

Waiving and Reviving the Right to Arbitrate Disputes

Judge Abraham J. Gafni (Ret.)

July 19, 2016



Compelling arbitration is often of significant importance to one of the parties to a dispute. It is surprising, therefore, how often a party will unintentionally abandon a right that it was so intent on securing when the contract was first negotiated.

Federal courts and most state courts favor the enforcement of agreements to arbitrate. Notwithstanding this preference, however, arbitration will not be ordered where the party seeking arbitration has, through its actions, effectively waived that right.

Waiver most typically occurs when a defendant responds to a proceeding by continuing to litigate in court while failing to assert that arbitration is mandated under the agreement between the parties. After litigation has progressed, and particularly where the plaintiff can show prejudice in terms of delay or expense by reason of the defendant's failure to earlier insist upon arbitration, courts will generally rule that the demand is not timely.

From time to time, however, actions taken by a plaintiff in the course of court litigation subsequent to the presumed waiver will allow a defendant to successfully revive a claim for arbitration. An example of this was recently reflected in the federal courts in *Collado v. J&G Transport* (11th Cir. No. 15-14635, April 21, 2016).

Enrique Collado had filed a collective action lawsuit under the Fair Labor Standards Act (FLSA) claiming that J&G had failed to pay truck drivers for overtime work as required by the FLSA. J&G participated in the litigation thereby waiving its right to arbitration.

Subsequently, after discovery had ended and shortly before the trial was to begin, Collado moved to amend the complaint by adding state law claims for breach of contract and quantum meruit. He claimed that this late amendment was necessary because certain information had not been disclosed by J&G until either shortly before or after discovery had ended.

Although J&G opposed the proposed amendment as not timely filed, the district court allowed it. Thereafter J&G immediately moved to dismiss the new state law claims or, in the alternative, to compel their arbitration. It acknowledged that it had earlier waived arbitration of the FLSA claim, but contended that the new state claims revived its right to elect arbitration "because those new claims unexpectedly broadened the scope of the case."

The district court denied this motion. It acknowledged that the amended complaint did alter the theory of the case, but concluded that this alteration was neither unexpected nor would fairness warrant reviving J&G's right to compel arbitration.

The U.S. Court of Appeals for the Eleventh Circuit rejected this holding. It noted that ordinarily arbitration will not be compelled where a party has waived that right. "In limited circumstances, however, where a party has waived the right to compel arbitration, an amended complaint can revive that right 'if it is shown that the amended complaint unexpectedly changes the scope or the theory of the plaintiff's claims,'" citing *Krinsk v. Sun Trust Banks*, 654 F. 3rd 1194, 1202 (11th Cir. 2011).

The facts and opinions of the courts in *Krinsk*, as well as here in *Collado*, reflect differing circumstances under which the filing of an amended complaint may revive the right to arbitrate.

In *Krinsk*, the plaintiff had brought a class action lawsuit against the defendant estimating that the class would consist of hundreds of class members. The defendant engaged in the litigation process, thereby waiving its right to compel arbitration.

Thereafter, the plaintiff amended the complaint. While asserting basically the same claims, the plaintiff expanded the size of the class so that it included "thousands—if not

tens of thousands of potential class members." Based upon this change, the defendant filed a motion to compel arbitration which was denied by the district court.

In *Collado*, the court explained that it had vacated the order of the district court in *Krinsk* because "the amended complaint revived the defendant's right to compel arbitration, which it had previously waived, because the defendant could not have foreseen such a major change to the definition of the class."

In essence, the appellate court's decision reflected its assumption that the defendant in *Krinsk* may have been willing to submit the dispute to a court trial where there were a limited number of potential plaintiffs. It could not conclude from this, however, that the defendant would have acquiesced in a court trial and been prepared to waive the right to arbitrate the claims of thousands or tens of thousands of plaintiffs, even though the nature of the claims was unchanged.

The circumstances in *Collado* differed from those in *Krinsk*. In *Collado*, the change was not in the number of plaintiffs but in the type of claim asserted. Initially, the claim had asserted a federal claim under the FLSA. Only after J&G had waived its right to arbitrate by engaging in the court defense of the federal claim was the amendment filed which asserted both federal and state claims.

In such circumstances, the circuit court held that merely because J&G had waived the right to arbitrate the federal claim, such waiver should not "extend to later asserted state claims." In fact, the court did not even regard the facts in *Collado* as reflecting a revival of a waived right to arbitrate. Rather, it concluded that "it is more accurate to say that there was never a waiver of the right to arbitrate the state claims in the first place."

Moreover, the court rejected *Collado's* argument that J&G should be presumed to have waived the right to arbitrate the state claims as well as the federal claim because the earlier amended complaint "revealed that a potential breach of contract action was an issue then known to *Collado*"; accordingly, these claims should not be deemed to have been unexpected, as it was apparent that there was "a state law claim lurking in the case."

Not so, said the appellate court. Merely because a potential claim may so "lurk in the shadows of the case" is not the same as litigating against it after it has been brought out into the open. A defendant may be willing to litigate rather than arbitrate a specific

revealed claim; it should not, however, be responsible for identifying all other potential, but as yet unpleaded claims, that may subsequently be brought in determining whether to insist upon or waive arbitration at the commencement of the litigation. Moreover, it should not be put in the anomalous position of being required to file a motion asserting that if any unpleaded claims are subsequently filed, they must be arbitrated.

These cases should serve as a warning in circumstances where arbitration has initially been waived, and the plaintiff subsequently seeks to amend its action in any fashion. If a court determines that the amendment has so broadened the scope or theory of the litigation, it will not presume that the defendant waived the right to arbitrate the amended claims. In such circumstances, rather, it will most likely enforce the earlier—waived arbitration provision in the agreement. •

Abraham J. Gafni is a retired judge and mediator/arbitrator with ADR Options and a professor at Villanova University School of Law.



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