"Keeping Arbitration Safe for Texas"

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"No man's life, liberty, or property are safe while the legislature is in session" Judge Gideon J,. Tucker, 1866

"Through many sessions we became aware of the gulf of understanding of arbitration in the Legislature, the judiciary, and the public."

It doesn't make for a good day when learning that your livelihood and passion are in jeopardy. In 2007, we of the Alternative Dispute Section of the State Bar of Texas[1] were informed that the Texas Legislature was contemplating a bill that required disclosure of *all* arbitration awards. Panic. Sections are forbidden by law from advocating or opposing most legislation.[2] We were helpless. Whatever we did would have to be done by individuals, haplessly no doubt. New York's own Judge Gideon J. Tucker's famous observation in 1866, "No man's life, liberty, or property are safe while the legislature is in session" became more than platitude.

A part from meager efforts, we did nothing. Fortunately (no thanks to us), the bill died in conference along with 95% of the some 6,000 bills filed every biennial session.[3] We dodged a bullet.

You might have thought we would have learned a lesson and attempted some organized response in 2009 but, no. Again, we were blindsided by an even more serious bill of an influential legislator that would impose "objective" standards on arbitrators, allowed courts to vacate awards

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1 Similar to New York's Dispute Resolution Section, the Texas Bar is divided into practice sections.

2 Unlike the New York Bar, the Texas Bar is an "integrated bar" – i.e. "an association of attorneys in which membership and dues are required as a condition of practicing law in a State." *Keller v. State Bar of California*, 496 U.S.1, 5 (1990). Thus, all attorneys in Texas are members. Analogizing an integrated bar to a labor union, the Court in *Keller* held that expenditures for political or ideological activities, not reasonably incurred for the purpose of regulating the legal profession, violated members' First Amendment rights. *Id.* at 9-17. This prohibition has been codified in Tex. Gov. Code §81.034 "Restriction on Use of Funds." Part VIII of the Board of Director's Policy Manual addressees the extensive process for a proposal to be placed on the Bar's legislative agenda. Some sections have legally circumvented these restrictions by creating a foundation each voluntarily supported by a section's members. For example, the Business Law Section created the Business Law Foundation. The New York Bar Association, as a private voluntary bar association, would not face these restrictions, but would subject to the general New York Lobbying Act, Art.1-A of New York Legislative Law.

3 The Texas Constitution limits the Legislature's sessions to 140 days from January through May of odd- numbered years; the next session begins January 2019. Tex. Const. art. III, §23(b).

under conventional appellate standards- i.e. errors of fact or law- and allowed interlocutory appeals of motions granting applications to compel arbitration. This time, at the last minute, through hard individual lobbying of several attorneys, we prevailed upon the House Judiciary Committee not to let the bill out of committee to the floor where it might easily have passed.

This angst of being prey to legislation that would effectively end arbitration in Texas - cleverly without appearing to do so- was the genesis of the Texas Arbitration Council prior to the 2011 session. We serve as an "educational resource" only. We do *not* formally lobby. The Council comprises two groups: first, prominent arbitrators, and, second, the ADR Section itself. Together we hired and jointly funded a governmental affairs consulting firm - i.e. a "lobbyist"- for the *strict purposes only*:

1) to assist in working with elected and appointed leadership in monitoring proposed legislation identified by the client; and,
2) to advise the client in offering comments and advice in an appropriate manner to state decision-makers.[4]

We neither write, nor propose, nor oppose legislation. Serving as an educational resource the ADR Section did not run afoul of the Bar's restrictions on formal lobbying.[5,6]

We intend to foster relationships from session to session and to serve as a resource to legislators and committee staff counsel as bills come up affecting arbitration. Our experience over the years is, while the professional community, including arbitral institutions such as the American Arbitration Association ("AAA"), do an excellent job of educating attorneys and parties

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4 Language comes from "Contract for Professional Services" with our lobbyist.

5 The contract was approved by the State Bar's counsel and included this language: "[Lobbyist] understands that the client, as a Section of the State Bar of Texas, is restricted in the use of funds for legislative actions. Such restrictions are set forth in Part VIII of the State Bar of Texas Board of Directors Policy Manual, Sec. 81.034 of the Texas Government Code and *Keller v. The State Bar of California*, 496 U.S. 1 (1990). The client shall not request any services from [Lobbyist], and [Lobbyist] shall not render any services to client, that conflict with those restrictions on the use of funds." We intend to remain a resource only. Our limited role allowed us, nonetheless, to work with the Bar's legislative team.

6 We focus on Texas, only, and leave monitoring of federal legislation to, among others, the Section of Dispute Resolution of the ABA.

on arbitration law and its nuances, we could do a better job of educating the very elected decision makers responsible for those laws. This reluctance may stem from lobbying restrictions imposed on integrated bars, as in Texas, and the restrictions imposed on arbitral institutions to maintain non-profit §501(c)(3) status under the Internal Revenue Code. It may be a matter of limited resources. We sought to build a reputation so interested parties would know to come to us for advice and comment. This has largely happened.

Our lobbyists were critical in facilitating this goal. With their wealth of knowledge they: tracked legislation, estimated passage, got us appointments with elected officials and committee staff counsel, visited themselves with officials and staff on legislation. The team organized breakfasts for staff where we made educational presentations. Our consultants provided us notice of upcoming committee hearings (some are posted with little advance warning), and advised us on the content of our testimony before those committees.[7] These services, which we could not have done on our own, were well worth their fee. They led bi-weekly conference calls to discuss the status of pending legislation. Our efforts bore fruit early on: we were relieved when a bill that would have upended decades of precedent by giving courts, at the outset, authority to determine the validity and enforceability of contracts containing arbitration clauses never got out of conference.[8] Again, we are only a resource.

The efficacy of our approach paid off in the 2013 session when an arbitration-friendly legislator floated amending the Texas General Arbitration Act ("TAA")[9] to set forth mandatory

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7 When signing in to testify before committees we were careful not to sign in as "opposing" or "in favor" but only as a "resource."

8 This bedrock precedent is the so-called Separability Doctrine which essentially "separates" the arbitration clause from the remaining agreement and allows arbitrators- in contrast to courts- to make the determination of the overall contract's invalidity. It's intent is to make arbitration an expeditious process. The bill would have innocuously gutted commercial arbitration.

9 Much of the TAA is derived from the FAA, and Texas courts have generally construed the TAA along the same lines as the FAA. *See, City of Pasadena v. Smith*, 292 S.W. 3d 14, 19 (Tex. 2009). *But see, NAFTA Traders. V. Quinn*, 339 S.W. 3d 84, 95 (Tex. 2011) (declined to construe vacatur standards under the TAA similarly to the FAA)

disclosures for arbitrators, like those of the AAA or other arbitral institutions.[10] Who could be against fair arbitrators particularly when one of the well-recognized grounds of vacatur under either the TAA or FAA is "evident partiality?"

We were. However well-intentioned the bill, our fear was that it would be vulnerable to the so-called "Christmas Tree" effect: amendments (like ornaments) would be tacked on at the last minute which would undermine arbitration. These amendments might have nothing to do with the disclosure issues the bill purported to remedy. We didn't see new statutory disclosure as even necessary: the system was self-regulating through the same "evident partiality" vacatur standard. Ultimately, we prevailed on the legislator who actually withdrew the bill. Without organization that would not have happened.

We continued our same approach in 2015. Our relationships paid off as staff, elected officials, and lobbyists of other groups approached us seeking our comments to various proposals, bills, and ideas. Ironically, because we did not formally lobby, we had more credibility. We were not pushing an agenda. No serious bills threatening arbitration were introduced that session. There are three reasons (the last two of which would equally true in New York.) The first is political: the Texas Legislature has become staunchly conservative and business friendly: many legislators hostile to arbitration had retired. Second, the TAA is a workable statute and, besides the political issue of mandatory arbitration, does not need substantive change.[11] Third, the FAA's pre-emption of state laws "net" seems to be cast wider, meaning that serious changes in state arbitration law will invite more challenges in court. [12]

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10 Common disclosures related to prior relationships with parties, counsel, witnesses, etc.

11 The Uniform Law Commission considers the TAA, like the New York Arbitration Law of 1920, New York CPLR Article 75, to be "substantially similar" to the Uniform Arbitration Act (1956). Neither state has adopted the Revised Uniform Arbitration Act, U.L.A. 1-98 (2009 & Supp.2015). Fortunately, this means the Texas Arbitration Council is in a "defensive" role. We seek no affirmative changes in the TAA.

12 *See generally*, Jon O. Shimabukuro and Jennifer A. Staman, *Mandatory Arbitration and the Federal Arbitration Act*, Congressional Research Service at 11 (2017); Kristen M. Blankley, *Impact Preemption: A New Theory of Federal Arbitration Preemption*, 67 Florida Law Review 711 (2016).

Through many sessions we learned of the gulf of understanding of arbitration in the Legislature, the judiciary, and the public. There is much misinformation floating around. We wrote an education pamphlet titled "Benefits of Arbitration in Texas," some of which was derived from a similar ABA publication.[13] On the advice of our consultants we specifically addressed consumer and employment arbitration. Most elected officials have little concern about traditional business to business arbitration. Employment and consumer arbitration, however, evoke strong opinions both in favor and against. The ADR Section paid for the pamphlet. This allowed us to enlist the resources of the State Bar's publications department. We printed a thousand copies, distributed them to the Texas judiciary and the Legislature and have received encouraging comments.

2017 saw the reappearance of several issues from past sessions over minor changes in arbitration. For example we again saw a "Sharia-law" bill designed to insure constitutional rights on arbitrations from foreign jurisdictions in family law only. We had no real concerns: it passed. Another bill granted arbitrators authority to abate actions if technical provisions in Texas construction law aren't met. We felt this weakened arbitration. It did not pass. We avoided adverse attempts to affect arbitration through engagement and aggressive issue education of legislators and staffs.

Our reputation has been confirmed when the Legislature invited us, during the 2017- 2018 interim, 1) to assist in rewriting arbitration procedure in property tax disputes, 2) to review the applicability of statutes of limitations in arbitration, and 3) to review licensing standards for out-of- state attorneys conducting arbitrations in Texas. We are working on all three, but the latter two- because they touch so many practice areas- are fair issues for the State Bar to take up in its 2019 legislative agenda.

13 Co-authored by your Edna Sussman, co-editor of the New York Dispute Resolution Lawyer.

With the upsurge of publicity over allegations of workplace sexual harassment, such as the #metoo movement, we anticipate that the 2019 Legislature will see bills to limit arbitration-particularly its confidentiality in employment disputes. It could mean public disclosure of awards. This presents a challenge to the Texas Arbitration Council. It puts arbitration at the intersection of the public policy. There is a legitimate debate about confidentiality agreements enabling inappropriate behavior. Our concern is that in the emotional stampede to rectify an injustice seemingly innocuous language will slip into the bill, without scrutiny, that would bleed into commercial arbitration. We have seen it before.

Conclusion

The Texas Arbitration Council has been effective. Given the heated discussion of the place of arbitration in today's environment, it is ever more incumbent upon practitioners to accurately explain the process to elected officials, the judiciary, and the general public. Our structure is simple. Its relative inexpensive cost would lend itself as a template easily replicated in other states. At stake is arbitration's safety.

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