

## Arbitration in the Fifth - October 2023

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November 13, 2023 Odean Volker

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**PRACTICES** Litigation, International Arbitration

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*In October 2023, the Southern District of Texas’ Garza v. Ayvaz Pizza, LLC considered whether a new employer could enforce a prior employer’s arbitration agreement following acquisition of the prior employer’s assets and liabilities. In the Eastern District of Texas, Marshall v. Human Services of Se. Tex., Inc. rejected a party’s attempt to recoup arbitration costs that were not granted in an award.*

### Opinions of the Fifth Circuit

*Flores v. BJ’s Rest. Operations Co.*, No. 23-50038, 2023 WL 6533452 (5th Cir. Oct. 6, 2023) (per curiam) (employment). Order denying motion to compel reversed. The arbitration agreement was signed by the employee as part of on-boarding, but was not signed by the employer. Determining whether there is a valid agreement to arbitrate is a question of law decided under state law. Under Texas law, “to make a signature a condition precedent to enforcement of a contract—including an arbitration agreement—the agreement must clearly and explicitly require a signature before it becomes binding.” Texas law did not require the employer’s signature to form an enforceable arbitration agreement.

*Matter of Hann*, No. 22-20407, 2023 WL 6803541 (5th Cir. Oct. 16, 2023) (per curiam) (bankruptcy). Order discharging debt reversed. The factual findings made in the arbitration award were relied upon by the court to determine whether the requirements to prove a debt was not dischargeable were met.

### Opinions of United States District Courts

#### Motions to Compel Arbitration

*Southland Square Apartments, LLC v. Certain Underwriters at Lloyd’s, London*, No. CV 23-2329, 2023 WL 6458844 (E.D. La. Oct. 4, 2023) (insurance). Motion to compel granted. Application of “equitable estoppel [was] warranted for both foreign and domestic insurer signatories to a policy when the defendant insurers, without differentiation, acted identically and in unison in failing to pay out on the damage.”

*Bourgeois v. Indep. Specialty Ins. Co.*, No. CV 22-1256, 2023 WL 6644171 (E.D. La. Oct. 12, 2023) (surplus lines insurance). Motion to compel granted. “Argument that the arbitration clause is jurisdictional [was] unpersuasive, and provide[d] no basis to except the arbitration clause from the application of Louisiana Revised Statute 22:868(D).” Therefore, as a surplus lines insurer, under 22:868(D) and 22:446(a), insurer was exempt from 22:868(A)’s prohibition on arbitration clauses in insurance contracts.

*Queens Beauty Supply, LLC v. Indep. Specialty Ins. Co.*, No. CV 22-3444, 2023 WL 7154117 (E.D. La. Oct. 31, 2023) (insurance). Motion to compel granted. Louisiana law allows surplus lines insurers to include forum and venue selection clauses in their policies. Louisiana courts explicitly recognize arbitration clauses as a type of forum selection clause.

*West v. Pate*, No. 3:23-CV-398-DPJ-FKB, 2023 WL 6794287 (S.D. Miss. Oct. 13, 2023) (employment). Motion to compel granted. “A court can compel parties to arbitrate a dispute only if the parties agreed to do so. In deciding whether the parties agreed to arbitrate a dispute, the court considers (1) whether a valid agreement to arbitrate between the parties exists; and (2) whether the dispute in question falls within the scope of that arbitration agreement. Where competent evidence showing the formation of an agreement to arbitrate has been presented, a party resisting arbitration is required to produce some contrary evidence to put the matter “in issue.”

*Cintas Corp. No. 2 v. Backwoods Investments, LLC*, No. 422CV00799SDJAGD, 2023 WL 6531519 (E.D. Tex. Sept. 13, 2023) (Durrett, Mag. J.), report and recommendation adopted, 2023 WL 6518091 (Oct. 5, 2023). Motion to compel denied. Plaintiff waived arbitration by filing suit and amending its complaint without invoking a desire to arbitrate. “Substantial invocation occurs when a party performs an ‘overt act in court that evinces a desire to resolve the arbitrable dispute through litigation rather than arbitration. It is difficult to see how a party could more clearly evince such a desire than by filing a lawsuit going to the merits of an otherwise arbitrable dispute.”

*Bequest Funds, LLC v. Magnolia Fin. Group, LLC*, No. 3:23-CV-0866-B, 2023 WL 6849442 (N.D. Tex. Oct. 17, 2023) (loan brokerage services). Motion to compel granted as to signatories and denied as to non-signatories. A non-signatory to a contract can only enforce an arbitration provision contained in rare circumstances. The question is ultimately one of the parties' intent “as expressed in the terms of the agreement.” Courts look to “traditional principles of state law” to determine whether a non-signatory to a contract can enforce an arbitration provision. Traditional principles of state law “allow a contract to be enforced by or against nonparties to the contract through assumption, piercing the corporate veil, alter ego, incorporation by reference, third-party beneficiary theories, waiver and estoppel.”

*Avalos v. Freemyer Indus. Pressure, LP*, No. 4:23-CV-00583-P, 2023 WL 6883658 (N.D. Tex. Oct. 18, 2023) (employment). Motion to compel granted. Claims for violation of the Americans with Disabilities Act and FMLA may be compelled to arbitration. Plaintiff argued that his claims did not arise in the course of his employment, but rather arose while he was on leave from his employment. The “nexus between being on leave and working in the normal course of his employment is direct: if not for leave, [plaintiff] would be doing his normal job duties. Therefore, any claims that arise in connection with [plaintiff's] leave are claims captured under the Arbitration Agreement, as they must naturally arise out of his employment with [his employer].”

*Lewis v. Circle K Stores, Inc.*, No. CV H-23-1446, 2023 WL 6448853 (S.D. Tex. Oct. 3, 2023) (employment). Motion to compel granted. To put the making of the arbitration agreement in issue, a party is required to unequivocally deny that he agreed to arbitrate and produce some evidence supporting his position. Evidence supporting or opposing a motion to compel arbitration must comply with the Federal Rules of Evidence and be based on personal knowledge. “Electronic contracts can be sent, accepted, signed, and returned electronically; a clickwrap agreement generally requires the user to assent to the terms of a contract by clicking an ‘accept’ button on the website to complete the transaction.”

*Garza v. Ayvaz Pizza, LLC*, No. CV H-23-1379, 2023 WL 6518092 (S.D. Tex. Oct. 5, 2023) (FLSA). Motion to compel granted as to certain plaintiffs and denied as to another. An employee had signed an arbitration agreement with his former employer. The current employer had acquired the assets and liability of the former employer, and argued that it was the assignee of the arbitration agreement. Texas law requires an alleged assignee of a contract to come forward with evidence of the assignment. The current employer failed to produce sufficient evidence of the assignment.

**Other Arbitration-related Decisions**

*Marshall v. Human Services of Se. Tex., Inc.*, No. 1:21-CV-529, 2023 WL 6393873 (E.D. Tex. Oct. 1, 2023) (employment). Motion to recover arbitration costs denied. The expansive scope of the parties arbitration agreement (covering “[a]ny controversy or dispute between [employee and employer] ... arising from or in any way related to [e]mployee's employment . . . , or the termination thereof,” demonstrated that the issue of costs arising from the arbitration was for the arbitrator to decide.

*Mekari v. Access Restoration US, Inc.*, No. CV 23-5362, 2023 WL 6809813 (E.D. La. Oct. 16, 2023) (construction). Motion to enjoin arbitration denied. Plaintiff sought to enjoin an ongoing arbitration arguing that the arbitration agreement was null and void. Plaintiff identified the cost of arbitration as irreparable harm. An injury which can be undone through monetary remedies is not “irreparable.”