

March 10, 2009

Why TLR Opposes SB 222—Arbitration

The Texas Legislature has recognized arbitration as an alternative dispute resolution procedure for 163 years, and has allowed enforcement of agreements to arbitrate future disputes for 43 years. SB 222 (by West) seeks to turn back time. By prohibiting agreements to arbitrate future disputes, SB 222 interferes with the right to contract and effectively eliminates arbitration in consumer and employment disputes, and any other case in which it can be asserted that the parties had “unequal bargaining power.” Further, other provisions in SB 222 disturb one of the most important aspects of arbitrations by preventing finality. Arbitration is the only useful mechanism many employees and consumers have for resolving disputes with their employers and the companies with which they do business. The changes proposed in SB 222 will make it more difficult to take a dispute to arbitration and more difficult for ordinary Texans to resolve disputes that are important to their lives. SB 222 is in the Senate Jurisprudence Committee.

ARBITRATION IS AN ALTERNATIVE TO COSTLY AND TIME-CONSUMING LITIGATION

- Arbitration is the submission of a legal dispute to a third-party in a setting that is more private and less formal than a court proceeding, which results in a binding decision resolving the dispute.
- Both the United States Congress and the Texas Legislature have approved of arbitration as an alternative to civil trial courts for resolving disputes.
- The policy of the State of Texas, as expressed in the Texas Arbitration Act, is to encourage the early resolution of legal disputes through voluntary or alternative settlement processes. SB 222 seeks to reverse state policy.

ARBITRATION IS DESIGNED TO BE COST-EFFECTIVE AND FAST

- The arbitration system allows parties to mutually agree on a knowledgeable, objective third-party to serve as the arbitrator and resolve their dispute. It is intended to be cost-effective for the parties, and to allow greater flexibility so that the process can be streamlined based on the circumstances of the matter.
- Arbitration provides enhanced access to justice because a person is not required to hire a lawyer to participate. Many people, if forced to litigate in court, however, would not do so because they fear the expense and uncertainty of litigation.

SB 222 SEVERELY LIMITS ARBITRATION

- SB 222 would effectively eliminate arbitration in consumer cases, employment matters, franchisor/franchisee disputes, and any dispute in which it is alleged that the parties had “unequal bargaining power.”
- It makes arbitration agreements “void and unenforceable” in these circumstances, unless the agreement is signed after the dispute has arisen, having the effect of nullifying the ability to resolve disputes through arbitration.
- A contract for, say, a \$1 million per year salary for a CEO of a Fortune 100 company could not have an arbitration provision.
- A contract between a millionaire and aircraft manufacturer for the purchase of a jet could not have an arbitration provision.
- SB 222 would void any arbitration agreement deemed to violate state or federal constitutional rights.
- What does this provision mean or imply? Given that the Texas Constitution provides a right to a jury trial in most circumstances and a jury trial is not available in arbitration, is this provision intended to destroy arbitration altogether?

SB 222 DESTROYS A CRITICAL ASPECT OF ARBITRATION—FINALITY

- One hallmark of arbitration is that the decision is binding on the parties, and not subject to appeal except in very unusual circumstances suggesting some corruption of the process.
- SB 222 destroys the finality of arbitration decisions by allowing an appeal if a party believes the award “violates fundamental public policy” or “is the result of manifest disregard of the law.” This will give a dissatisfied party ground to create an appeal.
- Allowing dissatisfied parties to appeal undermines the efficiency of arbitration as a dispute resolution mechanism and further clogs the court system.
- Arbitration is designed to alleviate the courts from having to rule on matters that can be resolved by a less formal and less expensive process. SB 222 destroys that option.

SB 222 INTERFERES WITH THE RIGHT TO CONTRACT

- SB 222 voids the rights of parties to contract as they see fit and prevents parties from seeking a mutually agreed-upon, cheaper, more-efficient dispute resolution procedure.