



The Fifth Circuit examines co-defendants' acts and the waiver doctrine

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The US Fifth Circuit recently examined whether the acts of an arbitration proponent's co-defendants may be imputed to that proponent for the purposes of determining it had waived its right to arbitrate, especially where the proponent had (i) adopted a wait-and-see attitude regarding service; (ii) otherwise benefitted from its co-defendants' use of the judicial process; and (iii) shared ownership with the other co-defendants.

Accepting that the party seeking arbitration might still be subject to a finding of waiver based on traditional agency or alter-ego principles, the Fifth Circuit nevertheless declined to extend the waiver doctrine in this context.

Rasheed Al Rushaid et al v. National Oil Well

In July, the United States Court of Appeals for the Fifth Circuit examined the doctrine of waiver in connection with an international arbitration dispute. The case involved a motion to compel arbitration in a case involving several parties, including Al Rushaid Parker Drilling Ltd. (ARPD), Rasheed Al Rushaid, and Al Rushaid Petroleum Investment Corp. (collectively, the plaintiffs) and National Oilwell Varco Inc.; National Oilwell Varco LP (NOV LP); NOW Oilfield Services, LLC, NOV Norway; Grant Prideco, LP; and Grant Prideco Holding, LLC (collectively, the defendants). The dispute arose out of various separate contracts between ARPD and the individual defendants.

ARPD served all the defendants except NOV Norway. The parties, except NOV Norway, subsequently engaged in extensive and costly pre-trial discovery – over 400 separate document requests and 129 interrogatories. Subsequently, ARPD took steps to serve NOV Norway pursuant to the Hague Convention.

After service was effected, the other defendants continued to participate in litigation. For its part, however, NOV Norway sought to arbitrate, including sending a demand for arbitration and moving to compel arbitration and stay proceedings. The District Court denied the motion to compel, holding that there was no arbitration agreement and that NOV Norway had waived any right to arbitrate by substantially invoking the judicial process thereby prejudicing its counter-party. Notably, the District Court based its waiver decision not on NOV Norway's actions, but on those of its co-defendants.

Appeals Court determines District Court erred

The Appeals Court determined the District Court had erred. With respect to the waiver issue in particular, the Appeals Court noted that it had not previously had opportunity to address when, if ever, the action of arbitration co-defendants may be imputed to the proponent for the purposes of determining waiver.[1] The Appeals Court further noted that the District Court's reasoning was not based on traditional principles of alter-ego or agency doctrines which often permit courts to look through or disregard the separate corporate form so as to treat what would otherwise be considered separate parties as one. Such principles have been relied upon in the past by other courts, including the US Supreme Court, to determine

whether, for example, an affiliate's consent to arbitrate can bind a non-signatory, or whether an affiliate's waiver of personal jurisdiction could result in a corporation having waived its right to resist the court's jurisdiction.

Rather, in this case, the District Court based its decision on the fact that NOV Norway (i) shared ownership and counsel with the co-defendants; (ii) benefitted from its co-defendants' discovery; and (iii) facilitated the lengthy discovery process by refusing informal service.

The Appeals Court decided, however, that these facts could not be determinative. The Appeals Court deemed it inappropriate to punish a defendant for refusing to accept informal service. Indeed, the Appeals Court held that such a rule (to the extent it were to exist) would essentially require defendants to accept informal process thereby giving up their right to proper service so as to preserve their right to arbitrate. The Appeals Court further reasoned that attributing the actions of an arbitration proponent's co-defendants to it simply because it benefitted from those actions would cast an unduly wide net.

In short, the Appeals Court stated that to "deprive a party of its right to arbitrate merely because of those benefits would not be reasonable if the party was not responsible for the litigation activities."

Room for tactical maneuvering?

Arguably, the Appeals Court's decision leaves open some room for tactical maneuvering permitting related parties – particularly those who are harder to serve – to take advantage of certain of the benefits of the judicial process without the drawback of relinquishing their right to arbitrate in private forums.

[1] The Appeals Court noted that other courts had confronted the issue. See *Doctor's Assocs., Inc. v. Distajo*, 66 F.3d 438, 456-57 (2d Cir. 1995) (holding that actions of proponent's affiliates could be imputed to proponent if the affiliates "were mere alter egos" of the proponent); *Yates v. Doctor's Assocs., Inc.*, 193 Ill. App. 3d 431, 440 (Ill. App. Ct. 1990) (holding actions of affiliate attributable to proponent since affiliate was "at least its agent").

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