

STATE BAR OF TEXAS FAIR PRACTICE GUIDELINES FOR ARBITRATION

The best practices described below apply to pre-dispute agreements to arbitrate that are contained in contracts between a business and a consumer. A consumer is a person who enters into a transaction primarily for personal, household, or other family purposes.

1. Arbitration is a selection of a dispute resolution forum. An agreement to arbitrate is not the waiver of substantive legal rights but merely a change in the forum. Therefore, an arbitration agreement must provide a fair process with appropriate safeguards for due process.
2. The agreement to arbitrate should be mutual and reciprocal. If a consumer is required to arbitrate the consumer's claims, then the business must equally be bound to arbitrate its claims against the consumer. The business should not be given an "opt-out" right unless the same is granted to the consumer.
3. The arbitration clause must be conspicuous and sufficiently clear to notify the consumer of the terms and conditions relating to the arbitration. Ideally, the notice should specifically state that both parties are waiving any right to a jury trial.
4. Arbitrators must be neutral and independent. Arbitrators should be required to adhere to the Arbitrator Ethics Guidelines adopted by the American Bar Association and the Alternative Dispute Resolution Section of the State Bar of Texas. This includes the requirement that arbitrators should be required to disclose all former and current associations and relationships with the parties and attorneys in a case that are likely to affect partiality or relationships that would cause a reasonable person to conclude the arbitrator was partial to one party to the arbitration.
5. Arbitration service providers must be independent. When an arbitration agreement names an arbitration service provider in which the business is a member, the agreement should also provide the option for the consumer to choose another non-affiliated and independent service provider to administer the arbitration. Full disclosure of the relationship should be made when a party is affiliated with or a member of the arbitration service provider.
6. All parties to an arbitration agreement should be provided an equal opportunity to participate in the selection of the arbitrator.
7. Consumers forum access fees which include arbitration filing fees, administrative fees, and arbitrator expenses must be reasonable. One of the factors to consider in the determination of what is a reasonable charge, is the amount of filing fees and court fees which a party would be expected to pay to initiate litigation of the claim.

8. The arbitration agreement should not require a consumer who does not prevail in an arbitration to pay the attorney fees or arbitration expenses of the business unless such payment is expressly provided in an applicable state or federal statute.
9. Consumers and businesses should be provided adequate disclosures and, if necessary, discovery in order to allow each party reasonable opportunity to fully present its claims or defenses. The amount and scope of discovery should be subject to the direction of the arbitrator and should be consistent with the equal goals of providing each party an adequate opportunity to develop its claim or defense and to avoid the excessive costs incurred in civil litigation.
10. A consumer is entitled to an in person hearing, and is entitled to be represented.
11. The arbitration venue should be in reasonable proximity of a consumer's residence.
12. The arbitrator must be given the power to award any damages or other relief that the consumer would be entitled to recover under applicable federal or state law.
13. The award of the arbitrator should include a brief written statement of the basis of the award.
14. The arbitration agreement should provide that when the size of the claim is small, either party may elect to bring the claim in small claims court.
15. A pre-dispute agreement to arbitrate should not require the arbitration award itself to be confidential, as there may be good reason to allow a synopsis of each award to be subject to public review or reporting. Normally, the proceeding is private. Subsequent to the occurrence of a dispute, the parties may mutually enter into an agreement providing that the arbitration hearing, arbitration award, or both will be confidential.

