

WAIVER OF RIGHT TO ARBITRATE

Introduction

A party may explicitly or implicitly waive its right to arbitration. The focus of the present analysis is implicit waiver by referring the matter to courts i.e., when may a party's resort to litigation be construed as a waiver of its right to arbitration?

Nature of waiver of right to arbitrate

There is a presumption against waiver of arbitration in the United States¹ because there is a strong liberal federal policy in favor of arbitration.² As a result of this, a waiver of the right to arbitrate is not lightly inferred³ and any party arguing waiver of arbitration has a heavy burden of proof.⁴

Gutierrez v. Wells Fargo Bank, NA summarized this as follows:⁵

“Careful examination of our precedent reveals that the purpose of the waiver doctrine is to prevent litigants from abusing the judicial process. Acting in a manner inconsistent with one's arbitration rights and then changing course mid-journey smacks of outcome-oriented gamesmanship played on the court and the opposing party's dime. The judicial system was not designed to accommodate a defendant who elects to forego arbitration when it believes that the outcome in litigation will be favorable to it, proceeds with extensive discovery and court proceedings, and then suddenly changes course and pursues arbitration when its prospects of victory in litigation dim. Allowing such conduct would ignore the very purpose of alternative dispute resolution: saving the parties' time and money.

As a threshold matter, the court determines the issue of whether the right to arbitrate has been waived or whether the issue must be submitted to arbitration.⁶

Test for waiver of arbitration in the U.S.

In order to constitute waiver of the right to arbitrate, the invocation and utilization of the litigation machinery must generally be substantial.⁷ Different jurisdictions have each developed varied tests on what specifically constitutes substantial invocation and utilization of the courts. The discussion usually involves a two-pronged analysis: (i) whether the totality of the circumstances

¹ *S & H Contractors, Inc. v. A.J. Taft Coal Co.*, 906 F.2d 1507, 1514 (11th Cir. 1990); *Miller Brewing Co. v. Fort Worth Distrib. Co.*, 781 F.2d 494, 497 (5th Cir. 1986).

² *Moses H. Cone Mem'l Hosp. v. Mercury Constr. Corp.*, 460 U.S. 1, 24 (1983).

³ *Schreiber v. Friedman*, 2017 U.S. Dist. LEXIS 221610, at *21 (E.D.N.Y. March 31, 2017), citing *Thyssen, Inc. v. Calypso Shipping Corp., S.A.*, 310 F.3d 102, 104-105 (2d Cir. 2002).

⁴ *Gutierrez v. Wells Fargo Bank, NA*, 889 F.3d 1230, 1236 (11th Cir. 2018), citing *Stone v. E.F. Hutton & Co.*, 898 F.2d 1542, 1543 (11th Cir. 1990).

⁵ 889 F.3d 1230, 1236-37 (11th Cir. 2018).

⁶ *Schreiber v. Friedman*, 2017 U.S. Dist. LEXIS 221610, at *22 (E.D.N.Y. March 31, 2017)

⁷ *S & H Contractors, Inc. v. A.J. Taft Coal Co.*, 906 F.2d 1507, 1514 (11th Cir. 1990).

constitutes waiver; and (ii) whether the party's conduct has prejudiced the opposing party.⁸ This is discussed in further detail below.

The first requisite of totality of circumstances constituting waiver generally looks into the following: (i) the time elapsed between commencement of litigation and the request for arbitration; (ii) litigation costs; and, (iii) extent of litigation proceedings that have already occurred.⁹ There is a slight divergence in the analysis in different jurisdictions. Some cases hold that the totality of circumstances should show that the party has acted inconsistently with the right to arbitrate¹⁰ but there are also some cases that hold that active participation in a lawsuit, even if the act does not constitute an inconsistency to the right to arbitrate, may meet this requirement.¹¹

The courts have analyzed this two-pronged test in different ways.

In one instance,¹² the court seemed to treat the test as a two-step approach where the absence of the first requisite would already render the intent to waive absent without further examination with regard to prejudice. In the other instances,¹³ the court seemed to examine the circumstances of the case with the two prongs considered cumulatively.

A case has held that "key ingredient in the waiver analysis is fair notice to the opposing party and the District Court of a party's arbitration rights and its intent to exercise them."¹⁴ However, there are other cases that hold that "the key to the waiver analysis is prejudice and waiver may be found only when prejudice to the other party is demonstrated."¹⁵ In discussing what constitutes prejudice, *E.C. Ernst, Inc. v. Manhattan Construction Co.*¹⁶ states that "substantially invoking the litigation machinery qualifies as the kind of prejudice...that is the essence of waiver."

⁸ *Blue Cross & Blue Shield of Ga., Inc. v. DL Inv. Holdings, LLC*, 2018 U.S. Dist. LEXIS 210899, at *23-24 (N.D. Ga. December 14, 2018); *Gutierrez v. Wells Fargo Bank, NA*, 889 F.3d 1230, 1236 (11th Cir. 2018); *Ivax Corp. v. B. Braun of Am., Inc.*, 286 F.3d 1309, 1315-16 (11th Cir. 2002).

⁹ *In re S & R Co. of Kingston v. Latona Trucking, Inc.*, 159 F.3d 80, 83 (2nd Cir. 1998).

¹⁰ *Blue Cross & Blue Shield of Ga., Inc. v. DL Inv. Holdings, LLC*, 2018 U.S. Dist. LEXIS 210899, at *23 (N.D. Ga. December 14, 2018); *Gutierrez v. Wells Fargo Bank, NA*, 889 F.3d 1230, 1236 (11th Cir. 2018); *S & H Contractors, Inc. v. A.J. Taft Coal Co.*, 906 F.2d 1507, 1514 (11th Cir. 1990).

¹¹ *Schreiber v. Friedman*, 2017 U.S. Dist. LEXIS 221610, at *20-21 (E.D.N.Y. March 31, 2017); *Miller Brewing Co. v. Fort Worth Distrib. Co.*, 781 F.2d 494, 497 (5th Cir. 1986); *Cornell & Co. v. Barber & Ross Co.*, 360 F.2d 512, 513 (D.C. Cir. 1966); *Doctor's Assoc., Inc. v. Distajo*, 66 F.3d 438, 455 (2d Cir. 1995).

¹² *Ivax Corp. v. B. Braun of Am.*, 286 F.3d 1309, 1320 (11th Cir. 2002).

¹³ *S & H Contractors, Inc. v. A.J. Taft Coal Co.*, 906 F.2d 1507, 1514 (11th Cir. 1990).

¹⁴ *Gutierrez v. Wells Fargo Bank, NA*, 889 F.3d 1230, 1237 (11th Cir. 2018); *Blue Cross & Blue Shield of Ga., Inc. v. DL Inv. Holdings, LLC*, 2018 U.S. Dist. LEXIS 210899, at *23 (N.D. Ga. December 14, 2018).

¹⁵ *Kausar v. GC Servs. Ltd. P'ship*, 2018 U.S. Dist. LEXIS 167166, at *3-4 (D.N.J. September 27, 2018); *Schreiber v. Friedman*, 2017 U.S. Dist. LEXIS 221610, at *21 (E.D.N.Y. March 31, 2017); *LG Elecs., Inc. v. Wi-Lan USA, Inc.*, 623 Fed. Appx. 568, 569 (2d Cir. 2015); *Thyssen, Inc. v. Calypso Shipping Corp., S.A.*, 310 F.3d 102, 105 (2d Cir. 2002); *La. Stadium & Exposition Dist. v. Merrill Lynch, Pierce, Fenner & Smith Inc.*, 626 F.3d 156, 159 (2d Cir. 2010); *FPE Found. v. Cohen*, 801 F.3d 25, 31 (1st Cir. 2015).

¹⁶ 559 F.2d 268, 269 (5th Cir. 1977), see also *Rota-McLarty v. Santander Consumer USA, Inc.*, 700 F.3d 690, 702 (4th Cir. 2012).

Significantly, there is also substantial divergence with regard to whether prejudice to the other party is needed.¹⁷ Majority of the circuits (first,¹⁸ second,¹⁹ third,²⁰ fourth,²¹ fifth,²² sixth,²³ eighth,²⁴ tenth,²⁵ eleventh,²⁶ and D.C. circuits²⁷) require the presence of prejudice for the existence of waiver of the right to arbitrate. On the contrary, the seventh²⁸ circuit holds that there is waiver to arbitrate by the mere fact of participation in litigation and there is no need to determine whether there was prejudice on the part of the other party.

The determination of presence or absence of the waiver of the right to arbitrate is factual in nature and, hence, dependent on the circumstances of each case.²⁹ The following are some case law on the matter and a brief description on how the tests were applied to the particular facts of each case:

- In *Gutierrez v. Wells Fargo Bank, NA*, the court held that Wells Fargo did not act inconsistently with its right to arbitrate the claims of the unnamed plaintiffs because, among others, it filed a reply and an answer in the district court reserving its arbitration rights to this set of plaintiffs.
- In *Blue Cross & Blue Shield of Ga., Inc. v. DL Inv. Holdings, LLC*, the court held that defendants waived their right to arbitrate when it only decided to demand arbitration after the court granted BCBS's motion for expedited discovery.³⁰
- In *Dickens v. GC Servs.*, the court, citing *Gutierrez*, denied GC Services' motion to compel arbitration since it had actively participated in litigation and belatedly invoked for the first time the right to arbitration.³¹
- In *S&H Contractors, Inc. v. A.J. Taft Coal Co.*, the court held that S&H waived its right to arbitrate when it waited eight months from the time it filed its complaint to demand arbitration. During that period, A.J. Taft (i) filed a motion to dismiss and an opposition to S&H's motion for discovery; and (ii) endeavored depositions of five Taft employees. The

¹⁷ See <http://arbitrationblog.kluwerarbitration.com/2011/08/30/implicit-waiver-of-the-right-to-arbitrate/> (last accessed: April 9, 2019).

¹⁸ *FPE Found. v. Cohen*, 801 F.3d 25, 31 (1st Cir. 2015).

¹⁹ *LG Elecs., Inc. v. Wi-Lan USA, Inc.*, 623 Fed. Appx. 568, 569 (2d Cir. 2015); *Thyssen, Inc. v. Calypso Shipping Corp., S.A.*, 310 F.3d 102, 105 (2d Cir. 2002); *La. Stadium & Exposition Dist. v. Merrill Lynch, Pierce, Fenner & Smith Inc.*, 626 F.3d 156, 159 (2d Cir. 2010).

²⁰ *Gray Holdco, Inc. v. Cassady*, 654 F.3d 444, 453-454 (3rd Cir. 2011).

²¹ *Rota-McLarty v. Santander Consumer USA, Inc.*, 700 F.3d 690, 702 (4th Cir. 2012).

²² *E.C. Ernst, Inc. v. Manhattan Construction Co.*, 559 F.2d 268, 269 (5th Cir. 1977).

²³ *Johnson Assocs. Corp. v. HL Operating Corp.*, 680 F.3d 713, 719-721 (6th Cir. 2012).

²⁴ *Erdman Co. v. Phoenix Land & Acquisition, LLC*, 650 F.3d 1115, 2011, 1118-1120 (8th Cir. 2011)

²⁵ *Hill v. Ricoh Ams. Corp.*, 603 F.3d 766, 774-775 (10th Cir. 2010).

²⁶ *Gutierrez v. Wells Fargo Bank, NA*, 889 F.3d 1230, 1236 (11th Cir. 2018); *Ivax Corp. v. B. Braun of Am., Inc.*, 286 F.3d 1309, 1315-16 (11th Cir. 2002).

²⁷ *National Foundation for Cancer Research v. A.G. Edwards & Sons, Inc.*, 821 F.2d 772, 777-778 (D.C. Circuit 1987).

²⁸ *Smith v. GC Servs. Ltd. P'ship*, 907 F.3d 495, 7th Cir 2018).

²⁹ *Schreiber v. Friedman*, 2017 U.S. Dist. LEXIS 221610, at *21 (E.D.N.Y. March 31, 2017), citing *In re S & R Co. of Kingston v. Latona Trucking, Inc.*, 159 F.3d 80, 83 (2nd Cir. 1998); *Tyco Int'l (U.S.) Ltd. v. Swartz (In re Tyco Int'l Ltd. Sec. Litig.)*, 422 F.3d 41, 46 (1st Cir. 2005).

³⁰ *Blue Cross & Blue Shield of Ga., Inc. v. DL Inv. Holdings, LLC*, 2018 U.S. Dist. LEXIS 210899, at *25 (N.D. Ga. December 14, 2018).

³¹ *Dickens v. GC Servs.*, 336 F. Supp. 3d 1369, 1377 (M.D. Fla. 2018).

court concluded that A.J. Taft was prejudiced by S&H's delay in demanding arbitration and by its invocation of the litigation process.

- In *Miller Brewing Co. v. Fort Worth Distrib. Co.*,³² the court held that FWDC waived its right to arbitrate because of the following: (i) its original petition did not mention the arbitration clause and it was only eight months after that it announced its intention to arbitrate; (ii) while its demand for arbitration lay dormant for 3.5 years, FWDC was busily pursuing its legal remedies; (iii) numerous depositions were taken; and (iv) Miller paid over \$85, 000 in legal fees and expended more than 300 hours of its own employees' time defending FWDC claims.
- In *Benoay v. Prudential-Bache Secur., Inc.*,³³ the court held that mere participation in discovery does not constitute prejudice amounting to waiver. It held that the fact that the motion to compel arbitration was made 2.5 years after the initiation of action does not constitute waiver because there was a change of law within the period that affected the parties' rights

Waiver of the right to arbitrate in other common law jurisdictions

Other common law jurisdictions may have a slightly lower bar than the U.S. in determining whether there was a waiver of the right to arbitrate. Whereas the U.S. requires something amounting to estoppel, Australia and the UK may generally be a bit looser by allowing a manifestation of intent to waive, even if not inducing prejudice, to be sufficient.³⁴

Waiver of the right to arbitrate in civil law jurisdictions

Civil law jurisdictions seem to adopt the same concept of waiver of the right to arbitration with the rest of the common law jurisdictions. Some civil law jurisdictions do not require the presence of prejudice of the other party.

Conclusion

There is an emphasis across jurisdictions that simply participating in, and even initiating litigation, is not a *per se* waiver of arbitration rights, depending on the circumstances. The line at which litigating crosses into prejudicial territory—thereby constituting a waiver—is murky and unsettled within jurisdictions, much less across them.

Additionally, the scope of the waiver of arbitration—i.e., whether the party has waived its right to arbitrate all claims under a contract, or merely those pursued in court—is an issue that varies across and within jurisdictions. Uniformly, though, the particular circumstances of a given party's conduct will be determinative on this question as well.

In the U.S., the presumption in favor of arbitration usually works to limit the extent of any waiver found; this is also a function of the test, which requires prejudice and thus can more easily be limited to those claims which have been fully pursued.

³² 781 F.2d 494 (5th Cir. 1986).

³³ 805 F.2d 1437, 1440 (11th Cir. 1986).

³⁴ Peter Gillies, Andrew Dahdal, *Waiver of a Right to Arbitrate by Resort to Litigation, in the Context of International Commercial Arbitration*, 2 J. Int'l Com. L & Tech. 221 (2007).



Other jurisdictions, which treat the waiver analysis more as a contractual repudiation of the arbitration agreement, will find a full waiver more easily. The rationale is that once a party has manifested an intent sufficient to “repudiate” the arbitration clause, the party has done so for all claims. Again, however, this is based on a fact-specific analysis of the party’s intent that may lead to differing conclusions.

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