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As alternative dispute resolution was gaining steam in the early eighties through mediation and arbitration, a procedure was adopted by the Texas legislature in 1984 providing for the hiring of a former or retired judge to hear a case, non-jury. Though part of Texas law for over two decades, this “rent-a-judge” approach remains grossly underutilized and misunderstood. Arbitration has become the preferred alternative to what is perceived as the risks inherent in a jury trial and the courts continue to countenance broad expansion of its application.\(^4\) However, the “special judge” provisions of the Texas Civil Practices and Remedies Code include several significant advantages over arbitration, in particular preservation of the right of appeal. This article will examine some of these advantages and suggest that the procedure is, in fact, superior to arbitration in many ways.

The Basics of the Statute

Chapter 151 of the Texas Civil Practice and Remedies Code\(^3\) allows the trial court, upon agreement of all parties, to refer a civil or family case for a non-jury trial by a “special judge.” To permit such referral, all parties must file a motion in the trial court in which the case is filed that: (a) requests the referral, (b) waives their right to trial by jury, (c) states the issues to be referred, (d) states the time and place agreed upon by the parties for the trial, and (e) states the name of the special judge and the fact that he or she has agreed to hear the case, and identifies the fee the judge is to receive.\(^4\)

The trial court may then issue an order of referral that must specify the issues referred, (which can include all issues of fact and law), and the name of the special judge.\(^6\)

Such an order may also designate the time and place for trial and the time for the filing of the special judge’s “report.” When such an order is signed, the proceedings in the trial court are stayed pending the outcome of the trial by the special judge.\(^5\)

The special judge so appointed must be a retired or former district, statutory county court or appellate judge who: (a) has served as a judge for at least four years in one of those courts, (b) has developed substantial experience in his or her area of specialty, (c) has not been removed from office or resigned while under investigation for discipline or removal, and (d) has completed at least five days of continuing legal education in the past calendar year in courses approved by the state bar or supreme court.\(^9\)

The trial may be conducted anywhere the parties choose except a public courtroom.\(^10\) However, public employees cannot be involved during “regular working hours.”\(^11\) All of the rules and statutes relating to procedure and evidence in the district court apply to the trial by the special judge\(^12\) and a record of the proceedings is kept by a court reporter that meets the qualifications prescribed by law for district court reporters.\(^13\) The special judge must conduct the trial in the same manner as a court trying an issue without a jury and is vested with the powers of a

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\(^2\) American Express Co. v. Italian Cakes Restaurant, 133 S. Ct. 2304, 186 L. Ed. 2d 417 (2013).


\(^5\) Id. § 151.001.

\(^6\) Id. § 151.004.

\(^7\) Id.

\(^8\) Id. § 151.001.

\(^9\) Id. § 151.003.


\(^11\) Id.

\(^12\) Id. § 151.005.

\(^13\) Id. § 151.008.
district judge, except that he or she may not hold a person in contempt of court unless the person is a witness in the trial.\textsuperscript{14}

The fees of the special judge, court reporter and any other administrative costs associated with the trial are borne by the parties equally.\textsuperscript{15} However, the cost of a witness or any other cost related solely to a single party’s case is borne by that party.\textsuperscript{16} Further, the state or any unit of local government is prohibited from paying any costs associated with such a trial.\textsuperscript{17}

Upon completion of the trial, the special judge issues its “verdict” which must comply with the requirements for a verdict by the court.\textsuperscript{18} This verdict is considered the verdict of the district court and, unless otherwise specified in the order of referral, must be submitted no later that the 60th day after the trial adjourns.\textsuperscript{19} Should the special judge fail to submit the verdict timely, the trial court may grant a new trial if a party files a motion requesting it and a hearing is conducted after due notice to all parties.\textsuperscript{20} Perhaps the most unique feature of this alternative dispute resolution procedure is that the right to appeal the verdict issued by the special judge is preserved and is treated as though the trial court rendered it.\textsuperscript{21}

\section*{Advantages}

\subsection*{A. THE RIGHT OF APPEAL}

While contracting for binding arbitration can spare one the uncertainty of a jury trial, it is by no means certain that the process or outcome will meet expectations. As an alternative dispute resolution technique, it can be a “you-bet-your-company” choice. An “excessive” jury verdict may form the basis of an appeal but an “excessive” arbitration decision generally will not. As the court stated in \textit{Pheng Investments, Inc. v. Rodriguez}, “An arbitration award has the same effect as a judgment of a court of last resort.”\textsuperscript{22} The arbitrator’s decision cannot be vacated except under narrow statutory grounds\textsuperscript{23} and cannot be modified by a court.\textsuperscript{24} The case law is replete with horror stories of arbitral surprises that remained undisturbed by appellate courts including: ruling on issues not submitted,\textsuperscript{25} miscalculations,\textsuperscript{26} errors and mistakes of law,\textsuperscript{27} and awarding punitive damages where state law governing the parties underlying transaction did not permit an award of punitive damages.\textsuperscript{28}

Similarly, rulings on procedure and evidence are not subject to challenge or review. Nor does the constitutional protection of due process apply to arbitration.\textsuperscript{29} The rules applicable to arbitration typically contemplate a more informal approach to such issues and, therefore, can be quite unpredictable depending upon the arbitrators involved.\textsuperscript{30} A special judge, however, must have served at least four years on the bench and will be accustomed to applying the rules of evidence and procedure in a more consistent manner.\textsuperscript{31} Additionally, the judge’s history of rulings on such issues may be ascertainable through appellate decisions or informal discussion with lawyers who have appeared in his or her court.
A proceeding under Chapter 151 is virtually identical to a non-jury trial. All rights of appeal to the courts of appeals and the supreme court are preserved, and the appeal is directly from the "verdict" of the special judge.\textsuperscript{52} The only role remaining for the trial judge is the ministerial entry of judgment based upon the verdict of the special judge.\textsuperscript{53} Further, the rules of procedure and evidence apply to the proceedings in the same manner they would in the trial court.\textsuperscript{54} Such rulings are subject to review in the appellate courts under the same standards that apply to any case.\textsuperscript{55} 

B. COST

Litigants and lawyers are learning that the suggestion that arbitration is faster and cheaper can be more myth than fact. First, it can be three times as expensive as a special judge proceeding if a panel of arbitrators is employed. Additionally, there can be significant filing fees associated with arbitration.\textsuperscript{56} The fee of the special judge, on the other hand, is split equally between the parties and there are no additional filing fees or costs in addition to those associated with the filing of the case.\textsuperscript{57}

Whether one works on a contingency basis or bills by the hour, uncertainty over when a case will be tried is expensive. For the billing lawyer, it is necessary to prepare for trial every time the case is set and to bill the client accordingly. When the case is not "reached" and then reset months later, the client has a hard time understanding why it was billed for something that did not happen. The client may become especially perturbed when this same process repeats itself two or three time before the case is tried. Likewise, the contingent fee lawyer knows time is money and delays in setting the case merely prolong the interest being paid on money advanced for costs associated with the case. Capita, that remains burdened cannot be used for other cases. As a result, the certainty of a trial setting may very well offset the per diem expenses associated with the fees of the special judge.

C. CONVENIENCE

The certainty of scheduling is greatly enhanced under the special judge procedure. The use of an arbitration tribunal can present significant difficulties in acquiring a mutually agreeable trial setting. Further, the issuance of the final opinion can be delayed as the members of the panel struggle to find time in their respective schedules for deliberation and rendition of their award. A case proceeding under the special judge provisions may be the only case of its kind on the judge's docket. The lawyers can usually pick the dates they prefer and take comfort in knowing that, absent unusual circumstances, the case will be tried on that date. Most lawyers will agree that an impending trial date is by far the most influential factor in reaching a settlement of the matter. On the other hand, if both sides agree to a continuance of the trial setting, it is rare that the judge will require any showing of good cause in addition to the agreement of the parties.

CONCLUSION

While personal injury cases may not lend themselves to the use of a special judge, the process can be particularly useful in complicated commercial cases. Such cases typically require the trier of fact to review numerous documents, consider the practices and policies unique to that industry, and apply a sophisticated legal analysis to such evidence. It seems far more prudent to employ the services of a former or retired judge who has performed such tasks on a routine basis over the course of his or her judicial career than to assume the expense, uncertainty and finality of an arbitration proceeding. And parties to a contract, having adopted arbitration as the exclusive means to resolve their dispute, could, by mutual agreement, substitute in its place this procedure.