex. App. — Dallas 2011, pet. denied). Although many practitioners see arbitration as the "new kid on the block," they are mistaken: agreements to resolve disputes, through arbitration, have not only been around but have been the object of judicial favor for a long time. *See, e.g., Brazoria County v. Knutson*, 176 S.W.2d 740, 743 (Tex. 1944).

B. Nuts and Bolts of an Arbitration

Having discussed the theory behind and reasons for the popularity of arbitration, it is also important to understand the nuts and bolts of how an arbitration proceeding works, from the initial demand to the final confirmation of the award.

1. An Agreement to Arbitrate

Arbitration is a consensual process. No matter how favored it may be, arbitration is, at its heart, the product of an agreement, and a court cannot force a party to arbitrate in the absence of their agreement to do so. *Freis v. Canales*, 877 S.W.2d 283, 284 (Tex. 1994) (orig. proceeding) (per curiam); *see also see also Rolland*, 96 S.W.3d at 345; *In re EGL Eagle Global Logistics, L.P.*, 89 S.W.3d 761, 764 (Tex. App. — Houston [1st Dist.] 2002, orig. proceeding) (mand. denied). In the words of the Dallas Court of Appeals:

> Although arbitration is encouraged, it is a contractual matter and, in the absence of an agreement to arbitrate, a party cannot be forced to forfeit the constitutional protections of the judicial system and submit its dispute to arbitration.

Jenkins & Gilchrist v. Riggs, 87 S.W.3d 198, 201 (Tex. App. — Dallas 2002, no pet.).

Because of this, there is no equivalent of the joinder rules found in the Rules of Civil Procedure, and means cases involving multiple claims arising out of more or less the same series of events may be decided in different proceedings. Subject to a few exceptions discussed below, this does not make these separate disputes subject to arbitration of claims for which there is no agreement to arbitrate. *In re Merrill Lynch Trust Co., FSB*, 235 S.W.3d 185, 192 (Tex. 2007) (orig. proceeding); *Northwest Constr. Co., Inc. v. The Oak Partners, L.P.*, 248 S.W.3d 837, 852 n. 13 (Tex. App. — Dallas 2008, pet. denied).

2. Demanding and Compelling Arbitration

If two parties who have an agreement to arbitrate that one party decides to invoke, he does so by sending a notice of a demand for arbitration. The purposes of this demand is (among other things) to put the other party on notice that arbitration is forthcoming, to allow it to protect its rights. *Haddock v. Quinn*, 287 S.W.3d 158, 181 (Tex. App. — Fort Worth 2009, pet. denied). The law does not say anything in particular about the mechanics of making this initial demand, *Executone Info. Svcs., Inc. v. Davis*, 26 F.3d 1314, 1322 (5th Cir. 1994) (noting federal law does not impose any requirements regarding how specific the notice must to be), so it should be sent in the manner provided by the agreement. *See, e.g., In re L&L Kempwood Assoc., L.P.*, 9 S.W.3d 125, 128 (Tex. 1999) (orig. proceeding) (per curiam) (demand for arbitration effective when sent in the way provided in the agreement). Sometimes, however, the other side refuses to accept the demand for arbitration, which can result in the party seeking to arbitrate pursuing a motion to compel arbitration in the courts.

Because an agreement to arbitrate is contractual, whether an agreement compels arbitration is determined by application of the traditional principals of contract law. *In re Big 8 Food Stores, Ltd.*, 166 S.W.3d 869, 874 (Tex. App. — El Paso 2005, orig. proceeding). In order to prove entitlement to arbitration, the party seeking it must bear the initial burden of proving: (1) an enforceable arbitration agreement exists; and (2) the agreement encompasses the claim at issue. *In re D. Wilson Constr. Co.*, 196 S.W.3d 774, 781 (Tex. 2006) (orig. proceeding); *Ernst & Young, L.L.P. v. Martin*, 278 S.W.3d 497, 499 (Tex. App. — Houston [14th Dist.] 2009, orig. proceeding and no pet.). These issues are decided by the courts, *In re Weekley Homes, Inc*., 180 S.W.3d 127, 130 (Tex. 2005) (orig. proceeding); *In re James E. Bashaw & Co.*, 305 S.W.3d 44, 51 (Tex. App. — Houston [1st Dist.] 2009, no pet.), unless in the arbitration agreement itself the parties have "unmistakably provided" the matter is one for the arbitrator. *Agere Sys., Inc. v. Samsung Electronics Co., Ltd.*, 560 F.3d 337, 339 (5th Cir. 2009). Once the proponent of arbitration has done this the presumption in favor of arbitration comes into existence, and the burden shifts to the party opposing arbitration to show some reason exists why the request for arbitration should be denied. *Nexion Health at Omaha, Inc. v. Martin*, 2010 WL 2690562 at * 2 (Tex. App. — Texarkana July 7, 2010, no pet.) (mem. op.); *Dallas Cardiology Assoc.,* 978 S.W.2d at 212.

However, this involvement by the courts cannot be used as a means to deny litigants the benefits of arbitration, and courts cannot use their power to determine whether a matter must be sent to arbitration to interfere with the agreement of the parties. Because arbitration

is so favored, once it has been shown that two parties have entered into an agreement to arbitrate their differences it is presumed that any difference between them that may arise is subject to being arbitrated. *Burton, McCumber & Cortez*, 115 S.W.3d at 237; *In re Rolland*, 96 S.W.3d 339, 345 (Tex. App. — Austin 2001, orig. proceeding). If there is any doubt as to whether a dispute is subject to being arbitrated, these doubts are resolved in favor of arbitration, *In re First Tex. Homes, Inc.*, 120 S.W.3d 868, 870 (Tex. 2003) (orig. proceeding) (per curiam); *Brown v. Anderson*, 102 S.W.3d 245, 247-48 (Tex. App. — Beaumont 2003, no pet.), unless it can say with "positive assurance" that the matter is not subject to arbitration. *In re Dillard Dep't Stores, Inc*., 186 S.W.3d 514, 516 (Tex. 2006) (per curiam) (orig. proceeding); *Graham-Rutledge & Co., Inc. v. Nadia Corp*., 281 S.W.3d 683, 691 (Tex. App. — Dallas 2009, no pet.). In other words, when the interpretation of an arbitration clause is fairly debatable or reasonably in doubt, courts decide in favor of arbitration, leaving it to the arbitrator to decide the scope of the arbitration provision. *Babcock & Wilcox Co. v. PMAC, Ltd.*, 863 S.W.2d 225, 230 (Tex. App. — Houston [14th Dist.] 1993, writ denied).

Matters relevant to the existence and enforceability of an arbitration provision are presented to the court in a summary judgment-like proceeding, *Jack B. Anglin Co., Inc. v. Tipps*, 842 S.W.2d 266, 272 (Tex. 1992); *Big 8 Food Stores,* 166 S.W.3d at 875, governed by the same evidentiary rules governing a request for summary judgment. *AXA Financial, Inc. v. Roberts*, 2007 WL 2403210 at * 4 (Tex. App. — Austin Aug. 23, 2007, no pet.) (mem. op.); *In re Jebbia*, 26 S.W.3d 753, 756-57 (Tex. App. — Houston [14th Dist.] 2000, orig.

proceeding). Based on the documents and evidence presented at such a proceeding a court should order the parties to arbitrate their differences, if they have agreed to do so.

3. Parties to the Arbitration

Assuming an agreement to arbitrate is shown, the next question is who may be made to arbitrate? Of course, as a contract, all parties who have agreed to be bound by it are subject to its terms, and may be made to arbitrate. But what about non-signatories? The answer is a non-signatory may be made to arbitrate when they are bound by the agreement to arbitrate, even though they did not sign the agreement.

The six such occasions recognized by the Texas Supreme Court are: (1) where the agreement containing the arbitration provision is incorporated by reference in another agreement; (2) when the non-signatory assumed a contract containing an arbitration provision; (3) in agency situations; (4) when the non-signatory is the alter ego of the signatory; (5) when the non-signatory is equitably estopped from denying the arbitration clause; and (6) when the non-signatory is a third-party beneficiary of the contract with the arbitration provision. *In re Kellogg, Brown & Root*, 166 S.W.3d 732, 739 (Tex. 2005) (orig. proceeding); *accord, In re Wells Fargo Bank, N.A.*, 300 S.W.3d 818, 824 (Tex. App. — San Antonio 2009, orig. proceeding) (mand. denied); *In re Merrill Lynch, Pierce, Fenner & Smith, Inc*., 195 S.W.3d 807, 813-14 (Tex. App. — Dallas 2006, orig. proceeding).

Some of these circumstances are straightforward. For example, in many construction contracts, the owner and the general contractor agree to arbitrate in their contract, and the

contract between the general and subcontractors incorporates the terms of this contract by reference. In such cases, this incorporation by reference incorporates the arbitration provision in the contract with the subcontractor, and it may then be enforced against the subcontractor. *See, e.g., D. Wilson Constr.*, 196 S.W.3d at 781-82. Assumption is also straightforward, and occurs when the non-signatory assumes the obligations of a contract containing an arbitration agreement, making the obligation his own. *See, e.g., Mullins v. Elieson*, 611 S.W.2d 921, 925 (Tex. Civ. App. — Amarillo 1981, no writ) (when contract is assumed, assignee stands in the shoes of the assignor). A similar logic appears to apply in cases involving alter ego of a signatory, because a finding of alter ego leads the court to ignore the corporate existence and to treat all parties as one. *Matthews Constr. Co. v. Rosen*, 796 S.W.2d 692, 693-94 (Tex. 1990). Finally, under general contract law third party beneficiary status is an exception to the general rule is that a non-party to a contract has no interest in it, *Drilltec Technologies, Inc. v. Remp*, 64 S.W.3d 212, 215 (Tex. App. — Houston [14th Dist.] 2001, no pet.), meaning the third party beneficiary has a legal interest in arbitration, and may enforce and be bound by the agreement. *In re NEXT Fin. Gp., Inc*., 271 S.W.3d 263, 267 (Tex. 2008) (orig. proceeding); *Carr v. Main Carr Dev., LLC*, 337 S.W.3d 489, 494-95 (Tex. App. — Dallas 2011, pet. denied). Other grounds for forcing a non-signatory to arbitrate are more complicated, and depend on the facts.

Equitable estoppel permits the enforcement of an arbitration provision against a non-signatory on two distinct grounds: (1) where the claims brought in the case in some way

depend on the terms of a contract containing an arbitration agreement; or (2) when the signatory has raised allegations of substantially interdependent and concerted misconduct by both the non-signatory and one or more of the signatories to the contract. *Merrill Lynch*, 195 S.W.3d at 814. The first kind of estoppel is called "direct benefits estoppel," which arises when a non-signatory plaintiff claims that he is entitled in some way to recover under a contract: in such cases the courts find the plaintiff is estopped from on the one hand seeking to enforce some provision of the contract and on the other hand from avoiding the arbitration provision. *See, e.g., Weekley Homes,* 180 S.W.3d at 132 (child's tort claims subject to agreement to arbitrate; although child did not sign arbitration agreement, and although claims were tort claims, claims arose out of and only existed because of construction contract containing arbitration provision).

The second kind of estoppel (which has no particular name) is less common, but is based substantially on the Fifth Circuit's decision in *Grigson v. Creative Artists Agency, L.L.C.*, 210 F.3d 524 (5th Cir.), *cert. denied*, 531 U.S. 1013, 121 S.Ct. 570 (2000). In *Grigson*, the Fifth Circuit recognized that, under limited circumstances, substantially interdependent and interrelated claims brought against a non-signatory alleging that the non-signatory was engaged in misconduct with a signatory, equity could permit all the claims heard by an arbitrator. *Grigson*, 210 F.3d at 527-28. This is because allowing the opposite result: arbitration of the claims against the signatory and not against the non-signatory would defeat the purpose of arbitration. *Id.* at 528-31. However, in a recent decision, the Texas

Supreme Court indicated that while it was comfortable with the idea of direct-benefits estoppel, it was unwilling to recognize concerted misconduct estoppel a la *Grigson*, unless forced to do so. *Merrill Lynch, Trust Co.*, 235 S.W.3d at 191-95.

Finally, if a non-signatory to the agreement to arbitrate is an agent of the signatory, claims by or against the agent may also be subject to arbitration. It is possible the scope of the arbitration agreement includes claims brought against an agent of the signatory. *See, e.g., In re Vesta Ins. Gp.*, Inc., 192 S.W.3d 759, 763 (Tex. 2006) (orig. proceeding); *In re Hawthorne Townhomes, L.P.*, 282 S.W.3d 131, 139 (Tex. App. — Dallas 2009, orig. proceeding). Also, courts refuse to allow a party to avoid the effect of an agreement to arbitrate by artful pleading, such as pursuing claims against an opponent's agents, rather than against the party itself. *See, e.g., In re Kaplan Higher Education Corp*., 235 S.W.3d 206, 209 (Tex. 2007).

4. Scope of the Agreement to Arbitrate

On occasion, disputes also arise as to whether a particular claim is or is not covered by the agreement to arbitrate. As set forth above, these disputes are usually resolved by the court, unless the agreement itself provides it is a matter for the arbitrator. When determining whether a claim falls outside the scope of an arbitration clause, the court must focus on the factual allegations of the complaint rather than the legal causes of action asserted. *Prudential Securities*, 909 S.W.2d at 900. The court determines whether "the facts alleged are 'factually intertwined' with the contract containing the arbitration clause, 'inextricably enmeshed' with

the contract, have a 'significant relationship' to the contract, or whether the facts alleged 'touch matters' covered by the contract." *In re Helix Energy Solutions Gp., Inc*., 303 S.W.3d 386, 397 (Tex. App. — Houston [14th Dist.] 2010, orig. proceeding) (internal citations omitted).

Although the ambit of an arbitration clause necessarily depends on the words, these words are often quite broad. For example, an arbitration clause governing "any dispute arising between the parties" or "any controversy or claim arising out of or relating to the contact thereof" is enforced broadly. *LDF Construction, Inc. v. Bryan*, 324 S.W.3d 137, 145 (Tex. App. — Waco 2010, no pet.); *950 Corbindale, L.P. v. Kotts Cap. Hldgs., L.P.*, 316 S.W.3d 191, 195 (Tex. App. — Houston [14th Dist.] 2010, no pet.); *McReynolds v. Elston*, 222 S.W.3d 731, 740 (Tex. App. — Houston [14th Dist.] 2007, no pet.). Likewise, if the arbitration provision says something like "all claims" will be arbitrated, this language is understood more or less literally. *Prudential Securities*, 909 S.W.2d at 899; *TMI, Inc. v. Brooks*, 225 S.W.3d 783, 791-92 (Tex. App. — Houston [14th Dist.] 2007, orig. proceeding and pet. denied). "Arising out of or connected with" the agreement is another example of broad language, construed as evidence of the parties' intent to be inclusive rather than exclusive. *In re Kepka,* 178 S.W.3d 279, 287 (Tex. App. — Houston [1st Dist.] 2005, orig. proceeding), *overruled on other grounds, In re Labatt Food Svc., L.P.*, 279 S.W.3d 640 (Tex. 2009) (orig. proceeding); *Pepe Int'l Dev. Co. v. Pub Brewing Co.*, 915 S.W.2d 925, 930 (Tex. App. — Houston [1st Dist.] 1996, no writ).

5. Referral to a Knowledgeable Arbitrator

Once the parties and issues are nailed down, the matter is then sent to either a single arbitrator or a panel of three arbitrators chosen by the parties in accordance with the agreement. It is at this time that the benefits of arbitration begin to become apparent.

In most instances the arbitrators are selected by the parties for the specific cases because of their knowledge of the subject matter. Of necessity judges are generalists, but parties to an arbitration may select arbitrators who have a deep knowledge of a particular issue or industry. Based on that experience and expertise, arbitrators can render an award based on thoughtful and thorough analysis. Thus, the selection of an appropriate arbitrator is critical, and studies show that an arbitrator's knowledge of a specific type of case is the most important qualification for his or her effectiveness, not whether the arbitrator has litigation or judicial experience.

In most cases (especially those that are legally complex or which involve large dollar amounts) the typical arbitrator is a practicing lawyer. As such they are knowledgeable in the law but, unlike judges, do not maintain a "docket" of hundreds of seemingly anonymous cases that require their attention. This means that, in addition to having useful subject-area expertise, they also have the ability to develop a comprehensive grasp of each individual case.

In order to make sure they are getting the arbitrator they have bargained for, arbitrators can be required to make disclosures of their qualifications, disclosures that could

be used to prevent an unqualified arbitrator from hearing the case. *Mewbourne Oil Co. v. Blackburn*, 793 S.W.2d 735, 737 (Tex. App. — Amarillo, orig. proceeding) (mand. denied) (contract established qualifications of arbitrator, and since party did not challenge he was qualified under the contract, he was not entitled to have arbitrator disqualified). Arbitrators also tend to disclose other information about their contacts with the litigants and their lawyers, to allow the participants to ensure that the person deciding their dispute is unbiased. Failures to fully disclose this information can lead to protracted and expensive satellite litigation after the arbitration is over. *See, e.g., Positive Software Solutions, Inc. v. New Century Mtg. Corp.*, 476 F.3d 278 (5th Cir.), *cert. denied*, 551 U.S. 1114, 127 S.Ct. 2943 (2007) (en banc court reversing panel's vacation of arbitration award based on failure to disclose arbitrator and one of the lawyers representing a party had litigated a case together some years before).

6. Informal Procedures, Subject to the Control of the Arbitrator

Another benefit of arbitration that soon becomes apparent is the informality and flexibility of the procedures used to conduct the arbitration. Because it is not in court, arbitrations are not subject to the rules of civil procedure; its more informal proceedings are thought to increase efficiency. *Nafta Traders, Inc. v. Quinn*, 339 S.W.3d 84, 101 (Tex. 2011) (orig. proceeding). However, the parties may specify in their agreement that certain rules apply, *ITT Educational Svcs., Inc. v. Arce*, 533 F.3d 342, 345 (5th Cir. 2008), and even if the agreement does not do this the parties (subject to the arbitrator's approval, *In re Wood*, 140

S.W.3d 367, 369-70 (Tex. 2004) (per curiam) (orig. proceeding)) can craft rules and procedures after the fact that make sense for their case. Much of the work in a typical lawsuit is intended to make sure something bad does not happen (i.e., all discovery is done to prevent surprises, steps are taken to make sure all evidence is admissible under the rules, etc.), but the parties to an arbitration may agree to dispense with such formalities and get the heart of the matter.

This flexibility gives rise to two further benefits: economy and speed. Being experts, there is no need to spend time educating the arbitrator about either the law or the practical considerations of a given matter, and the lack of formal discovery and extensive motions practice also keeps costs down. Because of the relative lack of "pre-trial" matters and their ability to focus on the case, most arbitrations are resolved quickly. According to the AAA, the majority of all cases brought before it are resolved in less than a year, with over ninety percent being decided after a hearing that lasts two days or less. Another arbitration provider claims the average time from filing to disposition of an arbitration claim is about two-thirds that of the average lawsuit, a significant time saving.

In order to capitalize on these advantages, many groups that conduct arbitrations (including the AAA) have rules aimed at specific kinds of cases. The essential difference between these "pre-packaged" arbitration rules and the rules governing civil lawsuits is that the arbitration rules rule for about 30 pages, while the annotated version of the Texas Rules of Civil Procedure used by many lawyers in Texas weighs in at over 1,200 pages. In most

employment law cases, the AAA's Commercial Arbitration Rules will apply, and the existence of this simple set of rules means parties to an arbitration do not have to reinvent the wheel for each case.

7. Confidentiality

For many participants in arbitration its confidentiality is also a selling point. Court hearings are almost always open, while arbitrations are closed and their resolution need not become a matter of public record. Cases involving sensitive or embarrassing family matters, trusts and confidential business information may all be resolved in private, without fear that one's "dirty laundry" will be hung out to dry on the front page of the newspaper.

8. The Award

An arbitrator has the power to decide any issue submitted under the agreement to arbitrate. *Ancor Hldg., L.L.C. v. Peterson, Goldman & Villani, Inc.*, 294 S.W.3d 818, 829-30 (Tex. App. — Dallas 2009, no pet.); *Kosty v. South Shore Harbour Community Ass'n, Inc*., 226 S.W.3d 459, 464 (Tex. App. — Houston [1st Dist.] 2006, pet. denied). After hearing the matter and coming to a decision, the arbitrator issues the document deciding the issues, called the "award." Given the broad power of the arbitrator to resolve the case, he will be found to have exceeded his powers if he decides a matter not properly before him, *Townes Telecommunications, Inc. v. Travis, Wolff & Co., L.L.P.*, 291 S.W.3d 490, 493 (Tex. App. — Dallas 2009, pet. denied), "effectively dispensing his own brand of industrial justice ..." *Stolt-Nielson*, 130 S.Ct. at 1767. Any doubts regarding whether the arbitrator exceeded his

authority are resolved in favor of the award. *Ancor Hldg*., 294 S.W.3d at 830; *Myer v. Americo Life, Inc*., 232 S.W.3d 401, 408 (Tex. App. — Dallas 2007, no pet.). Put simply, for almost all purposes the award is the final resolution of the case.

9. Enforcement of the Award

If necessary, this award may be confirmed by the courts and turned into a judgment that may be executed on the loser. The procedure for having an arbitration award confirmed by the court is straightforward. Under federal law, an order confirming an arbitration award is summarily issued in response to a timely motion asking that the award be confirmed. *Washington Mut. Bank v. Crest Mtg. Co.*, 418 F.Supp.2d 860, 862 (N.D. Tex. 2006); *see also* 9 U.S.C. § 9 (court "must grant" a request that the arbitration award be confirmed). In Texas, the parties merely file a motion with the court, Tex. Civ. Prac. & Rem. Code § 171.093, asking that the arbitration award be confirmed, and this motion "shall confirm the award" unless the other side can convince the court that grounds exist to have the award vacated. Tex. Civ. Prac. & Rem. Code § 171.082(a).

Because a prime objective of arbitration law is to "permit a just and expeditious result to be reached with a minimum of judicial interference," *Gulf Guar. Life Ins. Co. v. Connecticut Gen. Life Ins. Co.*, 304 F.3d 476, 492 (5th Cir. 2002), attempts to set aside an arbitration award are difficult. Arbitral awards are "entitled to great deference in a court of law, lest disappointed litigants seek to overturn every unfavorable arbitration award." *Blue Cross Blue Shield of Tex. v. Juneau*, 114 S.W.3d 126, 134 (Tex. App. — Austin 2003, no

pet.). If there is any permissible way the arbitrator could have arrived at the award, it should be affirmed. *Kergosien v. Ocean Energy, Inc*., 390 F.Supp.3d 346, 354-55 (5th Cir. 2004); *see also Peacock v. Wave Tec Pools, Inc*., 107 S.W.3d 631, 635 (Tex. App. — Waco 2003, no pet.) (all reasonable presumptions will be indulged in favor of the arbitration award).

Accordingly, judicial review of the award is "extraordinarily narrow," *Tanox, Inc. v. Akin, Gump, Strauss, Hauer & Feld, L.L.P.*, 105 S.W.2d 244, 250 (Tex. App. — Houston [14th Dist.] 2003, pet. denied), "among the narrowest known to the law." *Weber v. Merrill Lynch Pierce Fenner & Smith, Inc.*, 455 F.Supp.2d 545, 548 (N.D. Tex. 2006). Under Texas law judicial review of arbitration awards is limited to just a few grounds, such as whether the award was the product of fraud or corruption, whether the arbitrator showed "evident partiality" or whether he refused to hear material evidence, Tex. Civ. Prac. & Rem. Code § 171.088, although a few common law grounds for vacatur are still recognized. *Gumble v. Grand Homes 2000, L.P.*, 334 S.W.3d 1, 4 (Tex. App. — Dallas 2007, no pet.). Review under federal law is similarly narrow, 9 U.S.C. §§ 10(a), 11(a), with the statutory grounds for vacating an award identified in federal law being exclusive. *Hall Street Assoc., L.L.C. v. Mattel, Inc*., 552, U.S. 576, 583, 128 S.Ct. 1396 (2008). There is nothing like the legal and factual sufficiency review of an award like the review an appellate court applies to a judgment, so "[s]uccessful court challenges [to arbitration awards] are few and far between." *Tanox*, 105 S.W.3d at 250-51.

C. Arbitration in an Employment Law Context: General Considerations

All of the foregoing general rules will apply in cases involving an arbitration agreement between an employer and an employee. However, employment cases also give rise to issues that are specific to the employment context.

1. Arbitration and the At Will Employee

The fact an employee is an at will employee, and therefore subject to being terminated at any time and for almost any reason, does not mean the employer and employee cannot enter into a binding agreement to arbitrate disputes they may have. Although some have argued that any agreement with an at will employee is necessarily illusory because the employee could avoid having to act merely by firing the employee, the Supreme Court has rejected this claim. It has held that when the employer notifies the employee of a policy (such as a requirement that disputes be arbitrated), and the employee continues his employment after this notice, he is deemed to have consented to the change, and his continued employment constitutes the consideration supporting the agreement. *In re Haliburton*, 80 S.W.3d 566, 568-69 (Tex. 2002) (orig. proceeding), *cert. denied sub nom Myers v. Haliburton Co.*, 537 U.S. 1112, 123 S.Ct. 901 (2003); *accord, Dillard Dept. Stores,* 198 S.W.3d at 780. The requisite degree of notice seems to be of the existence of the agreement to arbitrate, not of all its contents. *In re Dallas Peterbilt, Ltd., L.L.P.*, 196 S.W.3d 161, 162 (Tex. 2006) (per curiam) (orig. proceeding) (summary of agreement effective to provide notice, even though employee claimed he never received the entire agreement); *accord, Weekley Homes, L.P. v. Rao*, 336 S.W.3d 413, 418-19 (Tex. App. — Dallas 2011, no pet.).

2. Consideration and Illusory Agreements

As contracts, all agreements to arbitrate must be supported by consideration. Of course, it is possible to pay another something in exchange for his agreement to arbitrate, but this is not necessary: mutual agreement to arbitrate can provide consideration for agreement to arbitrate. *In re 24R, Inc*., 324 S.W.3d 564, 566 (Tex. 2010) (per curiam) (orig. proceeding). This is true even if the only thing being agreed is to arbitrate: "In the context of stand-alone arbitration agreements, binding promises are required on both sides as they are the only consideration rendered to create a contract." *In re AdvancePCS Health L.P.*, 172 S.W.3d 603, 607 (Tex. 2005) (per curiam) (orig. proceeding).

However, the promises supporting the agreement to arbitrate cannot be illusory. If both parties to an arbitration agreement promise to arbitrate their disputes, the promise is not sufficient consideration if the promisor is not bound by it, which happens if he is able to unilaterally avoid the effect of his promise. *24R,* 324 S.W.3d at 567; *In re Palm Harbor Homes, Inc.*, 195 S.W.3d 672, 677 (Tex. 2006) (orig. proceeding); *In re HEB Groc. Co., L.P.*, 299 S.W3d 393, 399 (Tex. App. — Corpus Christi 2009, orig. proceeding). If an agreement is supported by an illusory promise, there is no contract because there is no mutuality of obligation. *24R*, 324 S.W.3d at 567; *Vanegas v. American Energy Svcs*., 302 S.W.3d 299, 302 (Tex. 2009); *Budd v. Max Int'l, LLC*, 339 S.W.3d 915, 919 (Tex. App. — Dallas 2011, no pet.).

In an employment arbitration context, this occurs when one of the parties to an

agreement is bound to arbitrate his disputes, but the other party is not. *Compare Mendivil v. Zanios Foods, Inc.*, 357 S.W.3d 827, 832-33 (Tex. App. — El Paso 2012, no pet.) (arbitration agreement illusory, because employee was required to arbitrate his claims but employer was not) *with Labidi v. Sydow*, 287 S.W.3d 922, 928 (Tex. App. — Houston [14th Dist.] 2009, no pet.) (agreement to arbitrate was enforceable because it was bilateral and mutually binding). Determining who is bound and how sometimes requires considering the agreement as a whole to determine whether the employer retains the unilateral right to change the arbitration agreement and, if so, what effect such a change could have on the arbitration of a dispute. For example, if the employer could amend the arbitration agreement in such a way as to avoid any obligation to arbitrate, or achieve the same result by cancelling the agreement entirely, the agreement should be found to be illusory, because it is up to the employer to determine whether he is bound, or not. *24R*, 324 S.W.3d at 567; *Nazareth Hall Nursing Ctr. v. Melendez*, 372 S.W.3d 301, 305-06 (Tex. App. — El Paso 2012, no pet.). However, even if the employer retains the right to amend or abolish the agreement to arbitrate, the agreement is not illusory if its operation is prospective only, i.e., if it would not have any effect on existing disputes. *In re Poly-America, LLC*, 296 S.W.3d 74, 76 (Tex. 2009) (per curiam) (orig. proceeding); *Budd*, 339 S.W.3d at 920.

To avoid having the agreement found to be illusory, it is wise for employers to make clear that any changes to the arbitration agreement will not have any retroactive effect. *Compare HEB Groc. Co.*, 299 S.W.3d at 399-400 (provision allowing amendment

specifically provided amendment would have no effect on claims accruing before the amendment took effect) *with Dell Marketing, L.P. v. InCompass It, Inc*., 771 F.Supp.2d 648, 657 (W.D. Tex. 2011) (provision allowing agreement to be modified did not make clear changes would not be given any retroactive effect, so agreement could be illusory); *see also Carey v. 24 Hour Fitness USA, Inc*., 669 F.3d 202, 206-07 (5th Cir. 2012) (noting lack of a "savings clause," i.e., provision specifically exempting pending arbitrations from effect of amendment, in finding agreement was illusory).

3. Agreement Cannot be Unconscionable

Finally, courts will refuse to enforce contracts generally and arbitration agreements specifically if they are unconscionable, which generally refers to an overall one-sidedness in the terms of the contract. *Poly-America,* 262 S.W.3d at 348; *Service Corp. Int'l v. Lopez*, 162 S.W.3d 801, 809 (Tex. App. — Corpus Christi 2005, orig. proceeding). While there is nothing unconscionable about agreements to arbitrate per se, *In re Oakwood Mobile Homes, Inc.*, 987 S.W.2d 571, 574 (Tex. 1999) (orig. proceeding), *abrogated on other grounds*, *In re Haliburton*, 80 S.W.3d 566 (Tex. 2002) (orig. proceeding), the facts and circumstances surrounding a particular agreement to arbitrate may render the agreement unconscionable. *Poly-America*, 262 S.W.3d at 348.

a. Unconscionability Generally

Proof of unconscionability starts with two broad questions: (1) how did the parties arrive at the terms of the arbitration agreement?; and (2) do legitimate commercial reasons

justify the terms of the provision? *American Employers' Ins. Co. v. Aiken*, 942 S.W.2d 156, 160 (Tex. App. — Fort Worth 1997, no writ). The first question addresses so-called "procedural unconscionability," while the second addresses so-called "substantive unconscionability." *Pony Express Courier Corp. v. Morris*, 921 S.W.2d 817, 821 (Tex. App. — San Antonio 1996, no writ). Procedural unconscionability focuses on the parties' assent and the facts surrounding the bargaining process, while substantive unconscionability focuses on the terms of the arbitration provision itself. *Haliburton Co.*, 80 S.W.3d at 571. Proof that an agreement is so one-sided as to make its enforcement unfair shows substantive unconscionability. *In re Green Tree Servicing, LLC*, 275 S.W.3d 592, 603-04 (Tex. App. — Texarkana 2008, orig. proceeding); *TMI,* 225 S.W.3d at 792.

b. Forcing Employees to Accept Arbitration is not Unconscionable

The fact an employer can create a binding agreement to arbitrate with an at-will employee merely by informing him of the matter if the employee continues his employment, and that an employee may be compelled to accept this agreement as a condition of his continued employment, has no effect on the enforceability of the agreement. An employer's conditioning of continued employment on agreeing to the arbitration of disputes is not unconscionable, *Haliburton Co.*, 80 S.W.3d at 572, and because the employer has the right to insist the employee agree to arbitrate in order to stay employed means a threat to fire the employee if he does not is not an act of coercion that would invalidate the agreement. *In re Frank Kent Motor Co.*, 361 S.W.3d 628, 632 (Tex. 2012) (orig. proceeding).

c. Excessive Cost Can Make Arbitration Unconscionable

An issue that often arises in an employer-employee arbitration context is whether the cost of arbitration is so high as to place it beyond the reach of the employee. While requiring employees to bear some of the costs of arbitration is not itself unconscionable, *In re Weeks Marine, Inc*., 242 S.W.3d 849, 860 (Tex. App. — Houston [14th Dist.] 2007, orig. proceeding), if the costs the claimant is required to bear are so high that he elects to forego relief for reasons unrelated to the merit of his claim the agreement may be substantively unconscionable. *Olshan Fnd. Repair Co. v. Ayala*, 180 S.W.3d 212, 215-16 (Tex. App. — San Antonio 2005, pet. denied). Conversely, a lack of evidence showing the costs of arbitration cannot be paid means the agreement has not been shown to be unconscionable. *In re First Meritbank, N.A.*, 52 S.W.3d 749, 755-56 (Tex. 2001) (orig. proceeding); *In re Standard Meat Co., L.P.*, 2007 WL 730660 at * 4 (Tex. App. — Dallas Mar. 9, 2007, orig. proceeding).

Proof that the costs of arbitration are so excessive as to be unconscionable is both fact-dependent and difficult. The mere fact arbitration will cost something is not sufficient; if it were, all arbitration could be avoided merely by pointing to the cost. When the cost does become excessive is a question of fact, and requires very exacting proof. In a case where the arbitration was to occur before a three-member panel in Boston "in accordance with the commercial arbitration rules of the American Arbitration Association," the claimant's lawyer submitted an affidavit claiming that the costs associated with pursuing the claim through the

AAA would total approximately $35,000, an amount the claimant could not afford. *Aspen Tech., Inc. v. Shasha*, 253 S.W.3d 857, 864 (Tex. App. — Houston [14th Dist.] 2008, orig. proceeding and no pet.). On appeal, the court found this evidence was insufficient to show the claim was too expensive because: (1) the fact the agreement required the arbitration to occur under AAA rules did not mean it had to be done through the AAA, and so the cost of having the matter heard before the AAA proved nothing; and (2) even if it was tried before the AAA, its rules allow the panel to apportion costs as it sees fit. *Aspen Tech*., 253 S.W.3d at 864-65; *accord TMI,* 225 S.W.3d at 796-97 (fact agreement requires dispute to be heard under AAA rules does not mean it actually has to be heard by the AAA, and so estimates of the costs of such a proceeding held before the AAA prove nothing). Other courts have held that unconscionability attributable to excessive costs can be remedied if the party with the money offers to pay the arbitration costs that will be incurred, *D.R. Horton, Inc. v. Brooks*, 207 S.W.3d 862, 870 (Tex. App. — Houston [14th Dist.[2006, orig. proceeding and no pet.), or if the arbitrator can give such relief, i.e., shift costs from one party to the other. *Woodlands Christian Academy v. Weibust*, 2010 WL 3910366 at * 5 (Tex. App. — Beaumont Oct. 7, 2010, no pet.).[1]

The Supreme Court recently addressed the question of excessive fees, holding that: (1) the question is determined on a case-by-case basis; (2) factors considered include (a) the

[1] *Weibust* is also interesting for finding an agreement requiring arbitration to be conducted pursuant to the "supreme authority" of the "Holy Scriptures" was not objectionable, although perhaps because it found courts could overrule the arbitrator to the extent the decision conflicted with state or federal law. *Weibust* at * 4-5.

party's ability to pay the arbitration fee; (b) the amount of the fee in relation to the amount of the underlying claim; and (c) the cost differential between arbitration and litigation; (3) evidence there is a "risk" that certain costs will be incurred is insufficient to show arbitration is unconscionable; (4) the evidence must be "specific," showing the fees will be charged; and (5) this requires invoices, expert testimony and "reliable" cost estimates. *In re Olshan Fnd. Repair Co., LLC*, 328 S.W.3d 883, 893-897 (Tex. 2010) (orig. proceeding). As will be discussed in greater detail below, when an employer drafts an arbitration agreement he needs to be sensitive to issues of costs and not try to use cost as a mechanism for avoiding claims. The old maxim "pigs get fat and hogs get slaughtered" is a useful one.

D. Arbitration in an Employment Law Context: Specific Issues

1. Arbitration and Workers' Compensation and Workplace Injury Claims

One of the most common workplace issues giving rise to claims between employers and employees are workplace injuries. Many such claims are subject to the workers' compensation statutes. Interestingly, claims for workers' compensation benefits are excluded from the kinds of claims that are subject to being arbitrated under Texas law, Tex. Civ. Prac. & Rem. Code § 171.002(a)(4), and the Workers' Compensation Act itself forbids employees from waiving the rights they have under its provisions before they are injured. Tex. Labor Code §§ 406.033(a), (e). Taken together, these provisions would suggest that workers' compensation issues ought to fall outside the ambit of arbitration. However, these seemingly straightforward provisions does not necessarily mean that all claims arising from a workplace

injury fall outside the realm of arbitration, for a couple of reasons.

a. Preemption by Federal Law

The first reason is that this Texas law is often preempted. Although state law makes clear that employees cannot be made to promise to arbitrate injury claims that would otherwise be handled through the workers' compensation system before they are injured, federal arbitration law can trump state law to the extent it is inconsistent. *Sidney Austin Brown & Wood, LLP v. J.A. Green Dev. Corp*., 327 S.W.3d 859, 866, n.7 (Tex. App. — Dallas 2010, no pet.); *In re H.E. Butt Grocery Co.*, 17 S.W.3d 360, 378 (Tex. App. — Houston [14th Dist.] 2000, orig. proceeding). This includes the prohibition against pre-injury waiver of workers' compensation rights. *In re Bison Bldg. Materials, Ltd.*, 2008 WL 2548568 at * 7-10 (Tex. App. — Houston [1st Dist.] June 26, 2008, orig. proceeding); *In re Border Steel, Inc.*, 229 S.w.3d 825, 831-32 (Tex. App. — El Paso 2007, orig. proceeding) (mand. denied); *In re R&R Personnel Specialists of Tyler, Inc*., 146 S.W.3d 699, 703-04 (Tex. App. — Tyler 2004, orig. proceeding).

However, such preemption requires proving that the agreement is subject to federal law. Under federal law, the FAA only applies to "contracts evidencing transactions involving commerce." 9 U.S.C. § 2. This requires showing the contract affects commerce, *Cantella & Co. v. Goodwin*, 924 S.W.2d 943, 944 (Tex. 1996), with the term "commerce" being given a very broad meaning. *In re Tenet Healthcare, Ltd.*, 84 S.W.3d 760, 765 (Tex. App. — Houston [1st Dist.] 2002, orig. proceeding). "The amount of commerce need not be

substantial," *American Realty Trust, Inc. v. JDN Real Estate - McKinney, L.P.*, 74 S.W.3d 527, 530 (Tex. App. — Dallas 2002, pet. denied), and it is not necessary to prove the employee is involved in commerce, only that the employer is. *Smith v. H.E. Butt Groc. Co.*, 18 S.W.3d 910, 913 (Tex. App. — Beaumont 2000, pet. denied). Agreements affecting commerce may include employment contracts. *Equal Employment Opportunity Comm'n v. Waffle House, Inc.*, 534 U.S. 279, 289, 122 S.Ct. 754 (2002); *Circuit City Stores, Inc. v. Adams*, 532 U.S. 105, 113-14, 121 S.Ct. 1302 (2001). The party arguing the contract is subject to federal law has the burden of proving this, *In re Turner Bros. Trucking Co., Inc.*, 8 S.W.3d 370, 376 (Tex. App. — Texarkana 1999, orig. proceeding) (mand. denied), and the issue presents a question of fact. *In re Education Mgmt. Corp., Inc.*, 14 S.W.3d 418, 422 (Tex. App. — Houston [14th Dist.] 2000, orig. proceeding).

In the absence of such a showing federal law does not preempt state law governing workers' compensation claims, and agreements to arbitrate such claims cannot be enforced. *In re Swift Transp. Co., Inc*., 311 S.W.3d 484, 491-92 (Tex. App. — El Paso 2009, orig. proceeding) (also noting an exemption from the FAA that applies to transportation workers engaged in interstate commerce); *In re Villanueva*, 311 S.W.3d 475, 481-82 (Tex. App. — El Paso 2009, orig. proceeding) (mand. dis'd). Similarly, claims arising under the Labor Code for something other than "workers' compensation benefits,"i.e., retaliation claims, are likewise not subject to any limitations on their arbitrability. *In re Tenet Healthcare, Ltd.*, 84 S.W.3d 760, 767-68 (Tex. App. — Houston [1st Dist.] 2002, orig. proceeding); *In re Kellogg*

Brown & Root, 80 S.W.3d 611, 617 (Tex. App. — Houston [1st Dist.] 2002, orig. proceeding) (employees could be made to arbitrate claim he was retaliated against for making a workers' compensation claim).

b. Injury Plans Outside the Workers' Compensation System

Also, became workers' compensation is not mandatory in Texas, many employers have opted out of the system entirely. In such cases these employers will often offer some kind of workplace injury plan that (to some degree) takes the place of workers' compensation coverage, and will pay the medical expenses and a portion of the wages of an employee who has been hurt at work. These claims are often subject to an agreement to arbitrate disputes, which is permissible to the extent the injury plan displaces workers' compensation as a remedy available to an injured employee. *See, e.g., Bison Bldg. Materials* at * 10 (noting the provisions of the plan "eliminates the applicability" of the anti-waiver and no arbitration provisions of the workers' compensation statutes).

The logic behind allowing employers to force employees to arbitrate claims under an injury plan that is in many ways the functional equivalent of workers' compensation coverage appears to be that such an agreement does not deprive the employees of any remedy he might otherwise enjoy, but rather merely requires that those claims be heard and decided in a particular forum, i.e., an arbitral forum rather than a court. *In re Odyssey Healthcare, Inc.,* 310 S.W.3d 419, 423 (Tex. 2010) (per curiam) (orig. proceeding); *In re Golden Peanut Co., LLC*, 298 S.W.3d 629, 631 (Tex. 2009) (per curiam) (orig. proceeding). Over the years

various bills have been introduced that would either prohibit employers from forcing arbitration of claims under workplace injury plans or which would make workers' compensation insurance mandatory, eliminating the need for such plans. To date none of these bills has passed, and as of February 1sr, 2013, no such bills have been filed for the upcoming legislative session.

c. Limitations on Available Remedies

Finally, the Supreme Court muddied the water even further in *Poly-America*, which addressed whether it was permissible to include in an arbitration agreement provisions limiting the remedies available. The issue arose in an unconscionability context.

The case involved an agreement to arbitrate workplace injury claims that was subject to federal law, *Poly-America,* 262 S.W.3d at 344 (Tex. 2008) (orig. proceeding), and which therefore was enforceable. The arbitration agreement contained a number of specific provisions limiting the scope of claims that could be made and available remedies, including: (1) a one year limitations period on claims; (2) an agreement to split all fees and costs equally, with the employee's contribution capped at an amount equal to one month's gross pay; (3) severe limitations on discovery; and (4) limitations on damages which may be awarded, including no exemplary damages, no liquidated damages and no reinstatement. *Id.* The employee sued, claiming he had been fired for making a claim and arguing that the arbitration agreement was unconscionable and against public policy. *Id.* at 345. The employer responded by seeking to compel arbitration. *Id.* Arbitration was ordered, and the employee

sought mandamus relief from the court of appeals. *Id.* It held the arbitration agreement's fee splitting and remedy limitations were unconscionable, and the employer sought mandamus relief from the Texas Supreme Court. *Id.*

The Supreme Court began its analysis by observing that even though the agreement was subject to federal law, under federal law certain issues were determined by applying state contract law. *Id.* at 346-48. Among the issues the Court found were to be decided under state law was the question of whether the damage limitations and other restrictions in the agreement were unconscionable. *Id.* at 348.

Under Texas state law, contracts to arbitrate are unconscionable if they are either so grossly one-sided as to be unenforceable, or are contrary to public policy. *Id.* at 348-49. In a case like the one before the court, where the arbitration agreement affected the statutory right not to be fired for suffering a workplace injury, the agreement is valid if it "does not waive the substantive rights and remedies the statute affords and the arbitration procedure are fair," allowing the employee to "effectively vindicate his statutory rights." *Id.* at 349 (internal quotations omitted).

Turning to the issue presented under the facts, the Court began by recognizing the anti-retaliation provisions of the Workers' Compensation Act show there was a strong public policy against allowing employers to fire injured workers just for making a claim to compensation benefits, because otherwise employers could avoid both common law liability and the more limited responsibilities imposed on them by the workers' compensation system.

Id. at 350-51. It then asked whether the limitations on damages available interfered with the employee's ability to vindicate the rights he otherwise had under state law. Finding it did, the Court held that allowing the employer to limit the employee's right to recover exemplary damages for malicious wrongful discharge (which the Workers' Compensation Act would allow) "would undermine the deterrent purpose" of the law, and therefore was improper. *Id.* at 352-53.

However, the Court refused to find either the fee-splitting provision or the discovery limitations made the arbitration agreement unconscionable. Although for the record it decried the use of fee-splitting provisions in an attempt to deter potential claimants from making their claims, it found the evidence insufficient to allow it to conclude the fees were so high that the claimant could not pursue his claims. *Id.* at 356-57. With respect to the discovery limitations, it recognized such limitations might also have the effect of precluding a plaintiff from prevailing on a viable claim for lack of ability to prove what he has alleged, but it held it was too early to determine if this would happen to the claimant, and further noted that if it would the arbitrator had the power to set aside these limitations and fashion effective relief for the employee, i.e., he could allow discovery regardless of what the agreement provided. *Id.* at 357-58.

Finally, the Court fashioned a remedy. The arbitration provision at issue had a severability clause. *Id.* at 359. Although some provisions of the agreement (the damage limitations) were unenforceable, others (the fee-splitting provision and discovery limitations)

might be unenforceable, the Court found this clause allowed any provisions ultimately found to offend the law to be severed. *Id.* at 360. Because they could be severed, the trial court did not abuse its discretion in ordering the matter to arbitration, subject to the caveat that provisions of the agreement making it unconscionable would not be enforced. *Id.* at 360-61.

3. "In House" Alternative Dispute Resolution

Another context in which arbitration issues arise in an employment context are what we might call "in house" arbitration requirements. Many employers mandate that certain kinds of disputes and workplace issues be resolved (either entirely, or in the first instance) through the use of some kind of internal dispute resolution procedure. Sometimes these procedures resemble mediation, sometimes arbitration, sometimes both.

In some cases, these in house remedies are perceived of as being different than an agreement to arbitrate legal disputes between the parties. One of the fundamentals in arbitration is that a dispute is settled by a neutral picked by the parties, and so an agreement to resolve a dispute that does not entitle the parties to choose their arbitrator or which involves one party adjudicating the rights of both is not an arbitration agreement, whatever the form its procedure might take. *See, e.g., In re Phelps Dodge Magnet Wire Co.*, 225 S.W.3d 599, 605 (Tex. App. — El Paso 2005, orig. proceeding) (mand. denied).

The question of the application of such procedures often arises when an employer argues that recourse to in house procedures is a condition precedent to the right to pursue arbitration before a "true" arbitrator. The outcomes of these cases are mixed: some hold the

failure to failure to pursue a pre-arbitration dispute resolution mechanism precludes arbitration if the pre-arbitration procedures required were expressly made conditions precedent to the right to arbitrate, *Weekley Homes, Inc. v. Jennings*, 936 S.W.2d 16, 17 (Tex. App. — San Antonio 1996, writ denied) (per curiam) (describing pre-arbitration mediation as "an express condition precedent" to the right to arbitrate), while others hold a pre-arbitration requirement does not rise to the level of a condition precedent, and so failure to meet the requirement does not deprive a party to the right to arbitrate. *See, e.g., In re U.S. Home Corp*., 236 S.W.3d 761, 763 (Tex. 2007) (per curiam) (orig. proceeding); *Dallas Cardiology Assoc.,*978 S.W.2d at 212-13. It is not clear whether the requirement is a condition precedent is determined by the court, *In re Igloo Products Corp*., 238 S.W.3d 574, 578-81 (Tex. App. — Houston [14th Dist.] 2007, orig. proceeding) (mand. denied) (concluding the matter was a gateway issue for the court), or by the arbitrator. *In re Pisces Foods, L.L.C.*, 228 S.W.3d 349, 354-55 (Tex. App. — Austin 2007, orig. proceeding) *and R&R Personnel Specialists*, 146 S.W.3d at 704-05 (both concluding the matter was for the arbitrator).

3. Other Workplace Claims

Of course, there are any number of different kinds of claims that can arise between employers and employees, all of which are subject to being arbitrated. Civil rights-type suits, where the employee claims he was discriminated against or harassed, are regularly arbitrated. *See, e.g., Dallas Peterbilt*, 196 S.W.3d at 162-63; *14 Penn Plaza LLC v. Pyett*, 556 U.S. 247,

257-58, 129 S.Ct. 1456 (2009). Claims based on the failure to the employer to pay some salary or commission due are also subject to being arbitrated, with no particular limitations. *Carter v. Countrywide Credit Indus., Inc*., 189 F.Supp.2d 606, 618-19 (N.D. Tex. 2002), *dis'd*, 57 Fed.Appx. 212 (5th Cir. Jan. 10, 2003); *see also Knapp v. Wilson N. Jones Mem. Hosp*., 281 S.W.3d 163 (Tex. App. — Dallas 2009, no pet.) (arbitration intended to determine whether employee was terminated with or without cause, and therefore whether employee was entitled to severance pay). Claims are especially subject to being sent to arbitration when the arbitration agreement contains broad "all claims" language. *See, e.g., In re ReadyOne Indus., Inc.,* 294 S.W.3d 764, 770 (Tex. App. — El Paso 2009, orig. proceeding) (agreement to arbitrate "all claims ... which arise from ... [a]ny injury ..." covered negligence claims); *In re Merrill, Lynch, Pierce, Fenner & Smith Inc*., 131 S.W.3d 709, 712-13 (Tex. App. — Dallas 2004, orig. proceeding) (agreement to arbitrate "any dispute, claim or controversy" required arbitration of sexual harassment claims brought against employer). Nor does the fact a claimant is also a shareholder of the employer affect the analysis; such disputes are still subject to being arbitrated, if otherwise covered by a valid arbitration agreement. *See, e.g., Robinson v. West*, 218 S.W.3d 312, 314 (Tex. App. — Eastland 2007, pet. denied). As observed at the beginning of the article, arbitration is here to stay, and it should come as no surprise that it therefore is a mechanism used to resolve almost any conceivable kind of employment dispute.

4. A Sample Arbitration Provision

The following is a sample arbitration provision an employer might choose to have an employee sign. Although fairly basic it is broadly written, and can be adapted to address other, more specific situations that may arise:

> Any controversy or claim arising out of or relating to this contract, or the breach thereof, shall be settled by arbitration administered by the American Arbitration Association in accordance with its Employment Arbitration Rules, and judgment on the award rendered by the arbitrator(s) may be entered in any court having jurisdiction thereof.

E. Conclusion

Arbitration of employment disputes makes practical sense. Not only is its use promoted by unqualified judicial and legislative endorsement but the rising costs of formal litigation with its perceived deficiencies bode well for the use of arbitration in employment disputes. In contrast to formal litigation, where large numbers of claims are disposed of by summary procedures, arbitration insures that an employee has access to a forum and a hearing. At the same time, arbitration offers employers a cost efficient and expedient way to resolve conflicts with employees at minimal impact on business. If arbitration continues to live up to its promise as being "better, faster, cheaper" it will embraced across the board by both employers and employees.