Arbitration agreements are intended to expedite the legal process while minimizing fees and costs. In reality, former employees and their counsel often resist submitting their employment claims to arbitration, resulting in protracted and expensive litigation before trial and appellate courts on the issue of whether there is an enforceable arbitration agreement. This year, the Supreme Court of Texas issued two key decisions that may provide employers with stronger legal grounds for enforcing their arbitration agreements.

**In re Copart, Inc.: Pre-Arbitration Discovery**

Once a motion to compel arbitration is filed, opposing counsel will often petition the trial court to permit pre-arbitration discovery in advance of any hearing on the motion to compel. Some trial courts have freely permitted this process without due consideration of the applicable legal standard warranting pre-arbitration discovery.

Maria Ordaz filed suit in state court against her former employer, Copart, Inc.,
alleging discrimination and retaliation under the Texas Commission on Human Rights Act related to the termination of her employment. In response, Copart filed a motion to compel arbitration pursuant to the dispute resolution policy and agreement Ordaz electronically signed during her employment. Copart supported its motion with a sworn business records affidavit from Human Resources Generalist Kallie Sirles. Ordaz’s counsel then “served a notice of Sirles’s deposition and moved to compel pre-arbitration discovery, denying the existence of an enforceable arbitration agreement.”

The trial court granted Ordaz’s motion, and Copart sought mandamus relief in the court of appeals. The court of appeals vacated the order, holding that Ordaz’s counsel had failed to identify any “colorable basis for the trial court to conclude it lacked sufficient information to decide the motion to compel arbitration.” At the same time, the court of appeals allowed Ordaz additional time to file a new motion for pre-arbitration discovery with the trial court.

Ordaz filed a new motion for pre-arbitration discovery and included an “affidavit in which she denied the existence of a valid arbitration agreement, disputed Sirles’s personal knowledge regarding Ordaz’s execution of the agreement, and averred that the agreement lacked consideration.” The trial court granted the motion, and Copart once again sought mandamus with the court of appeals, which was denied. Copart then sought mandamus relief with the Texas Supreme Court.

The Texas Supreme Court began its analysis with citation to the legal standard applicable to considering requests for pre-arbitration discovery and that is, “when a trial court cannot fairly and properly make its decision on the motion to compel because it lacks sufficient information regarding the scope of an arbitration provision or other issues of arbitrability.” Further, the party requesting pre-arbitration discovery must make “a colorable showing that the requested pre-arbitration discovery would aid the trial court in resolving the arbitrability issues raised by the requesting party.”

As an example, the Texas Supreme Court cited, with approval, an earlier court of appeals decision, in which the court held “that the plaintiff’s claim that she did not remember signing the arbitration agreement and was not told the consequences of signing the agreement” was insufficient to establish any “colorable basis to believe that [pre-arbitration] discovery would aid in establishing that she was misled into signing.” The court then ruled “[c]onclusory assertions regarding an arbitration agreement’s validity and factual assertions that have no bearing on the arbitrability of the plaintiff’s claims do not justify pre-arbitration discovery because such assertions provide no reasonable basis to conclude that discovery would aid the trial court in its determination.” Absent a colorable basis, a trial court abuses its discretion in ordering pre-arbitration discovery.

Importantly, one of the arguments most frequently advanced in support of pre-arbitration discovery is the need to investigate the affiant’s personal knowledge of the statements made by the affiant in the business records affidavit. The Texas Supreme Court rejected this argument, stating, “[t]o the extent Ordaz argues Sirles did not personally observe Ordaz … electronically execute the agreement, we agree with Copart that such knowledge has no bearing on Sirles’s status as a witness qualified to verify the authenticity of the various documents attached to her
Aerotek, Inc. v. Boyd: Electronic Execution of Arbitration Agreements

Despite increasing widespread usage of electronic signatures, parties opposing arbitration frequently attack the enforceability of an arbitration agreement lacking a “wet” signature. In particular, denial of electronic execution can be more difficult to rebut than a handwritten signature for which there are likely exemplars by which to draw comparison.

To date, employers have experienced mixed results in seeking to compel arbitration of an electronically signed arbitration agreement, even though both federal and state law explicitly recognize the validity of electronic signatures on legal documents provided sufficient safeguards are maintained to ensure the disputed electronic signature was actually made by the alleged signer. The Texas Uniform Electronic Transactions Act (TUETA) recognizes that electronic signatures may take a variety of forms, including any “electronic sound, symbol, or process attached to or logically associated with a record and executed or adopted by a person with the intent to sign the record.” In particular, an electronic signature may be as simple as “clicking a box” on an online document to indicate consent.

With this framework in mind, the Texas Supreme Court recently ruled in Aerotek, Inc. v. Boyd, that the electronic signatures of four former employees were valid to compel arbitration in a decision the court acknowledged would have far-reaching application. In that case, Aerotek utilized a mandatory, multistep online application process for all job applicants (except for instances requiring accommodation). The onboarding process began with a welcome email being sent to the email address identified by job applicants “during the recruitment and initial interview phase.” The email included a unique link for the job candidate to access the account registration page, which prompted the user to create unique log-in credentials and choose security questions and answers.

Thereafter, the applicant was prompted to complete and sign a variety of forms, including an electronic disclosure agreement (EDA) and mutual arbitration agreement (MAA). Once the applicant completed the process, the completed package was transmitted to Aerotek for consideration. As a candidate navigated this online process, the database logged the electronic activity, including the creation of a date and time stamp for each completed electronic signature.

In moving to compel arbitration, Aerotek provided each former employee’s time-stamped EDA and MAA and a digitized log indicating the date and time of each action taken by each former employee in completing the onboarding process. In response, the former employees tendered their own affidavits, acknowledging that they had completed the online hiring application but denying that they “had ever seen, signed, or been presented with the MAA.”

The trial court held an evidentiary hearing during which Aerotek presented the testimony of its program manager, who had been involved in the design and development of the computerized onboarding program. The program manager
testified as to the onboarding process described above, as well as to the applicable security measures in place. Despite this evidence, the trial court found the former employees’ affidavits to be sufficient to preclude enforcement of the arbitration agreements, and the court of appeals affirmed.

In an 8-1 decision, the Texas Supreme Court reversed, holding that Aerotek conclusively established that the four former employees electronically signed, and thus consented to, the arbitration agreements. Specifically, as the party seeking to compel arbitration, Aerotek met its initial burden, as required under the TUETA, to offer “proof of the efficacy of the security procedures used in generating” the electronically signed arbitration agreements, such that those electronic signatures could be “attribut[ed] to [the] alleged signator[ies].” Once it did so, the four former employees, as the parties resisting arbitration, carried the burden to “offer evidence that [the] security procedures lack[ed] integrity or effectiveness and therefore [could not] reliably be used to connect a computer record to a particular person.” In the case at hand, the court held that the candidates’ “den[ial] [of] the result that the reliable procedures generate” was insufficient to discredit Aerotek’s evidence.

The Aerotek case is a significant victory for employers seeking to enforce mandatory arbitration agreements signed electronically. Employers, however, may want to ensure that they work with reputable software vendors and adopt sufficient security safeguards to establish the authenticity of the online signature. If an electronic signature is challenged, courts are likely to require the employer to produce a witness who can verify the security and reliability of the onboarding process.


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