Have You Waived Your Right To Arbitrate?

By Bart. J. Eagle

Your client, a salesperson for a distributor of luxury products, leaves and joins a competitor. Your client has a non-competition clause with her former employer, which may apply to her position with the new company. Her former employer does not seek injunctive relief to prohibit her from working for the new company. Instead, several months later, the former employer commences a lawsuit against her for breach of contract. Your client's contract with her former employer has an arbitration clause. You believe, based on applicable law, that the non-competition clause may be unenforceable. You have a decision to make: should you defend the lawsuit in court or move to stay the action and compel arbitration?

There are advantages and disadvantages to proceeding in each forum.

On the one hand, you're confident that a motion to dismiss what you believe to be an unnecessary and overbroad non-competition clause is likely to succeed in court. If you prevail on the motion, your client is relieved from any constraint arising from the non-competition clause. However, if you do not prevail on the motion, litigation is likely to take a long time, creating a cloud over her employment and potentially exposing her to substantial damages.

On the other hand, if you move to stay the lawsuit and proceed to arbitration, while you are less confident that an arbitrator may dismiss the claim on a motion, you know that you are likely to be able to obtain an arbitration award far more quickly than you would obtain a judgment in court.

What should you do? You pride yourself on your creativity as a litigator, so here's an idea: why not make the motion to dismiss in the pending action in court and, only if you do not prevail, move to stay the action and compel arbitration. You know that merely appearing and answering the complaint in an action will not necessarily serve to waive your contractual right to arbitrate.

Another scenario: your client, a licensee of the plaintiff, has been served with a complaint. The parties' relationship is governed by a written agreement containing an arbitration clause. Having been retained at the last minute and concerned that you do not have enough time to move for a stay and to compel arbitration, you file an answer, expecting that your client would not be waiving his contractual right to arbitrate, and intend to move for a stay and to compel arbitration shortly thereafter. However, your judge, who takes charge of her cases quickly, schedules a conference where she orders the parties to proceed to mediation. She has made it clear that

she thinks that mediation can be successful. And, actually, you agree. If the mediation ordered by the court results in a quick settlement, your client will save considerable time and litigation costs. So, should you proceed to move to stay the lawsuit and compel arbitration, or proceed to mediation as directed by the court?

You make your decision: rather than file your motion for a stay, you proceed to the mediation, prepare a mediation statement, have pre-mediation conferences with the mediator, and then participate in a mediation over several sessions with your client. Unfortunately, the mediation is unsuccessful. Can you now move to stay the lawsuit and compel arbitration? You've done far more than simply put in an answer. Further, the parties have engaged in some informal, mediation-related discovery prior to the mediation and have engaged with the other party during the sessions. Therefore, the parties have had the opportunity to learn a great deal about the strengths and weaknesses of the other party's position and better evaluate their own. By participating in the lengthy mediation, has your client waived his right to compel arbitration?

These are only examples of common circumstances that attorneys may have to confront from time to time. The question is: under New York law, when has a party waived its contractual right to arbitrate by litigating in court? At what point – and to what extent – may a party still rely on an arbitration clause to stay a pending lawsuit and compel arbitration?

Arbitration agreements are favored as a matter of New York public policy,[1] but like any contractual right, arbitration may be waived, modified, or abandoned by a party's conduct.[2]

A party may waive its right to arbitrate by affirmative conduct clearly inconsistent with an intent to arbitrate. Waiver typically occurs when a party substantially participates in litigation – such as by filing dispositive motions, conducting discovery, or delaying assertion of the arbitration clause – thereby invoking the court's jurisdiction to resolve the merits.

However, limited or defensive participation, such as by filing an answer, seeking a stay, or obtaining urgent injunctive relief to preserve the status quo, generally does not constitute waiver.

A party may rely on the arbitration clause to dismiss or stay an action only if it promptly invokes arbitration before engaging in litigation on the merits and before its conduct causes prejudice to the opposing party.[3]

I. The Legal Standard

Courts applying New York law evaluate waiver under a totality of the circumstances analysis, focusing on (1) the extent of litigation participation; (2) the length of delay between litigation commencement and the arbitration demand; and (3) prejudice to the opposing party.[4]

Courts consistently find waiver where a party seeks to resolve the merits through the 'judicial arena' rather than through invoking arbitration.

A waiver arises when a party's use of the judicial process is "clearly inconsistent" with an intent to arbitrate.[5]

II. Litigation Conduct Constituting Waiver

Courts consistently find waiver where a party seeks to resolve the merits through the "judicial arena" rather than through invoking arbitration, e.g.,

- Where a plaintiff commences an action in court for purposes other than preserving the status quo.[6]
- Where a defendant answered on the merits, filed a counterclaim demanding money damages, noticed trial, and moved to depose – conduct deemed a deliberate election of the judicial forum.[7]
- Where a defendant asserted cross-claims and counterclaims mirroring arbitral issues and deposed witnesses; participation "clearly inconsistent" with arbitration.[8]
- Where a defendant's cross-claim and depositions demonstrated affirmative acceptance of litigation.[9]
- Where a defendant moved for summary judgment.[10]
- Where there was a three-year delay, plus litigation on the merits, and dispositive motions filed.[11]
- Where an answer with affirmative defenses and counterclaims were filed, discovery had taken place, and partial summary judgment granted.[12]
- Where a defendant waited one year before asserting arbitration.[13]

Courts also recognize prejudice where the opposing party expends substantial litigation costs or would lose a substantive advantage.[14]

III. Conduct Not Constituting Waiver

By contrast, limited or defensive participation to preserve the status quo does not waive arbitration, for example:

- Where a party seeks an injunction to preserve the status quo pending arbitration ("There is neither waiver nor an election of remedies where … plaintiff moves in court for protective relief in order to preserve the *status quo*

while at the same time exercising its right under the contract to demand arbitration.").[15]

- Where a party answers a complaint without asserting counterclaims or conducting discovery.[16]
- Where a defendant served an answer, opposed the plaintiff's motion to stay arbitration, and cross-moved to compel arbitration.[17]

Thus, parties seeking to preserve arbitration rights may resort to court only for emergency protective relief or defensive procedural actions, provided they promptly assert arbitration once the immediate necessity ends.

IV. Timing and Reliance on Arbitration Clause

To successfully compel arbitration or stay or dismiss an action after partial litigation, a party must demonstrate that (1) its litigation conduct was minimal or defensive; (2) it raised arbitration promptly, typically in the initial responsive pleading or shortly thereafter; and (3) the opposing party has suffered no prejudice.

Once a party files or prosecutes motions addressed to the merits (e.g., seeking summary judgment) or delays for months or years after commencement, courts generally refuse to compel arbitration, viewing the party as having elected to air out its grievances in the judicial arena.

V. Conclusion

While arbitration is a favored form of dispute resolution in New York, courts will evaluate waiver under a totality of the circumstances approach, focusing on the extent of litigation participation, length of delay between litigation commencement and the arbitration demand, and prejudice to the opposing party. However, a party asserting an arbitration clause may preserve the right to arbitrate when it asserts the right early, and when its prior court activity was limited, defensive, or aimed at preserving the status quo.

So, in the first scenario described above, will counsel be able to move successfully to stay the lawsuit and compel arbitration after having first (unsuccessfully) moved to dismiss the complaint? Not likely. A motion to dismiss the complaint is addressed to the merits of the claim – there, for breach of a non-competition agreement.

The second scenario above appears to be a closer call. While the parties have not undertaken the usual steps in prosecuting or defending the lawsuit – such as engaging in motion practice addressed to the merits or by commencing formal discovery – indeed, the court's scheduling order delayed the commencement of discovery to allow the parties to try and settle the case in mediation – court referrals to mediation are increasingly becoming a part of litigation.

Has the plaintiff, who initiated the lawsuit, been prejudiced by being required to participate in mediation prior to addressing a motion to stay the lawsuit? Has the mediation – which was undertaken as a result of a court order, and not a request by either party – delayed the lawsuit? By engaging in limited, mediation-related discovery, have you gone too far in attempting to resolve the dispute in the judicial arena? Have you waited too long to enforce the arbitration provision in the agreement? Closer questions, to be sure – for counsel and a court.

Bart J. Eagle is a partner in the Litigation & Dispute Resolution Practice Group at Falcon Rappaport & Berkman LLP, where he focuses on commercial litigation, mediation, and arbitration, including service as a neutral. He may be reached at beagle@frblaw.com.

The author wishes to thank **Felicia Fortel**, a third-year student at the Benjamin N. Cardozo School of Law and student mediator in the Cardozo Mediation Clinic, for her important contributions to this article. She may be reached at ffortel@frblaw.com.

Endnotes

1. *Matter of Smith Barney Shearson Inc. v. Sacharow*, 91 N.Y.2d 39, 49 (1997).
2. *Sherrill v. Grayco Builders, Inc.,* 64 N.Y.2d 261, 272 (1985).
3. *Cusimano v. Schnurr*, 26 N.Y. 3d 391, 400 (2015).
4. *Cusimano*, 26 N.Y.3d at 400; *NBC Universal Media, LLC v Strauser*, 190 A.D.3d 461, 461 (1st Dep't 2021).
5. *Sherrill v. Grayco Builders, Inc.*, 64 N.Y.2d 261, 272 (1985); *De Sapio*, 35 N.Y.2d at 405 (1974).
6. *De Sapio*, 35 N.Y.2d at 405.
7. *Zimmerman v. Cohen*, 236 N.Y. 15, 19 (1923); De Sapio, 35 N.Y.2d at 405.
8. *Sherrill* , 64 N.Y.2d at 261.
9. *De Sapio*, 35 N.Y.2d at 405.
10. *Johnson v. Brooklake Assoc.*, 271 A.D.2d 382 (1st Dept. 2000).
11. *Digitronics Inventioneering Corp. v. Jameson*, 52 A.D.3d 1099, 1100-101 (3d Dept. 2008).
12. *Bucci v. McDermott*, 156 A.D.2d 328, 328-29 (2d Dept. 1989).
13. *Arnav Industries Inc. Profit Sharing Plan v. 3449–3461 Hamilton FT, LLC*, 2023 WL 3951620 (App. Div. 2023).
14. *Louisiana Stadium & Exposition Dist. V. Merrill Lynch*, 626 F.3d.156, 159 (2d Cir. 2010).
15. *Preiss/Breismeister v. Westin Hotel Co.*, 56 N.Y.2d 787, 787-78 (1982).
16. *Two Cent. Tower Food, Inc. v. Pellegrino*, 212 A.D.2d 441 (1st Dep't 1995).
17. *Garner v. Revel Transit Inc.*, 80 Misc. 3d 647, 648 (Sup. Ct. N.Y. County 2023).