"Should I Stay or Should I Go"


In this conversation, Rob Harris and Dave Reif, two arbitrators/mediators, discuss the remedies available to a court compelling arbitration – not the hit by the British Punk Band, the Clash.

Dave Reif – So, Rob, in ultimate arbitration geek style, I was reading the *cert.* applications pending before SCOTUS. (By the way, SCOTUSblog is an interesting and informative way to follow the Supreme Court). One of those petitions, *Smith v. Spizzirri,* raises perhaps the hottest (okay, maybe a little hyperbolic), current issue in arbitration law. What options are open to the court after it grants a motion to compel arbitration? May it dismiss the case or only stay it?

Rob Harris—For those who do not speak geek, the practical issue facing lawyers is what happens to a court case if a judge determines that it should go to arbitration. Since the Federal Arbitration Act doesn't allow an appeal from an order compelling arbitration, unless the court dismisses the case, the plaintiff—who believes the judge got it wrong— needs to go through the entire arbitration process and only then (assuming she loses)—raise in post-arbitration proceedings that the case never should have been arbitrated in the first place.

Dave Reif—Correct. Section 3 of the Federal Arbitration Act says that, after granting an application to compel arbitration, the court "*shall* stay the action until such arbitration has been had …", thereby creating the nightmare scenario you posit, where the plaintiff must proceed with the arbitration. However, several Circuits (perhaps as many as four) have adopted the position that the court may dismiss the case, not just stay it, if all the issues are going to arbitration. Since a dismissal is a final judgment, if the court does not just issue a stay, there is a right to appeal. Other Circuits (the petitioners count six) hold that a stay is the only option, which would preclude an immediate appeal. In short, there's a clear Circuit split.

Rob Harris—This case sounds similar to *Coinbase, Inc. v. Bielski*, decided by the Supreme Court last term. In *Coinbase*, a defendant was unsuccessful in seeking to convince the court to compel arbitration, and filed an interlocutory appeal. Undaunted, the trial court

determined that the litigation should proceed notwithstanding the pendency of the appeal. Thus, the defendant was faced with the prospect of defending claims in court that it believed belonged in arbitration. The Supreme Court (interpreting Section 16(a) of the Federal Arbitration Act in a 5-4 ruling) came to the defendant's defense, so to speak, holding 5-4 that the litigation should be stayed until arbitrability was finally determined.

Dave Reif— Right. On a practical level *Coinbase* permits defendants to delay a merits hearing until the appropriate forum is determined. The question is whether this is a precursor to what the Court does in *Spizzirri.* Is the Supreme Court saying that parties have to hash out all efforts at arbitration before they can do anything else? This sets up an interesting potential conflict between the "textualist" wing of the court and the policy-driven Justices.

Rob Harris—As far as policy and strategy are concerned, *Coinbase* generally was viewed as providing a victory to the defense bar. There, the bottom line was that the merits hearing was delayed. In contrast, post-*Spizzirri* – if the Supreme Court were to hold that the FAA requires the judicial action be stayed (and not dismissed) pending arbitration—plaintiffs may end up with two bites at the apple. They can take their best shot in arbitration and possibly win. If they lose, they can challenge the fact that they were sent to arbitration in the first place, and may end up with another opportunity to present their case in court (and to a jury). Under this scenario, Dave, what would you advise a defendant to do?

Dave Reif—Let me first question the premise that a stay, rather than a dismissal, favors plaintiffs. If the case is dismissed, and the plaintiff immediately and successfully convinces an appellate court that the matter is not arbitrable, plaintiff would not incur the cost of a futile arbitration. The same cost savings apply to the defendant, so I think that a dismissal is equally beneficial to both sides - unless one has deeper pockets and wants to outspend its opponent into settlement. The reduction of fees versus the statutory language is where the policy v. text dichotomy will rear its head. For example, isn't cost saving part of the reason, at least in business-to-business transactions, that companies enter into arbitration in the first place?

Rob Harris—Sure, in theory. But, when push comes to shove, I'm not convinced that a plaintiff would find the arbitration to have been futile if she prevails, even if the case is subsequently deemed not to have been arbitrable. If nothing else, the arbitration award likely will meaningfully increase the settlement value of the case. And, for what it's worth, I will note that California—often known as the savior of plaintiffs—just enacted legislation that is intended to undermine *Coinbase* for California cases. Under the law, plaintiffs can proceed with their litigation claims even though arbitrability is being contested in the appellate courts.

Dave Reif—I agree that an arbitration would give a peek at settlement value, but, at least in my experience, the arbitration is probably going to stay on hold until the arbitrability issue is resolved. Neither side is going to want to lay out the significant arbitrator and administrative fees until they know that the effort won't be in vain. And California has not always been quick to think about how to save folks from attorneys' fees.

Rob Harris - I won't take your bait about California. I'm too much an East coast person. But I'm not as confident about disputing parties agreeing to sit tight during a protracted arbitrability fight. If they were that reasonable, they probably would have settled, or at least mediated, the dispute.

Dave Reif - So, I guess the bottom line is that we wait to see if SCOTUS takes the case. It sure seems inviting, since even the Circuit court panel said that the statute seems to mandate a stay. "Although the plain text of the FAA appears to mandate a stay pending arbitration upon application of a party, binding precedent establishes that district courts may dismiss suits when, as here, all claims are subject to arbitration." But, the Justices have ducked the issue by denying previous *cert.* petitions, and, in light of two extensions for the Respondent to file its opposition to the petition, they may decide that this is not the right case to consider it.

In the meantime, counsel's choice of arbitration venue – where a choice is available – should be driven in part by whether the Circuit gives them a speedy appeal from an "unfortunate" order to arbitrate. Labor on!!!