

FREQUENTLY ASKED QUESTIONS: Economical Litigation Agreements for Commercial Contracts

What is an ELA?

An ELA stands for "Economical Litigation Agreement", or sometimes referred to as a "litigation prenup." It is a clause that is included instead of a conventional arbitration clause in a business contract to reduce the costs and delay of discovery. The ELA is a hybrid of arbitration and litigation that replaces the infinite discovery process of conventional litigation with a finite process of discovery based on a discovery contract, which is proportionate to the size of the controversy, and enforced by an ELA arbitrator.

How is the ELA included in a contract?

The ELA model contract clause is included in the underlying contract instead of a conventional arbitration clause. The clause incorporates by reference the detailed Economical Litigation Agreement that is published on the CPR website. It is not necessary, or desirable, to append the full ELA agreement to the underlying contract.

What is the legal justification for an ELA?

Federal Rule of Civil Procedure 29, and most state civil rules that parallel the federal rules, provides that the parties can stipulate to alternative discovery procedures instead of the conventional procedures described in the rules. The ELA is an agreement that stipulates to discovery process as part of the underlying transaction. The legal basis of the ELA is the parties' power to contract.

How is the ELA enforced?

The ELA is a contract that includes an arbitration clause. In the case of an ELA, the contract prescribes discovery process and the arbitrator enforces the discovery contract, issuing binding awards like any arbitration. The ELA arbitrator also has the power to award damages in the event any party violates their discovery agreement.

Are trade secrets protected?

Yes, upon ruling by the ELA Arbitrator. In essence, any discovery motion that would be made to a judge in conventional litigation is made to the ELA Arbitrator in the ELA.

How does the ELA reduce costs of discovery?

The ELA provides for limited discovery, proportionate to the amount in controversy, and for fee/cost shifting in discovery disputes. Unlike conventional litigation, where all parties pay their own costs, the ELA Arbitrator generally will issue an award of attorney's fees to be paid by the losing side on any discovery dispute.

Why does the ELA waive a jury trial?

Bench trials are easier to schedule and permit a more focused presentation at trial than jury trials, so should cost less. However, trials are a relatively minimal cost of civil litigation and the parties are free to agree to a

jury trial. Like other areas of process, the ELA simply inverts the presumptions and allows the parties to agree otherwise if they wish.

Can the parties agree to additional discovery beyond the ELA limits?

Yes. Section 14 of the ELA provides that the parties can agree to anything in writing to advance the purpose of prompt and affordable justice.

What if a judge takes over discovery and ignores the ELA?

The ELA provides that, in such case, the parties either can agree to waive the ELA provisions or can agree to or compel arbitration to remove the substantive dispute from the court and let the ELA Arbitrator decide on the merits as well as the process of the dispute. This provision is colloquially referred to as a "Fire the Judge" provision if the judge ignores the parties' discovery agreement.

Are appellate rights preserved under the ELA?

Yes. The ELA allows for the dispute to be litigated in the civil justice system with full appellate rights. The ELA encourages the development of the common law to keep pace with changes in technology.

Why are the discovery opportunities so limited under the ELA?

The ELA requires counsel to think strategically about their proof, their defenses and the facts needed for each. Broad brush requests and fishing expeditions are very difficult within the ELA limits. While the parties can agree to more discovery, it is important to remember that the ELA is a civil litigation alternative to arbitration where even less discovery would likely be allowed.

Do judges support the ELA?

Many do, and more will likely support ELA agreements when judges realize that the ELA frees up scarce judicial resources for judges to focus on deciding cases on their merits. All the expensive and time-consuming aspects of litigation--discovery--are handled outside of court by the parties pursuant to an arbitrated discovery contract. By eliminating discovery demands from the court docket, judges and their staff will have more time to focus on dispositive motions and trial.

What if a party refuses to pay an ELA Arbitrator's fee-shifting award?

The ELA Arbitrator's award is an arbitration award that can be enforced in civil court. With very few exceptions, it is nearly impossible to evade judicial enforcement of an arbitration award.

Can a judge control the discovery schedule?

Yes. The ELA does not affect the inherent power of the court to control its docket or to manage the pretrial schedule. The judge continues to control the pace and schedule of discovery leading to trial, but the number and type of discovery events, scope of discovery, and discovery motions are governed by the ELA.

If a court system requires mandatory mediation, are the parties required to mediate a case twice--once for the ELA and once for the court?

No. Under Section 14, the parties can agree to treat the court-mandated mediation as their ELA mediation to save time and expense.