

## Were Mandatory Arbitration Obligations Assigned When the Company Was Purchased?

*Judge Abraham J. Gafni (Ret.)*

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What happens when a company purchases all the assets and liabilities of its predecessor? Does it thereby acquire the right to enforce a mandatory arbitration agreement the predecessor had with its employees?

This question was considered recently in *Garza v. Ayvaz Pizza, (Ayvaz)* 2023 WL 6518092 (S.D. Texas, 10/5/ 23).

There, the class action complaint alleged that the successor company violated the Fair Labor Standards Act by failing to correctly reimburse the costs of employees who used their vehicles on the job.

The named plaintiff had signed an agreement to arbitrate with the predecessor company, MUY Pizza-Tejas, LLC (MUY). The agreement provided, in pertinent part:

“MUY companies on behalf of itself and its affiliated companies , officers, directors and managers (hereinafter MUY) and I agree to use confidential binding arbitration instead of going to court for any disputes or claims involving pay/wages ,overtime or other forms of compensation ... including any claims now in existence or that may

exist in the future that I may have against MUY, its affiliates, and their current or former officers, directors or managers or that MUY may have against me.”

In support of its motion to compel arbitration Ayvaz alleged: It entered into a transaction to purchase all the assets of its predecessor, MUY. In consummating that transaction, it offered employment to and retained essentially all of the MUY employees seamlessly, and nearly all of the employees retained their positions, job responsibilities and job locations they previously held with MUY. There was no change to the terms or conditions of their employment, except that they were now employed by Ayvaz.

After the transaction was consummated, Ayvaz assumed physical possession of the former MUY employee files, including any arbitration agreements those employees had with MUY. In considering whether arbitration was required, the court first noted that while doubts should generally be resolved in favor of arbitration, the policy is to make arbitration agreements only as enforceable as other contracts—not more so.

### **Were MUY’s Arbitration Rights Assignable?**

Ayvaz argued and the court recognized that whether a nonsignatory can enforce an arbitration agreement is guided by traditional principles of state law, and that under Texas law all contracts are assignable. But, as with any other contract term, parties to a contract can also agree that their rights in a particular agreement are not assignable.

The plaintiff asserted, however, that the arbitration agreement restricted MUY’s ability to transfer its rights under the agreement because it “limited the parties bound to only MUY and ‘their current or former officers, directors or managers’” Importantly, that clause also does not include future officers, directors or managers, signaling that the plain language of the agreement did not include future assigns.”

The court rejected this argument. It noted that the reference to “current or former officers” appearing in the MUY agreement “describes the scope of covered claims—

not which parties may enforce the agreement” which only refers to “any claims now in existence or that may exist (a) that I may have against MUY, its affiliates, and their current or former officers, directors or managers ...” “Moreover, the purported omission is future officers, directors, and managers, which are not at issue here.” Thus, “this language does not restrict MUY’s ability to assign its arbitration rights,” and “MUY was able to assign its rights.”

### **Did MUY Assign Its Arbitration Rights to Defendant?**

The plaintiff next argued that even if such arbitration rights were assignable, Ayvaz failed to show that they were so assigned.

- Ayvaz cited three pieces of evidence in response to this argument.
- Ayvaz’s spokesperson’s statement that Ayvaz had entered a transaction to purchase all of the assets and liabilities of MUY.
- The spokesperson’s statement that Ayvaz had assumed possession of all of the MUY employees’ files including any arbitration agreements those employees had with MUY.
- Documents with it its own affiliated entity for administrative services in transferring former MUY employees.

The plaintiff contended that the spokesperson’s statement was conclusory only because it failed to attach or otherwise present excerpts of the underlying agreements showing what was purchased. The plaintiff cited Texas cases holding that an alleged assignee must come forward with evidence of the assignment, and Ayvaz had offered no such admissible evidence.

In response, Ayvaz cited a California case in which the court did rely on an assistant secretary of the acquiring company who attested, without more, that the acquiring company “had assumed all of the predecessor’s assets ,debts, rights, responsibilities liabilities and obligations, including all the rights and obligations arising from the predecessor’s employee relationships.” The California court accepted this undisputed

language as reflecting “that the defendant acquired all of the predecessor’s assets, employees , rights and liabilities.” See *Marenco v. DirecTV* 233 Cal. App. 4th 1409 (Cal. Ct. App. 2015).

The court suggested that it would have been prepared to accept Ayvaz’s spokesperson’s oral statement regarding assignment if it had been as extensive as the assistant secretary’s attestation in *Marenco* that specifically stated that the acquirer’s purchase included the predecessor’s “assets, debts, rights responsibilities liabilities and obligations.” The statement of Ayvaz’s spokesperson, however, only referred to the acquisition of all MUY’s “assets and liabilities.” It did not mention rights, responsibilities, or obligations.

Additionally, in *Marenco*, the statement of the assistant secretary went even further, stating in detail, that the acquiring company’s assumption “included all the rights and obligations arising from the predecessor’s employee relationship.” By sharp contrast, the statement of Ayvaz’s spokesperson only stated that the defendant “assumed possession of the former MUY employee files.”

Thus, the statements of Ayvaz’s spokesperson were “confusingly vague.” They did not clarify whether “assets and liabilities” referred to MUY’s contractual rights and obligations to its employees or only to its balance sheet? The court considered the physical possession of the plaintiff’s employment file to be of “marginal relevance.”

The court was clearly unsatisfied with the Ayvaz’s motion to compel arbitration because it neither attached excerpts from its agreement or at least an “oral declaration that the defendant assumed MUY’s contractual obligations to its employees.”

Finally, Ayvaz argued that the plaintiff’s acceptance of identical employment with it constituted an “implied acceptance” of Ayvaz’s decision to maintain the existing agreement, including the arbitration provision. Ayvaz again relied upon *Marenco* which held that the arbitration agreement there remained binding

because the acquiring company, in acquiring the predecessor's employment relationship as part of the merger, had specifically assumed all the rights and obligations arising from the predecessor's employment relationship.

In *Ayvaz*, however, after purchasing MUY's assets and liabilities, Ayvaz entered into a new employment relationship with the plaintiff. That an employee is offered employment by a successor company is not enough to set the terms of that relationship. This new contract, like all contracts, required an offer and acceptance. The burden was not on the plaintiff to disprove a contract term relating to the arbitration provision that had not been proven by Ayvaz. Rather, Ayvaz had the obligation to offer evidence about the offer and acceptance of that provision.

In short, Ayvaz failed to present evidence reflecting that the original arbitration agreement with MUY should continue to be similarly applied to the Plaintiff, although the court noted several instances where provision of that information might have allowed it to so find.

The lesson for parties acquiring another company appears clear. Assure that your agreements sufficiently, and not just impliedly, clearly reflect all of the assets, including all contractual rights and obligations which the parties believe are being transferred in the transaction.

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