
Litigating in the U.S. Voids an International Arbitration Agreement Under NY Convention

by Ronan J. McHugh

There are many reasons why businesses engaged in international commerce may choose arbitration to settle disputes. Having made the effort and decision in their contracts to forego resolution of disputes in court, parties wishing to retain their choice of arbitration should exercise care not to engage in litigation that may void these arbitration rights.

This situation was again made clear in the recent U.S. District Court decision in *Belcourt v. Grivel SLR et al*, 2009 WL 3764085 (D.Utah), November 9, 2009. The court held that arbitration had been waived by Grivel litigating the matter. Applying an analysis for the first time in the U.S. 10th Circuit, the court found that a party to an international arbitration agreement may waive arbitration by taking steps in a litigation contrary to the agreement, causing the agreement to become null and void under Article II(3) of the New York Convention. The court also acknowledged its circumscribed remit for making determinations under the New York Convention regarding the validity of arbitration agreements. And, it detailed the factors for determining whether a waiver of an international arbitration agreement has occurred.

The Applicable Facts

Belcourt, the U.S. distributor for Grivel, and Grivel, an Italian mountaineering equipment company, entered into a series of contracts containing an agreement to arbitrate disputes. When disputes arose, Belcourt sued in court. Receiving no response to the suit, Belcourt filed for default. Grivel moved to set aside the default, which was granted. Grivel then filed an answer, third-party complaint and counterclaim. The Answer consented to jurisdiction and venue in U.S. District Court in Utah. Belcourt and the third-party defendant responded to Grivel's pleadings with motions to dismiss. The court issued a scheduling order. Only after all of this did Grivel move for arbitration.

The court found that Grivel had waived arbitration. "Defendants' actions have been inconsistent with the right to arbitrate. By consenting to jurisdiction and venue, the Defendants appeared willing to proceed with litigating this dispute. In addition, the Defendants appeared before the court at the hearing to set aside the default certificate and have made numerous filings. At no time did the Defendants mention the right to arbitrate or indicate that they would be seeking a remedy outside the court. Although the delay in seeking

arbitration may not have been particularly lengthy [between March 6 and August 10, 2009] and significant discovery has not yet been undertaken, some important litigation steps have been taken.”

Grivel’s filing of a counterclaim and third-party complaint was significant. “These actions brought new parties into the litigation (the Third-Party Defendants) and precipitated the filing of defensive motions by Mr. Belcourt and the Third-Party Defendants. The filing of a counterclaim is an important consideration in the waiver analysis.” The court also noted the effect of Grivel’s litigation acts on the other parties, which “certainly led the opposing parties to believe that the Defendants planned to litigate this matter in the District of Utah. This caused the parties to spend significant time and resources defending against the counterclaim and third-party complaint.”

Finally, it was also not clear that Grivel wished to arbitrate: “[E]ven after the motion to compel arbitration, it is not clear that the Defendants do not wish to waive the right to arbitrate. The reply memorandum submitted by the Defendants appears to indicate a willingness to proceed in this court provided Italian law is applied to the claims(Def.’s Reply Mem. at 6-7.). Furthermore, at the hearing on this motion, the Defendants represented to the court a willingness to proceed in the District of Utah even if their motion were granted, provided Italian law is applied. These representations are inconsistent with the right to arbitrate and indicate waiver.”

The Relevant Law

The liberal U.S. federal policy favoring arbitration agreements, and the presumption in their favor, is “even stronger in the context of international commercial arbitration agreements” under the New York Convention. The court noted that “The Tenth Circuit has held that courts should perform a ‘very limited inquiry ... when presented with a request to refer an international dispute to arbitration.’” This inquiry is:

- “1. Is there an agreement in writing to arbitrate the subject of the dispute?
2. Does the agreement provide for arbitration in the territory of the signatory of the Convention?
3. Does the agreement arise out of a legal relationship whether contractual or not, which is considered as commercial?
4. Is a party to the agreement not an American citizen, or does the commercial relationship have some reasonable relation with one or more foreign states?

If these questions are answered in the affirmative, a court is *required* to order arbitration.”

In *Belcourt* all of these questions were answered affirmatively. Nevertheless, “Under Tenth Circuit precedent, a court may only refuse to enforce a valid international arbitration agreement if it is ‘null and void, inoperative or incapable of being performed’” under Article III (2) of the New York Convention (citing *Riley v. Kingsley Underwriting Agencies, Ltd.*, 969 F.2d 953, 959 (10th Cir.1992)). The court noted, “The Tenth Circuit has not considered whether waiver falls under the “null and void” exception. But courts considering this question have concluded that because the right to arbitration is a contract right, it, just like any other contract right, can be waived.” The court did not concern itself with the fact that these other courts considering the matter were doing so “in a domestic setting.” The same waiver rules applied. “The test for determining whether the right to arbitration has been waived is well established. The court must examine:

1. whether the party’s actions are inconsistent with the right to arbitrate;

2. whether the litigation machinery has been substantially invoked and the parties were well into preparation of a lawsuit before the party notified the opposing party of an intent to arbitrate;
3. whether a party either requested arbitration enforcement close to the trial date or delayed for a long period before seeking a stay;
4. whether a defendant seeking arbitration filed a counterclaim without asking for a stay of the proceedings;
5. whether important intervening steps (e.g., taking advantage of judicial discovery procedures not available in arbitration) had taken place; and
6. whether the delay affected, misled, or prejudiced the opposing party.”

Conclusion

Belcourt sets out clearly how an international arbitration agreement may be waived under the New York Convention by litigating in a U.S. court. It establishes the test that U.S. federal courts in the 10th Circuit will apply in considering waiver (which differ very little from the factors applied in the U.S. generally to the issue). A review of the case shows the importance of having a clear approach to deciding strategically the forum to resolve disputes and to focus on the arbitration clause when a dispute first arises—which may not have occurred in *Belcourt*, the clause being in a document written in Italian. It is also not clear why Grivel did not invoke its arbitration rights even if it wished to secure the application of Italian law—arbitration not being any less inimical to such than court proceedings. As this case will now continue in court in Utah, which is not the forum the parties initially agreed to use to resolve their disputes, the moral of the case is that a party should review its agreement’s dispute provisions carefully immediately upon a dispute arising, and make strategic decisions taking this into account so as to ensure that it proceeds in a forum it has agreed and chosen, not one that someone else chooses.

If you have any questions about the content of this alert, please contact the Pillsbury attorney with whom you regularly work or any of the attorneys below.

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