HOW (NOT) TO DRAFT ARBITRATION CLAUSES

by David Coale

INTRODUCTION

This paper presents five examples of arbitration agreements taken from recent Fifth Circuit cases. They show how – and how not – to address the challenge of a contractual relationship defined by multiple documents, drafted and executed at different times.

1. ***Carey v. 24 Hour Fitness***
   Arbitration agreement not enforced; employer had broad unilateral power to amend

2. ***In re: 24R, Inc.***
   Arbitration agreement enforced; documented separately from employee manual

3. ***Lizalde v. Vista Quality Markets***
   Arbitration agreement enforced; broad termination power in a related contract did not expressly refer back to the arbitration agreement

4. ***Sharpe v. Ameriplan***
   Arbitration agreement not enforced; amendment to policy manual conflicted with earlier employment agreements

5. ***Klein v. Nabors Drilling***
   Arbitration agreement enforced; references to nonbinding dispute resolution did not change mandatory nature of arbitration clause

1 ILLUSORY

Employee Handbook, with arbitration clause, said:

"I acknowledge that, except for the at-will employment, 24 Hour Fitness has the right to revise, delete, and add to the employee handbook. Any such revisions to the handbook will be communicated through official written notices approved by the President and CEO of 24 Hour Fitness or their specified designee. No oral statements can change the provisions of the employee handbook."

NOT ENFORCEABLE: "[T]he fundamental concern . . . is the unfairness of a situation where two parties enter into an agreement that ostensibly binds them both, but where one party can escape its obligations under the agreement by modifying it." *Carey v. 24 Hour Fitness*, 669 F.3d 202 (5th Cir. 2012).

2 NOT ILLUSORY

Arbitration Agreement, a stand-alone document signed by both parties, said in relevant part:

"All employees and applicants for employment are required as a condition of employment to agree to submit any and all claims or disputes relating to their employment and to the termination of their employment to bring their claims or disputes in court. Such agreement to arbitrate, in turn, continues beyond, and is not affected by, a termination of employment."

Employee Manual, which incorporated the Arbitration Agreement, said:

"[Employer] reserves the right to revoke, change or supplement guidelines at any time without notice . . . [Employer] may modify, augment, delete or revoke any and all policies, procedures, practices, and statements contained in this manual at any time without notice."

ENFORCEABLE: "The arbitration agreement is a stand-alone contract that . . . does not incorporate the employee policy manual. Although language in the employee manual recognizes the existence of the arbitration agreement, this does not diminish the validity of the arbitration agreement as a stand-alone contract." *In re: 24R, Inc.*, 324 S.W.3d 564 (Tex. 2010)

3 NOT ILLUSORY

"Mutual Agreement to Arbitrate" said:

"Company shall have the right to prospectively terminate this Agreement. Termination is not effective for Covered Claims which accrued or occurred prior to the date of the termination. Termination is also not effective until ten (10) days after reasonable notice is given to Claimant."

That Agreement linked itself to the parties' "Occupational Injury Benefit Plan":

"[T]his Agreement is presented in connection with Company's Employee Injury Benefit Plan. Payments made under that Plan also constitute consideration for this Agreement."

And as to amendment and termination, the Benefit Plan said:

"**Amendment**. The Company has the sole right to amend this Plan. An amendment may be made by (i) a certified resolution or consent of the Board of Directors, or (ii) by an instrument in writing executed by an appropriate officer of the Company. The amendment must describe the nature of the amendment and its effective date.

Termination. The Sponsor may terminate this Plan by executing and delivering to the Plan Administrator a notice of termination specifying the date of termination . . . ."

ENFORCEABLE: "The termination provision found in the Arbitration Agreement explicitly states that Vista 'shall have the right to prospectively terminate *this Agreement*.' Similarly, the termination provision found in the Benefit Plan states that Vista 'may terminate *this Plan*' unilaterally. In both cases then, the termination provisions clearly demarcate their respective applications." *Lizalde v. Vista Quality Markets*, 746 F.3d 222 (5th Cir. 2014)

4 CONFLICT

First, the parties' Broker Agreements, which "may not be changed except by written amendment duly executed by all parties, except as otherwise provided in this Agreement," incorporated the company's Policy Manual, and noted that the Manual can:

". . . be hereinafter amended, modified or revised in the sole discretion of AmeriPlan . . . and Broker further covenants and agrees to obtain and comply with any and all such amendments, modifications or revisions of the Broker Manual which may be hereinafter made by AmeriPlan."

Second, the parties' Sales Director Agreements, which also "may not be changed except by written amendment duly executed by all parties," had this dispute resolution provision:

"6.07.01. THE PARTIES AGREE TO SUBMIT ANY CLAIM, CONTROVERSY OR DISPUTE ARISING OUT OF OR RELATING TO THIS AGREEMENT (AND ATTACHMENTS) OR THE RELATIONSHIP CREATED BY THIS AGREEMENT TO NON-BINDING MEDIATION PRIOR TO **FILING SUCH CLAIM CONTROVERSY OR DISPUTE IN A COURT**. . . . NOT WITHSTANDING THE FOREGOING, THE PARTIES MAY BRING AN ACTION (1) FOR MONIES OWED, (2) FOR INJUNCTIVE OR OTHER EXTRAORDINARY RELIEF, OR (3) INVOLVING THE POSSESSION OR DISPOSITION OF, OR OTHER RELIEF RELATING TO, REAL PROPERTY IN A COURT HAVING JURISDICTION AND IN ACCORDANCE

WITH [THE NEXT PARAGRAPH] BELOW, WITHOUT SUBMITTING SUCH ACTION TO MEDIATION.

6.07.02. WITH RESPECT TO ANY CLAIMS, CONTROVERSIES OR DISPUTES WHICH ARE NOT FINALLY RESOLVED THROUGH MEDIATION, SALES DIRECTOR HEREBY IRREVOCABLY SUBMITS TO THE NON-EXCLUSIVE JURISDICTION OF THE STATE COURTS OF DALLAS COUNTY, TEXAS AND THE FEDERAL DISTRICT COURT FOR THE NORTHERN DISTRICT OF TEXAS, DALLAS DIVISION.. . . **VENUE FOR ANY LEGAL PROCEEDING RELATING TO OR ARISING OUT OF THIS AGREEMENT SHALL BE DALLAS COUNTY, TEXAS**. . . . THIS AGREEMENT SHALL BE INTERPRETED AND CONSTRUED UNDER TEXAS LAWS. (emphasis added)"

Finally, the Policy Manual – as amended after execution of the above contracts, but before the parties' dispute – had this arbitration clause:

"Any issue, dispute, claim or controversy (collectively, the "Claim") between AmeriPlan or any officer, director, employee, manager, member, affiliate, legal counsel and/or advisor of AmeriPlan and IBO/Sales Director, arising out of or relating to the Policies and Procedures Manual then in effect, the IBO and/or Sales Director Agreements or any of the other documents, shall be resolved by binding arbitration at the AmeriPlan headquarters in Plano, Texas. The Claim shall be governed by the laws of the State of Texas."

NOT ENFORCEABLE: "[A]lthough the Manual could be amended without the need for a written agreement executed by all parties, such an amendment could not override a provision in the Broker and Sales Director Agreements. Otherwise, amendments to the Manual could undo the Broker and Sales Director Agreements in their entirety, rendering the "written amendment" requirement a nullity. . . . [Additionally,] AmeriPlan's argument that the dispute resolution provisions in the Sales Director Agreements apply to only a limited scope of claims 'not governed by arbitration' is also at odds with the contracts' broad language." *Sharpe v. Ameriplan*, ___ F.3d ___, No. 13-10922 (5th Cir. Oct. 16, 2014).

5 NO CONFLICT

"Employee Acknowledgement" said:

"I understand that nothing contained in the Employee Dispute Resolution Program is intended to violate or restrict any rights of employees guaranteed by state or federal laws. By my signature below, I acknowledge and understand that I am required to adhere to the Dispute Resolution Program and its requirements for submission of disputes to a process that may include mediation and/or arbitration."

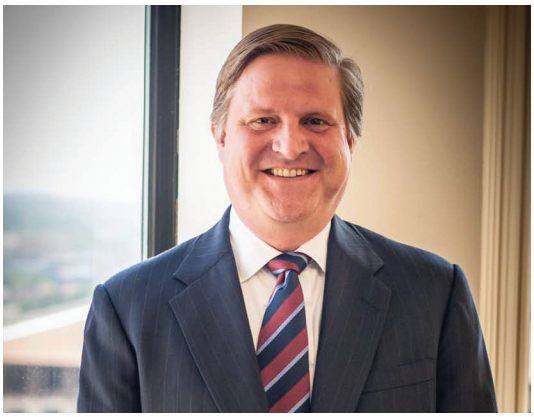
"Program" said in relevant part:

- it was intended "to create an exclusive procedural mechanism for the final resolution of all Disputes falling within its terms" and establishes "the exclusive, final, and binding method" of dispute resolution;

- says "the Parties may agree to mediate their dispute" at any time before the proceeding under the Program closes; and

- if the parties cannot agree to mediate, or mediate and fail: "the Dispute shall be arbitrated under the[ ] Rules."

ENFORCEABLE: "[T]he Program preserves options for nonbinding dispute resolution before final, binding arbitration. Thus, the permissive language in the Acknowledgment simply reflects a party's available options under the Program. At no point, however, does the Program include judicial resolution among those options." *Klein v. Nabors Drilling*, 710 F.3d 234 (5th Cir. 2013).



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