DRAFTING & ENFORCING ARBITRATION CLAUSES IN WILLS, TRUSTS & SETTLEMENT AGREEMENTS

by W. Cameron McCulloch[*] *and Michelle Rosenblatt*[**]

* Partner at MacIntyre McCulloch & Stanfield, LLP. J.D., South Texas College of Law, 1993; B.A., Texas Christian University, 1990.

** Partner at Jackson Walker. B.A., with high honors, The University of Texas at Austin; J.D., Pepperdine School of Law.

I. INTRODUCTION

Estate and trust litigation can pose a greater risk to family wealth than the current tax regime under which most estates are not subject to transfer taxes.[1] Specifically, there is always the possibility that an estate plan will be subject to attack, whether on a legitimate basis, out of frustration, or confusion with the plan.[2] The description in Charles Dickens' *Bleak House* of legal proceedings involving conflicting wills dragging on for generations remains appropriate: "Innumerable children have been born into the cause; innumerable young people have married into it; innumerable old people have died out of it. Scores of persons have deliriously found themselves made parties . . . without knowing how or why; whole families have inherited legendary hatreds with the suit."[3]

Dickens' story, although an extreme example of heirs not receiving their intended inheritance, encapsulates the worst of trust and estate litigation.[4] The authors find that trust and estate disputes are less common in families who start discussions about wealth early and often, who have chosen to be transparent about the source and preservation of their wealth, and who do not

1. *See* Mary Randolph, *Five Myths About Wills and Probate*, NOLO, https://www.nolo.com/legal-encyclopedia/five-myths-about-wills-probate.html [perma.cc/MW3N-SZVR] (last visited Sept. 13, 2019).
2. *See id.*
3. CHARLES DICKENS, BLEAK HOUSE (Bradbury & Evans, 1853).
4. *See id.*

have fissured familial relationships.[5] However, when disputes arise in those instances, the question becomes how to effectively address such disputes.[6]

Over the last century, arbitration has established itself as one of the most popular means for resolving commercial disputes.[7] It is no wonder that commentators and planners have been talking about arbitration as a method of resolving trust and estate disputes for some time.[8] Notably, George Washington, a forefather in more ways than one, included in his 1799 Will a clause providing that any disputes should be decided by three impartial individuals who, "unfettered by Law, or legal constructions" would decide the matter.[9] However, the practice of including arbitration provisions in estate planning documents failed to gain much traction until recently.[10] Part of the issue was that few courts around the country enforced arbitration provisions in trust agreements or wills.[11] In 2007, a shift began to occur as some states began enacting statutes authorizing arbitration in trust or will disputes—to date, Texas has not joined their ranks.[12] In 2009, the International Chamber of Commerce released its first arbitration clauses.[13] In 2012, the American Arbitration Association® (AAA) followed suit and released arbitration rules for wills and trusts.[14] In 2013, the Texas Supreme

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5. *See* Richard M. Morgan & Loraine M. DiSalvo, *Estate & Trust Disputes: Common Types and How to Avoid Them*, MORGAN AND DISALVO (Sept. 12, 2014), https://morgandisalvo.com/estate-trust-disputes-common-types-and-how-to-avoid-them/ [perma.cc/LT5S-4QP9].

6. *See id.*

7. *See* GARY B. BORN, INTERNATIONAL COMMERCIAL ARBITRATION 93–97 (Kluwer Law Int'l, 2d ed. 2014).

8. *See id.*

9. *The Will of George Washington*, TRANS-LEX (July 9, 1799), https://www.trans-lex.org/800900/_/arbitration-clause-in-the-will-of-george-washington-1799/ [perma.cc/MGZ7-K3DD] (". . .But having endeavoured [sic] to be plain, and explicit in all Devises–even at the expence [sic] of prolixity, perhaps of tautology, I hope, and trust, that no disputes will arise concerning them; but if, contrary to expectation, the case should be otherwise from the want of legal expression, or the usual technical terms, or because too much or too little has been said on any of the Devises to be consonant with law, My Will and direction expressly is, that all disputes (if unhappily any should arise) shall be decided by three impartial and intelligent men, known for their probity and good understanding; two to be chosen by the disputants–each having the choice of one–and the third by those two. Which three men thus chosen, shall, unfettered by Law, or legal constructions, declare their sense of the Testators intention; and such decision is, to all intents and purposes to be as binding on the Parties as if it had been given in the Supreme Court of the United States.").

10. *See* John T. Brooks & Jena L. Levin, *Enforceability of Mandatory Arbitration Provisions in Trust Agreements*, TR. & EST. (Dec. 30, 2013), https://www.wealthmanagement.com/estate-planning/enforceability-mandatory-arbitration-provisions-trust-agreements [perma.cc/A85L-N57A].

11. *See* FLA. STAT. ANN. § 731.401 (West 2013) (noting, in 2007, Florida was the first state to enact a statutory provision expressly authorizing mandatory arbitration clauses in wills and trusts for disputes between or among the beneficiaries and a fiduciary. Disputes about the validity of the instrument, however, are not subject to arbitration).

12. *See* Edward F. Sherman, *Arbitration in Wills and Trusts: From George Washington to an Uncertain Present*, 9 ARB. L. REV. 83 (2017).

13. *See* Camilla Gambarini, *ICC Launches ICC Arbitration Clause for Trust Disputes*, INT'L CHAMBER OF COM. (Dec. 12, 2018), https://iccwbo.org/media-wall/news-speeches/icc-launches-icc-arbitration-clause-trust-disputes/ [perma.cc/GZ5K-GYPV].

14. *See Wills and Trusts Arbitration Rules and Mediation Procedures*, AM. ARB. ASS'N (June 1, 2012), https://www.adr.org/sites/default/files/Commercial%20Wills%20and%20Trusts%20Rules%

Court jumped into the fray by ruling that an arbitration clause in an *inter vivos* trust instrument was valid and enforceable.[15] The decision opened the door to the widespread use of arbitration in trust and estate disputes.[16]

Now, Texas fiduciary litigation attorneys (including one of the authors) see a casual approach to the inclusion of arbitration clauses in wills and trusts when the planner—and more importantly, the settlor—has given no real thought to the consequences of including the provision.[17] Many well-intentioned estate planning attorneys now include arbitration provisions in their estate planning documents regardless of whether it actually saves time, money, or discourages litigation.[18] An attorney at a recent CLE presentation suggested that:

> . . .[t]he arbitration provision should be included in the basic form so that 'the planner would be reminded to discuss it with the client.'. . . In many cases, if not most, rather than reminding the planner to discuss the option with the client, the provision receives little attention or explanation other than a stock mention of the supposed benefits.[19]

An estate planning lawyer needs to give genuine consideration as to why an arbitration provision is included in a document and what benefit, if any, the arbitration provision will provide.[20]

In this paper, the authors examine whether, how, and when it makes sense to include arbitration clauses in estate planning documents.[21]

II. ARBITRATING TRUST AND ESTATE DISPUTES IN TEXAS

Texas courts have historically held that a valid arbitration provision required an agreement between the parties.[22] The Texas General Arbitration Act (TAA), enacted in 1965, provides that "[a] written agreement to arbitrate is valid and enforceable if . . . the controversy . . . exists at the time of the agreement; or . . . arises between the parties after the date of the agreement."[23] The expectation was that arbitration required two signatories and could not be forced upon a beneficiary who did not specifically agree to

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2012813%20-%20Archieve%202015%20Oct%2021%2C%202011.pdf [perma.cc/FYK7-2YMM].

15. *See* Jim Hartnett, *Arbitration Issues in Trust and Estate Litigation*, ST. B. OF TEX. EIGHTH ANN. FIDUCIARY LITIG. COURSE 1–9 (Dec. 5–6, 2013), https://www.hartnettlawfirm.com/wp-content/uploads/2014/04/8th-Annual-Fiduciary-Litigation-Course.pdf [perma.cc/C77E-9X7K].

16. *See id.*

17. *See id.*

18. *See id.*

19. *Id.* at 1–2.

20. *See id.*

21. *See infra* Part VI.

22. *See, e.g.*, Prudential Sec., Inc. v. Marshall, 909 S.W.2d 896, 898 (Tex. 1995).

23. TEX. CIV. PRAC. & REM. CODE § 171.001(a). (noting the TAA largely tracks the FAA, but contains certain differences relating to arbitration procedure.); *see also* TEX. CIV. PRAC. & REM. CODE §§ 154.024–.027 (providing additional procedures for "mini-trial," "moderated settlement conference," "summary jury trial," and "arbitration.").

it.[24] Thus, arbitration in the trust and estate context occurred in Texas, but only on a very small scale and usually when a fiduciary acceptance document required arbitration.[25] In such cases, the settlor, beneficiary, or another trustee may have bound themselves to arbitrating any disputes with the accepting fiduciary.[26]

III. ARBITRATION CLAUSES IN TRUST AGREEMENTS

In 2013, the Texas Supreme Court changed the landscape of how an agreement to arbitrate could be created.[27] The Court held in *Rachal v. Reitz* that an arbitration provision in an *inter vivos* trust agreement was binding against the trust beneficiaries.[28] The trust instrument at issue contained the following provision:

> Despite anything herein to the contrary, I intend that as to any dispute of any kind involving this Trust or any of the parties or persons concerned herewith (e.g., beneficiaries, Trustees), arbitration as provided herein shall be the sole and exclusive remedy, and no legal proceedings shall be allowed or given effect except as they may relate to enforcing or implementing such arbitration in accordance herewith. Judgment on any arbitration award pursuant hereto shall be binding and enforceable on all said parties.[29]

The trust instrument further provided that "[t]his agreement shall extend to and be binding upon the Grantor, Trustees, and beneficiaries hereto and on their respective heirs, executors, administrators, legal representatives, and successors."[30]

Rachal was an attorney who drafted the trust instrument and was named the successor trustee of the trust.[31] Reitz, a beneficiary, sued Rachal claiming misappropriation of trust assets and failure to account.[32] Rachal moved to compel arbitration under the trust agreement.[33] The probate court denied Rachal's motion on the basis "that a binding arbitration provision must be the product of an enforceable contract between the parties," and that no such contract existed in the context of a trust because there was no consideration

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24. *See generally* Rachal v. Reitz, 403 S.W.3d 840, 845 (Tex. 2013) (defining "assent" as two or more signatories and comparing arbitration to a contract).

25. *See* Nancy E. Delaney, Jonathan Byer & Michael S. Schwartz, *Rachal v. Reitz and the Evolution of the Enforceability of Arbitration Clauses in Estate Planning Documents*, 27 PROB. & PROP. 12, 12 (2013).

26. *See id.*

27. *See Rachal*, 403 S.W.3d at 842.

28. *Id.* at 847.

29. *Id.* at 842.

30. *Id.* at 842–44.

31. *Id.* at 842.

32. *Id.*

33. *Id.*

and the beneficiary had not assented to the arbitration provision.[34] The Court of Appeals, in an en banc split decision, affirmed the trial court's ruling and held that it was for the legislature, rather than the courts to decide "whether and to what extent the settlor of this type of trust should have the power to bind the beneficiaries of the trust to arbitrate."[35] The Texas Supreme Court reversed, and held that the arbitration provision was enforceable for two reasons.[36]

First, the Court found that there was consideration because the beneficiary received a distribution from the trust, subject to conditions (the settlor's intent to arbitrate trust disputes).[37] "Some commentators contend that the Court's decision turned on both an 'intent' theory and an 'acceptance of benefits' theory and suggest that even if there had been no 'acceptance of benefits,' the Court would have held that arbitration was required simply because the settlor intended that arbitration apply."[38]

The Court's opinion is not entirely clear on this point because the opinion states:

> We conclude that the arbitration provision contained in the trust at issue is enforceable against the beneficiary for two reasons. First. . . we enforce trust restrictions on the basis of the settlor's intent. The settlor's intent here was to arbitrate any disputes over the trust. Second. . . an agreement [to arbitrate] requires mutual assent, which we had previously concluded may be manifested through the doctrine of direct benefits estoppel.[39]

The statement suggests that the two theories (intent and acceptance of benefits) are independent and that the settlor's intent alone is enough to bind the beneficiary.[40] However, the Court later states, "we must enforce the settlor's intent and compel arbitration if the arbitration provision is valid and the underlying dispute was within the scope of the provision."[41] In that regard, "a settlor's intent that arbitration apply will always be clear from the mere fact that the arbitration requirement is included in the trust agreement. The key, at least in the Rachal set of facts, is that some action by the beneficiary must indicate an acceptance of the arbitration agreement."[42] This acceptance of the agreement can be actual written consent by the beneficiary, or in the case of *Rachal*, an acceptance of benefits under the agreement.[43] Under this ruling, the:

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34. *Id.* at 843.
35. *Id.*
36. *Id.* at 842.
37. *Id.*
38. *See* Hartnett, *supra* note 15.
39. *Rachal*, 403 S.W.3d at 842.
40. Harnett, *supra* note 15.
41. *Rachal*, 403 S.W.3d at 844.
42. Harnett, *supra* note 15.
43. *Id.*

> . . .“acceptance of benefits” or “direct benefits estoppel” doctrine, a “beneficiary who attempts to enforce rights that would not exist without the trust manifests his or her assent to the trust’s arbitration clause. . .in such circumstances it would be incongruent to allow a beneficiary to hold a trustee to the terms of the trust but not hold the beneficiary to those same terms.”[44]

In summary, after the *Rachal* ruling, a beneficiary need not be a signatory to an arbitration agreement; he or she is subject to an arbitration provision in a trust agreement by merely accepting the benefits or rights under the trust agreement and is estopped from arguing otherwise.[45]

Another aspect of *Rachal* is that, at least in the near term, there is likely to be considerable litigation disputing the application or scope of arbitration clauses.[46] While most lawyers, and even clients (if they know anything about it) assume that arbitration will save money, the reality is that disputes concerning the applicability or scope of arbitration clauses, in fact, can create more expensive and prolonged litigation, at least until the law is fleshed out.[47] In the interim, many planners will continue to use the clause simply because they have heard it is the thing to do or assume it discourages contests or litigation, without really knowing or thinking about the concrete ramifications.[48]

Litigation in Texas regarding the enforceability of arbitration clauses in wills and trusts typically arises from a claim that an unwilling participant did not accept a benefit (and therefore is not bound) or manifest themselves in objections to the actual meaning and scope of the arbitration clause, or some combination of both.[49] For example, arguments tend to arise if the arbitration clause is silent or vague regarding the number of arbitrators, the arbitrator selection process, or which arbitration rules will be utilized, etc.[50] A motivated lawyer can argue about anything, and an arbitration clause which is susceptible to more than one meaning provides good fodder for argument.

IV. ARBITRATION CLAUSES IN WILLS

The *Rachal* case did not address whether an arbitration clause in a will is enforceable, but it seems the same rule and analysis would apply, the questions then becomes: (1) is there intent for an arbitration provision and

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44. *Rachal*, 403 S.W.3d at 847.

45. *Id.*

46. Steven D. Baker, *Rachal v. Reitz and the Efficacy and Implementation of Mandatory Arbitration Provisions in Trusts*, 9 EST. PLAN & COMM. PROP. L. J. 191, 193, 204 (2017).

47. *Id.*

48. *Id.*

49. *Id.*

50. *Arbitration Task Force Report*, ACTEC, (Sept. 18, 2006), https://www.mnbar.org/docs/default-source/sections/actec-arbitration-task-force-report.pdf?sfvrsn=2 [perma.cc/WXA4-HTER].

(2) is the beneficiary estopped from challenging its applicability under the direct benefit theory?[51]

The purpose of probate courts is to achieve the testator's intent.[52] Accordingly, it would follow that the probate court would honor a testator's stated intent in a will for disputes to be arbitrated unless it violated a law or public policy.[53] With regard to the second prong of the analysis, when one has accepted benefits under a will that contains an arbitration clause, the individual seems to have bound himself to arbitrate any covered claims.[54] If so, it follows that the arbitration clause applies to a testamentary trust in a will, the administration of the estate, or the construction of the terms of the will itself.[55]

The question becomes: who has received a benefit under the will?[56] The entire estate administration proceeding is *in rem*, which binds all persons having notice, whether or not they actually participate in the proceeding.[57] Is it fair to require arbitration by all persons having notice (i.e., those having an interest in the probate proceeding)?[58] If this theory is applied, all persons interested in the estate, including beneficiaries and creditors, would be bound by an arbitration provision in a will.[59]

Next, it seems that allowing arbitration of estate administration disputes without a written agreement signed by the parties to be bound presents the question of whether a testator may deprive the court of its ability to supervise probate proceedings that are non-statutory in nature.[60] For example, if no separate arbitration agreement of the parties is required, a will could be submitted to the court for probate; however, any disputes regarding the instrument or the rights under the instrument would be decided by arbitration, which seems to undermine the court's authority to hear and resolve estate administration disputes.[61] That said, the apparent "undermining" is a regular occurrence, such as when parties to an independent estate administration enter into a settlement agreement that adjusts the disposition of a testator's assets.[62]

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51. *Rachal*, 403 S.W.3d at 845, 847; *see* Gerry W. Beyer, *Wills & Trusts*, 66 SMU L.R. 1219, 1230 (2013).

52. *Rachal*, 403 S.W.3d at 844; Zack, *Arbitration: Step-child of Wills and Estates*, 11 ARB. J. 179 (1956).

53. *Rachal*, 403 S.W.3d at 844.

54. Beyer, *supra* note 51.

55. *See id.*; Baker, *supra* note 46, at 207.

56. Baker, *supra* note 46, at 198.

57. TEX. EST. CODE ANN. § 32.001(d); *see* R. Kevin Spencer, *Standing and Error Correction in Probate*, 10 EST. PLAN & COMM. PROP. L.J. 299, 300 (2018).

58. *See generally,* Baker, *supra* note 46 (exploring generally the concern of fairness to all persons who have notice).

59. *Id.* at 205.

60. *Id*. at 218.

61. *Id.*

62. *Id.*

Finally, does it make sense that an independent executor or administrator can be forced into or to participate in mutually agreed arbitration to settle a claim, but the same claim against a dependent administrator would remain in court? This type of bifurcated system seems to be unfair.

Thankfully, the Houston Court of Appeals has decided the only Texas case addressing arbitration in the context of a will, which answered some of those questions.[63] In *Ali v. Smith*, the court-appointed estate administrator sued the executor who had been removed by the court for breach of fiduciary duty arising from wasted and misappropriated trust assets.[64] The will contained an arbitration clause; however, the court-appointed administrator contended that the claims against the executor were not subject to the arbitration clause because the claims arose not from the administrator's powers given under the will, but rather under statutory and common law.[65] Specifically, the administrator argued that administrators are not named in a will and the source of the administrator's power to act is created under the statutes and by the court; furthermore, the administrator's fees were also statutorily authorized.[66] Additionally, nothing in the administrator's petition alleged that the executor's liability needed to be determined under the will.[67]

The court agreed that the administrator had not received a direct benefit under the will that would estop the claim.[68] In doing so, the court held that the *Rachal* theory of direct-benefits estoppel was inapplicable.[69] Therefore, the arbitration clause in the will did not apply to the administrator's claim against the removed executor.[70]

Finally, it seems clear that an arbitration provision in a will that has not been probated is meaningless until the will is admitted to probate; there can be no agreement of mutual assent by way of direct-benefit estoppel or any *in rem* jurisdiction over interested parties.[71] Thus, a challenge to the will before it is submitted for probate should not invoke an arbitration clause in the will.[72]

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63. Ali v. Smith, 554 S.W.3d 755, 762 (Tex. App.—Houston [14th Dist.] 2018) (providing that the arbitration clause in the will failed to provide that disputes involving an "estate administrator" would be subject to arbitration. Instead, the will specified disputes between or among the beneficiaries of the will, beneficiaries of trusts created under the will, the executor of the estate, or the trustee of a trust created under the will).

64. *Id.* at 758.

65. *Id.* at 761.

66. *Id.* at 762–63.

67. *Id.* at 762.

68. *Id.* at 763.

69. *Id.* at 761.

70. *Id.* at 760.

71. *See id.*

72. *See id.*

V. SHOULD I INCLUDE AN ARBITRATION CLAUSE IN MY CLIENT'S ESTATE PLANNING DOCUMENTS?

A. Reasons Why You Should

Proponents of arbitration argue that it is faster, less costly, private, and more convenient than litigation.[73]

1. Privacy

The trend for most clients tends to be toward keeping information and proceedings private.[74] Included in the top reasons why families engage in estate planning are: avoiding probate (e.g., privatization of the wealth-transfer process) and minimizing discord among beneficiaries.[75]

Therefore, one of the most attractive aspects of arbitration is the prospect of avoiding publicity.[76] In today's world of immediately available information, clients and planners recognize the need for privacy and security, especially with regard to wealth transfers and intra-family disputes.[77] Few clients wish to advertise their familial issues, who manages or will manage their wealth, or the identity of who will receive the wealth and in what manner.[78] Similarly, professional trustees may not want adverse publicity regarding their trust management and administration services.[79] Although court proceedings offer some privacy measures, such as applications for in camera review or sealing of court records, the parties must prove such need to the court before protective measures will be granted.[80] Alternative dispute resolution, such as arbitration, can be a viable option for privately resolving trust and estate disputes.[81] Specifically, the arbitration record is not public, with the exception of someone's initial filing or motion to compel arbitration.[82] However, it should be noted that "non-public" does not mean

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73. Jean R. Sternlight, *Creeping Mandatory Arbitration: Is It Just?,* 57 STAN. L. REV. 1631, 1635–36 (2005).

74. Mari Adams *Top 8 Reasons Why Clients Turn to Estate* Planners, (July 18, 2016) https://www.chartingyourfinancialfuture.com/estate-planning/top-8-reasons-clients-turn-to-estate-planners/ [perma.cc/2AKG-94Q4].

75. *See id.*

76. *See* John R Phillips, et al., *Analyzing the Potential for ADR in Estate Planning Instruments*, 24 ALTERNATIVES TO HIGH COST LITIG. 1, 9 (2006).

77. *See id.*

78. *See id.*

79. *See id.*; Arthur R. Miller, *Confidentiality, Protective Orders, and Public Access to the Courts*, 105 HARV. L. REV. 427, 464–67 (1991) (explaining generally the importance of privacy and the harmed consequences that can result from public access).

80. Bridget A. Logstrom, *Arbitration and Trust Disputes: Friend or Foe?,* 30 AM. C. OF TR. & EST. J. 266–67 (2005).

81. *See id.*

82. *Id.*

"confidential."[83] If the client desires or needs confidentiality, the arbitration provisions should specify it.[84]

2. Expertise

Trust and estate litigation can arise in several forums.[85] In a statutory probate court bench trial, the parties are assured that an expert in the subject matter will hear and rule upon their case.[86] In contrast, neither a jury trial nor a sitting district court or county court at law judge offers that same guarantee.[87] Arbitration provisions can require a subject matter expert with whatever qualifications the drafting attorney desires.[88] The prospect of having an arbitrator who is well-versed in probate and trust matters can be advantageous to both sides.[89]

3. Access to Information

Discovery in arbitration is typically limited so that less emphasis is placed on digging up all of the familial issues that often find their way into trust and estate litigation which can deter from the actual issue.[90] Additionally, many estate and trust disputes are submitted to juries to decide; unfortunately, in that forum, there is some evidence that juries tend to side with a disinherited or disgruntled heir over a settlor or testator.[91] In those cases, arbitration may be somewhat less inflammatory than litigation.[92]

4. Shifting the Burden of Expense

A plaintiff in an estate or trust dispute risks little in bringing a lawsuit; plaintiffs' attorneys often offer contingency fee structures to their clients, and a losing plaintiff may not be ordered to pay the defense costs of a successful

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83. *See id.*

84. *See id*; *infra* Section VI.

85. *See* Logstrom, *supra* note 80.

86. *See* Christian N. Elloie, *Are Pre-Dispute Jury Trial Waivers a Bargain for Employers over Arbitration? It Depends on the Employee*, 76 DEF. COUNS. J. 91, 96–98 (2009).

87. *See id.* (nothing that this statement is not to suggest that a district court judge or county court at law judge may not have a great understanding of trusts and estates law; the subject matter simply is not one that most such judges study on a daily basis and the subject can involve different rules).

88. *See id.*

89. *See id.*

90. *See generally id.* (applying the principles discussed to an arbitration regarding estate planning).

91. John H. Langbien, *Living Probate: The Conservatorship Model*, 77 MICH. L. REV. 63, 64-66 (1978); Jeffrey A. Schoenblum, *Will Contests—An Empirical Study*, 22 REAL PROP. PROB. & TR. J. 607, 614–32 (1987).

92. *See* Langbien, *supra* note 91; Schoenblum, *supra* note 91.

defendant.[93] Specifically, many estate planning documents permit a fiduciary to use estate or trust assets to defend a suit, which diminishes the assets to be distributed and spreads the burden of defense among all estate or trust beneficiaries.[94]

An arbitration provision can provide that the parties pay their own fees, thereby shifting the economic burden more squarely upon the disputing party.[95] The expense also may encourage the disputing party to be more open to settlement and at an earlier date.[96]

5. Less Time Consuming or Less Expensive

Arbitration proponents often cite overburdened and understaffed courts, but the situation will differ from jurisdiction to jurisdiction.[97] In some cases, arbitration can be faster and less contentious—and often less expensive.[98] The arbitrator can impact these factors greatly; the arbitrator has the ability to "drive" the proceeding by creating shorter deadlines and limiting the number of issues at hand, which can also reduce costs and make the proceeding more efficient.[99] Furthermore, the lack of an appeals process can expedite matters, reduce the costs of the process, and lead to a quicker conclusion of the matter.[100] In cases in which there may be various options for jurisdiction or venue (e.g., multi-national clients), arbitration can also limit the proceedings to the desired jurisdiction or venue.[101]

6. Enforceability of Award

In cases involving multiple jurisdictions, arbitration awards may be more easily enforceable.[102] For example, the Convention on the Recognition and Enforcement of Foreign Arbitral Awards offers recognition of awards across jurisdictions.[103] Under Texas common law, a person seeking to

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93. *See Guidelines for Individual Executors & Trustees*, ABA, https://www.americanbar.org/groups/real_property_trust_estate/resources/estate_planning/guidelines_for_individual_executors_trustees/ [perma.cc/CJ4X-4JBS] (last visited Sept. 16, 2019).

94. *See id.*

95. *See id.*

96. *See id.*

97. *See* Barbara Kate Repa, *Arbitration Pros and Cons*, NOLO, https://www.nolo.com/legal-encyclopedia/arbitration-pros-cons-29807.html [perma.cc/3ZCV-MKV5] (last visited Sept. 16, 2019).

98. *See id.*

99. *See id.*

100. *See id.*

101. *See id.*

102. *See United Nations Convention on the Recognition and Enforcement of Foreign Arbitration Awards*, NEW YORK ARBITRATION CONVENTION (June 10, 1948), http://www.newyorkconvention.org/english [perma.cc/NB2Q-F7E4].

103. *See id.*

enforce an award must obtain a judgment by filing a new lawsuit.[104] The TAA provides a straightforward statutory method for enforcing an arbitration award.[105] On application of a party, a Texas court is required to confirm an arbitration award unless grounds are urged for vacating, modifying, or correcting the award within the appropriate time limits.[106] Review of an arbitration award is extremely limited, and an award may not be vacated even if there is a mistake of law or fact.[107] On granting an order that confirms an award, the court must render a judgment or decree in conformity with the award.[108] In this judgment, the court may also include an order awarding the costs of the application and judicial proceeding.[109] The judgment may be enforced like any other judgment or decree.[110] The State of Texas has many laws which benefit judgment debtors, and the collectability of judgments in Texas is a topic which is beyond the scope of this article.[111]

7. Different Rules

Arbitrations are typically less stressful for the lawyer because many of the rules tend to be relaxed, in particular, the rules of evidence.[112] Whether or not formal rules of evidence will be employed during an arbitration proceeding depends upon the arbitrator.[113] More specifically, there is case law which suggests that the Texas Rules of Evidence apply only in court proceedings.[114] In 1993, the U.S. District Court for the Southern District of Texas opined that the arbitrator is the "judge of the relevance and admissibility of evidence introduced in an arbitration proceeding."[115] There are various sources of administrative rules applied to arbitration proceedings that permit arbitrators to exercise their discretion with regard to discovery.[116]

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104. *See* Payton v. Hurst Eye, Ear, Nose & Throat Hosp. & Clin., 318 S.W.2d 726, 732 (Tex. App.—Texarkana 1958, writ ref'd n.r.e.); *e.g.,* Com. Standard Ins. Co. v. Nunn, 445 S.W.2d 586, 586–87 (Tex. App.—Texarkana 1969, writ ref'd n.r.e.).

105. *See* TEX. CIV. PRAC. & REM. CODE ANN. § 171.087.

106. *Id.*

107. TEX. CIV. PRAC. & REM. CODE ANN. § 171.054; *see* Thakkar v. Patel, No. 11-00-00220, 2002 WL 32341812 (Tex. App.—Eastland, 2002 no pet.)

108. TEX. CIV. PRAC. & REM. CODE ANN. § 171.0092; *see* Matz v. Bennion, 961 S.W.2d 445, 452 (Tex. App.—Houston [1st Dist.] 2014, pet. denied).

109. *See* TEX. CIV. PRAC & REM CODE ANN. § 171.092(b)(1).

110. *See id.* at § 171.092(a).

111. *See, e.g.*, *How to Collect on a Judgment in Texas*, LAW OFFICES OF SETH KRETZER (Apr. 19, 2019) https://kretzerfirm.com/how-to-collect-on-a-judgement-in-texas/ [perma.cc/J4T9-V5LT].

112. Karl Bayer & Victoria Vanburen, *Evidence and Discovery in Arbitration*, KARLBAYER.COM (May 20, 2019) http://www.karlbayer.com/pdf/publications/2010-05-20_KarlBayer_Evidence-and-Discovery-in-Arbitration.pdf [perma.cc/6CVU-YG9Y] (discussing when discovery is permitted, which rules of evidence apply, and guidelines for addressing both in arbitration).

113. *See id.*

114. *See* Castleman v. AFC Enters, Inc., 995 F. Supp. 649, 653–54 (N.D. Tex. 1997) (holding arbitration proceedings are not governed by formal rules of evidence).

115. *See id.* at 653 (citing Cordis Corp. v. C.R. Bard, Inc., 1993 WL 723844 *3, No. H-92-1623 (S.D. Tex. 1993).

116. *See* Bayer & Vanburn, *supra* note 112.

When a lawyer is participating in an arbitration proceeding, the lawyer and arbitrator should discuss their intentions of the case at the initial pre-hearing conference.[117] It is important that the lawyer acknowledge the arbitrator's preferences to apply the rules of evidence, and the types and scope of discovery the arbitrator will permit in the case.[118] In the authors' experience, the rules of evidence are observed, but not always followed, in an arbitration, and discovery is typically allowed but streamlined, as well as controlled, by the arbitrator.

B. Reasons Why You Should Not

1. Lack of Specificity in Instrument

Based upon one of the author's own personal and very recent experiences arbitrating trust disputes in Texas, arbitration has not been any cheaper or faster than a lawsuit at the courthouse.[119] This is because, in large part, the arbitration clauses at issue have been silent as to arbitration particulars and terms—which has led to court room disputes and skirmishes between attorneys.[120]

2. Expertise

Trusts and estates litigation is a subset of litigation involving specific (and in many cases) different rules of law that can make the arbitration process longer and more expensive if a subject matter expert is not used.[121] Although arbitration provisions can require a subject matter expert with whatever qualifications the drafting attorney desires, some arbitration clauses specify or require arbitrators from specific trusts and estates forums (e.g., ACTEC) or arbitrators with a specific certification (e.g., Board Certified in Estate Planning & Probate by the Texas Board of Legal Specialization).[122] In contrast, other arbitration clauses simply default to arbitrators who are members of a specific arbitration organization (e.g., the

117. *Id.*

118. *Id.*

119. *See* Seth Lipner, *Is Arbitration Really Cheaper?*, FORBES (July 14, 2009), https://www.forbes.com/2009/07/14/lipner-arbitration-litigation-intelligent-investing-cost.html#127a4ca34ed1 [perma.cc/JP9F-RS4H]; Hartnett, *supra* note 15.

120. *See* Lipner, *supra* note 119; Harnett, *supra* note 15.

121. *See* Bruce S. Ross & Vivian L. Thoreen, *Litigation-Trusts & Estates*, BESTLAWFIRMS. U.S. NEWS, https://bestlawfirms.usnews.com/litigation-trusts-estates/overview [perma.cc/92PT-KQ2U] (last visited Sept. 15, 2019).

122. *See,* Richard Stim, *Arbitration Clauses in Contracts*, NOLO, https://www.nolo.com/legal-encyclopedia/arbitration-clauses-contracts-32644.html [perma.cc/PH63-GSQY] (last visited Sept. 15, 2019) (providing example arbitration clauses).

American Arbitration Association), thereby relying upon the vetting of the organization for a qualified arbitrator.[123]

3. Cost

Probate court matters are heard by a judge who does not receive an hourly fee, whereas arbitrators are paid by the hour or by the proceeding.[124] Additionally, probate courts may limit or reduce attorneys' fees.[125] Unsophisticated parties also may not realize that the slightly less formal nature of arbitration does not mean that information should not be consolidated and presented only if relevant to the claim or defense.[126] Additionally, if the other party will represent himself or herself, the pro se party may require additional hand-holding that will increase the cost of the proceeding.[127]

4. Access to Information

Discovery typically does not commence until after the pre-hearing conference with the arbitrator, as the discovery scheduling order usually is signed at that conference.[128] As previously mentioned, arbitration discovery might be more limited at the order of the arbitrator or the rules of the arbitration organization, which could be especially problematic in a fiduciary case involving many transactions over a period of several years.[129] As a result, an attorney arbitrating such case needs to consider employing informal discovery mechanisms outside of arbitration, making a demand for information and documents under the fiduciary's duty of disclosure, which can then be used to cross examine the fiduciary at the arbitration hearing or during the fiduciary's pre-hearing deposition.[130] As in a court trial, setting deadlines for responses and rules around the production of relevant

123. *See id*.

124. *See* TEX. GOV'T CODE ANN. § 25.0023(c); *Wills and Trusts Arbitration Rules and Mediation Procedures*, AM. ARB. ASS'N (June 1, 2012), https://www.adr.org/sites/default/files/Commercial%20Wills%20and%20Trusts%20Rules%2012813%20-%20Archieve%202015%20Oct%2021%2C%202011.pdf [perma.cc/NSAJ-NJJL].

125. *See* PROBATE, NORTONBASU LLP, https://www.nortonbasu.com/probate/ [perma.cc/TFY4-NFWM] (last visited Sept. 15, 2019).

126. *See id.*; *Wills and Trusts Arbitration Rules and Mediation Procedures*, *supra* note 124.

127. *See, e.g.*, Amy Liebenman, *10 Rules for Working with a Pro Se in Mediation and Arbitration*, ATTORNEY AT LAW MAGAZINE (Oct. 23, 2016) https://attorneyatlawmagazine.com/10-rules-for-working-with-a-pro-se-in-mediation-and-arbitration [perma.cc/88ZW-FX36].

128. John Wilkinson, *Arbitration Discovery: Getting it Right*, ABA (June 29, 2017), https://www.americanbar.org/groups/dispute_resolution/publications/dispute_resolution_magazine/2014/fall/arbitration-discovery--getting-it-right/ [perma.cc/FJK9-N3J2].

129. *See id.*

130. *See id*.

documents are key to permitting the parties to assess their claims earlier in the process, which may lead to a faster resolution and reduced costs.[131]

5. Inability to Obtain Summary Judgment

In court, a party can seek summary judgment on legal grounds, such as statute of limitations, lack of duty, or causation.[132] Arbitration generally does not permit a preliminary bite at the apple on legal grounds; instead, written submissions or a hearing will occur.[133] Therefore, it can be difficult to address a discreet issue without tackling the entire case, which may not be as time or cost efficient.[134]

6. Inability of Arbitration Award to Bind Desired Party

As previously discussed, arbitration works best in cases of direct benefit estoppel or *in personam* jurisdiction.[135] One issue in arbitration may be binding all of the beneficiaries.[136] Will the arbitration award bind unborn, unascertained, minor, or otherwise incapable beneficiaries?[137] In court cases, a guardian ad litem may be appointed or such parties may be bound by virtual representation.[138] Will those same concepts apply under the arbitration rules?[139]

Under Texas law, at least one of the authors believes that minors, the unborn, and unascertained beneficiaries probably can be bound by virtual representation, but if there is a conflict, a guardian ad litem is essential.[140] If necessary, the American Arbitration Association (AAA) rules contemplate the appointment of a guardian ad litem.[141] Care must be taken to join those beneficiaries that are required to have finality, but that may lead to more fights about the arbitration process.[142]

If an arbitration award will not bind all of the desired parties, a lawsuit should be the chosen course of action.[143] For example, consider a trustee administering a trust in accordance with an arbitration decision that does not

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131. *See id*.

132. John A. Shope & Diana Tsutieva, *Summary Disposition in Arbitration,* (March 26, 2018) https://www.americanbar.org/groups/litigation/committees/alternative-dispute-resolution/articles/2018/spring2018-summary-disposition-in-arbitration/ [perma.cc/ 3F8T-3EZ6].

133. *See id.*

134. *See id.*

135. *See* Rachal v. Reitz, 403 S.W.3d 840, 842 (Tex. 2013).

136. *See id.*

137. *See id.*

138. TEX. PROP. CODE ANN. §§ 114.032(b)–(e), 115.013(c).

139. *See id.* § 115.013(c).

140. *See id.*

141. *See Wills and Trusts Arbitration Rules and Mediation Procedures*, *supra* note 124.

142. *See id.*

143. *See id.*

bind all beneficiaries.[144] The trustee lacks certainty as to whether the position or actions taken are binding and final, which potentially subjects the trustee to further disputes and litigation and may hinder the trustee's decision making.[145]

7. Potential Bias

In the context of commercial arbitration, several critics have voiced concerns about perceived or inherent bias in favor of those parties who routinely appear before arbitrators.[146] In the trusts and estates context, if such bias were to exist, it likely would be in favor of institutional executors or trustees who service many clients, rather than in favor of a particular individual who is not likely to be involved in multiple disputes.[147]

8. Appeals Process

Section 171.098 of the Texas Civil Practice and Remedies Code provides the instances in which a party may appeal.[148] The first arises when a motion to compel arbitration is granted.[149] In Texas, there is an inequity involved in appealing orders on motions to compel arbitration.[150] Specifically, a party may appeal an order denying a motion to compel arbitration and an order granting an application to stay arbitration, but not an order that compels arbitration unless that order also dismisses the underlying litigation.[151] Therefore, if the court compels arbitration but does not dismiss the underlying suit, the losing party may not appeal the order granting arbitration.[152] Thus, depending on your position in the suit, you will either want to ensure that the order granting arbitration does not dismiss the underlying suit if you do not want the order immediately appealable or that it does dismiss the underlying suit, if you want to appeal the order immediately.[153]

The inability to appeal an arbitration award (the award itself only can be modified to correct clerical or computational errors) can make for unfortunate results when arbitrators make mistakes or do not have sufficient expertise in

144. *See id.*
145. *See id.*
146. *See* Miles B. Farmer, *Mandatory and Fair? A Better System of Mandatory Arbitration*, 121 YALE L. J. 2346, 2355–60 (2012).
147. *See id.*
148. TEX. CIV. PRAC. & REM. CODE ANN. § 171.098.
149. *See id.*
150. *See* 7 TEX. JUR. 3d *Arbitration and Award* § 89 (2019).
151. *See id.*; TEX. CIV. PRAC. & REM. CODE ANN. § 171.098(a)(1)-(2); *e.g.,* Chambers v. O'Quinn, 242 S.W.3d 30, 31 (Tex. 2007) (ruling that appellate court may review, on direct appeal, an order compelling arbitration if the order also dismisses the underlying litigation, making it a final order).
152. *See Chambers*, 242 S.W.3d at 31.
153. *See id.*

the subject matter.[154] The trusts and estates area is one that is particularly rife for mistakes of law given the special rules involved.[155] While a probate judge will have specific expertise in the area, the same cannot be said for all decision makers, and mistakes of law can occur.[156] Arbitration rulings also can be wildly different from and inconsistent with cases decided by courts, and because there is no review, there is no way to correct an erroneous decision.[157] Texas law and the Federal Arbitration Act (FAA) rules specifically provide that no appellate review will be allowed for mistakes of law or fact by arbitrators, even clear or gross errors.[158] However, in limited situations there is the ability to file a court action seeking to vacate the award, but the grounds for doing so are very narrow.[159]

VI. 14 QUESTIONS TO ASK AND ANSWER WHEN DRAFTING AN ARBITRATION CLAUSE

The AAA publishes a resource titled, "The Top 10 Ways to Make Arbitration Faster and More Cost Effective" in which the first item discussed is "Pay Attention to Your Arbitration Clause."[160]

The following arbitration provision was included in a trust agreement that was at issue in a lawsuit which one of the authors handled:

> The trustee may originate a proceeding (including mediation and binding arbitration) to construe this trust instrument, and to resolve all matters pertaining to disputed issues or controverted claims. Settlor does not want to burden this trust with the cost of a litigated proceeding to resolve questions of law or fact.

This provision is included in this paper for the very limited purpose of illustrating the authors' belief that the content of an arbitration provision needs to be more than boilerplate. Moreover, the authors believe that the aforementioned arbitration provision illustrates the need for an estate planning attorney to answer the five questions set forth below when he or she is deciding to incorporate an arbitration provision into an estate planning document for a client.

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154. *Id.*; TEX. CIV. PRAC. & REM. CODE ANN. § 171.091(a)(1)(A)(B) (detailing when and how arbitration awards can be modified or corrected).

155. *See* Ross Thoreen, *supra* note 121.

156. *See id.*

157. *Id.*

158. 9 U.S.C. § 16; TEX. CIV. PRAC. & REM. CODE ANN § 171.088; *e.g.*, Universal Comp. Sys., Inc. v. Dealer Solutions, L.L.C., 183 S.W.3d 741, 751–52 (Tex. App.—Houston [1st Dist.], pet. denied).

159. TEX. CIV. PRAC. & REM. CODE ANN § 171.088.

160. Murphy & Johnson, *The Top 10 Ways to Make Arbitration Faster and More Cost Effective*, AM. ARB. ASS'N (2013), https://www.adr.org/sites/default/files/document_repository/The%20Top%2010%20Ways%20to%20Make%20Arbitration%20Faster%20and%20More%20Cost-.pdf [perma.cc/HB38-H955] (last visited Sept. 22, 2019).

A. Is the Subject Matter Arbitrable?

There are two types of estate and trust disputes: (1) contests over the validity of the instrument itself on the basis of lack of capacity, undue influence, fraud, or duress and (2) the interpretation or application of the instrument's terms and provisions.[161]

Therefore, the question under Texas law becomes whether there is a written agreement to arbitrate, or whether there is mutual assent.[162] In the case where a beneficiary has not accepted benefits from an estate or trust nor attempted to enforce such beneficiary's rights under the instrument (direct benefit theory), but instead seeks to have the instrument set aside on the basis of lack of capacity, undue influence, duress, or fraud, it is unlikely that the Texas courts will enforce an arbitration clause because there is no mutual assent.[163] In other words, the beneficiary is not estopped from making the claim on the basis that the beneficiary has received some benefit under the instrument (e.g., receipt of assets or enforcement of the beneficiary's rights).[164] A 2014 California case (citing *Rachal*) succinctly analyzes whether a contest attempts to enforce any aspect of the instrument as follows:

> And a beneficiary is also free to challenge the validity of a trust: conduct that is incompatible with the idea that she has consented to the instrument. Thus, beneficiaries have the opportunity to opt out of the arrangement proposed by the settlor' and consequently to not be bound by the arbitration provision.[165]

The Texas Supreme Court has held that whether there is a valid or existing contract for arbitration is an issue that must be decided first.[166] The issue of settlor or testator capacity must be decided by a court to determine whether there is a valid contract requiring arbitration that can be enforced.[167]

At the outset, the attorney must decide if the potential dispute in which he or she prefers arbitration is *in personam* or *in rem*.[168] As discussed previously, an estate administration proceeding is *in rem*, and as such, binds all persons having notice, whether or not they actually participate in the

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161. *See* Mary F. Radford, *Using Arbitration and Mediation to Resolve Estate and Trust Disputes*, SV024 ALI-ABA 227, 230 (2014).

162. Rachal v. Reitz, 403 S.W.3d 840, 843–44 (Tex. 2013).

163. *Id.* at 844.

164. *Id.* at 846.

165. McArthur v. McArthur, 168 Cal. Rptr. 3d 785, 788 (Cal. Ct. App. 2014).

166. *Rachal*, 403 S.W.3d at 843 (noting that the Texas Supreme Court follows the majority view of the Third, Sixth, Seventh, Eighth, Ninth, Tenth, and Eleventh Circuits. In contrast, the Fifth Circuit takes the minority position that an arbitrator should decide the issue of mental incapacity because it is not a specific challenge to the arbitration clause, but impacts the entire instrument. The United States Supreme Court has not addressed the issue of whether a challenge that an instrument was fraudulently induced renders the whole contract invalid); *See* Buckeye Check Cashing, Inc. v. Cardegna, 546 U.S. 440, 444 n.1 (2006).

167. *Rachal*, 403 S.W.3d at 843 .

168. TEX. EST. CODE ANN. § 32.001(d).

proceeding; although, this interpretation may not hold in the arbitration context.[169]

B. Which Arbitration Rules Apply?

The AAA has established Wills and Trusts Arbitration Rules and Mediation Procedures, a forty-five page document available on the internet.[170] It can give you guidance as to how to proceed.[171] The first issue is to determine whether the arbitration is governed by the TAA or another act.[172] If it is an arbitration provision in a Texas trust or will that does not incorporate some other arbitration procedure, one can assume it is arbitrated in conjunction with the TAA.[173]

If not mandated by the agreement, the parties can agree to arbitrate according to the rules of a particular administrative organization, like the AAA or JAMS.[174] While a bit more expensive, it can actually make the process more streamlined and provide clearer rules.[175]

C. How Many Arbitrators Will Be Used?

One of the first issues is deciding to pick one or multiple arbitrators, assuming it is not in the arbitration provision itself.[176] Obviously, odd is the right number so that you have a tie-breaker.[177] Many practitioners believe that three is the optimum number; however, requiring three arbitrators can add to the cost and extend the length of the process.[178] One schedule is obviously easier to manage than trying to schedule three arbitrators, the parties, and the parties' attorneys.[179] If you choose to require a single arbitrator, and the arbitrator takes the wrong approach, misunderstands the facts, or gets sidetracked, you may be stuck with an unfortunate ruling.[180] Three minds working together does not guarantee that they get it right, but it makes it more likely.[181]

Absent a requirement or agreement on the number of arbitrators, the rules of the AAA require a three-person panel for claims of $1,000,000 or more and a single arbitrator for claims of less than that amount; subject

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169. *Id.*
170. *Wills and Trusts Arbitration Rules and Mediation Procedures*, *supra* note 124.
171. *See id.*
172. TEX. CIV. PRAC. & REM. CODE ANN. § 171.001.
173. *See id*.
174. *See Wills and Trusts Arbitration Rules and Mediation Procedures*, *supra* note 124.
175. *See id.*
176. *See id.*
177. *See id*.
178. *See id.*
179. *See id.*
180. *See id.*
181. *See id.*

however, to a financial hardship exception.[182] In contrast, under JAMS' Comprehensive Arbitration Rules & Procedures, there will be a single arbitrator unless the parties have agreed otherwise.[183]

D. What Qualifications Should the Arbitrator(s) Have?

As discussed above, the authors recommend including specific requirements for the arbitrator(s).[184]

The AAA arbitration clause provides that the arbitrator will be a practicing lawyer in the state at issue who has primarily practiced in the area of wills and trusts for at least ten years.[185] Some commentators have suggested that the arbitrator might be someone who is a member of the American College of Trust and Estate Counsel or Board Certified in Estate Planning & Probate Law by the Texas Board of Legal Specialization.[186] Both suggestions likely lead to estate planners.[187]

Consider whether you want the arbitrator to be involved in an everyday trusts and estates practice.[188] An estate planner might be ideal in some situations, especially highly complicated trust constructions or accounting issues.[189] In contrast, a seasoned lawyer with experience in fiduciary or other estate and trust litigation could be better in certain cases.[190] An attorney with actual trial experience may be an even better choice.[191]

Oftentimes, describing the qualifications of the arbitrator leads to the naming of the estate planner as the arbitrator.[192] While this might sound ideal because of the planner's knowledge of the settlor's intent, it raises a number of issues, such as: defensive language construction, bias towards the fiduciary or beneficiaries, or the risk of undue influence.[193] Provisions like arbitration, exculpation, and forfeiture clauses are classic examples of ways an undue influencer might solidify their connection to a trust or estate.[194] If the estate planner does not notice these ulterior motives during the estate planning process, arbitration by a planner with a shared history with the beneficiaries of the plan could easily bias the planner in their role as the arbitrator.[195]

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182. *See id.*
183. *See JAMS Comprehensive Arbitration Rules & Procedures*, JAMS MEDIATION, ARBITRATION, AND ADR SERVES (July 1, 2014), https://www.jamsadr.com/rules-comprehensive-arbitration/ [perma.cc/R666-5YY5].
184. *See Wills and Trusts Arbitration Rules and Mediation Procedures*, *supra* note 124.
185. *See id.*
186. *See id.*
187. *See id.*
188. *See id.*
189. *See id.*
190. *See id.*
191. *See id.*
192. *See id.*
193. *See Harnett*, *supra* note 15.
194. *See id.*
195. *See id.*

E. How Should the Arbitrator Be Selected?

Each arbitration provision should provide methods for arbitrator selection, and without agreement, there are common rules that apply.[196] Typically, the administering organization provides the two parties with candidates from a roster of arbitrators.[197] The parties then strike candidates they object to and select their preference from the remaining candidates.[198] The organization then selects the most preferred arbitrator of both parties from among the remaining candidates.[199]

After this, most administering organizations require that the arbitrator disclose any information that may present a justifiable doubt about their impartiality or independence, such as previous relationships to the parties or counsel.[200] Based on this information, the parties may then choose to object to the selected arbitrator.[201]

An arbitration provision in an estate planning document, if appropriate, could specifically permit the parties to question arbitrator candidates as a part of the arbitrator selection process.[202] The parties thus have the ability to hand select the temperament or other qualities of the arbitrator that would be beneficial to their type of case.[203]

F. Where Should the Arbitration Occur and What Law Should Govern?

When drafting the arbitration clause, the general rule is to make the arbitration convenient for your client.[204] Determining convenience for the potential parties in an estate planning dispute can be difficult.[205] You may know where the initial trustee is located, but that location may change over time or a different trustee may be in place when a dispute arises.[206] Similarly, if you are seeking to assist the beneficiaries, you may know their current location, but again, the location may change over time.[207] Therefore, it may

196. *See id.*

197. *See Wills and Trusts Arbitration Rules and Mediation Procedures*, *supra* note 124; *see Harnett*, *supra* note 15.

198. *See Wills and Trusts Arbitration Rules and Mediation Procedures*, *supra* note 124; *see Harnett*, *supra* note 15.

199. *See Wills and Trusts Arbitration Rules and Mediation Procedures*, *supra* note 124; *see Harnett*, *supra* note 15.

200. *See Wills and Trusts Arbitration Rules and Mediation Procedures*, *supra* note 124; *see Harnett*, *supra* note 15.

201. *See Wills and Trusts Arbitration Rules and Mediation Procedures*, *supra* note 124; *see Harnett*, *supra* note 15.

202. *See Wills and Trusts Arbitration Rules and Mediation Procedures*, *supra* note 124; *see Harnett*, *supra* note 15.

203. *See Wills and Trusts Arbitration Rules and Mediation Procedures*, *supra* note 124; *see Harnett*, *supra* note 15.

204. *See* Bette J. Roth et al., 1 ALTERNATE DISP. RESOL. PRAC. GUIDE § 3:6 (2019).

205. *Id.*

206. *See id.* § 7:6.

207. *Id.*

be prudent to include language requiring arbitration in the location in which the party to be prioritized is a resident.[208]

The governing law of the instrument generally should govern the arbitration proceeding; if you desire to change that law for some reason, be sure that you specify what other law should govern.[209]

G. What Will the Scope of the Arbitration Be?

It is important to determine or at least consider what issues will be addressed in arbitration.[210] Will it be a documents-only hearing or will testimony be permitted?[211] Will there be a timeframe imposed on the proceedings?[212]

H. What Remedies Will Be Permitted?

The remedy sought may differ depending on the context.[213] Consider whether you want the arbitrator to be able to offer legal or equitable remedies or both.[214] The desired remedies will vary depending on the document in which the arbitration clause is included.[215] For example, your client may want the ability to offer specific performance (for example, the instruction that a trustee should or should not do something), damages (if the complaining party has been financially harmed), and the recovery of attorneys' fees.[216] The arbitration clause should address what remedies will be available.[217]

I. Will the Arbitration Be Confidential?

As discussed above, clients often seek arbitration to preserve privacy and obtain the offer of confidentiality.[218] Just because arbitration proceedings are not public, it does not necessarily mean they are

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208. *Id.*
209. *Id.* § 4:10.
210. *Id.* § 4:4.
211. *See id.*
212. *See id.*
213. *See id.* at 5:1; *see also generally*, Thomas Oppenheimer, *Tips To Drafting Effective Arbitration Clauses*, DAILY BUSINESS REVIEW (Sept. 5, 2014), https://www.foxrothschild.com/publications/tips-to-drafting-effective-arbitration-clauses/ [perma.cc/X74H-6WSE] (providing general tips regarding drafting effective arbitration clauses).
214. Roth et al., *supra* note 204, § 5:1.
215. *Id.*
216. *Id.* §§ 5:2–5:9.
217. *Id.*
218. *Id.* § 4:9.

"confidential."[219] If this is what your client seeks, make sure that it is clearly stated in the provision that you draft.[220]

J. Will Emergency Relief Be Available?

If the transaction at issue involves any measure of timeliness, you should reference what, if any, emergency interim relief (as with court hearings, arbitration proceedings take time to arrange) will be made available.[221]

K. Will the Arbitrator Prepare an Opinion to Accompany the Award?

In some cases, you may want the arbitrator to prepare a written opinion to accompany the award.[222] If the arbitration will be appealable, it would be wise to require such an opinion.[223] If the arbitration will not be appealable, then it generally will not be as important to have a written opinion.[224] However, if the arbitration is to produce a course of action to be followed or some other set of rules for moving forward, you may want some or all of the award in written form.[225]

L. Will Arbitration Be Binding, or Can the Award Be Appealed?

1. Binding Versus Non-Binding Arbitration

In non-binding arbitration, the arbitrator still decides the outcome of the dispute, but this decision is not binding, and no enforceable award is issued.[226] Each disputing party is at liberty to reject the arbitrator's decision, and instead head to the courthouse to settle the matter.[227]

Non-binding arbitration is best for less complex disputes or cases where parties simply require an independent decision maker.[228] Non-binding arbitration also may be useful in very limited cases to solve a discrete issue

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219. *Id.*

220. *Id.*

221. *Id.* § 5:6; *Commercial Arbitration Rules and Mediation Procedures*, AM. ARBIT. ASS'N (Sept. 15, 2005), https://www.adr.org/sites/default/files/Commercial%20Arbitration%20Rules%20and%20Mediation%20Procedures%20Sept.%2015%2C%202005.pdf [perma.cc/ULV8-44PD].

222. *Decision & Award*, FINRA, https://www.finra.org/arbitration-mediation/decision-award [perma.cc/WX9G-4WSD] (last visited Sept. 18, 2019).

223. *Id.*

224. *Id.*

225. *Id.*

226. TEX. CIV. PRAC. & REM. CODE ANN. § 154.027 (providing for binding and non-binding arbitration).

227. Roth et al., *supra* note 204, § 3:19; Arbitration, AM. B. ASS'N, https://www.americanbar.org/groups/dispute_resolution/resources/DisputeResolutionProcesses/arbitration/ [perma.cc/XFR8-WPXP] (last visited Sept. 18, 2019).

228. Steven C. Bennett, *Non-Binding Arbitration: An Introduction*, 61 DISP. RESOL. J. 22 (2006).

or provide guidelines for a non-contentious relationship that might not otherwise be possible if the parties are involved in a lawsuit.[229] Although non-binding arbitration is often used in the high-dollar commercial contexts to help parties assess their strengths and weaknesses in a potential court proceeding or to assist the parties in reaching a mutually acceptable settlement, non-binding arbitration is likely not advisable in most trust and estate contexts.[230] Many drafters include provisions for independent decision makers or tie-breakers in their documents.[231] Moreover, if arbitration is not binding, the parties incur the cost of arbitration without the certainty most parties desire.[232]

In binding arbitration, disputing parties waive their right to trial and agree that they will be bound by the arbitrator's final decision.[233] Binding arbitration is more commonly used in the trusts and estates context where the parties need to resolve a conflict in order to achieve or expedite an outcome determinatively.[234]

2. Appealing or Vacating an Award

Once a binding arbitration award is issued, an arbitrator is not allowed to revisit the merits.[235] Instead, the arbitrator can amend or modify an award only for clerical or computational errors.[236] Therefore, participants in an arbitration cannot file a motion for rehearing or write a letter to the arbitrator asking for reconsideration—except in very unique circumstances (e.g., proof of fraud or an infringement of public policy in obtaining the decision).[237] Even if a decision is appealed, courts tend to respect the arbitrator's expertise and judgement as a manner of validating and upholding arbitration as a trusted alternative to litigation.[238]

Because arbitration lacks an appeals process, some losing parties may be tempted to find another way around the award by filing a court action to annul or vacate the award.[239] However, doing so can bear additional financial risks; for example, the United States Court of Appeals for the Seventh Circuit recently cautioned: "[C]hallenges to commercial arbitration awards bear a high risk of sanction."[240]

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229. *Id.*
230. Logstrom, *supra* note 80, at 267.
231. *See id.*
232. *See id.*
233. *See id.*
234. *Id.* at App. A (detailing examples of standard arbitration clauses).
235. 9 U.S.C. § 2 (1947); TEX. CIV. PRAC. & REM. CODE ANN. § 171.098.
236. TEX. CIV. PRAC. REM. CODE ANN. § 171.054.
237. *Id.* §§ 171.054, 171.098.
238. Graham-Rutledge & Co., Inc. v. Nadia Corp., 281 S.W. 3d 683, 687 (Tex. App.—Dallas 2009, no pet.).
239. Johnson Controls, Inc. v. Edman Controls, Inc., 712 F.3d 1021, 1028 (7th Cir. 2013).
240. *Id.* (citing Flexible Mfg. Sys. Pty. Ltd. v. Super Prods. Corp., 86 F.3d 96, 101 (7th Cir. 1996) (demonstrating where the court imposed sanctions)).

Most court actions seeking to vacate awards fail because the grounds for setting aside arbitration awards are exceedingly narrow under the FAA and the TAA.[241] A recent opinion from the United States Court of Appeals for the Fifth Circuit illustrates how difficult it is for a non-prevailing party to overturn an unfavorable arbitration award in court.[242] In its opinion, the Fifth Circuit found that a federal district court committed error when it substituted its judgment for that of the arbitrators merely because it would have reached a different decision.[243] The Fifth Circuit reiterated that a court's decision to confirm or vacate an arbitration award is reviewed *de novo*, but such review "is extraordinarily narrow" and "[e]very reasonable presumption must be indulged to uphold the arbitrator's decision."[244] Additionally, as previously mentioned, Texas law requires review of an arbitration award to be so limited that an award may not be vacated even if there is a mistake of fact or law.[245]

The TAA provides a list of enumerated grounds to vacate an arbitration award.[246] A key section in the TAA states that an arbitration award can only be vacated by a court if there is evidence of one or more of the following:

(1) The award was obtained by corruption, fraud, or other undue means;
(2) The rights of a party were prejudiced by evident partiality by an appointed neutral arbitrator;
(3) The arbitrator committed misconduct or willful misbehavior;
(4) The arbitrators exceeded their powers;
(5) The arbitrators refused to postpone the hearing even after a showing of sufficient cause for postponement;
(6) The arbitrators refused to hear evidence material to the controversy;
(7) The arbitrators conducted the hearing, contrary to various statutory provisions, in a manner that substantially prejudiced the rights of a party; or
(8) There was no agreement to arbitrate, the issue was not adversely determined in a proceeding, and the party did not participate in the arbitration hearing without raising the objection.[247]

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241. *See* Scott M. McElhaney, *Enforcing and Avoiding Arbitration Clauses Under Texas Law*, (2018), https://www.jw.com/wp-content/uploads/2018/02/Enforcing-and-Avoiding-Arbitration-Clauses-2018.pdf [perma.cc/KR86-7L88].

242. *Id.*

243. Campbell, Harrison & Dagley v. Hill, 2015 WL 4587567 at *2 (N.D. Tex. 2015) (citing Humitech Dev. Corp. v. Perlman, 424 S.W.3d 782, 790 (Tex. App. —Dallas 2014, pet. denied)).

244. Forest Oil Corp. v. El Rucio Land & Cattle Co., Inc., 446 S.W.3d 58, 75 (Tex. App.—2014, Houston [1st Dist.] 2014, pet. granted) (citations omitted).

245. Universal Comp. Sys., Inc. v. Dealer Sol., L.L.C., 183 S.W.3d 741, 752 (Tex. App. —Houston [1st Dist.] 2005, pet. denied).

246. TEX. CIV. PRAC. & REM. CODE ANN. § 171.088(a).

247. *Id.*

In 2016, the Texas Supreme Court addressed whether a party can vacate an arbitration award under the TAA by invoking extra-statutory, common law *vacatur* grounds.[248] The case involved a trust dispute between a mother and her two sons.[249] The parties entered into a settlement agreement requiring mediation for disputes about performance, and if mediation was unsuccessful, by binding arbitration.[250] Several years after the settlement agreement was executed, a performance dispute arose and the parties went to arbitration, during which the arbitrator dismissed—without hearing claims brought by one of the sons.[251]

The losing son sought to vacate the arbitrator's award because the arbitrator manifestly disregarded the law—despite not being a ground for *vacatur* under the TAA.[252] The trial court confirmed the arbitration award, and the losing son appealed the trial court's ruling.[253] The Fourth District Court of Appeals in San Antonio affirmed the trial court's confirmation of the arbitration award.[254] Specifically, the court of appeals held that the TAA's enumerated *vacatur* grounds are exclusive without considering the merits of the manifest disregard arguments—and rejected the appellant's argument that he was deprived of his statutory hearing rights.[255] The appellant then petitioned the Texas Supreme Court for review; the court granted to resolve "a split in the courts of appeals on whether the TAA permits vacatur of an arbitration award on common law grounds not enumerated in the [TAA]."[256] In its majority opinion, the Texas Supreme Court affirmed the court of appeals' ruling by holding that the TAA's enumerated vacatur grounds are exclusive.[257]

It is important to mention, of course, that the arbitration provision you draft can determine whether or not the award can be appealed.[258] The AAA offers such clauses via its online ClauseBuilder®.[259]

M. Enforcing an Award

If an arbitration claimant obtains an award that grants monetary damages and the other side does not properly pay by the required date—the claimant's remedy is to file an action in court seeking confirmation of the

248. Hoskins v. Hoskins, 497 S.W. 3d 490, 491 (Tex. 2016) (cert. denied).
249. *Id.*
250. *Id.*
251. *Id*. at 492.
252. *Id.* at 493.
253. *Id.*
254. Hoskins v. Hoskins, 498 S.W. 3d 78, 82 (Tex. App.—San Antonio 2014, aff'd).
255. *Id.* at 83.
256. Hoskins v. Hoskins, 497 S.W.3d 490, 493 (Tex. 2016).
257. *Id.*
258. *Id.*
259. *See Clause Builder Tool*, AM. ARBIT. ASS'N, https://www.clausebuilder.org/cb/faces/index [perma.cc/TV9P-DCBS] (last visited Sept. 22, 2019).

award.[260] A court order or judgment confirming an arbitration award is enforceable in the same manner that any other judgment is enforceable.[261]

N. What Should I Do to Keep a Disgruntled Beneficiary from Defeating the Arbitration Clause?

Under *Rachal*, one answer seems obvious.[262] If your client is likely to make a claim, plan to make it before accepting any benefits or acknowledging the validity of the estate planning document; note that this is likely easier with a trust than a will.[263] That said, be assured that there will be fights about what constitutes acceptance of benefits.[264] For example, what if your client was to receive mandated distributions, had not received them, and sued to enforce them?

If your client has not accepted the actual benefits he or she was supposed to receive, your client has to accept the right to receive those benefits in order to enforce them—that is the deciding factor in *Rachal*.[265] In this context, for the acceptance of benefits to apply, it does not seem that a beneficiary would have to receive the assets, one merely has to have accepted the trust; in other words, it is one's entitled benefit that one is seeking to enforce that manifests acceptance of the trust.[266]

Finally, there is an exception to the acceptance of benefits doctrine where one is not estopped if he or she returns that which was accepted.[267]

VII. WE HAVE A VALID ARBITRATION PROVISION, NOW WHAT?

Once the rules are set, hopefully by a well-drafted arbitration provision, arbitrator selection is of utmost importance.[268] You want an arbitrator with subject matter expertise, whose professional background and experience suggest that the arbitrator will be fairly receptive to your client's claim or defense, and unburdened by relationships to the opposing party or opposing counsel that might fairly call the arbitrator's neutrality into question.[269] It may also be important to investigate the potential candidates by checking their websites, using a search engine, and browsing their social media accounts.[270] Ask the other lawyers in your office and any colleagues who

260. Roth et al., *supra* note 204, § 13:11.
261. *Id.*
262. *See* Rachal v. Reitz, 403 S.W.3d 840, 842 (Tex. 2013).
263. *See id.*
264. *See id.*
265. *Id.* at 851.
266. *Id.*
267. *See* Kramer v. Kastleman, 508 S.W.3d 211, 213 (Tex. 2017).
268. Roth et al., *supra* note 204, § 3:12.
269. *Id.*
270. *Id.*

regularly arbitrate if they know or know of the candidates.[271] Some administering organizations, including the AAA, may allow the parties to submit written questions to the candidates or to conduct telephone interviews of the candidates—with counsel for both parties being on the call.[272]

VIII. ARBITRATION CLAUSES IN SETTLEMENT AGREEMENTS

Settlement agreements are highly favored by Texas courts.[273] The main object of any settlement is a termination of all, or at least a part of litigation—both pending and contemplated.[274] If you have to sue to enforce a settlement agreement, the objective of the settlement (e.g., the termination of litigation) has not been achieved.[275]

A settlement agreement will not be set aside because of an ordinary mistake of law or fact if all parties had the same knowledge, provided there is no fraud, misrepresentation, concealment, or other inequitable conduct.[276] Thus, a party's unilateral mistake of law is not grounds to avoid the settlement agreement.[277]

A settlement agreement is subject to the laws of contracts, so the lack of an essential contractual element, which is a question of law for the court to decide, will prevent its enforceability.[278] In doing so, the court may consider evidence of the facts and circumstances surrounding the execution of the settlement agreement.[279] When the evidence shows that the parties intended to enter into a settlement agreement, courts must enforce the agreement.[280] In reaching its determination, the court will decide whether all the essential

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271. *Id.*

272. *See Wills and Trusts Arbitration Rules and Mediation Procedures*, *supra* note 14; Stewart Edelstein, *The Best Strategies for Choosing Arbitrators*, CONNECTICUT LAW TRIBUNE (Dec. 15, 2014), http://www.evergreeneditions.com/article/The+Best+Strategies+For+Choosing+Arbitrators/1884888/238885/article.html [perma.cc/J6BG-ALR9].

273. Jim Hartnett Jr. & Christopher Nolland, *How to Reach a Settlement Agreement: Using Mediation and Other Techniques*, WILLS, EST., AND PROB.: A SATELLITE PROGRAM DALLAS, TEX. (Jan. 21, 2000), http://www.texasbarcle.com/Materials/Events/2028/41160_01.pdf [perma.cc/4N9F-QDYA].

274. *Id.*

275. *See id.*

276. *See* Crosley v. Staley, 988 S.W.2d 791, 796 (Tex. App.—Amarillo 1999, mand. denied).

277. *Id.* at 796 (citing Atkins v. Womble, 300 S.W.2d 688, 703 (Tex. Civ. App.— Dallas 1957, writ ref'd n.r.e.)).

278. *See* Montanaro v. Montanaro, 946 S.W.2d 428, 430 (Tex. App.—Corpus Christi 1997, no writ.) (citing Texaco, Inc. v. Pennzoil Co., 729 S.W. 2d 768, 814 (Tex. App.—Houston [1st Dist.] 1987, writ ref'd n.r.e.)); *e.g.*, Huffco Petroleum Corp. v. Trunkline Gas Co., 769 S.W.2d 672, 674 (Tex. App.—Houston [14th Dist.] 1989, writ denied); *e.g.*, Southwestern States Oil & Gas Co. v. Sovereign Resources, Inc., 365 S.W.2d 417, 419 (Tex. App.—Dallas 1963, writ ref'd n.r.e.); *e.g.*, Browning v. Holloway, 620 S.W.2d 611, 615 (Tex. App.—Dallas 1981, writ ref'd n.r.e.); *e.g.*, Stewart v. Mathes, 528 S.W.2d 116, 118 (Civ. App.—Beaumont 1975, no writ).

279. *See Montanaro*, 946 S.W.2d at 430 (citing Sun Oil Co. v. Madeley, 626 S.W.2d 726, 731 (Tex. 1981)).

280. *Id.* (citing TEX. CIV. PRAC. & REM. CODE § 154.003); *see also In re* Marriage of Ames, 860 S.W.2d 590, 592 (Tex. App.—Amarillo 1993, no writ).

terms were included in the settlement agreement and all conditions precedent to the enforcement of the agreement have occurred.[281]

Additionally, if the settlement agreement is ambiguous to the extent that it creates an unresolved issue of fact, the party challenging the agreement may be entitled to a jury trial on any unresolved fact issue.[282] Consider the case in which a term sheet created at mediation and signed by all parties was an enforceable settlement agreement.[283] The term sheet provided that "the parties' understandings are subject to securing documentation satisfactory to the parties."[284] The court held that a question of fact existed regarding whether the parties intended the execution of formal documentation to be a condition precedent to the formation of a contract or a memorialization of an existing contract.[285] However, when no fact issue exists the court may find as a matter of law that the agreement is enforceable, notwithstanding the fact that the agreement contemplated circulation of final settlement documentation.[286]

When "the settlement dispute arises while the trial court has jurisdiction over the underlying action, a claim to enforce the settlement agreement should, if possible, be asserted in that court under the original cause number."[287] However, when the dispute arises while the underlying action is on appeal, the party seeking enforcement must file a separate breach of contract action.[288] The inclusion of a carefully drafted arbitration clause or provision in a settlement agreement can go a long way towards terminating the litigation that the agreement intends to settle; however, the agreement should also include a series of binding representations for the parties to the agreement.[289]

For purposes of minimizing, and hopefully completely eliminating, the success rate of any attempts by the opposing party or parties to repudiate the agreement after it is signed, the authors recommend the inclusion of the following representations within the agreement:

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281. Browning v. Holloway, 620 S.W.2d 611, 615 (Tex. App.—Dallas 1981, writ ref'd n.r.e.).

282. *Id.*

283. Martin v. Black, 909 S.W.2d 192, 196 (Tex. App.—Houston [14th Dist.] 1995, writ denied).

284. *Id.* at 194.

285. *Id.* (citing Foreca, S.A. v. GRD Dev. Co. Inc., 758 S.W.2d 744, 746 (Tex. 1988)).

286. *See* Hardiman v. Dault, 2 S.W.3d 378 (Tex. App.—San Antonio 1999, no pet.) (holding that the parties' agreement was not "subject to" execution of subsequent documents).

287. Mantas v. Fifth Court of Appeals, 925 S.W.2d 656, 658 (Tex. 1996); *see also In re* General Metals Fabricating Corp., 2006 WL 3316877 (Tex. App.—Houston [1st Dist.] 2006, no pet) (memo not designated for publication) (holding that the trial court abused its discretion in failing to abate main cause and severing breach of contract claim); *e.g.*, Batjet, Inc. v. Jackson, 161 S.W. 3d 242, 245 (Tex. App.—Texarkana 2005, no pet.) (noting that parties property asserted their motion for summary judgment to enforce settlement agreement in trial court under original cause number); *e.g.*, Citgo Ref. & Mktg. v. Garza, 94 S.W.3d 322, 330 (Tex. App.—Corpus Christi 2002, no pet.) (noting that because settlement dispute arose while trial court still had jurisdiction, parties properly asserted claims to enforce settlement agreement under original cause number).

288. *Mantas*, 925 S.W. 2d at 659.

289. *See* Jack B. Anolin Co. v. Tipps, 842 S.W.2d 266, 270 (Tex. 1992).

(1) That each party to the settlement agreement has knowledge of all relevant and material information and facts about the case and the underlying evidence;
(2) That each party has been fully informed, including by advice of counsel, concerning the existence of potential claims of any other party including additional affirmative or defensive claims arising from all matters known to the party and arising during the period of negotiations leading to and culminating in the execution by the parties of the agreement in order for each party to make an informed and considered decision to enter into the agreement;
(3) That each party, after receiving advice of counsel, is waiving any right to demand or obtain further information and/or documents;
(4) That each party, after receiving advice of counsel, is waiving any obligation of any other party that is not specifically stated in the agreement;
(5) That each party acknowledges that he or she is not in a significantly disparate bargaining position with regard to any other party to the agreement;
(6) That each party intends to enter into a settlement agreement, and that all intended, agreed upon and essential terms of settlement are recited in the agreement;
(7) That each party represents that the terms of the settlement agreement are not in any way ambiguous;
(8) That each party intends for the agreement to be a binding settlement agreement under Texas law for the purpose of terminating the litigation which is presently pending between them that the agreement concerns;
(9) That in executing the agreement, each party represents that he or she has relied upon his or her own judgment and the advice of his or her own attorneys, and further, that he or she has not been induced to sign or execute the agreement by promises, agreements or representations not expressly stated herein, and he or she has freely and willingly executed this agreement and expressly disclaims reliance upon any facts, promises, undertakings, or representations made by any other party to the agreement; and
(10) That each party represents that his or her consent to the agreement was not procured, obtained, or induced by improper conduct, undue influence or duress.

IX. ARBITRATION PROVISIONS IN OTHER DOCUMENTS

Arbitration provisions may also arise under documents not previously discussed. The question is, whom does the document containing the arbitration provision bind? Consider the case of beneficiaries suing a trustee

and trust advisor for breach of fiduciary duty.[290] In one case, the trustee and trust advisor attempted to force the trust beneficiaries to arbitration based on an arbitration clause in the wealth-management agreement between the trustee and trust advisor.[291] The court, applying the direct benefits estoppel theory, found that the agreement did not bind the trust beneficiaries because the beneficiaries were asserting their rights under the trust agreement and not under the wealth-management agreement.[292] The case underscores the need for an analysis of where an arbitration clause appears and under what theory beneficiaries are asserting their rights.[293]

290. Pinnacle Trust Co., L.L.C. v. Mctaggart, 152 So. 3d 1123, 1124 (Miss. 2014).
291. *Id.*
292. *Id.*
293. *See id.*