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## Arbitration

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# ARBITRATION

*John Allen Chalk, Sr.\**

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## I. INTRODUCTION

This article reviews case law on arbitration from both federal courts and Texas courts during the Survey period of December 1, 2017 through November 30, 2018. Subjects discussed in these cases and addressed herein include: arbitration agreement issues; non-signatories; and court involvement. Validity and scope of the arbitration agreement, including delegation of arbitrability questions, continue to be sources of significant contention, as do the multiple contract affirmative defenses that could invalidate an arbitration agreement. Different methods by which a non-signatory can either be compelled to arbitrate or can utilize and benefit from arbitration are found in cases during this Survey period. What constitutes a final order or award, jurisdictional issues, the vacatur grounds, and modification of awards were also considered during the Survey period.

## II. ARBITRATION AGREEMENT ISSUES

During the Survey period, many cases discussed issues of arbitrability. “Arbitrability” refers to whether or not arbitrators have the authority to rule on a dispute. The arbitrator’s power is derived from the arbitration agreement as a matter of contract. Therefore, questions of arbitrability concern whether or not the agreement gives the arbitrator authority to rule on a specific question. “A party seeking to compel arbitration must establish the existence of a valid arbitration agreement and that the claims at issue fall within the scope of that agreement.”<sup>1</sup> If the party seeking to compel arbitration meets the burden of proof, the burden then shifts to the party opposing arbitration to prove an affirmative defense to prevent enforcement of the arbitration provision.<sup>2</sup> However, this task of deciding arbitrability can be delegated to the arbitrator regardless of the presumption.<sup>3</sup>

### A. DELEGATION

When considering a motion to compel arbitration, the court must first determine who decides questions of arbitrability: the courts or the arbitrator. Long-standing U.S. Supreme Court jurisprudence notes that questions of arbitrability, as potentially dispositive “gateway” questions, are presumptively for the courts to decide.<sup>4</sup> As the Supreme Court put it, arbitrability questions are “rather arcane,” and cannot be presumed to have crossed the parties’ minds when negotiating the terms of the binding agreement without clear and unmistakable intent to send them to arbitra-

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1. *Henry v. Cash Biz, LP*, 551 S.W.3d 111, 115 (Tex. 2018) (citing *Venture Cotton Coop. v. Freeman*, 435 S.W.3d 222, 227 (Tex. 2014)).

2. *See id.*

3. *See RSL Funding, LLC v. Newsome*, 569 S.W.3d 116, 121 (Tex. 2018).

4. *See Rent-A-Center W. Inc., v. Jackson*, 561 U.S. 63, 68–69 (2010).

tion.<sup>5</sup> Therefore, courts should presume that the question of arbitrability remains with the court.<sup>6</sup> This presumption can be overcome with clear and unmistakable evidence of the parties' intent to have the arbitrator determine questions of arbitrability, even when the trial court would ordinarily be the proper forum to hear such validity issues.<sup>7</sup>

If the party seeking to compel arbitration argues that there is a clause delegating questions of arbitrability to an arbitrator, the court must determine "whether the purported delegation clause is in fact a delegation clause."<sup>8</sup> If the agreement to arbitrate includes a proper delegation clause and the opponent does not directly challenge the delegation clause itself, the court will compel arbitration; any questions about the validity of the agreement as a whole will be addressed by the arbitrator.<sup>9</sup>

In *Ridge Natural Resources, L.L.C. v. Double Eagle Royalty, L.P.*,<sup>10</sup> the question of delegation was heavily discussed. The El Paso Court of Appeals had to determine if the delegation clause in the arbitration agreement was sufficient to require the court to compel all questions of arbitrability to an arbitrator. The court of appeals used a three-question inquiry to determine delegation:

- (1) Did a contract form?
- (2) Do the arbitration covenants in a validly formed contract delegate contract validity issues to the arbitrator?
- (3) If the arbitration clause delegates contract validity questions to the arbitrator, is the party resisting arbitration levelling complaints about the validity of the arbitration clauses specifically, or the validity of the container contract as a whole?<sup>11</sup>

The court of appeals easily determined that there was a contract, and the delegation clause language clearly showed the intent of the drafters to delegate as many issues to the arbitrator as was permitted by law.<sup>12</sup> In inquiry three, the court of appeals had to determine if the challenges were to the arbitration agreement itself or to the container agreement at large. The court of appeals held that the challenges for substantive uncon-

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5. *First Options of Chi., Inc. v. Kaplan*, 514 U.S. 938, 945 (1995); *see, e.g., AT&T Techs. v. Commc'ns. Workers of Am.*, 475 U.S. 643, 699 (1986) (The question of arbitrability "is undeniably an issue for judicial determination. Unless the parties clearly and unmistakably provide otherwise, the question of whether the parties agreed to arbitrate is to be decided by the court, not the arbitrator.").

6. This is different than the more common presumption in favor of arbitration when the scope of an arbitration clause is at issue. When a contract is ambiguous or silent on the parties' intent to arbitrate an issue, the default presumptions are to resolve ambiguities and inconsistencies in favor of arbitration. *See, e.g., Howsam v. Dean Witter Reynolds, Inc.*, 537 U.S. 79, 83 (2002).

7. *Ridge Nat. Res., L.L.C. v. Double Eagle Royalty, L.P.*, 564 S.W.3d 105, 120 (Tex. App.—El Paso 2018, no pet.).

8. *Edwards v. DoorDash, Inc.*, 888 F.3d 738, 744 (5th Cir. 2018) (citing *Kubala v. Supreme Prod. Servs., Inc.*, 830 F.3d 199, 202 (5th Cir. 2016)).

9. *See id.* at 744.

10. *Ridge Nat. Res.*, 564 S.W.3d at 118.

11. *See id.* at 119–20.

12. *Id.*

scionability could have been heard by the court because they went to the existence of the arbitration clause itself, but the claims for procedural unconscionability were to the container contract, which the court could not hear.<sup>13</sup>

This third inquiry above was also heavily discussed in *Edwards v. DoorDash, Inc.*<sup>14</sup> Here, the appellant contested the validity of the arbitration agreement as a whole, but did not directly challenge the delegation clause.<sup>15</sup> Appellant argued that the arbitration clause as a whole was unconscionable; included an unenforceable class waiver; and was illusory, lacking proper consideration.<sup>16</sup> The U.S. Court of Appeals for the Fifth Circuit held that it was bound to compel arbitration after determining the existence of an arbitration clause, the validity of the delegation clause, and that all questions of arbitrability would be decided by an arbitrator.<sup>17</sup>

### 1. Court Determining Arbitrability

As a default presumption, courts decide gateway questions of arbitrability, unless the agreement clearly shows the intent of the parties for the arbitrator to determine arbitrability.<sup>18</sup> Therefore, though there were many challenges to the courts' ability to determine arbitrability during the Survey period, the burden of proof required to overcome this presumption—clear and unmistakable intent to delegate to the arbitrator—left many gateway issues to be determined by the courts.<sup>19</sup>

In *Hebbronville Lone Star Rentals, L.L.C. v. Sunbelt Rentals Industrial Services, L.L.C.*,<sup>20</sup> the U.S. Court of Appeals for the Fifth Circuit held that the arbitration agreement was limited in scope and did not delegate reformation arbitrability questions to the arbitrator, leaving such questions for the court to decide.<sup>21</sup> The Texas Supreme Court made a similar decision as to the scope of a delegation clause in *Jody James Farms, JV v. Altman Group, Inc.*<sup>22</sup> Here, the insurance policy in dispute only required arbitration for disagreements between the farm and the insurer, and “[g]iven the absence of clear and unmistakable evidence that [the landowner] agreed to arbitrate arbitrability in disputes with non-signatories, compelled arbitration cannot precede a judicial determination that an agreement to arbitrate exists.”<sup>23</sup> Therefore, the presumption that gateway

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13. *Id.* at 131–32.

14. 888 F.3d 738 (5th Cir. 2018).

15. *Id.* at 743.

16. *Id.*

17. *Id.* at 746. Appellant's main complaint—outside the validity of the arbitration agreement—was the failure to certify a class prior to compelling arbitration. However, because there was a valid delegation clause, the availability of class arbitration must be decided by the arbitrator. *Id.*

18. *See Ridge Nat. Res.*, 564 S.W.3d at 118.

19. *See, e.g., Encore Enters. v. Borderplex Realty Tr.*, No. 08-17-00134-CV, 2018 Tex. App. LEXIS 7941, at \*1 (Tex. App.—El Paso Sept. 28, 2018, no pet.).

20. 898 F.3d 629 (5th Cir. 2018).

21. *Id.* at 636.

22. 547 S.W.3d 624, 636 (Tex. 2018).

23. *Id.* at 633.

matters of arbitrability will be decided by the court was followed.<sup>24</sup>

There can be major consequences when the wrong individual decides gateway questions of arbitrability. On appeal from a motion to confirm and a cross-motion to vacate the award in *Brown Lab Investments, LLC v. Moesser*,<sup>25</sup> the First Houston Court of Appeals held that arbitrability was an issue for the trial court, not the arbitrator.<sup>26</sup> The court of appeals further held that by deciding gateway questions of arbitrability, the arbitrator exceeded his authority, the award should have been vacated, and arbitrability should have been determined by the lower court on independent review.<sup>27</sup> The parties have now gone through arbitration, district court proceedings, and appellate court proceeding, and the entire process will likely have to start all over before a final award can be confirmed.<sup>28</sup> As this case demonstrates, the consequences of wrongfully determining who decides arbitrability can be costly in both time and money.

## 2. Arbitrator Determining Arbitrability

Parties to an arbitration agreement can draft around the default presumption discussed above by expressing their clear and unmistakable intent for gateway questions of arbitrability to be decided by an arbitrator.<sup>29</sup> In *Kyäni, Inc. v. HD Walz II Enterprises*,<sup>30</sup> the Dallas Court of Appeals held that the express incorporation of the American Arbitration Association (AAA) Commercial Arbitration Rules, “empower[s] the arbitrator to determine arbitrability . . . [and] has been held to be clear and unmistakable evidence of the parties’ intent to allow the arbitrator to decide such issues.”<sup>31</sup>

Additionally, in *Arnold v. HomeAway, Inc.*,<sup>32</sup> the U.S. Court of Appeals for the Fifth Circuit held that the express incorporation of the AAA Consumer Rules evidenced the parties’ clear and unmistakable intent to arbitrate issues of arbitrability.<sup>33</sup> The court further held that because there was “no specific challenge” to the delegation provision itself, additional arguments about the validity of the agreement as a whole were “for an arbitrator to resolve.”<sup>34</sup>

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24. *Id.* at 640.

25. No. 01-16-00837-CV, 2018 Tex. App. LEXIS 6156, at \*19, \*29 (Tex. App.—Houston [1st Dist.] Aug. 7, 2018, no pet.) (mem. op.).

26. *Id.* at \*29.

27. *Id.* at \*29–30.

28. *See id.* at \*30.

29. *Kyäni, Inc. v. HD Walz II Enters.*, No. 05-17-00486-CV, 2018 Tex. App. LEXIS 5610, at \*1, \*20 (Tex. App.—Dallas July 24, 2018, no pet.) (mem. op.).

30. *Id.*

31. *Id.* at \*21 (citing *Schlumberger Tech. Corp. v. Baker Hughes Inc.*, 355 S.W.3d 791, 802 (Tex. App.—Houston [1st Dist.] 2011, no pet.) (internal citations omitted)).

32. 890 F.3d 546 (5th Cir. 2018).

33. *Id.* at 553.

34. *Id.* at 559.

## B. VALIDITY OF THE AGREEMENT

Arbitration is a creature of contract. As such, the existence of a valid agreement to arbitrate disputes is necessary for a court to compel arbitration. During the Survey period, parties often argued that there was no valid agreement to arbitrate or that an affirmative defense applied against arbitration. The elements for valid contracts must be present for the arbitration agreement to be enforceable: (1) offer; (2) acceptance in strict compliance with the terms of the offer; (3) a meeting of the minds; (4) each party's consent to the terms; and (5) execution and delivery of the contract with the intent for it to be mutual and binding.<sup>35</sup>

In a motion to compel arbitration, the court must determine: (1) “whether the parties entered into *any arbitration agreement at all*”; and (2) “whether *this* claim is covered by the arbitration agreement.”<sup>36</sup> According to the Texas Civil Practices and Remedies Code, “if a party opposing an [arbitration] application . . . denies the existence of the agreement [to arbitrate], the court shall summarily determine that issue.”<sup>37</sup> Additionally, Section 171.023(b) provides that “if there is a substantial bona fide dispute as to whether an agreement to arbitrate exists, the court shall try the issue promptly and summarily.”<sup>38</sup>

1. *Existence of Agreement to Arbitrate*

The first step in determining if there is a valid and enforceable agreement to arbitrate is finding that there is in fact some agreement to arbitrate. When challenging the existence of an agreement to arbitrate, the parties can challenge either: (1) specific challenge to the validity of the arbitration agreement or clause itself; or (2) the entire contract.<sup>39</sup> A court determines the first type of challenge, but the second must go to the arbitrator.<sup>40</sup> Based on these facts, the Dallas Court of Appeals determined in *Law Office of Thomas J. Henry v. Cavanaugh* that the arbitration agreement was valid, but that the arbitrator will decide the enforceability of the contract as a whole.<sup>41</sup> During the Survey period, many cases discussed the issues that can arise when determining the existence of an arbitration agreement: (1) contract language interpretation; (2) lack of required formalities; (3) clickwrap agreements; and (4) multiple papers being jointly interpreted to form one agreement.

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35. *Kyäni, Inc.*, 2018 Tex. App. LEXIS 5610, at \*5–6.

36. *Richland Equip. Co. v. Deere & Co.*, 745 F. App'x 521, 523 (5th Cir. 2018) (quoting *Kubala v. Supreme Prod. Servs., Inc.*, 830 F.3d 199, 201 (5th Cir. 2016)).

37. TEX. CIV. PRAC. & REM. CODE ANN. § 171.021(b).

38. *Id.* § 171.023.

39. *Law Office of Thomas J. Henry v. Cavanaugh*, No. 05-17-00849-CV, 2018 Tex. App. LEXIS 3182, at \*1, \*7 (Tex. App.—Dallas May 7, 2018, pet. denied) (mem. op.) (citing *In re Labatt Food Serv., L.P.*, 279 S.W.3d 640, 647–48 (Tex. 2009) (orig. proceeding)).

40. *Id.*

41. *See id.* at \*5.

There will always be arguments about the validity of the agreement based on the language of the agreement itself. During the Survey period, this was no different. In *South Green Builders, LP v. Cleveland*, appellee contended that the language in the arbitration agreement was permissive, but not mandatory.<sup>42</sup> South Green Builders requested arbitration for a contract dispute, but Cleveland refused, arguing that the language of the agreement did not require arbitration simply because one party requested it. The agreement stated that “the parties may submit disputes to arbitration,” and prior drafts of the agreement proved that the word “shall” had been replaced with “may.”<sup>43</sup> However, the Fourteenth Houston Court of Appeals, following precedent, held that the plain meaning of the language in the agreement requires mandatory arbitration if a party requests it, and that the evidence of prior drafts cannot be admitted to change the unambiguous meaning of the contract due to the parole evidence rule.<sup>44</sup>

One common requirement for valid agreements is the signatures of both parties. In *Huckaba v. Ref-Chem, L.P.*, the district court’s judgment compelling arbitration was reversed because there was “not a valid agreement to arbitrate.”<sup>45</sup> The agreement included language requiring the parties to sign the agreement in order for it to be effective; however, the employer never signed the agreement. The contractual nature of arbitration mandates that the arbitration agreement be valid according to its words. Here, the contract required a signature to be valid, and the contract was never signed.<sup>46</sup>

However, in *Law Office of Thomas J. Henry v. Cavanaugh*, the Dallas Court of Appeals held the arbitration agreement valid even though appellant law firm failed to sign the fee contract.<sup>47</sup> Appellant’s conduct showed a meeting of the minds, and any noncompliance with Texas laws requiring contingent fee agreements to be signed by both the client and the attorney<sup>48</sup> did not make the arbitration agreement itself unenforceable against the client who signed the fee contract.<sup>49</sup>

The rise of technology and online agreements has also led to new issues in arbitration. An interesting question regarding whether clicking an “I Understand” or “I Agree” button creates a valid agreement to arbitrate was posed in multiple cases. In *Kyāni, Inc. v. HD Walz II Enterprises*, the Dallas Court of Appeals held that a valid arbitration agreement existed between two commercial parties when the appellee contractor completed

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42. *S. Green Builders, LP v. Cleveland*, 558 S.W.3d 251, 257 (Tex. App.—Houston [14th Dist.] 2018, no pet.).

43. *Id.* at 257.

44. *Id.* at 258–59.

45. *Huckaba v. Ref-Chem, L.P.*, 892 F.3d 686, 691 (5th Cir. 2018).

46. *Id.* at 689–90.

47. *Law Office of Thomas J. Henry v. Cavanaugh*, No. 05-17-00849-CV, 2018 Tex. App. LEXIS 3182, at \*1, \*17 (Tex. App.—Dallas May 7, 2018, pet. denied) (mem. op.).

48. TEX. GOV’T CODE ANN. § 82.065(a).

49. *Cavanaugh*, 2018 Tex. App. LEXIS 3182, at \*5.



the online application that included a binding arbitration agreement.<sup>50</sup>

In another click-to-arbitrate case, *Wal-Mart Stores, Inc. v. Constantine*, the Dallas Court of Appeals had to determine if an unsophisticated individual party could be bound similarly by an online “clickwrap” agreement.<sup>51</sup> Employee of appellant, who was killed on the job, completed an online employee injury benefits plan learning module which included an agreement to arbitrate negligence and wrongful death claims against appellant employer.<sup>52</sup> Appellees argued that the employee did not sign the arbitration agreement and there was “no evidence [the employee] actually agreed to arbitrate any claim in this case, or that he even had notice of the alleged agreement.”<sup>53</sup> However, the employer testified that: (1) a confidential employee identification number and password was required to access the module; (2) the employee had to separately and deliberately access the arbitration agreement; (3) the screen instructed the employee to “read the policy carefully”; (4) the employee had to click a box stating “I Understand” underneath the “Arbitration Acknowledgement”; and finally, (5) the program notified the employee that he had completed the course and acknowledged the arbitration agreement.<sup>54</sup> The court of appeals held that the employer met the burden of proving that there was a valid and enforceable arbitration agreement between the parties.<sup>55</sup>

Further issues regarding the existence of an arbitration agreement can arise when the parties to a dispute have multiple, conflicting agreements regarding dispute resolution. This was the issue in *Adcock v. Five Star Rentals/Sales, Inc.*<sup>56</sup> Here, the original employment contract between the parties included a valid and enforceable arbitration agreement. A later pre-suit agreement required that the issue at hand would be determined in the courts as opposed to arbitration. The later agreement did not expressly discharge the original arbitration agreement; therefore, the San Antonio Court of Appeals had to determine which dispute resolution agreement would prevail.<sup>57</sup> The court of appeals held that because the contracts governed the same subject matter and, thus, could not be interpreted together, the latter contract must prevail.<sup>58</sup>

Multiple papers can also cause confusion when some contain arbitration agreements and others do not. This was the precise issue in *Richland Equipment Co. v. Deere & Co.*, where the particular agreements at issue

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50. *Kyäni, Inc. v. HD Walz II Enters.*, No. 05-17-00486-CV, 2018 Tex. App. LEXIS 5610, at \*1, \*19 (Tex. App.—Dallas July 24, 2018, no pet.) (mem. op.).

51. *Wal-Mart Stores, Inc. v. Constantine*, No. 05-17-00694-CV, 2018 Tex. App. LEXIS 3023, \*26–27 (Tex. App.—Dallas Apr. 30, 2018, no pet.) (mem. op.).

52. *Id.* at \*2.

53. *Id.* at \*13.

54. *Id.* at \*13–14.

55. *Id.* at \*21.

56. No. 04-17-00531-CV, 2018 Tex. App. LEXIS 2690, at \*1 (Tex. App.—San Antonio Apr. 18, 2018, no pet.) (mem. op.).

57. *Id.* at \*1–3.

58. *Id.* at \*7.

did not contain arbitration agreements.<sup>59</sup> However, the two agreements were so closely connected to a third agreement, which contained an arbitration clause but had been dropped from the lawsuit.<sup>60</sup> The U.S. Court of Appeals for the Fifth Circuit held “that the delegation of arbitrability was intended to apply to all disputes.”<sup>61</sup>

## 2. *Scope of the Agreement*

“If there is prima facie evidence that a contract formed, the scope of the arbitration clause’s sweep will determine which issues are arbitrable and which are not.”<sup>62</sup> “[A]ny doubts concerning the scope of arbitrable issues should be resolved in favor of arbitration, whether the problem at hand is the construction of the contract language itself or an allegation of waiver, delay, or a like defense to arbitrability.”<sup>63</sup> After determining that a valid arbitration agreement exists, the analysis turns to whether the alleged dispute falls within the scope of the agreement.<sup>64</sup> Most arbitration agreements are written very broadly to cover “all disputes” or “all claims” relating to either the contract itself or possibly even to the relationship formed by the contract. These broad agreements often withstand judicial review for scope and arbitrability. Many cases during the Survey period mentioned arguments about the scope of the arbitration agreement; however, most quickly dispelled the issue.<sup>65</sup>

In *Sinclair Group, Ltd. v. Haggblom*, the Beaumont Court of Appeals reversed the district court’s denial of a motion to compel arbitration, holding that the broad language of the arbitration agreement encompassed the issue at hand.<sup>66</sup> Likewise, in *Dallas Food & Beverage, LLC v. Lantrip*, the Dallas Court of Appeals held that the arbitration agreement “unambiguously” required binding arbitration on any claim arising out of the dancer’s work at the club “whether contractual, in tort, or based upon common law or statute.”<sup>67</sup>

In *Henry v. Cash Biz, LP*, petitioners argued that their claims were not within the scope of the arbitration agreement which provided that “all disputes . . . shall be resolved by binding arbitration.”<sup>68</sup> Petitioners argued that their claims related solely to respondent’s use of the criminal justice system, not claims arising under the contract. The Texas Supreme

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59. *Richland Equip. Co. v. Deere & Co.*, 745 F. App’x 521, 523 (5th Cir. 2018).

60. *Id.*

61. *Id.* at 525.

62. *Ridge Nat. Res., L.L.C. v. Double Eagle Royalty, L.P.*, 564 S.W.3d 105, 120 (Tex. App.—El Paso Aug. 24, 2018, no pet.); *see also* *Edwards v. DoorDash, Inc.*, 888 F.3d 738, 743 (5th Cir. 2018) (internal quotations omitted).

63. *Henry v. Cash Biz, LP*, 551 S.W.3d 111, 115 (Tex. 2018) (citing *In re Serv. Corp. Int’l*, 85 S.W.3d 171, 174 (Tex. 2002)).

64. *See Ridge Nat. Res.*, 564 S.W.3d at 117.

65. *See, e.g., Sinclair Grp., Ltd. v. Haggblom*, 548 S.W.3d 40, 46 (Tex. App.—Beaumont 2018, no pet.); *Dall. Food & Bev., LLC v. Lantrip*, No. 05-17-00647-CV, 2018 Tex. App. LEXIS 1464, at \*1 (Tex. App.—Dallas Feb. 23, 2018, no pet.) (mem. op.).

66. *Sinclair Grp.*, 548 S.W.3d at 46.

67. *Dall. Food & Bev.*, 2018 Tex. App. LEXIS 1464, at \*5–6.

68. *Henry*, 551 S.W.3d at 113–14.

Court noted, however, that “the scope of an arbitration clause that includes all ‘disputes,’ and not just claims, is very broad and encompasses more than claims based solely on rights originating exclusively from the contract.”<sup>69</sup> Though petitioners’ claims were not for breach of contract, their claims were based on the manner in which respondent behaved pursuant to the contracts and were within the broad scope of the arbitration agreement.<sup>70</sup>

However, during the Survey period, there were cases finding that the claims fell outside the scope of the arbitration agreement. In *Staley v. Crossley*, the arbitration agreement limited arbitration to “discrepancies based on an audit” which had not yet occurred.<sup>71</sup> Additionally, the agreement did not use broad sweeping language such as “arising out of” or “relating to.”<sup>72</sup> The Dallas Court of Appeals held that the right to compel arbitration had not yet accrued under the arbitration clause.<sup>73</sup> Additionally, in *In Interest of M.W.M.*, the Dallas Court of Appeals used traditional contract interpretation principles to determine if the dispute over a party’s failure to pay amounts already determined under a divorce decree fell within the scope of the arbitration agreement in a divorce settlement.<sup>74</sup> The court of appeals held that the dispute was not within the scope of the arbitration agreement because a dispute regarding payments already determined under the divorce agreement was not a “dispute” under the arbitration clause and to treat it as such would render meaningless the processes already taken to come to a divorce agreement.<sup>75</sup>

### 3. Affirmative Defenses

If the party seeking to compel arbitration proves that a valid agreement to arbitrate exists, the party opposing arbitration can raise an affirmative defense. The most common defenses raised were illusory promises, unconscionability, and waiver.<sup>76</sup>

#### a. Illusory Promises

An illusory promise is one that bestows upon one party the unilateral or retrospective right to terminate the agreement at any time. More sim-

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69. *Id.* at 115 (internal citations omitted).

70. *Id.* at 116.

71. *Staley v. Crossley*, No. 05-17-00319-CV, 2018 Tex. App. LEXIS 3540, at \*12 (Tex. App.—Dallas May 17, 2018, no pet.) (mem. op.).

72. *Id.* at \*14.

73. *Id.* at \*15–16.

74. *In Interest of M.W.M.*, No. 05-17-01309-CV, 2018 Tex. App. LEXIS 5401, at \*1 (Tex. App.—Dallas July 17, 2018, pet. denied) (mem. op.).

75. *Id.* at \*7–8.

76. The defense of misnomer was also discussed in *Redi-Mix, LLC v. Martinez*, No. 05-17-01347-CV, 2018 Tex. App. LEXIS 5683, at \*1 (Tex. App.—Dallas July 25, 2018, no pet.) (mem. op.). In this case, the arbitration agreement was between the employee and Redi-Mix, L.P., a company that was no longer in existence and had been replaced by Redi-Mix, LLC. Appellants argued that the contract contained a simple misnomer, but the Dallas Court of Appeals held that they did not meet their burden on appeal to overturn the denied motion to compel arbitration. *Id.* at \*20.

ply put, an illusory arbitration agreement “binds one party to arbitrate, while allowing the other to choose whether to arbitrate.”<sup>77</sup> In *ReadyOne Industries, Inc. v. Lopez*, the parties had a mutual agreement to arbitrate; however, appellee employee claimed that the arbitration agreement was illusory.<sup>78</sup> However, the El Paso Court of Appeals held that because the unambiguous terms of the agreement required ten days’ notice before termination of the agreement to arbitrate, the agreement could not be illusory.<sup>79</sup>

In *CBRE, Inc. v. Turner*, the terminated employee argued that the arbitration agreement was illusory because the agreement did not require the employer to give advance notice of any plan to terminate the employment agreement containing the arbitration agreement, including termination of the agreement upon termination of employment.<sup>80</sup> The employee argued that the employer held “employees to the promise to arbitrate while reserving its own escape hatch.”<sup>81</sup> However, the agreement did not include language giving the employer the ability to unilaterally modify the agreement and, importantly, the agreement unambiguously noted that it continued to govern claims arising from termination of employment.<sup>82</sup> Therefore, even though the employer had the right to terminate the employment agreement at any time and without notice, the arbitration agreement continued to be effective after the employment agreement’s termination and was not illusory.<sup>83</sup>

In *Mission Petroleum Carriers, Inc. v. Dreese*, the Corpus Christi-Edinburg Court of Appeals held that the trial court abused its discretion when it held that the agreement was illusory.<sup>84</sup> The challenge was to the entire contract and not a specific challenge to the validity of the arbitration agreement itself; therefore, the question of illusory contract was for the arbitrator to decide.<sup>85</sup>

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77. *CBRE, Inc. v. Turner*, No. 05-18-00404-CV, 2018 Tex. App. LEXIS 8591, at \*1 (Tex. App.—Dallas Oct. 22, 2018, no pet.) (mem. op.) (citing *Royston, Rayzor, Vickery, & Williams, LLP v. Lopez*, 467 S.W.3d 494, 505 (Tex. 2015)).

78. *ReadyOne Indus., Inc. v. Lopez*, 551 S.W.3d 305, 312 (Tex. App.—El Paso 2018, pet. denied).

79. *Id.* at 312–14.

80. *Turner*, 2018 Tex. App. LEXIS 8591, at \*7.

81. *Id.* at \*8.

82. *Id.* at \*8–10.

83. *See id.* at \*10.

84. *Mission Petroleum Carriers, Inc. v. Dreese*, No. 13-17-00102-CV, 2018 Tex. App. LEXIS 1736, at \*7 (Tex. App.—Corpus Christi-Edinburg Mar. 8, 2018, no pet.) (mem. op.).

85. As the court stated:

There are two types of challenges to an arbitration provision: (1) a specific challenge to the validity of the arbitration agreement or clause, and (2) a broader challenge to the entire contract, either on a ground that directly affects the entire agreement, or on the ground that one of the contract’s provision is illegal and renders the whole contract invalid.

*Id.* at \*6.

b. Unconscionability

During the Survey period, many cases considered both procedural and substantive unconscionability. Texas law renders unconscionable contracts—including those to arbitrate—unenforceable under the policy that unfair bargains should not be enforced.<sup>86</sup> “Procedural unconscionability refers to the circumstances surrounding” the drafting and adoption processes for the arbitration agreement, and “substantive unconscionability [considers] the unfairness” of the actual words of the arbitration agreement.<sup>87</sup> Many cases argue unconscionability; however, the burden of proof is really high because this doctrine invalidates an otherwise enforceable contract.<sup>88</sup> “The basic test for unconscionability is whether, given the parties’ general commercial background and the commercial needs of the particular trade or case, the clause involved is so one-sided that it is unconscionable under the circumstances existing when the parties made the contract.”<sup>89</sup>

In *Wal-Mart Stores, Inc. v. Constantine*, as previously discussed in Section II.A.1 above, the employee had to click a button acknowledging his agreement to be bound by an arbitration agreement. The employee’s beneficiaries argued that the agreement was unconscionable because it was hidden in an online program about the health benefit plan, but actually required arbitration on all employment claims. They further argued that the agreement was unconscionable because of the disparity in bargaining power between the sophisticated employer and the unsophisticated employee. However, Texas courts have long held that “gross disparity in bargaining power between employer and employee, without more, does not establish procedural unconscionability.”<sup>90</sup> Because the employee failed to provide sufficient evidence of fraudulent misrepresentation or trickery, any disparity in bargaining power or misleading circumstances is insufficient to establish procedural unconscionability.<sup>91</sup>

In *ReadyOne Industries, Inc. v. Lopez*, the employee argued that the arbitration agreement was procedurally unconscionable because she had a limited ability to read and write, suffered from multiple learning disorders, and the employer had misrepresented the nature and importance of the papers that were being signed by the human resources representative who told the employee “that the documents are for benefits if you get

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86. *Wal-Mart Stores, Inc. v. Constantine*, No. 05-17-00694-CV, 2018 Tex. App. LEXIS 3023, at \*24 (Tex. App.—Dallas Apr. 30, 2018, no pet.) (mem. op.); see also *Ridge Nat. Res., L.L.C. v. Double Eagle Royalty, L.P.*, 564 S.W.3d 105, 135 (Tex. App.—El Paso 2018, no pet.).

87. *Wal-Mart Stores*, 2018 Tex. App. LEXIS 3023, at \*24; see also *ReadyOne Indus. v. Lopez*, 551 S.W.3d 305, 314 (Tex. App.—El Paso 2018, pet. denied); *Ridge Nat. Res.*, 564 S.W.3d at 135.

88. *Ridge Nat. Res.*, 564 S.W.3d at 135.

89. *Wal-Mart Stores*, 2018 Tex. App. LEXIS 3023, at \*24–25 (internal quotations omitted) (citing *In re First Merit Bank, N.A.*, 52 S.W.3d 749, 757 (Tex. 2001) (orig. proceeding)).

90. *Id.* at \*26 (citing *In re Halliburton Co.*, 80 S.W.3d 566, 572 (Tex. 2002)).

91. *Id.* at \*28.

hurt on the job, just sign them.”<sup>92</sup> The employee had, however, been provided with a copy of the agreement in her native language, Spanish, and there was no evidence of affirmative misrepresentation, a coercive environment, or trickery by the employer.<sup>93</sup> Therefore, the El Paso Court of Appeals held that the agreement was not unconscionable.<sup>94</sup>

In *UniFirst Linen, a Division of UniFirst Holdings, L.P. v. Poncho’s Restaurants, Inc.*, the appellant argued both procedural and substantive unconscionability.<sup>95</sup> Appellant argued first that the print was so small as to be unconscionable; the Corpus Christi-Edinburg Court of Appeals noted that the print was so small it was barely legible in the photocopied version of the agreement in the record.<sup>96</sup> Appellant additionally argued that he had no viable alternative to signing the agreement, and that the sophistication and knowledge differences between the parties caused the agreement to be unconscionable. The court of appeals held that even if appellant was in a less advantageous bargaining position, it did not meet its burden to show the arbitration clause at issue was procedurally unconscionable because the clause was in the same small print as the contract’s other technical terms and appellant’s manager testified that he discussed the arbitration clause with appellant when the agreement was executed.<sup>97</sup>

Appellant in *UniFirst Linen* also argued that the agreement was substantively unconscionable because it evoked the Federal Arbitration Act (FAA), which does not consider the same policy goals as the Texas Arbitration Act (TAA), and the clause places unfair burdens on the company regarding the default location for arbitration proceedings.<sup>98</sup> However, the court of appeals held that the arbitration clause was not substantively unconscionable because all provisions—including choice-of-law—applied to both parties and thus did not indicate that the agreement was impermissibly one-sided.<sup>99</sup> Substantive unconscionability was also argued in *Dominguez v. Kenneth D. Eichner, P.C.*<sup>100</sup> Appellant argued that the arbitration clause was unconscionable because it required a two-year notice of complaints as a condition precedent to seeking arbitration. Appellant, however, failed to explain how this notice provision was so oppressive and unfairly surprising as to render the arbitration clause unconscionable. Therefore, the court of appeals held that the agreement was valid and enforceable.<sup>101</sup>

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92. *ReadyOne Indus.*, 551 S.W.3d at 315.

93. *Id.* at 315–16.

94. *Id.* at 316.

95. *UniFirst Linen, a Div. of UniFirst Holdings, L.P. v. Poncho’s Rests., Inc.*, No. 13-17-00603-CV, 2018 Tex. App. LEXIS 5036, at \*1 (Tex. App.—Corpus Christi-Edinburg July 5, 2018, no pet.) (mem. op.).

96. *Id.* at \*9.

97. *Id.*

98. *Id.* at \*12–13.

99. *Id.* at \*14.

100. No. 01-17-00332-CV, 2018 Tex. App. LEXIS 4667, at \*1, \*3 (Tex. App.—Houston [1st Dist.] June 26, 2018, no pet.) (mem. op.).

101. *Id.* at \*9.

Many parties will argue unconscionability, but the argument rarely prevails.<sup>102</sup> However, in *Ridge Natural Resources, L.L.C. v. Double Eagle Royalty, L.P.*, the El Paso Court of Appeals held that the arbitration agreement was unconscionable on its merits based on the contract's prohibition of exemplary damages, which cuts off statutory rights available in a judicial forum.<sup>103</sup> Texas has a strong policy goal of preventing fraud, malice, and gross negligence of which the ability to impose exemplary damages is a strong component.<sup>104</sup> Therefore, the court of appeals held that the prohibition was substantively unconscionable as a matter of public policy.<sup>105</sup>

After determining that a provision of the arbitration agreement was unconscionable, the court of appeals discussed the possibility of severing the offending section while retaining the rest of the agreement.<sup>106</sup> “[I]llegal or unconscionable provision[s] of a contract may generally be severed so long as [they] do[ ] not constitute the essential purpose of the agreement.”<sup>107</sup> Though the agreement did not contain a severability clause—which often evidences the parties’ intent for a contract to survive if an individual clause is invalidated—the court of appeals held that the unconscionable provision could be severed from the remainder of the arbitration agreement.<sup>108</sup>

### c. Waiver

One common affirmative defense argued during the Survey period was implied waiver by invoking judicial process. “There is a strong presumption against waiver of arbitration, but it is not irrebuttable. The party opposing arbitration based on the affirmative defense of waiver has the burden to prove waiver.”<sup>109</sup> The party arguing waiver must prove: (1) that the party seeking arbitration “substantially invoked the judicial process in a manner inconsistent with its claimed right to compel arbitration”; and (2) that the opposing party “suffered actual prejudice as a result.”<sup>110</sup>

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102. See, e.g., *id.*; *UniFirst Linen*, 2018 Tex. App. LEXIS 5036, at \*12, \*14; *ReadyOne Indus., Inc. v. Lopez*, 551 S.W.3d 305, 316 (Tex. App.—El Paso 2018, pet. denied).

103. *Ridge Nat. Res., L.L.C. v. Double Eagle Royalty*, 564 S.W.3d 105, 138 (Tex. App.—El Paso 2018, no pet.).

104. *Id.* at 137.

105. *Id.* at 138.

106. *Id.* at 139.

107. *Venture Cotton Coop. v. Freeman*, 435 S.W.3d 222, 230 (Tex. 2014).

108. *Ridge Nat. Res.*, 564 S.W.3d at 139. The court of appeals held that the arbitration agreement was enforceable, except for the clause as to exemplary damages that was severed. *Id.*

109. *BBX Operating, LLC v. Am. Fluorite, Inc.*, No. 09-17-00245-CV, 2018 Tex. App. LEXIS 923, at \*1, \*15 (Tex. App.—Beaumont Feb. 1, 2018, no pet.) (mem. op.) (internal citations omitted).

110. *Henry v. Cash Biz, LP*, 551 S.W.3d 111, 116 (Tex. 2018).

*i. Substantially Invoking the Judicial Process*

To waive the right to arbitration by substantially invoking the judicial process, “the party seeking arbitration must take specific and deliberate actions inconsistent with the right to arbitrate after the filing of the suit or actively try, but fail, to achieve a satisfactory result through litigation before turning to arbitration.”<sup>111</sup> Actions waiving the right to arbitration must go beyond filing suit, delay in seeking arbitration, or seeking initial discovery; the parties conduct must unequivocally and substantially invoke judicial process.<sup>112</sup> The court may look at the totality of the circumstances and can consider, among other things, “how much discovery has been conducted, who initiated it, and whether it relates to the merits; how much time and expense has been incurred in litigation; and the proximity in time between a trial setting and the filing of the motion seeking arbitration.”<sup>113</sup>

In *BBX Operating, LLC v. American Fluorite, Inc.*, the Beaumont Court of Appeals held that appellant did not substantially invoke the judicial process by responding to discovery or delaying the motion to compel arbitration.<sup>114</sup> However, the court of appeals held that appellant did substantially invoke the judicial process by seeking enforcement of the “Rule 11 Settlement Agreement” that addressed the same claims as arbitration at issue.<sup>115</sup> The court of appeals also held that appellees would be prejudiced if arbitration was compelled because it would result in a piecemeal result and they would incur excessive costs and fees required to proceed both in litigation and in arbitration.<sup>116</sup>

The burden of proving waiver is very high and is placed on the party opposing arbitration. Many cases during the Survey period held that the opposing party failed to meet the burden of proof that the party moving for arbitration substantially invoked the judicial process. In *Henry v. Cash Biz, LP*, appellants argued that the appellees had invoked the criminal justice system, thereby waiving their right to compel arbitration, when they provided evidence to criminal prosecutors that led to criminal charges on the civil debts at issue in the case.<sup>117</sup> The Texas Supreme Court held that appellees did not substantively invoke the justice system as they simply provided information to the district attorney and then “let[ ] the chips fall where they may.”<sup>118</sup>

Additionally, in *In re Deeb*, appellant argued that the arbitration should be compelled because appellant did not substantially invoke the

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111. *Camp v. Potts*, No. 05-18-00149-CV, 2018 Tex. App. LEXIS 7959, at \*1, \*6 (Tex. App.—Dallas Oct. 1, 2018, no pet.) (mem. op.).

112. *Henry*, 551 S.W.3d at 116; see also *BBX Operating, LLC*, 2018 Tex. App. LEXIS 923, at \*20 (citing *G.T. Leach Builders, LLC v. Sapphire V.P., L.P.*, 458 S.W.3d 502, 515 (Tex. 2015)).

113. *Henry*, 551 S.W.3d at 117.

114. *BBX Operating, LLC*, 2018 Tex. App. LEXIS 923, at \*20.

115. *Id.* at \*21–22.

116. *Id.* at \*22–23.

117. *Henry*, 551 S.W.3d at 117–18.

118. *Id.* at 118.



judicial process.<sup>119</sup> The Austin Court of Appeals agreed and held that appellant did not impliedly waive his right to arbitration by filing an answer, a motion to compel, and a second arbitration; the four and a half month delay caused by ignoring applicable AAA fees did not prejudice appellee.<sup>120</sup> Finally, in *Diligent Texas Dedicated LLC v. York*, the Fort Worth Court of Appeals held that the claimant did not substantially invoke the judicial process.<sup>121</sup> The employer certainly came very close to substantially invoking the judicial process when he filed a merits-based motion for summary judgment, however, “because [the employee] did not show prejudice from [the employer’s] delay in invoking arbitration, the trial court abused its discretion by not compelling arbitration.”<sup>122</sup>

ii. *Prejudice*

Prejudice “refers to an inherent unfairness caused by a party’s attempt to have it both ways by switching between litigation and arbitration to its own advantage.”<sup>123</sup> “Prejudice may therefore result when the movant first seeks to use the judicial process to gain access to information that is not discoverable in arbitration, and/or when the nonmovant incurs costs and fees due to the movant’s actions or delay.”<sup>124</sup> “A party should not be allowed purposefully and unjustifiably to manipulate the exercise of its arbitral rights simply to gain an unfair tactical advantage over the opposing party.”<sup>125</sup>

In *Forby v. One Technologies, L.P.*, it was obvious that appellee substantially invoked the judicial process by pursuing a decision on the merits in the court before seeking arbitration.<sup>126</sup> However, the district court held that there was no prejudice to the opposing party; therefore, appellee did not waive the right to arbitration.<sup>127</sup> On appeal, the U.S. Court of Appeals for the Fifth Circuit reversed the district court’s ruling, holding that appellant was prejudiced and noting that “[w]hen a party will have to re-litigate in the arbitration forum an issue already decided by the district court in its favor, that party is prejudiced.”<sup>128</sup> The Fifth Circuit held that “[a] party does not get to learn that the district court is not receptive to its

119. *In re Deeb*, No. 03-17-00635-CV, 2017 Tex. App. LEXIS 11703, at \*1 (Tex. App.—Austin Dec. 15, 2017, no pet.) (mem. op.) (orig. proceeding).

120. *Id.* at \*4–5.

121. *Diligent Tex. Dedicated LLC v. York*, No. 02-17-00416-CV, 2018 Tex. App. LEXIS 7146 (Tex. App.—Fort Worth Aug. 30, 2018, pet. denied) (mem. op.).

122. *Id.* at \*14 (the employee only showed evidence of lost time and attorney fees).

123. *College Station Med. Ctr., LLC v. Burgess*, No. 10-15-00191-CV, 2018 Tex. App. LEXIS 4064, at \*1, \*31 (Tex. App.—Waco June 6, 2018, no pet.) (mem. op.) (citing *G.T. Leach Builders, LLC v. Sapphire V.P., L.P.*, 458 S.W.3d 502, 515 (Tex. 2015)) (internal quotations omitted).

124. *Id.*

125. *Camp v. Potts*, No. 05-18-00149-CV, 2018 Tex. App. LEXIS 7959, at \*7 (Tex. App.—Dallas Oct. 1, 2018, no pet.) (mem. op.) (quoting *Perry Homes v. Cull*, 258 S.W.3d 580, 597 (Tex. 2008)).

126. *Forby v. One Techs.*, 909 F.3d 780, 782 (5th Cir. 2018).

127. *Id.*

128. *Id.* at 785.

arguments and then be allowed a second bite at the apple through arbitration.”<sup>129</sup>

Many cases during the Survey period focused their prejudice arguments on delay. In *Camp v. Potts*, appellant waited almost a year after moving to compel arbitration to set a hearing date and also failed to consolidate cases for judicial efficiency.<sup>130</sup> Appellee argued that the delay tactics caused significant “inconvenience, expense, and heartache.”<sup>131</sup> In ruling for appellant, the Dallas Court of Appeals stuck with its own precedent that says delay is often not enough to establish waiver.<sup>132</sup>

Similarly, in *College Station Medical Center, LLC v. Burgess*, the plaintiff asserted claims regarding health care payments after a car accident.<sup>133</sup> One and a half years later, plaintiff amended the petition and added a breach of contract claim. Five months later, defendant moved to compel arbitration. Plaintiff argued that the delay in moving to compel arbitration was prejudicial because she had incurred significant attorney’s fees during the delay, defendant received more discovery than would likely have been available in arbitration, and much of the work necessary for arbitration would be time consuming and duplicative of the litigation.<sup>134</sup> The Waco Court of Appeals held that the defendant did not substantially invoke the judicial process as to the breach of contract claim because plaintiff caused much of the delay, discovery issues, and duplication issues by waiting a year and a half to allege the contract claim.<sup>135</sup> Finally, the court of appeals held that even if there was proof that the defendant substantially invoked the judicial process, plaintiff failed to meet the burden of proof to establish prejudice.<sup>136</sup>

### III. NON-SIGNATORIES

Arbitration is a matter of contract, and a party cannot be required to arbitrate a dispute to which they did not agree to arbitrate. However, “non-signatories to a contract containing an arbitration clause may be allowed or required to arbitrate if rules of law or equity would apply the contract to them generally.”<sup>137</sup> The issue of non-signatories is an issue of arbitrability, presumably for the court to decide; however, as discussed above in Section II.A., these gateway issues can be delegated to the arbi-

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129. *Id.* (citing *Petroleum Pipe Ams. Corp. v. Jindal Saw Ltd.*, 575 F.3d 476, 482 (5th Cir. 2009)).

130. *Camp*, 2018 Tex. App. LEXIS 7959, at \*9.

131. *Id.* at \*8.

132. *Id.* at \*11 (citing *In re Vesta Ins. Grp., Inc.*, 192 S.W.3d 759, 763 (Tex. 2006)).

133. *College Station Med. Ctr., LLC v. Burgess*, No. 10-15-00191-CV, 2018 Tex. App. LEXIS 4064, at \*1 (Tex. App.—Waco June 6, 2018, no pet.) (mem. op.).

134. *Id.* at \*36–37.

135. *Id.* at \*37.

136. *Id.* at \*36.

137. *Shillinglaw v. Baylor Univ.*, No. 05-17-00498-CV, 2018 Tex. App. LEXIS 4611, at \*1, \*5 (Tex. App.—Dallas June 21, 2018, pet. denied) (mem. op.) (citing *Roe v. Ladymon*, 318 S.W.3d 502, 511 (Tex. App.—Dallas 2010, no pet.)).

trator upon clear and unmistakable intent of the parties to so delegate.<sup>138</sup>

Texas and federal law recognize six theories “that may bind non-signatories to arbitration agreements: (1) incorporation by reference; (2) assumption; (3) agency; (4) alter ego; (5) equitable estoppel[;] and (6) third-party beneficiary.”<sup>139</sup> During the Survey period, in addition to these six theories, parties tried different methods to hold non-signatory third-parties to arbitration agreements. In both *Dauz v. Valdez*<sup>140</sup> and *Shillinglaw v. Baylor University*,<sup>141</sup> parties unsuccessfully argued *respondeat superior*, and in *D.R. Horton-Emerald, Ltd. v. Mitchell*, appellant unsuccessfully argued that appellee was a successor in interest to not only the benefits of a contract, but also to the obligations and restrictions of the contract.<sup>142</sup>

#### A. INCORPORATION BY REFERENCE

During the Survey period, incorporation by reference was rarely discussed in detail. Texas law “allows parties to incorporate by reference other writings into a contract, and upon doing so, the terms of those other writings become enforceable obligations.”<sup>143</sup> In *Encore Enterprises v. Borderplex Realty Trust*, appellants argued that a draft operating agreement was incorporated by reference into the contract at issue, which validated the arbitration agreement in the draft.<sup>144</sup> The El Paso Court of Appeals did not agree and held that incorporation of the draft would unnecessarily contort the structure of agreement at issue, rendering certain provisions meaningless and subverting the parties’ intended contractual scheme.<sup>145</sup>

#### B. ASSUMPTION

Implied assumption also appeared in the cases during the Survey period. “An implied assumption of obligations may arise when the benefit received by the assignee is so entwined with the burden imposed by the assignor’s contract that the assignee is estopped from denying assumption and the assignee would otherwise be unjustly enriched.”<sup>146</sup> However, be-

138. *Brown Lab Invs., LLC v. Moesser*, No. 01-16-00837-CV, 2018 Tex. App. LEXIS 6156, at \*17 (Tex. App.—Houston [1st Dist.] Aug. 7, 2018, no pet.) (mem. op.).

139. *In re Kellogg Brown & Root, Inc.*, 166 S.W.3d 732, 739 (Tex. 2005) (orig. proceeding).

140. No. 01-15-00831-CV, 2018 Tex. App. LEXIS 7163, at \*1, \*6 (Tex. App.—Houston [1st Dist.] Aug. 30, 2018, no pet.).

141. *Shillinglaw*, 2018 Tex. App. LEXIS 4611, at \*6.

142. *D.R. Horton-Emerald, Ltd. v. Mitchell*, No. 01-17-00426-CV, 2018 Tex. App. LEXIS 731, at \*1, \*8–12. (Tex. App.—Houston [1st Dist.] Jan. 25, 2018, no pet.) (mem. op.).

143. *Encore Enters. v. Borderplex Realty Tr.*, No. 08-17-00134-CV, 2018 Tex. App. LEXIS 7941, at \*1, \*16 (Tex. App.—El Paso Sept. 28, 2018, no pet.) (interpreting Delaware law).

144. *Id.*

145. *See id.* at \*25.

146. *D.R. Horton-Emerald, Ltd.*, 2018 Tex. App. LEXIS 731, at \*12 (quoting *NextEra Retail of Tex., LP v. Inv’rs Warranty of Am., Inc.*, 418 S.W.3d 222, 228 (Tex. App.—Houston [1st Dist.] 2013, pet denied)) (internal quotations omitted).

cause implied covenants are not favored in the law, courts do “not lightly imply additional covenants enlarging the terms of a contract.”<sup>147</sup>

In *D.R. Horton-Emerald, Ltd. v. Mitchell*, appellant homebuilder argued that the appellee, who purchased an appellant-built home from the original owner, impliedly assumed the contract between the builder and the original owners by “demanding warranty inspection and compliance pursuant to the [contract].”<sup>148</sup> However, the First Houston Court of Appeals held that the evidence did not show that the appellees were seeking a benefit under the contract or that the benefits they did seek were “entwined with the burden imposed by” the contract.<sup>149</sup> The court of appeals reasoned that the limited warranty utilized by appellees was a “separate and independent document” from the contract.<sup>150</sup>

### C. AGENCY

The agency doctrine is most often used to allow non-signatories to compel arbitration with a party to the agreement. However, in *Shillinglaw v. Baylor University*, appellant, the ex-Director for Football Operations, attempted to reverse this ordinary usage and compel unwilling non-signatories to arbitration.<sup>151</sup>

Appellant was terminated from his employment and asserted claims for libel, slander, tortious interference with contract, conspiracy, and other claims. Following his termination, appellant asserted claims against Baylor University, the interim president of the University, and five individual members of the Board of Regents.<sup>152</sup> Appellant argued that the non-signatory appellees were bound in their capacities as employees or agents of Baylor as Baylor’s interim president and its senior vice president/chief financial officer had a “close connection to Baylor,” meaning that the claims are so intertwined that arbitration is appropriate.<sup>153</sup> Appellant opined that the “members of the Baylor Board of Regents have an even closer relationship than that of employer and employee, that they are the human agents through which the university acts.”<sup>154</sup> The Dallas Court of Appeals was reluctant to follow this line of reasoning and held that there was not sufficient evidence to require the unwilling non-signatories to arbitrate.<sup>155</sup> The court of appeals further stated that “to require an unwilling non-signatory to arbitrate is no small matter of procedural convenience. It would carry serious constitutional implications and undermine the core consensual nature of the federal arbitration act.”<sup>156</sup>

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147. *Id.*

148. *Id.*

149. *Id.* at \*13.

150. *See id.* at \*14.

151. *Shillinglaw v. Baylor Univ.*, No. 05-17-00498-CV, 2018 Tex. App. LEXIS 4611, at \*7–8 (Tex. App.—Dallas June 21, 2018, pet. denied) (mem. op.).

152. *Id.* at \*2.

153. *Id.* at \*5.

154. *Id.* at \*5–6.

155. *See id.* at \*9.

156. *Id.* at \*8.

## D. ESTOPPEL

The doctrine of estoppel “simply precludes a signatory from avoiding arbitration with a [non-signatory] when the issues the non-signatory is seeking to resolve in arbitration are intertwined with the agreement that the estopped party has signed.”<sup>157</sup>

1. *Direct Benefits Estoppel*

“[E]stoppel principles may require a non-signatory to arbitrate if it seeks through its claim to obtain a direct benefit from the contract containing the arbitration clause.”<sup>158</sup> The direct benefits estoppel theory “precludes a signatory claimant from having it ‘both ways’ by seeking to hold the non-signatory liable pursuant to duties imposed by the agreement, which contains an arbitration provision, but, on the other hand, denying arbitration’s applicability because the defendant is a non-signatory.”<sup>159</sup> In other words, a signatory cannot “both have his contract and defeat it too.”<sup>160</sup>

The simplest usage of direct benefits estoppel is to estop a party from objecting to being bound to arbitration under an agreement that they are seeking to directly benefit from. However, direct benefits estoppel can also be used to make parties “arbitrate claims if liability arises from a contract with an arbitration clause, but not if liability arises from general obligations imposed by law.”<sup>161</sup> In *Kyäni, Inc. v. HD Walz II Enterprises*, the Dallas Court of Appeals had to determine if the non-signatory appellant’s claims against the party to a distributor agreement for tortious interference could be compelled to arbitrate under the direct benefits theory.<sup>162</sup> The court of appeals held that appellant’s claims not only referenced the existence of the distributor agreement, which included an arbitration clause, but relied on the existence of the agreement for the validity of their claims.<sup>163</sup> Therefore, appellant was entitled to invoke the arbitration clause of the agreement, and appellees were estopped from refusing to arbitrate the claims.<sup>164</sup>

As noted above, for direct benefits estoppel to apply, the non-signing party must be seeking to benefit from or enforce the terms of an agreement; however, “[w]hen the substance of the claim arises from general obligations imposed by state law, including statutes, torts and other common law duties or federal law, rather than from the contract, ‘direct benefits’ estoppel does not apply, even if the claim refers to or relates to the

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157. *Id.*

158. *Id.* at \*7.

159. *Kyäni, Inc. v. HD Walz II Enters.*, No. 05-17-00486-CV, 2018 Tex. App. LEXIS 5610, at \*1, \*22 (Tex. App.—Dallas July 24, 2018, no pet.) (mem. op.) (citing *VSR Fin. Servs., Inc. v. McLendon*, 409 S.W.3d 817, 831 (Tex. App.—Dallas 2013, no pet.)).

160. *Jody James Farms, JV v. Altman Grp., Inc.*, 547 S.W.3d 624, 637 (Tex. 2018).

161. *Kyäni, Inc.*, 2018 Tex. App. LEXIS 5610, at \*22–23.

162. *Id.*

163. *Id.* at \*25.

164. *Id.*

contract.”<sup>165</sup> In *Cardon Healthcare Network, Inc. v. Goldberg*, the Austin Court of Appeals followed this distinction, holding that the claims were all statutory or common law causes of action and direct benefits estoppel did not apply.<sup>166</sup>

There are often multiple contracts governing different aspects of a commercial relationship. In *Voss Engineering, Inc. v. Bauer*, it was this situation that led to a dispute regarding if there was a valid arbitration agreement requiring the dispute to go to arbitration.<sup>167</sup> In appellees’ suit for breach of contract, negligence, malpractice, and deceptive trade practices, appellants could not compel arbitration under the general contract because appellees’ claims were based on subcontracts and statutory and common law. Therefore, the trial court did not abuse its discretion when it denied appellants’ motion to compel arbitration.<sup>168</sup>

A unique case examined the applicability of the direct benefits estoppel theory to an arbitration clause in a will. In *Ali v. Smith*, appellant, a former executor who was being sued by the current executor for failing to comply with the will, sought to compel arbitration based on the arbitration clause in the will.<sup>169</sup> Appellant argued that the doctrine of direct benefits estoppel was applicable because the appellee (current executor) had enforced the will by bringing the current claims and had benefitted from the will by “receiv[ing] appointee fees.”<sup>170</sup> The Fourteenth Houston Court of Appeals held that direct benefits estoppel did not apply because the claims were based on statutory and common law and that appellee was entitled to the fees under Texas law.<sup>171</sup>

However, as noted many times, arbitration is a creature of contract. This runs true for non-parties seeking to compel arbitration under a contract. The contract can draft around these rules by explicitly stating in the contract that the contractual rights and remedies cannot be extended to anyone other than the parties and their permitted successors and assignees. This was the case in *Black v. Diamond Offshore Drilling, Inc.*<sup>172</sup> The Fourteenth Houston Court of Appeals held that the expressed terms of the contract limited who could utilize the forum selection clause in the contract at issue.<sup>173</sup>

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165. *Cardon Healthcare Network, Inc. v. Goldberg*, No. 03-17-00474-CV, 2018 Tex. App. LEXIS 1639, at \*1, \*10–11 (Tex. App.—Austin Mar. 2, 2018, no pet.) (mem. op.) (internal quotations omitted).

166. *Id.* at \*15.

167. *Voss Eng’g, Inc. v. Bauer*, No. 13-16-00247-CV, 2018 Tex. App. LEXIS 4529, at \*1, \*3 (Tex. App.—Corpus Christi-Edinburg June 21, 2018, no pet.) (mem. op.).

168. *Id.* at \*8–9.

169. *Ali v. Smith*, 554 S.W.3d 755, 757 (Tex. App.—Houston [14th Dist.] 2018, no pet.).

170. *Id.* at 759.

171. *Id.* at 761.

172. 551 S.W.3d 346, 351 (Tex. App.—Houston [14th Dist.] 2018, no pet.).

173. *Id.* at 356.

## 2. *Equitable Estoppel*

In *Barantas, Inc. v. Enterprise Financial Group*, the Dallas Court of Appeals allowed a signatory to an agreement to compel non-signatories to arbitrate “because the supplier’s claims against the non-signatories were so intertwined with and dependent upon the 2008 Agreement that it would be impractical to resolve the supplier’s claims against the sales company’s without simultaneously resolving the claims against the non-signatories.”<sup>174</sup>

### E. THIRD-PARTY BENEFICIARIES

Arbitration agreements can be enforced by third-party beneficiaries, “so long as the parties to the contract intended to secure a benefit to that third party and entered into the contract directly for the third party’s benefit.”<sup>175</sup> As a matter of interpretation, a mere description of the contract’s intended use cannot—on its own—confer third-party-beneficiary status; the intent must be clearly spelled out in the contract.<sup>176</sup>

In *Jody James Farms, JV v. Altman Group, Inc.*, appellant farm argued that they were not a third-party beneficiary to an insurance policy.<sup>177</sup> The Texas Supreme Court held that any general benefit conferred was “indirect and incidental” at best and did not create a third-party beneficiary relationship that would compel appellant to arbitration.<sup>178</sup> The supreme court noted that absent an agreement to arbitrate between the parties, it would not compel arbitration under the agreement.<sup>179</sup>

In *Cardon Healthcare Network, Inc. v. Goldberg*, appellee alleged in an amended petition that she was an intended third-party beneficiary of an agreement between a healthcare network and a health insurance provider.<sup>180</sup> After appellant moved to compel arbitration based on third-party beneficiary theory, appellee dropped that claim. However, appellant continued to argue to compel arbitration because appellee continued to seek benefits from the agreement by referring to terms in the petition. The Austin Court of Appeals held that no third-party beneficiary status existed because there was no evidence that either party to the contract intended to confer upon appellee a benefit by the agreement.<sup>181</sup>

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174. *Barantas, Inc. v. Enter. Fin. Grp.*, No. 05-17-00896-CV, 2018 Tex. App. LEXIS 6169, at \*1, \*26 (Tex. App.—Dallas Aug. 7, 2018, no pet.) (mem. op.).

175. *Jody James Farms, JV v. Altman Grp., Inc.*, 547 S.W.3d 624, 635 (Tex. 2018) (quoting *In re Palm Harbor Homes, Inc.*, 195 S.W.3d 672, 677 (Tex. 2006) (orig. proceeding)).

176. *Id.*

177. *Id.* at 630.

178. *Id.* at 636.

179. *Id.* at 637.

180. *Cardon Healthcare Network, Inc. v. Goldberg*, No. 03-17-00474-CV, 2018 Tex. App. LEXIS 1639, at \*1 (Tex. App.—Austin Mar. 2, 2018, no pet.) (mem. op.).

181. *See id.* at \*12–13.

## IV. COURT INVOLVEMENT

## A. FINAL ORDERS

Cases from this Survey period continued to hold that appellate courts lack jurisdiction when the trial court does not issue a final order on the applicable motion—most commonly in motions to compel arbitration.<sup>182</sup> As such, interlocutory appeals are prohibited, as the appellate court lacks jurisdiction to decide the matter. “A final decision is one that ends the litigation on the merits and leaves nothing more for the court to do but execute the judgment.”<sup>183</sup> When the order on appeal sends the parties to arbitration, the order becomes “final” once the district court has dismissed all the claims before it. However, if the court stays the proceedings pending arbitration, this is not a final order and is therefore unappealable.<sup>184</sup> Appellant stated that he would wait for the dispute to be dismissed so that he could appeal the final order.

In *Griggs v. S.G.E. Management, L.L.C.*, the U.S. Court of Appeals for the Fifth Circuit expanded on the concept of voluntary dismissals and whether they are final orders capable of being appealed.<sup>185</sup> Here, appellant was ordered multiple times to submit the claim to arbitration. However, appellant refused, stating that he disagreed with the order compelling arbitration and was ready to litigate the dispute or wait and appeal the decision after the case was dismissed for want of prosecution.<sup>186</sup> Appellees contended that this was a voluntary dismissal that could not be appealed under Federal Rules of Civil Procedure 41(a). The Fifth Circuit did not agree and held that appellant’s statements were not a voluntary dismissal but merely a statement of his intended inaction; thus, the Fifth Circuit affirmed the dismissal.<sup>187</sup>

The issuance of a partial award will tend to complicate arbitration proceedings, including the court proceeding to confirm the award. In *Signature Pharmaceuticals, L.L.C. v. Ranbaxy, Inc.*, the arbitration panel issued

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182. Section 16(a) of the Federal Arbitration Act further states that an appeal may be taken from an order

(A) refusing a stay of any action under section 3 of this title, (B) denying a petition under section 4 of this title to order arbitration to proceed, (C) denying an application under section 206 of this title to compel arbitration, (D) confirming or denying confirmation of an award or partial award, or (E) modifying, correcting, or vacating an award.

9 U.S.C. § 16(a)(1)(A)–(E).

183. *Edwards v. DoorDash, Inc.*, 888 F.3d 738, 742 (5th Cir. 2018) (internal quotations omitted) (citing *Green Tree Servicing, L.L.C. v. Charles*, 872 F.3d 637, 639 (5th Cir. 2017); 9 U.S.C. § 16(b), (a)(3)).

184. *Griggs v. S.G.E. Mgmt., L.L.C.*, 905 F.3d 835, 839 (5th Cir. 2018); *see also* *Gittins v. MetroPCS Tex., LLC*, No. 13-17-00619-CV, 2017 Tex. App. LEXIS 11597, at \*1 (Tex. App.—Corpus Christi-Edinburg Dec. 14, 2017, no pet.) (mem. op.). In *Gittins*, the motion to compel arbitration was granted, and litigation abated; therefore, there was no final award giving the appellate court jurisdiction over an appeal. *Id.* at \*4.

185. *Griggs*, 905 F.3d at 840.

186. *Id.* at 839.

187. *Id.* at 845.



a partial final award as to their jurisdiction to hear the claim.<sup>188</sup> On appeal, appellee argued that the Dallas Court of Appeals lacked jurisdiction because the trial court did not make a “final decision with respect to an arbitration.”<sup>189</sup> However, under FAA Section 16(a)(1)(D)–(E), the court of appeals held that it had jurisdiction because the trial court expressly denied the companies’ motion to confirm the tribunal’s “Partial Final Award,” which effectively vacated that award and made it a final, appealable order.<sup>190</sup>

## B. LACK OF JURISDICTION

During the Survey period there were many issues connected to the court’s lacking jurisdiction to confirm or vacate an award or lacking jurisdiction to compel arbitration. Cases discussed issues pertaining to the appellate requirement of having a final order from the trial court, the location of the hearing giving jurisdiction to the state courts, and voluntary dismissal subsequently stripping the court of jurisdiction. The consequences of a court not having jurisdiction can be the denial of arbitration as the chosen method for dispute resolution. A case on point is *Shillinglaw v. Baylor University*, where the claimant voluntarily non-suited his claims in the trial court before the court granted the motion to compel arbitration.<sup>191</sup> However, because the claims had already been non-suited, the court lacked jurisdiction to compel arbitration.<sup>192</sup>

In *SM Architects, PLLC v. AMX Veteran Specialty Services, LLC*, appellants moved for the trial court to review the arbitration panel’s denial of a motion to dismiss the arbitration proceedings based on the “failure” to submit a proper certificate of merit.<sup>193</sup> However, when there is no final order on a motion to compel, the appellate court lacks jurisdiction to decide on the interlocutory matters unless there is a statute giving the appellate court jurisdiction to hear the appeal.<sup>194</sup> Here, the Dallas Court of Appeals concluded that the right to immediate interlocutory appeal granted by Texas Civil Practice & Remedies Code Section 150.002 for claims requiring a certificate of merit did not confer jurisdiction on the court of appeals to review an order rendered by an arbitration panel.<sup>195</sup> Additionally, because the TAA does not provide an alternative means for

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188. *Signature Pharm., L.L.C. v. Ranbaxy, Inc.*, No. 05-17-00412-CV, 2018 Tex. App. LEXIS 1827, at \*1 (Tex. App.—Dallas Mar. 12, 2018, pet. denied) (mem. op.).

189. *Id.* at \*13.

190. *Id.* at \*16.

191. *Shillinglaw v. Baylor Univ.*, No. 05-17-00498-CV, 2018 Tex. App. LEXIS 4611, at \*1 (Tex. App.—Dallas June 21, 2018, pet. denied) (mem. op.).

192. *Id.* at \*12.

193. *SM Architects, PLLC v. AMX Veteran Specialty Servs., LLC*, 564 S.W.3d 902, 903 (Tex. App.—Dallas 2018, no pet.).

194. *See, e.g., Thomas v. Std. Cas. Co.*, No. 02-17-00335-CV, 2017 Tex. App. LEXIS 11669, at \*1, \*3 (Tex. App.—Fort Worth Dec. 14, 2017, pet. withdrawn) (mem. op.). Appellant did not establish that there was a valid agreement to arbitrate; therefore, Texas Civil Practice & Remedies Code Sections 171.021 and 171.098(a)(1) did not give the appellate court jurisdiction to hear the appeal. *Id.*

195. *SM Architects, PLLC*, 564 S.W.3d at 907.

judicial review, the court of appeals lacked jurisdiction to hear the interlocutory appeal.<sup>196</sup>

Other issues regarding the requirement for a final order occurred during the Survey period. In particular, mandamus relief is generally unavailable for orders compelling arbitration because the moving party often has an adequate remedy by appealing the final judgment.<sup>197</sup> However, in *In re Ron*, the Fourteenth Houston Court of Appeals highlighted an exception to this general rule: when the order compelling arbitration is void for lack of jurisdiction.<sup>198</sup> In this case, a trial court granted a motion to compel arbitration of multiple disputes, including some issues related to a divorce settlement. Appellant argued that the trial court did not have jurisdiction to compel arbitration over aspects of the divorce settlement because those provisions were in the exclusive jurisdiction of the family court. The court of appeals agreed, holding that the order was void and granting mandamus relief to the claims regarding the validity of the divorce settlement and the child custody arrangement; all other claims were sent to arbitration.<sup>199</sup>

Additional issues arose during the Survey period regarding location of the arbitration proceedings. The courts of the state in which the arbitration was held have jurisdiction to confirm or vacate the award. Therefore, if there is a dispute as to the hearing location, jurisdictional issues also arise. In *EcoClean USA, Inc. v. Geneon Technicians, LLC*, appellants argued that the arbitration agreement became enforceable because the arbitration was not held at a “mutually agreed upon location” as required in the agreement.<sup>200</sup> Additionally, because the agreement did not specify that arbitration was to occur in Texas, the trial court lacked jurisdiction to confirm the award.<sup>201</sup> However, because the arbitration agreement provided that the AAA would determine the location for arbitration if the parties could not agree, which occurred in this case, this made arbitration in Texas proper, giving Texas courts jurisdiction to confirm the award.<sup>202</sup>

### C. GROUNDS FOR VACATUR

There are no common-law grounds for vacating an arbitration award under either the FAA or the TAA.<sup>203</sup> Instead both acts, enumerate spe-

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196. *Id.*

197. *In re Ron*, No. 14-18-00711-CV, 2018 Tex. App. LEXIS 8702, at \*9 (Tex. App.—Houston [14th Dist.] Oct. 25, 2018, no pet.) (orig. proceeding).

198. *Id.* at \*1.

199. *See id.* at \*18.

200. *EcoClean USA, Inc. v. Geneon Techs., LLC*, No. 04-17-00177-CV, 2017 Tex. App. LEXIS 11313, at \*1 (Tex. App.—San Antonio Dec. 6, 2017, no pet.) (mem. op.).

201. *Id.* at \*7.

202. *See id.* at \*6.

203. The common-law claim of manifest-disregard for the law is no longer a basis by which a court can vacate an arbitration award. *See, e.g., C Tekk Sols., Inc. v. Sricom, Inc.*, No. 05-17-00845-CV, 2018 Tex. App. LEXIS 3052, at \*1 (Tex. App.—Dallas May 1, 2018, no pet.) (mem. op.); *see also* TEX. CIV. PRAC. & REM. CODE ANN. § 171.088.

cific grounds to vacate an arbitration award.<sup>204</sup>

Under the FAA, an award may be vacated: (1) where the award was procured by corruption, fraud, or undue means;<sup>205</sup> (2) where there was evidence of partiality or corruption in any of the arbitrators; (3) where the arbitrators were guilty of misconduct or other misbehavior that prejudiced the rights of a party; or (4) where the arbitrators exceeded their powers or so imperfectly executed them that a mutual, final, and definite award upon the subject matter submitted was not made.<sup>206</sup>

The party seeking to vacate the award bears the burden of proof and must timely serve a notice of the motion to vacate the award.<sup>207</sup>

### 1. *Evident Partiality*

“A neutral arbitrator selected by the parties exhibits evident partiality if he ‘does not disclose facts which might, to an objective observer, create a reasonable impression of the arbitrator’s partiality.’”<sup>208</sup> In *Novoa v. Viramontes*, the sole arbitrator had a long-standing and on-going business relationship with a witness for respondents, leading the claimant to move for the recusal of the arbitrator.<sup>209</sup> The arbitrator denied the motion, stating that there was no doubt as to his impartiality or independence. Claimant-appellant argued that this undisclosed relationship amounted to evident partiality justifying the vacatur of the award. The El Paso Court of Appeals held that claimant failed to provide sufficient evidence to vacate the award.<sup>210</sup>

In *Prell v. Bowman*, appellants argued that the arbitration award should be vacated for evident partiality because the arbitrator was Facebook friends with appellee.<sup>211</sup> However, the court held that there was not enough evidence to vacate the award for evident partiality because the arbitrator and appellee were engaged in the same business and

204. *Holmes Builders at Castle Hills, Ltd. v. Gordon*, No. 05-16-00887-CV, 2018 Tex. App. LEXIS 1572, at \*1 (Tex. App.—Dallas Feb. 28, 2018, no pet.) (mem. op.).

205. No cases during the Survey period provided an example of this statutory vacatur ground.

206. *Thiessen v. Fid. Bank*, No. 02-17-00321-CV, 2018 Tex. App. LEXIS 9338, at \*1, \*4 n.1 (Tex. App.—Fort Worth Nov. 15, 2018, no pet.) (mem. op.) (quoting 9 U.S.C. § 10); *see also* 9 U.S.C. § 10(a).

207. *See Craig v. Sw. Sec., Inc.*, No. 05-16-01378-CV, 2017 Tex. App. LEXIS 11741, at \*1, \*5–6 (Tex. App.—Dallas Dec. 18, 2017, no pet.) (mem. op.) (appellant did not meet the three-month statute of limitations to file a motion to vacate the arbitration award in 9 U.S.C. § 12); *see also Reitman v. Yandell*, No. 02-17-00245-CV, 2018 Tex. App. LEXIS 1941, at \*1, \*5 (Tex. App.—Fort Worth Mar. 15, 2018, no pet.) (mem. op.) (same); *Parker v. United-Bilt Homes, LLC*, No. 12-17-00054-CV, 2017 Tex. App. LEXIS 11564, at \*1, \*9 (Tex. App.—Tyler Dec. 13, 2017, pet. denied) (mem. op.) (the trial court was required to confirm the arbitration award because the homeowner did not attempt to demonstrate grounds for vacating the arbitration award under either the FAA or the TAA).

208. *Novoa v. Viramontes*, 553 S.W.3d 45, 53 (Tex. App.—El Paso 2018, no pet.) (quoting *Burlington N.R.R. Co. v. TUCO, Inc.*, 960 S.W.2d 629, 636 (Tex. 1997)).

209. *See id.* at 49.

210. *Id.* at 54.

211. *Prell v. Bowman*, No. 05-17-00369-CV, 2018 Tex. App. LEXIS 3970, at \*1, \*20 (Tex. App.—Dallas June 4, 2018, no pet.) (mem. op.).

being Facebook friends was not enough to create a reasonable impression of partiality.<sup>212</sup>

## 2. *Failure to Postpone the Hearing, Hear Evidence, or Any Other Prejudicial Misbehavior*

Appellant in *Dominguez v. Kenneth D. Eichner, P.C.* made multiple arguments for vacating the arbitrator's award.<sup>213</sup> Appellant argued that the award should be vacated because he was forced to participate in the arbitration without appellee answering his discovery requests and because the arbitrator refused to postpone the arbitration when appellant filed a motion in the trial court to set aside the order compelling arbitration. The First Houston Court of Appeals overruled both these arguments and affirmed the trial court's confirmation of the arbitration award.<sup>214</sup>

## 3. *Exceeded Powers*

During the Survey period, the most common argument for vacatur was that the arbitrators exceeded their authority in rendering the award. The arbitrator's authority is created by the parties' arbitration agreement.<sup>215</sup> Arbitration agreements give wide latitude to the arbitrator, and other agreements limit the arbitrator's authority to specific decisions.<sup>216</sup> "Arbitrators exceed their powers when they decide matters not properly before them or where the resulting award is not rationally inferable from the parties' agreement."<sup>217</sup> The TAA further restricts court review stating: "[t]he fact that the relief granted by the arbitrators could not or would not be granted by a court of law or equity is not a ground for vacating or refusing to confirm the award."<sup>218</sup> Therefore, because the courts give wide deference to arbitrators and the statutes limit courts' ability to review the award, an argument for exceeded power rarely leads to a vacated award.<sup>219</sup>

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212. *See id.* at \*21.

213. *Dominguez v. Kenneth D. Eichner, P.C.*, No. 01-17-00332-CV, 2018 Tex. App. LEXIS 4667, at \*1, \*5-8 (Tex. App.—Houston [1st Dist.] June 26, 2018, no pet.) (mem. op.).

214. *See id.* at \*8.

215. *Constr. Fin. Servs. v. Douzart*, No. 09-16-00035-CV, 2018 Tex. App. LEXIS 1551, at \*1, \*7 (Tex. App.—Beaumont Feb. 28, 2018, pet. denied) (mem. op.) (Arbitrator fashioned an equitable remedy, which was not prohibited by the arbitration agreement; thus, the arbitrator did not exceed her authority.).

216. *See Nafta Traders, Inc. v. Quinn*, 339 S.W.3d 84, 90 (Tex. 2011).

217. *Holmes Builders at Castle Hills, Ltd. v. Gordon*, No. 05-16-00887-CV, 2018 Tex. App. LEXIS 1572, at \*6 (Tex. App.—Dallas Feb. 28, 2018, no pet.) (mem. op.) (The phrase "(a) All applicable Federal and State law . . . shall apply" and "(b) All applicable claims, causes of action, remedies and defenses that would be available in court shall apply" did not limit the power of the arbitrator.).

218. TEX. CIV. PRAC. & REM. CODE ANN. § 171.090.

219. *See, e.g., Pasadera Builders, LP v. Hughes*, No. 04-17-00021-CV, 2017 Tex. App. LEXIS 11538, at \*1, \*9-10 (Tex. App.—San Antonio Dec. 13, 2017, pet. denied) (mem. op.) (The arbitration agreement did not contain any language specifically foreclosing the panel from determining that neither party was a prevailing party, and since the panel was

In *Jefferson County v. Jefferson County Constables Association*, the arbitrator interpreted the collective bargaining agreement (CBA) between the county and its deputy constables.<sup>220</sup> The arbitrator determined that the county violated the agreement when it eliminated several deputy constable positions without regard for seniority of the officers. The county appealed with their motion to vacate, arguing that the arbitrator exceeded his authority by “essentially controlling the budgetary process reserved by law in this instance to the county government.”<sup>221</sup> The county argued that, according to the CBA, they had the right to “abolish” positions as part of their duty to create the budget, and that the seniority system was for layoffs, not the abolishment of a position as a whole.<sup>222</sup> The Texas Supreme Court reiterated the narrowness of the grounds for vacating an arbitration award, holding that even if the arbitrator misinterpreted the CBA, the arbitrator’s award could not be vacated on a mistake of law because the arbitrator acted within his powers.<sup>223</sup>

The U.S. Court of Appeals for the Fifth Circuit similarly gave deference to the arbitrator’s decision in *Delek Refining, Ltd. v. Local 202, United Steel, Paper & Forestry, Rubber, Manufacturing, Energy, Allied Industries & Service Workers International Union*.<sup>224</sup> The CBA required union workers be given first opportunity for work over contract workers and gave the arbitrator “jurisdiction and authority to interpret and apply the provisions in the determination of such grievance but he shall not have jurisdiction or authority to add to or alter in any way the provisions of this Contract.”<sup>225</sup> The Fifth Circuit recognized that sections of the CBA were conflicting, leading to an ambiguity; however, the Fifth Circuit

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not specifically foreclosed from making that finding, the panel “did not act in direct contravention of the agreement or exceed its powers.”); *Miller v. Walker*, No. 02-17-00035-CV, 2018 Tex. App. LEXIS 1313, at \*1, \*16–17 (Tex. App.—Fort Worth Feb. 15, 2018, no pet.) (holding that the award of attorney’s fees was within the arbitrator’s authority and the trial court erred in modifying the award to vacate the award of attorney’s fees); *Belfiore Developers, LLP v. Sampieri*, No. 01-17-00847-CV, 2018 Tex. App. LEXIS 1671, at \*1, \*23–24 (Tex. App.—Houston [1st Dist.] Mar. 6, 2018, no pet.) (mem. op.) (Because “the evidence demonstrated that the liquidated damages were a reasonable forecast” of the seller’s damages, the arbitrators did not exceed their authority); *Acra v. Bonaudo*, No. 05-17-00451-CV, 2018 Tex. App. LEXIS 4987, at \*1, \*12 (Tex. App.—Dallas July 3, 2018, no pet.) (mem. op.) (the arbitration agreement did not create *Nafta Traders* increased judicial review); *Long Lake, Ltd. v. Pillittere*, No. 14-17-00373-CV, 2018 Tex. App. LEXIS 6452, at \*1, \*9 (Tex. App.—Houston [14th Dist.] Aug. 16, 2018, no pet.) (mem. op.) (argument that the arbitrator disregarded a contractual limitation failed because of inadequate evidentiary support); *Midani v. Smith*, No. 09-18-00009-CV, 2018 Tex. App. LEXIS 8954, at \*1, \*15–16 (Tex. App.—Beaumont Nov. 1, 2018, pet. denied) (mem. op.) (“[T]he attorney and law firm’s contentions that the arbitrator incorrectly decided the case could not be characterized as an assertion that the arbitrator exceeded his authority.”).

220. *Jefferson Cty. v. Jefferson Cty. Constables Ass’n*, 546 S.W.3d 661, 663 (Tex. 2018). This case was reviewed under common law principles because the parties were arguing over a collective bargaining agreement to which the Texas General Arbitration Act does not apply. *Id.* at 665.

221. *Id.* at 664.

222. *Id.* at 673.

223. *Id.* at 674.

224. 891 F.3d 566 (5th Cir. 2018).

225. *Id.* at 569 (internal quotations omitted).

held that the arbitrator acted within his powers in interpreting the CBA.<sup>226</sup>

One unique case during the Survey period was *Famsa, Inc. v. Bexar Appraisal District*.<sup>227</sup> Here, the arbitrator derived his power from the Property Tax Code as opposed to an arbitration agreement.<sup>228</sup> Appellant argued that the arbitrator exceeded his authority by assigning the burden of proof to appellants. The San Antonio Court of Appeals held that the statute did not specify which party had the burden of proof, therefore any potential error in assigning the burden to one party or the other would be a mistake of law which the court could not review.<sup>229</sup> Therefore, the court of appeals held that the arbitrator did not exceed his powers in assigning the burden of proof to appellants.<sup>230</sup>

#### D. MODIFICATION OF ARBITRATION AWARDS

Similar to the grounds for vacating an arbitration award, a motion to modify an award is limited to statutory grounds. The TAA authorizes trial courts to correct or modify arbitration awards for “an evident miscalculation of numbers” or “mistake in the description of a person, thing, or property referred to in the award.”<sup>231</sup> An award may also be modified if the arbitrators “made an award with respect to a matter not submitted to them” or if the “form of the award is imperfect in a manner not affecting the merits of the controversy.”<sup>232</sup>

In *Rassouli v. National Signs Holding, LLC*, on a motion to modify the arbitration award, appellant argued that the arbitrator issued an award on an issue not submitted and that there was an evident miscalculation in determining a non-competition period or a “misinterpretation” of the closing date of the non-competition period.<sup>233</sup> The Fourteenth Houston Court of Appeals disposed of the first argument because appellant had *informally* submitted the dispute to the arbitrator. Second, the court of appeals clarified that the statute required an “evident miscalculation of numbers” and appellant’s argument was a miscalculation of *dates*.<sup>234</sup> Additionally, the *misinterpretation* of the closing date also could not be modified because it was not a mistake in *describing* the date.<sup>235</sup> The court of appeals held that the trial court did not err in failing to modify the arbi-

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226. *Id.* at 573.

227. No. 04-17-00672-CV, 2018 Tex. App. LEXIS 3242, at \*1 (Tex. App.—San Antonio May 9, 2018, no pet.) (mem. op.).

228. *Id.*

229. *Id.* at 7.

230. *Id.* (interpreting TEX. TAX CODE ANN. § 41A.09(b)).

231. TEX. CIV. PRAC. & REM. CODE ANN. § 171.091(a)(1)(A)–(B). The FAA has similar grounds for modification. See 9 U.S.C. § 11.

232. TEX. CIV. PRAC. & REM. CODE § 171.091(a)(2)–(3).

233. *Rassouli v. Nat’l Signs Holding, LLC*, No. 14-15-00353-CV, 2017 Tex. App. LEXIS 11651, at \*1 (Tex. App.—Houston [14th Dist.] Dec. 14, 2017, no pet.) (mem. op.).

234. *Id.* at \*13.

235. *Id.* at \*14.

tration award.<sup>236</sup>

In contrast, the Beaumont Court of Appeals in *Construction Financial Services v. Douzart* held that the trial court's modification of the arbitrator's award of attorney's fees by imposing joint and several liability was proper because it "did not affect the merits" of the arbitrator's decision under Texas Civil Practice & Remedies Code Section 171.091(B)(3).<sup>237</sup>

## V. CONCLUSION

The Survey period found numerous Texas and federal courts considering issues arising out of arbitration. Though the courts did not decide any cases of first impression, the cases provided additional discussion of a number of arbitration issues as well as some unique nuances rarely discussed in courts.

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236. *Id.* at \*15–16.

237. *Constr. Fin. Servs. v. Douzart*, No. 09-16-00035-CV, 2018 Tex. App. LEXIS 1551, at \*1, \*16–17 (Tex. App.—Beaumont Feb. 28, 2018, pet. denied) (mem. op.).