

MEDIATION NEWS FOR THE 21ST CENTURY™

Mediation and Arbitration News (Nov. 2023)

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The best rule of friendship is to keep your heart a little softer than your head.

A conclusion is the place where you got tired thinking.

Fraud in Virtual Proceedings.

As we gain experience in utilizing virtual platforms (Zoom, Teams and others), we are learning about challenges to protecting and maintaining the integrity, confidentiality and efficacy of the process.

In virtual mediations, mediators need to reaffirm protocols and clarify expectations to assure that mediating parties who are participating remotely:

1. Are committed to be fully engaged, not distracted and visible on the virtual platform.
2. Are physically in a place, be it home, office or other meeting space, where they are comfortable, safe and in a place where sensitive and confidential discussion can be conducted.
3. Where all persons present or within earshot are identified and the extent and scope of their interest, connection, role and participation as advisor, confidant and/or decision maker is articulated and understood by all participants in the mediation.
4. Will affirm and confirm that there are no audio, video recordings or transcriptions of any kind being taken in order to encourage the frank and open consideration of settlement ideas and proposals and to preserve the confidentiality of the

mediation process. With the advent and availability of devices, smart phones and AI recording and transcription apps and technologies, it has become increasingly easy to surreptitiously record, transcribe and alter recordings of discussions.

Similarly, in virtual and hybrid virtual.in person arbitrations, arbitrators need to be careful and intentional to preserve the integrity and fairness of the arbitral process. Among the things that arbitrators need to consider doing are:

1. Confirm the privacy of a participant's remote location by using two computers to present a more complete view to the arbitrator of the participant and the participant's environs.
2. Use multiple computers and/or smartphones to project a more complete view of the room where remote witnesses or participants are located.
3. Obtain confirmation and include in the administration of the oath to testify truthfully a witness' affirmation that there are:
 - no other persons in the remote room,
 - no documents, notes, information or communications are available to or being provided to the witness while the witness is testifying in the proceeding that is not expressly noted and identified.
 - No devices operating that can be used to communicate texts, emails or chat information to the witness while the witness is providing testimony.

When Does a Party Waive the Right to Arbitrate by Inconsistent Conduct?

How long and to what extent can a party litigate in court before claiming that the dispute needs to be arbitrated? The case *Worbes Corp. v Sebrown*, 78 Misc 3d 1212(A) (Sup. Ct. Bronx Cnty. March 17, 2023), presents an excellent analysis of the factors a Court might consider.

In the Worbes case, the closely held shares of the corporation were subject to the terms of a shareholders' agreement that contained an agreement to arbitrate disputes. Plaintiffs filed a legal action seeking a judicial declaratory judgment as to the ownership of controlling stock shares. The litigation was prosecuted through several legal steps before Plaintiffs changed course and filed a motion to compel arbitration. The Court articulated five factors of considerations for determining whether the plaintiff shareholders had waived the right to arbitrate by engaging in conduct warranting a finding of waiver.

The Court observed that the right to arbitrate was not "unfettered and irrevocable," and a party, "by his conduct, can waive the right". The Court set forth five factors to be considered are:

1. whether the party seeking arbitration had "elected to proceed and/or resolve the otherwise arbitrable dispute in a judicial arena or whether a party's conduct in court was "clearly inconsistent with its later claim that the parties were obligated to settle their differences by arbitration";
2. whether the party seeking to compel arbitration availed itself of the remedies available in court. "[A] party who either affirmatively seeks to have a court resolve otherwise arbitral claims or who in defending a claim avails itself of the remedies available in [court] ought not be allowed to proceed to arbitration;
3. whether the claims before the court are the same as those sought to be arbitrated." Where the claims asserted in court are distinct from those sought to be arbitrated, arbitration should be allowed to proceed:
4. whether the party seeking to compel arbitration delayed seeking arbitration of its claims; and
5. whether arbitration would result in prejudice to the party opposing arbitration.

In applying these five factors to the circumstances of the case, the Court ordered arbitration finding that:

1. Plaintiffs filed a complaint containing causes of actions sounding in declaratory judgment, tortious interference with prospective business relations, abuse of process, malicious prosecution, and breach of fiduciary duty.
2. Plaintiffs had filed five motions including three motions for summary judgment seeking various reliefs and remedies before they filed the instant motion seeking an order compelling arbitration.
3. Plaintiffs charted a protracted course of litigation over the course of nearly one year which caused a significant delay in the resolution of the claim before deciding to move for an order to compel arbitration.
4. The resulting delay caused the Defendant to incur unnecessary and prejudicial delay and expense.

Mere filing of a lawsuit and amendment of the Complaint held sufficient to waive arbitration.

Cintas Corp. No. 2 v. Backwoods Investments, LLC, No. 422CV00799SDJAGD, 2023 WL 6531519 (E.D. Tex. Sept. 13, 2023) (Durrett, Mag. J.), report and recommendation adopted, 2023 WL 6518091 (Oct. 5, 2023). Motion to compel denied. Plaintiff waived arbitration by filing suit and amending its complaint without invoking a desire to arbitrate. “Substantial invocation occurs when a party performs an ‘overt act in court that evinces a desire to resolve the arbitrable dispute through litigation rather than arbitration. It is difficult to see how a party could more clearly evince such a desire than by filing a lawsuit going to the merits of an otherwise arbitrable dispute.”