

ARBITRATION RISK-BENEFIT ANALYSIS

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Arbitration Strengths and Weaknesses

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Arbitration could be your worst ...



Arbitration Myth # 1

Arbitration is
cost efficient.

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Reality Check

**Arbitration may
cost more \$.**

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Myth # 2

Arbitration is *preferred*.

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Reality Check

- A growing awareness that arbitration may be *too risky* for complex, high stakes disputes
- Arbitration has fewer evidence safeguards

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Myth # 3

**Limited discovery
is a *Good Idea*.**

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Reality Check

Limited discovery in complex cases
may lead to BAD result

- Inability to develop testimony of non-party witnesses
- Inability to obtain needed documents

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Fewer Rights and Safeguards

- Appeal rights may vary from venue to venue
- Discovery rights may vary from venue to venue
- Gatekeeper functions may be illusory
 - Less rigid evidence rules
 - Use of Hearsay

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Discovery Warnings

- **Certain venues discourage, limit or frustrate discovery**
- **Limited subpoena power for non-party discovery**
 - Inability to compel witness testimony
 - Inability to compel documents
- **Potential novel legal issues**
 - Conflicting state laws with witnesses in different states

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Sources of Rules

- FAA
- State Arbitration Statutes
- UAA
- RUA
- AAA

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Drafting Issues

- **Discovery Rights**
 - Subpoena Power
 - Discovery from Third Parties
- **Evidentiary Rules**
 - Hearsay
 - Use of Affidavits
- **Rights of Appeal**

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Pre-Hearing Discovery

- **Federal Arbitration Act**
 - Section 7 only provides arbitrator with authority to require attendance of witnesses and production of documents **at hearing**
 - Recent case law trends ...arbitrators **NOT** authorized to order **pre-hearing discovery** from third parties
- **State Arbitration Acts**
 - Variety of approaches to pre-hearing discovery
 - UAA Section 7
 - RUAA Section 7

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Practice Tips

- **Arbitrator could move the hearing to the state where recalcitrant witness resides**
- **Review state procedural rules regarding out of state subpoenas before agreeing to venue for arbitration and choice of law provisions**

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Limited Appeal

- **Section 10 of the Federal Arbitration Act**
 - Corruption, fraud, undue means in procurement of the award
 - Biased or corrupt arbitrator
 - Refusal to hear evidence
 - Denial of due process
 - Arbitrator exceeded powers
 - Failure to issue final and definite award.
- **Hall Street Associates, Inc. v. Mattel, Inc., 128 S. Ct. 1396 (2008)**
 - FAA Section 10 provides EXCLUSIVE grounds for appeal
 - Parties cannot expand basis of judicial appeal.
 - "Manifest disregard for the law" may NOT be sufficient grounds for an appeal.
- **State Arbitration Statutes**
 - Possibility for contractual expansion for basis of judicial appeal

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Key Considerations

- Selection of appropriate venue consistent with arbitration goals
- Whether parties can expand judicial review of an award under state law
- Types of discovery allowed
- Location of potential witnesses
- Whether parties can recover attorney fees under state law

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Resources

- **American Arbitration Association:**
<http://www.adr.org/>
- **JAMS:**
<http://www.jamsadr.com/>
- **American Bar Association, Dispute Resolution Section:**
<http://www.abanet.org/dispute/>

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Sawnie McEntire has practiced law for more than twenty-five years, handling complex litigation matters in federal and state courts throughout Texas and in several other states. He has served as national counsel, state-wide counsel, and regional counsel for several clients. Mr. McEntire has tried dozens of cases to jury verdict.

Education

Areas of Litigation

Practice
Chemicals
Commercial
Litigation
Consumer Products
Energy Litigation
Insurance
Intellectual Property
Mass Tort & Toxic
Tort
Pharmaceuticals,
Medical Devices, &
Biotech
Products Liability
Real Estate

- Southern Methodist University School of Law, Dallas, Texas, 1980, J.D.

Honors:

-Alpha Chi Alpha

Law Journal: Journal of Air Law and Commerce, Associate Editor, 1978 - 1980

- Dartmouth College, 1976, B.A., Magna Cum Laude

Admissions to Practice

- Texas
- U.S. District Courts for the Northern, Southern, Eastern, and Western Districts of Texas
- U.S. Court of Appeals for the 5th Circuit

Memberships & Affiliations

- State Bar of Texas
- Houston Bar Association
- Dallas Bar Association
- American Bar Association
- Dallas Bar Foundation
- Environmental Law Institute Associates Program
- Life Member, Dartmouth Lawyers' Association

Honors and Awards

- Life Fellow, Texas Bar Foundation
- Named "Texas Super Lawyer," Texas Monthly, 2004-2007

