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Miami Lawyer Wades Into Supreme Court Head-Scratcher Over International Arbitration

by Raychel Lean

Carlos F. Concepcion of Shook, Hardy & Bacon has stepped into a U.S. Supreme Court battle on behalf of the Miami International Arbitration Society.

The Miami attorney filed an amicus brief in a case that asks what to do when one litigant is bound by a contract compelling arbitration, but the other is not.

If the dispute is domestic, then arbitration contracts win out, thanks to the doctrine of equitable estoppel, which says parties can't benefit from a contract they've signed unless they abide by its terms.

But this case asks: What if one party is a foreign entity?

Concepcion chairs the arbitration society, which promotes alternative dispute resolution for commercial and investment conflicts that cross borders and encourages litigants to choose Miami and Florida as their venue.

Courtesy photo

Carlos Concepcion, with Shook, Hardy & Bacon.

"When this case came up for appeal in the Eleventh circuit, which is our appellate backyard, we took a significant interest in it because it affects us directly, and it affects everything about international arbitration," Concepcion said.

He teamed with Shook Hardy's Giovanni Angles, and Edward M. Mullins and Benjamin S. Paulsen of Reed Smith in Miami to file the "friend of the court" document. Their brief seeks the reversal of a U.S. Court of Appeals for the Eleventh Circuit ruling, which said that a nonsignatory can't compel arbitration if one of the parties is foreign.

The dispute emanates from contracts between Europe's largest stainless steel producer Outokumpu Stainless

USA LLC and German company Fives St. Corp., which it hired to make equipment. The agreement between the companies included a clause that required any disputes to be arbitrated in Germany.

Fives St. then subcontracted with a foreign subsidiary of General Electric Co. — GE Energy Power Conversion France SAS Corp. — which provided parts for the equipment. But those parts allegedly failed, so Outokumpu sued GE Energy, claiming losses in the millions.

Outokumpu filed suit in Alabama, where it operates a steel plant. GE removed the proceedings to federal court.

After the district court agreed to dismiss the case and the Eleventh Circuit reinstated it, GE Energy looked to the U.S. Supreme Court.

GE argued that because Outokumpu sued based on the contracts, the plaintiff should also have to abide by the arbitration clauses. Counsel to GE Energy, Shay Dvoretzky of Jones Day's Washington, D.C., office and Amanda Rice of its Detroit office did not respond to requests for comment by deadline.

But Outokumpu called the issue "unimportant and underdeveloped" in its response, which stressed that GE Energy never signed the agreement it made with Fives, so shouldn't be able to compel arbitration under German law.

Counsel to Outokumpu, Eddie Travis Ramey of Burr & Forman in Alabama, and counsel to the company's insurer, Don Ray Sampen of Clausen Miller in Chicago, did not respond to requests for comment by deadline.

The U.S. as an outlier?

The Miami International Arbitration Society isn't the only group to step into the fray. Eight other onlookers have also filed amicus briefs, including the U.S Department of Justice, which has called for a reversal of the Eleventh Circuit's ruling.

Those seeking reversal worry that if the court doesn't intervene, parties in international disputes might avoid arbitration by seeking out jurisdictions where it can't be enforced.

Concepcion argues that upholding the Eleventh Circuit's ruling would make businesses less likely to arbitrate in the U.S., claiming it would cloud the process with uncertainty, complexity and high cost. If the court rules against GE Energy, he said the U.S. will be the only country in the world that doesn't allow protections for international arbitration agreements.

"The rest of the world, through their own local legislation, can argue the position of General Electric, and it's recognized essentially all over the world that even if you're not a signator to an international arbitration agreement, you can still be protected by it," Concepcion said.

On behalf of neither party, Karla Gilbride filed an amicus brief for Public Justice PC in Washington, D.C., which advocates for consumers and employees. It warned in its amicus brief that estoppel doctrines are sometimes "potent weapons that corporations can and do use to bind plaintiffs to arbitrate, even when the plaintiffs have not entered any arbitration agreement with those corporations, and when the traditional elements of equitable estoppel are not present."

Supporters of the Eleventh Circuit's ruling are scheduled to file amicus briefs in November, and the U.S. Supreme Court is expected to hear oral arguments in January 2020.

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