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Fifth Circuit Blocks Attempts at Arbitrating after Commencing Litigation

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The efficiency of arbitration as a means of alternative dispute resolution (ADR) recently got a boost from the U.S. Fifth Circuit. Arbitration has long been promoted as less costly and time consuming than litigation. However, parties seeking those benefits have often been disappointed, in part because of the lengthy and costly court battles they can be forced to fight just to reach arbitration. The Fifth Circuit has now foreclosed at least one way parties had picked such fights. In *International Energy Ventures Management L.L.C., v. United Energy Grp., Ltd*., No. 20-20221, 2021 WL 2177062 (5th Cir. May 28, 2021), the court held that a party who files suit and engages in initial motion practice waives its right to compel arbitration. Parties will no longer be able to file suit in a favorable forum or procedural posture, comfortable that, should they lose on initial motions, they can always move to arbitrate. This decision removes an important procedural loophole some parties used to try to evade their obligation to arbitrate. So parties in Louisiana, Texas and Mississippi who contract to arbitrate their dispute will now more likely receive what they bargained for.

The arbitration clause in this case originated from a 2010 agreement between consulting firm International Energy Ventures Management ("IEVM") and United Energy Group ("UEG"). In 2021, the parties eventually reached a supplemental agreement that included an arbitration clause. A disagreement arose over a finder's fee IEVM claimed to be owed. Instead of pursuing arbitration, IEVM filed suit in Texas state court. UEG removed the case to federal court. IEVM moved for remand to state court. When the federal district court denied IEVM's motion, after three months of litigation, IEVM moved to compel arbitration and filed a demand for arbitration with the American Arbitration Association (AAA). After additional procedural scuffling, two different arbitration panels eventually held that IEVM had waived its right to arbitrate. The federal district court rejected this conclusion, finding both that the decision was for it and not the arbitration panel to make and that IEVM had not waived its right to arbitrate. The Fifth Circuit agreed on the first point but reversed on the second. It ruled that IEVM's motion to compel arbitration should be

denied because IEVM had waived its right to compel arbitration and thus that the case should be litigated in federal court.

The Fifth Circuit first held that, without clear and unmistakable language in the arbitration agreement, courts, not arbitrators, must resolve whether litigation-conduct sufficient to waive a party's right to compel arbitration has occurred. This was an issue of first impression for the Fifth Circuit but aligned with essentially all other federal circuits that had confronted the issue.

The Fifth Circuit then held that IEVM waived its right to arbitrate when it substantially invoked the judicial process and prejudiced UEG by causing delay and expense. It concluded that IEVM substantially invoked the judicial process simply by filing a lawsuit on an arbitrable issue instead of seeking arbitration. It also concluded that UEG had been sufficiently prejudiced by the delay and expense caused by IEVM's pursuit of litigation. Although the delay was for only a few months and the expense was only for the argument and filing fees in removing IEVM's case to federal court and defending a motion to remand, the Fifth Circuit held that this was enough to constitute prejudice to UEG.

The Fifth Circuit's decision does not eliminate all the procedural tools some parties use to evade or delay an obligation to arbitrate. But it addresses one of the most egregious and susceptible to abuse. This decision should deter parties from pursuing concurrent or preceding litigation that undermines arbitration's efficiency, protecting the contractual rights and expectations of parties who enter into arbitration agreements and the usefulness of arbitration as a means of alternative dispute resolution in this Circuit.

Brendan Besh, Law Clerk, coauthored this article.