

# ARBITRATION *as a* *Fair & Effective* Alternative *to Litigation*

**T**he right to enter into arbitration agreements is under attack—an attack funded by plaintiffs’ lawyers around the country and organizations supported by them. The reason for this is straightforward: arbitration and other alternative dispute resolution mechanisms reduce the need for expensive, time-consuming litigation, the potential for runaway jury verdicts, and industry-threatening class action lawsuits. Stated simply, arbitration agreements are economically undesirable for lawyers who make their living filing lawsuits or lawyers who want to use the court system for personal enrichment. The effort to curtail the right to enter into arbitration agreements is in full swing in a number of states, including California and Texas, as well as on the federal level in the U.S. Congress.

**The Right To Contract For Arbitration Is A Fundamental Right That Must Be Preserved.** A number of state legislatures, including Texas, are currently studying pre-dispute binding arbitration provisions in consumer contracts. In hearings and in materials supplied to legislative committees, arbitration has been criticized as unfair for consumers. A variety of reforms have been suggested, including banning pre-dispute arbitration agreements altogether. *Texans for Lawsuit Reform (TLR) believes that the rights of parties to elect to resolve disputes related to a transaction by arbitration rather than having to rely exclusively on lawsuits is an important, fundamental contractual right in our free society and should be preserved.* Arbitration is typically a faster, less expensive,

and less cumbersome method of resolving a wide variety of disputes.<sup>1</sup> Arbitration agreements can also provide a means for parties to ensure—before a dispute arises—that it will be resolved by an independent, unbiased arbiter or arbiters with special expertise in the subject matter of the dispute.<sup>2</sup> TLR supports the freedom to contract for arbitration as a method of resolving civil disputes as an alternative to litigation.

**Texas Law Currently Provides Many Safeguards For Consumers In Arbitration Contracts.** The primary theme underlying most of the criticisms of arbitration provisions in consumer contracts is that unfair arbitration “agreements” can be essentially forced on unsuspecting consumers without their

being truly informed of the nature of the arbitration provision or the implications of the “agreement” to arbitrate.<sup>3</sup> The criticisms focus on consumers relinquishing valuable rights they would enjoy under the rules governing lawsuits in the court system in a situation where the consumer is not truly agreeing to give up these rights.

These criticisms ignore three crucial facts: 1) Texas law already provides protections to ensure that consumers understand the nature of proposed arbitration provisions and to protect consumers from coercive, unfair “form” arbitration agreements, 2) “unconscionable” arbitration agreements are not enforceable under Texas law, and 3) the majority of arbitration agreements enforced by the courts are governed by the Federal Arbitration Act, which preempts Texas law.

**The Texas Consumer Must Have Informed Consent For An Arbitration Provision To Be Enforceable.**

A key fact often ignored by critics is that the Texas legislature has already taken steps to assure that pre-dispute binding arbitration provisions in consumer contracts are fair and willingly agreed to by the consumer. Under section 171.002 of the Texas Arbitration Act as amended in 1997, pre-dispute

binding arbitration provisions in consumer contracts involving an amount less than \$50,000 are not enforceable unless the agreement is signed not only by the consumer but also by the consumer’s attorney.<sup>4</sup> By requiring the signature of an attorney representing the consumer

in order to make arbitration binding for contracts involving consideration of less than \$50,000, the Texas legislature has already provided that consumers will be required to arbitrate their claims only if they willingly agree to the arbitration provisions, after being fully informed of them. The practical effect of this law is that enforceable arbitration provisions in consumer contracts will be rare under Texas law because it will be highly unusual for businesses to insist that consumers seek legal counsel in transactions under \$50,000. When this does occur, the consumer will be entering the transaction informed of the effect of the arbitration provision and electing to

accept it as part of the deal. This is a very practical method of addressing the “contract of adhesion” issue<sup>5</sup> because it essentially eliminates “form” arbitration agreements in most consumer transactions.

**Texas Law Allows Courts Wide Discretion To Void Arbitration Provisions That Are Patently Unfair.**

Another key fact ignored by the critics of consumer arbitration agreements is that under current Texas law “unconscionable” arbitration agreements are not enforceable, regardless of the amount involved.<sup>6</sup> An “unconscionable” arbitration agreement is one that is “unfair because of its overall one-sidedness or the gross one-sidedness of one of its terms.”<sup>7</sup> In deciding whether an arbitration agreement is unconscionable under Texas law, courts “look at the bargaining process the parties went through and must evaluate the fairness of a contractual provision in controversy by determining whether there are legitimate commercial reasons that justify its inclusion as part of the agreement.”<sup>8</sup>

Thus, Texas law already provides protections for anyone who may have agreed, wittingly or unwittingly, to an unconscionable arbitration provision. Such provisions are not enforceable under the Texas Arbitration Act and courts are required to evaluate the fairness of arbitration provisions before enforcing them against consumers or anyone else. Listening to the opponents of arbitration one would get the impression that businesses have carte blanche to run over consumers with unfair, overreaching arbitration provisions. This is simply not true. If a consumer is being taken advantage of by a business or company, Texas courts already have the tools available to remedy the situation.

In summary, Texas law provides these protections to the consumer: 1) unconscionable arbitration agreements are not enforceable, 2) arbitration agreements in transactions involving individuals acquiring property, services, money or credit in an amount of \$50,000 or less must be signed by each party and each party’s attorney, and 3) arbitration agreements relating to personal injury claims must be signed by each party and each party’s attorney, regardless of the amount of the claim.

**The Federal Arbitration Act Preempts State Law In Most Arbitration Matters.**

Critics of consumer arbitration agreements also ignore the fact that the

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provisions of the Texas Arbitration Act rarely come into play because of the broad reach of the Federal Arbitration Act and its preemption of state law. The simple truth is that the enforceability of most arbitration provisions is governed by federal law and courts rarely have occasion to apply Texas law. When critics complain that consumers might unwittingly give up their right to a jury or might unintentionally “agree” to a patently unfair arbitration provision, they are not complaining about Texas law. Texas law already addresses these issues, but the relevant provisions of the Texas Arbitration Act are rarely invoked because of the preemption of state law by the Federal Arbitration Act.<sup>9</sup>

Federal law controls virtually the entire field of law related to arbitration. Any requirement or provision of Texas law will come into play only if allowed by federal law. Today, there are few instances in which federal law permits the application of state law in the area of arbitration. Nonetheless, this does not change the fact that, to the extent allowed, Texas law affords consumers substantial protections.

**Criticisms Of Arbitration.** Setting aside the reality of the interaction between federal and Texas law with respect to arbitration agreements, opponents of arbitration raise concerns about the arbitration process that include the following: (1) the cost of accessing the arbitration process; (2) venue of the arbitration proceeding; (3) perceived bias in arbitration favoring businesses; (4) the lack of an appeal from arbitration awards; (5) limited discovery; (6) the confidentiality of arbitration decisions and proceedings; (7) and the inability to bring class actions on issues subject to arbitration.<sup>10</sup>

**The Purpose And Benefits Of Arbitration.** To evaluate the above-stated concerns, it is necessary to put them in the context of the purpose and benefits of arbitration. In general terms, arbitration is a streamlined, private dispute resolution procedure designed to avoid some of the uncertainty, expense, and time that often are associated with lawsuits in the court system. There will typically be one or more independent arbitrators who have experience and/or education in the relevant subject matter and who bring a greater level of expertise to the issues in the case than a lay jury. Arbitrations are not necessarily constrained by the rules of civil procedure that apply in the court

system and can allow for flexible discovery and procedures tailored for the particular case. Additionally, the decision of the arbitrator is generally final except when review is allowed under the arbitration

agreement or under the Texas Arbitration Act. Consequently, arbitration agreements give contracting parties the ability to tailor their dispute resolution process to their needs or the needs of the transaction, and limit the length of time the dispute can continue by declaring finality to the arbitrators’ award. Even arbitration opponents concede that “[t]he peculiarities of arbitration can serve the needs of parties of equal bargaining strength who voluntarily agree to private dispute resolution. In such circumstances, the objectives of arbitration—quick, unbiased, economical resolution of disputes—may be attained.”<sup>11</sup>

**The Cost Of Arbitration vs. The Cost Of Litigation.** Arbitration is generally considered to be cheaper than litigation in the courts. Arbitration opponents, however, have argued that arbitration is unsuited for resolving consumer disputes because the cost of arbitration is greater than the cost of traditional litigation. The primary support for this position is a “study” conducted by Public Citizen that reports that the costs of initiating and administering an arbitration is greater than the costs of initiating a lawsuit in the civil justice system.<sup>12</sup> This report, aside from being methodologically unsound, ignores reality in making its cost comparisons.<sup>13</sup>

The appropriate standard for comparing the cost of arbitrations vs. the cost of a lawsuit is the total cost to the litigants at the end of the process—the bottom line. Arbitration opponents, including Public Citizen and Texas Watch, discuss only the cost of initiating an arbitration versus the cost of initiating a lawsuit. The cost of initiating either process is only a small part of the entire cost. The principal drivers of costs in litigation are discovery and attorneys’ fees. These costs dwarf the cost of initiating either an arbitration or a lawsuit. A principal purpose of arbitration is to cut down on overall cost by curtailing or limiting discovery and by reducing the amount of attorney time

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required. Ease of access to the arbitration panel, the reduced number of motions necessary, limited discovery, ease of scheduling hearings, and the expertise of the arbitrators (necessitating less educational time)

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all can contribute to dramatic reductions in the amount of attorney time and, consequently, the overall expense necessary to pursue an arbitration.<sup>14</sup> A typical arbitration can be completed in a matter of months where a civil lawsuit in the court system can take years to move to conclusion and exhaust the appeal process.<sup>15</sup> While it is possible that the cost of simply initiating an arbitration can be higher than the filing fee for a lawsuit, these fees are typically a fraction of the cost of the entire litigation.

In addition, these costs relate only to the costs to the litigants and not to society. Every time someone files a lawsuit that goes to trial, the plaintiff is imposing on numerous citizens who must go to the courtroom to possibly be picked as a juror, taking the better part of a day, a week, or a month of people's time. Nor does this consider the cost to the taxpayers who pay for the court system. These are significant costs to society that arbitration does not impose.

**Arbitration Fees.** Even though arbitration is generally less expensive than litigation in the long run, it is possible that fees to initiate arbitration could be a barrier for some consumers. For arbitration to be an effective dispute resolution tool, consumers must have meaningful access to arbitration. The leading arbitration provider, the American Arbitration Association ("AAA"), has rules that limit the fees charged to a consumer to initiate arbitration to fees that are equivalent to the cost of filing a lawsuit, and AAA has procedures to waive or defer the costs charged to consumers when appropriate.<sup>16</sup> In AAA proceedings consumers pay only \$125 toward an arbitrator's fees in cases under \$10,000, and in cases under \$75,000 consumers pay only \$375, and even these fees are fully refundable if the dispute is settled before the arbitrator takes any action.

If the initiation fees for arbitration are truly prohibitive (a proposition for which there is currently no

discernible evidence) the Texas Legislature could consider measures to cap the fees charged to a consumer to access arbitration at a level commensurate with the fees charged to access the civil justice system. Any fees over that limit charged by the arbitration provider would then be paid by the business entity in the dispute. It is important to note that the Texas Arbitration Act already requires the arbitrator to allocate the arbitrator's fees and the arbitration expenses in the final award.

**Arbitration Venue.** Another complaint targets arbitration provisions that place onerous or prohibitive venue requirements on the consumer. The arbitration's venue is typically determined by the arbitration agreement, not by law. Like the costs to initiate arbitration, it is possible that venue in a location that is inconvenient for a consumer can operate as a barrier to meaningful access to arbitration. For example, a company that requires its Texas customers to arbitrate claims in the company's home office in Maine could have the effect of limiting a consumer's desire and ability to pursue a claim in light of the expense and inconvenience of traveling to Maine. This type of venue requirement when applied to a consumer would likely be found to be unconscionable and, therefore unenforceable under Texas law.

There is no evidence such venue provisions are, in fact, widely promulgated, used to the disadvantage of Texas consumers, or enforced by Texas courts applying Texas law when challenged. In the absence of evidence that such venue provisions are actually being used in Texas to the detriment of Texas consumers despite the prohibition against unconscionable arbitration terms, it is difficult to articulate a legitimate reason to change current law. If evidence is presented that onerous venue provisions are a problem in arbitration agreements governed by Texas law, then the Legislature could consider requiring that arbitration venue for consumer transactions be in a location that is reasonably convenient to the consumer. This could be in the county where the property at issue is located, the county where the transaction at issue occurred, or the county of the consumer's residence.

**The Fairness Of Arbitrators.** Some critics claim that arbitration proceedings are biased in favor of business entities because arbitrators typically have ties to the same general industry as the business

defendant in the dispute. This belief, however, is not supported by evidence nor is it corroborated by any actual information of partiality by arbitrators on a systematic basis. In fact, the only study comparing arbitration and jury awards found that arbitrators tend to rule in favor of the plaintiff more than juries, and arbitrators and juries award similar amounts of damages in comparable cases.<sup>17</sup> If bias does unfairly affect the outcome of an arbitration or if arbitrators are biased toward either party, the party affected has grounds to vacate the award under Texas Arbitration Act section 171.088.

In short, bias on the part of arbitrators in arbitration proceedings is prohibited under current law and

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current law provides a remedy for such an occurrence. In addition, every major arbitration service in the country has rules designed to ensure that unbiased arbitrators hear the matters before them.<sup>18</sup>

**Disclosure By Arbitrators.** One suggestion that has been made to add extra protection to prevent bias in the arbitration process is to increase disclosure requirement for arbitrators. Notably, arbitration service providers such as the American Arbitration Association already require extensive disclosures from arbitrators working under AAA rules.<sup>19</sup> Texas law also currently requires extensive disclosures for potential arbitrators in international cases under Civil Practice and Remedies Code section 172.056.<sup>20</sup> If evidence is presented that undisclosed bias on the part of arbitrators is, in fact, an existing problem with arbitration proceedings generally, a potential remedy could be to incorporate in the Texas Arbitration Act disclosure requirements similar to the requirements applicable to international arbitrations.

**Appeals In Arbitration.** Some critics have opined that another problem with arbitration is that the ability to appeal an arbitrator's decision is too limited. The scope of review for arbitration awards is defined in Texas Arbitration Act section 171.088, but this scope can be expanded by the arbitration agreement itself or by the rules of an arbitration provider. Nevertheless, limited

appeals in arbitration are part of the tradeoff to create an efficient, streamlined dispute resolution system. Finality earlier in the process allows the parties repose and ends the litigation costs of the dispute earlier than could be expected in a lawsuit in the court system.

Allowing full appeals of arbitration rulings could cause the parties to invest as much time, or maybe more, to get to a final result than if they had litigated in court, and one of the great benefits of arbitration would be lost. Furthermore, to appeal an arbitration decision would reduce the flexibility of arbitration and impose new costs on the arbitration process. For example, a court reporter may have to transcribe the proceedings to create a record, hearings would have to be more formalized, and parties would have to object and litigate issues solely to preserve error. Making appeal rights in arbitrations as broad as the right to appeal trial court decisions would remove one key feature that makes arbitration an alternative system from traditional courtroom litigation. Limited appeal rights and their consequences are one of the tradeoffs parties often seek out for the benefits of quick, efficient, and inexpensive dispute resolution.

**Limited Discovery.** Critics have suggested that limited discovery is a problem with arbitration in Texas. The Texas Arbitration Act, however, specifically empowers arbitrators to authorize depositions and issue subpoenas for the production of documents.<sup>21</sup> While discovery is clearly permissible under the Texas Arbitration Act, in practice, discovery is typically streamlined to expedite the process and limit the discovery to relevant materials. This streamlining of discovery is one of the attributes of arbitration that allows the proceedings to be tailored to the facts of the case and that can make the dispute resolution process faster and cheaper.<sup>22</sup>

Imposing all of the expensive and comprehensive discovery tools available under the Rules of Civil Procedure in arbitrations would defeat part of the very purpose of creating an alternative system that is flexible and responsive to the issues in dispute in a way designed to lessen the cost of the process. It would eliminate one of the major components that make arbitration attractive for certain types of disputes.

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**Confidentiality Of Arbitration Decisions.** Critics have also suggested that confidentiality of arbitration awards is a problem that should be addressed. Importantly, the Texas Arbitration Act does not make arbitration awards confidential. To the extent the awards are confidential, the confidentiality is based on the arbitration agreement itself or the procedures of an arbitration provider. In fact, Texas law expressly allows for arbitration awards to be “confirmed” by a trial court and made a public record, which makes the arbitration result publicly available. That said, confidentiality is generally important to businesses to protect private business matters and trade secrets and avoid being a target for litigation. The benefit of making arbitration awards public to competitors, plaintiff lawyers, the media, and others, does not outweigh the parties’ right to contract for confidentiality in their arbitration agreement. In addition, settlements in lawsuits are often confidential for similar reasons.

**Arbitration And Class Actions.** Some opponents of arbitration argue that arbitration provisions are barriers to the pursuit of class action lawsuits and that this is a problem. There is no inherent right to be a participant in a class action lawsuit or an inherent right for class action plaintiff lawyers to have a class to certify. Texas citizens should be free to voluntarily contract in the manner they deem appropriate regarding arbitration as long as the agreement is not unconscionable. If Texans want to be excluded from a hypothetical future class action by electing the benefits of arbitration they should be allowed to do so. Protections are already in the Texas Arbitration Act to ensure that consumers are fully informed of the implications of an arbitration provision and to give courts the power to set aside unfair, one-sided arbitration agreements. With such protections in place, a party’s decision to elect arbitration over the possibility of a hypothetical class action should be honored. Preserving the ability of plaintiff class action lawyers to seek out and design profitable class actions should not be a policy goal of the State of Texas.

**Conclusion.** The availability of legitimate alternative methods of civil dispute resolution is an important and valuable right in our free society. Citizens should be free to contract within the current parameters of the law as it relates to arbitration, and the Legislature should be cautious when considering measures that will encroach on this freedom to contract. Any changes to current law should be targeted at a demonstrated and tangible problem, which to date has not been shown. Also, the benefits of such a change should plainly outweigh the cost associated with depriving Texans of alternative forms of dispute resolution. Although not appropriate for every dispute, arbitration agreements can and do provide tangible benefits to parties seeking to reduce the cost and uncertainty of potential disputes. They offer parties a mechanism to limit the scope of certain aspects of litigation such as discovery, appellate review and formal procedures in exchange for the resulting economic benefits to the transaction. Arbitration agreements also allow parties to elect to have decision-makers with particular expertise in the subject matter of the dispute rather than the random draw of a jury.

As long as the arbitration agreement is fair, balanced, and not forced on someone without informed consent, it is inherently fair and reasonable to allow Texans the option to agree to arbitrate. Texas law as it stands today provides these protections and strikes a fair balance between the freedom to contract and the abuse of that freedom by opportunistic merchants. Before any legislative changes are made to this balance, those proposed changes should be carefully studied, proven to be clearly compelling to cure a demonstrated abuse, and advanced with caution.

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## ENDNOTES

<sup>1</sup> Stephen J. Ware, *Arbitration under Assault: Trial Lawyers Lead the Charge*, Cato Institute Policy Analysis No. 433, April 18, 2002, at 2; Michel Picher, et al., *The Arbitration Profession in Transition*, Cornell Studies in Conflict and Dispute Resolution No. 3, 2000, at 7.

<sup>2</sup> Ware, *Arbitration under Assault*, at 3.

<sup>3</sup> Texas Watch, *The Pitfalls of Arbitration* at p. 1.

<sup>4</sup> That same section of the Texas Arbitration Act makes agreements to arbitrate personal injury claims unenforceable unless an attorney for each party signs the arbitration agreement regardless of the amount involved.

<sup>5</sup> A contract of adhesion is generally defined as “a standardized contract form for consumer goods and services that are offered on a ‘take it or leave it’ basis without affording the consumer a realistic opportunity to bargain and under such conditions that the consumer cannot obtain the desired product or services except by acquiescing.” In *re H.E. Butt Grocery Co.* 17 S.W.3d 360, 370-71 (Tex.App.—Houston [14 Dist.] 2000, no pet); BLACK’S LAW DICTIONARY, 40 (6th ed.).

<sup>6</sup> Tex. Civ. Prac. & Rem. Code § 171.022.

<sup>7</sup> *Pony Exp. Courier Corp. v. Morris*, 921 S.W.2d 817, 821 (Tex.App.—San Antonio 1996, no writ.)

<sup>8</sup> *American Employers’ Ins. Co. v. Aiken*, 942 S.W.2d 156, 160 (Tex.App.—Fort Worth 1997, no writ.)

<sup>9</sup> See, e.g., Texas Watch, *The Consumer Pitfalls of Arbitration*, at 12 (describing a “case study” where the case was decided based on the Federal Arbitration Act not the Texas Arbitration Act.

<sup>10</sup> These issues are raised in Texas Watch’s, *The Consumer Pitfalls of Arbitration*, at 5.

<sup>11</sup> Texas Watch, *The Pitfalls of Arbitration* at p. 6.

<sup>12</sup> Public Citizen, *The Cost of Arbitration*, <http://www.publiccitizen.org/publications/release.cfm?ID=7173>.

<sup>13</sup> One commentator describes the Public Citizen report as “Beltway gibberish” and concludes, “For those who care about arbitration, the rights it implicates, and who seek to resolve the dilemma it has created, the Public Citizen study is a testimonial on how not to proceed.” World Arbitration and Mediation Report, *A Comment on a Public Citizen Study Condemning Arbitration*, July 2002, at 194-95.

<sup>14</sup> Ware, *Arbitration under Assault*, at 2-3.

<sup>15</sup> Cher Gonzalez, *Arbitration, Confidentiality Settlements Key to State’s Costly Litigation Burden*; California Chamber of Commerce California Business Issues, 2002, at p.54, available at <http://www.calchamber.com/business-issues/2002/02litigation.pdf>.

<sup>16</sup> American Arbitration Association, *The Cost of Arbitration*, <http://www.adr.org>.

<sup>17</sup> Donald Wittman, *Lay Juries, Professional Arbitrators and the Arbitration Selection Hypothesis*, working paper no. 462 (2000); available at <http://econ.ucsc.edu/faculty/workpapers.html>.

<sup>18</sup> See, e.g., American Arbitration Association arbitrator guidelines, available at [http://www.adr.org/index2.1.jsp?JSPssid=13914&JSPsrc=upload\LIVESITE\Rules\\_Procedures\Ethics\\_Standards\code.html](http://www.adr.org/index2.1.jsp?JSPssid=13914&JSPsrc=upload\LIVESITE\Rules_Procedures\Ethics_Standards\code.html); National Arbitration Forum arbitrator guidelines, [http://www.arbitration-forum.com/arbitration/NAF/Code\\_linked/Part4.htm#Rule%2023](http://www.arbitration-forum.com/arbitration/NAF/Code_linked/Part4.htm#Rule%2023); and JAMS arbitrator guidelines, available at [http://www.jamsadr.com/ethics\\_for\\_arbs.asp](http://www.jamsadr.com/ethics_for_arbs.asp).

<sup>19</sup> American Arbitration Association’s required arbitrator disclosures are described at

ENDNOTES (Cont.)

http://www.adr.org/index2.1.jsp?JSPssid=13916&JSPsrc=upload\LIVESITE\Rules\_Procedures\Fact\_Sheets\..\ADR\_Guides\fact-disclosure.html. See also the American Arbitration Association Code of Ethics for Arbitrators in Commercial Disputes, http://www.adr.org/index2.1.jsp?JSPssid=13914&JSPsrc=upload\LIVESITE\Rules\_Procedures\Ethics\_Standards\code.html; and the American Arbitration Association Consumer Due Process Protocol, http://www.adr.org/index2.1.jsp?JSPssid=13964&JSPsrc=upload\LIVESITE\Rules\_Procedures\Protocols\..\Resources\EduResources\consumer\_protocol.html.

<sup>20</sup> § 172.056. Disclosure of Grounds for Challenge

(a) Except as otherwise provided by this chapter, a person who is contacted in connection with the person's possible appointment or designation as an arbitrator or conciliator or who is appointed or designated shall, not later than the 21st day after the date of the contact, appointment, or designation, disclose to each party any information that might cause the person's impartiality or independence to be questioned, including information that:

- (1) the person:
  - (A) has a personal bias or prejudice concerning a party;
  - (B) has personal knowledge of a disputed evidentiary fact concerning the proceeding;
  - (C) served as an attorney in the matter in controversy;
  - (D) is or has been associated with another who has participated in the matter during the association;
  - (E) has been a material witness concerning the matter;
  - (F) served as an arbitrator or conciliator in another proceeding involving a party to the proceeding; or
  - (G) has a close personal or professional relationship with a person who:

- (i) is or has been a party to the proceeding or an officer, director, or trustee of a party;
- (ii) is acting or has acted as an attorney or representative in the proceeding;
- (iii) is or expects to be nominated as an arbitrator or conciliator in the proceeding;
- (iv) is known to have an interest that could be substantially affected by the outcome of the proceeding; or
- (v) is likely to be a material witness in the proceeding;

(2) the person, individually or as a fiduciary, or the person's spouse or minor child residing in the person's household has:

- (A) a financial interest in:
  - (i) the subject matter in controversy; or
  - (ii) a party to the proceeding; or
- (B) any other interest that could be substantially affected by the outcome of the proceeding; or

(3) the person, the person's spouse, a person within the third degree of relationship to either of them, or the spouse of that person:

- (A) is or has been a party to the proceeding or an officer, director, or trustee of a party;
- (B) is acting or has acted as an attorney in the proceeding;
- (C) is known to have an interest that could be substantially affected by the outcome of the proceeding; or
- (D) is likely to be a material witness in the proceeding.

(b) Except as provided by this subsection, the parties may agree to waive the disclosure under Subsection (a). A party may not waive the disclosure for a person serving as:

- (1) the sole arbitrator or conciliator; or
- (2) the chief or prevailing arbitrator or conciliator.

<sup>21</sup> Tex. Civ. Prac. & Rem. Code §§ 171.050, 171.051.

<sup>22</sup> Ware, *Arbitration under Assault*, at 4-5.