Sixth Circuit Rejects International Abstention Doctrine in Compelling Arbitration

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Addressing an issue of first impression, the United States Court of Appeals for the Sixth Circuit recently held that, notwithstanding a prior-filed lawsuit in Australia, the doctrine of international abstention did not prevent a federal court from deciding a motion to compel arbitration under Chapter 2 of the Federal Arbitration Act. Answers in Genesis of Kentucky, Inc. v. Creation Ministries Int'l, Ltd., 556 F.3d 459, 469 (6th Cir. 2009). The court applied the traditional abstention doctrine established by the Supreme Court in Colorado River Water Conservation Dist. v. United States, 424 U.S. 800 (1976), and also considered the language of, and policies behind, the New York Convention. The court held that the defendant failed to meet its burden of showing the exceptional circumstances needed for the federal court to abstain. Additionally, the court posited an interesting question for future courts to decide – whether, in light of the New York Convention's mandatory language regarding arbitration, it would ever be appropriate for a court of a New York Convention country, based on concerns of comity, to abstain from compelling an international arbitration.

Factual Background

The case arose out of a dispute between the Defendant Creation Ministries Int'l

Ltd. (“CMI”), an Australia-based organization engaged in creation science ministry, and the Plaintiff Answers in Genesis of Kentucky, Inc. (“AiG”), its American counterpart. Initially, the two organizations worked closely together to promote an international movement of creation science. By 2005, however, a schism between the entities developed as the parties battled for control over an umbrella organization jointly founded by the parties, the two ministries’ joint website, and their magazine.

The parties attempted to resolve their differences by entering into a Memorandum of Agreement (“MOA”) which, among other things, gave CMI control of the umbrella organization and AiG ownership of international copyrights and the website domain name. The MOA contained a dispute resolution provision providing that “in the event of a disagreement of the parties regarding the meaning or application of any provision of this Agreement or any related agreements,” the parties would submit the matter to arbitration. Id. at 466. The parties also executed a Deed of Copyright License (“DOCL”), granting AiG a license to use the articles CMI had provided for the website and publications. The DOCL contained a forum selection clause under which “the parties submit to the non-exclusive jurisdiction of [the] court and courts of appeal [of the State of Victoria, Australia].” Id. at 465.

Despite fierce objection by CMI’s leader, the parties’ boards ratified the agreements. Deepening tensions led CMI’s board to resign and the new board to join its leader in rejecting the MOA and DOCL. In May 2007, CMI filed suit in the State of Queenland’s trial court against AiG and its leader, seeking declaratory, injunctive and monetary relief. Rather than defending the Australian action, AiG moved to compel arbitration in federal district court in Kentucky under section 206 of the Federal Arbitration Act (“FAA”) and to enjoin CMI from pursuing its Australian suit. The district court entered an order compelling arbitration of all of CMI’s numerous causes of action but declined to issue an anti-suit injunction. Shortly thereafter, AiG initiated arbitration before the International Centre for Dispute Resolution. The district court refused to stay the arbitration pending appeal.

The Appellate Court’s Decision

The Sixth Circuit affirmed the district court in its entirety. Among its principal holdings, the appellate court addressed for the first time in that circuit whether, when faced with a motion to compel arbitration of an agreement falling under the New York Convention, a federal court should abstain from deciding the motion because of concerns of international comity. Following the approach taken by at

least two other circuits, the Sixth Circuit applied the abstention doctrine developed in the domestic context to prevent duplicative litigation by federal courts or by federal and state courts. Id. at 467-68 (citing Turner Entm't, Co. v. Degeto Film GmbH, 25 F.3d 1513, 1518 (11th Cir. 1994) (summarizing various approaches)). Under this doctrine, "a District Court may decline to exercise or postpone the exercise of its jurisdiction [as] an extraordinary and narrow exception to the duty of a District Court to adjudicate a controversy properly before it." Colorado River, 424 U.S. at 813 (internal quotation marks and citation omitted). Although federal courts have a "virtually unflagging obligation" to exercise the jurisdiction given them, abstention has been found appropriate for reasons of proper constitutional adjudication, regard for federal-state relations, or in limited circumstances, wise judicial administration. Id. at 817-18.

The Colorado Rivers opinion instructs courts to consider several factors in determining whether to abstain in favor of a parallel proceeding in the courts of another sovereign, which are whether there exists a clear federal policy evincing the avoidance of piecemeal adjudication, how far the parallel proceeding has advanced in the other sovereign's courts, the number of defendants and complexity of the proceeding, the convenience of the parties, and whether a sovereign government is participating in the suit. Id. at 467. The Answers in Genesis court reasoned that these factors were likewise applicable to the present case because they "match most closely the public-policy concerns the Supreme Court has identified as vital in the area of arbitration." Id.

Applying the factors, the court concluded that CMI had not met its burden to show that abstention was required. The court placed primary importance on the first Colorado River factor, reasoning that there was no clearly articulated policy against bifurcated litigation under the FAA. Rather, according to the court, the preeminent concern of that statute was "to enforce private agreements into which parties had entered" and "[t]his concern should govern even if 'piecemeal litigation' was the inevitable result." Id. at 468 (quoting Dean Witter Reynolds, Inc. v. Byrd, 470 U.S. 213, 221 (1985)). The court then reviewed the remaining Colorado River factors, considering that the Australian proceeding was in its initial stages, that neither forum was more convenient for all of the parties, that the issue involved interpretation of an unambiguous treaty (i.e., the New York Convention), and that no sovereign was involved.

The court also weighed concerns of international comity, a concept which has been described by the Supreme Court as "the recognition which one nation allows within its territory to the legislative, executive, or judicial acts of another nation, having

due regard both to international duty and convenience, and to the rights of its own citizens, or of other persons who are under the protection of its laws." Hilton v. Guyot, 159 U.S. 113, 163-64 (1895). The Answers in Genesis pointed to Article II(3) of the New York Convention, which provides that when a party to an arbitration agreement governed by the treaty requests that a court refer the dispute to arbitration, that court "shall" do so. The court stated that it would be difficult to see how it would violate international comity for a court of a nation that is party to the treaty to compel arbitration given the mandatory nature of Article II(3). The court explained that to hold otherwise would assume that Australian courts would be less likely to follow their treaty obligation and that would "demean the foreign tribunal" and "hardly advance" any comity interest. Id. at 468.

The court also posed – but did not decide – a related question: "[W]hether abstention is ever appropriate when one party seeks to compel arbitration with regard to an agreement in which the other party is international in origin." Id. at 467. This question does not appear to have been squarely addressed by any federal appellate court.

The argument against abstention in the face of a motion to compel finds support in the text of the Convention and rationale of Answers in Genesis. Under such an argument, in cases of arbitration falling under the New York Convention, abstention principles are not available because courts of both countries have a mandatory treaty obligation to refer the case to arbitration, unless there exist exceptional circumstances set forth under Article II(3) (i.e., where the arbitration agreement is "null and void, inoperative or incapable of being performed"). Cf. Pepsico Inc. v. Oficina Central de Asesoria y Ayuda Tecnica, C.A., 945 F. Supp. 69, 72 (S.D.N.Y. 1996) (recognizing the Convention's strong policy favoring prompt arbitration but staying proceedings on a petition to compel arbitration to give the Venezuelan court of a prior-filed action sixty days to determine the threshold issue of arbitrability).

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