IN THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF GEORGIA ATLANTA DIVISION

MAURICIO WIOR,	*	
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Petitioner,	*	
	*	
v.	*	1:15-CV-02375-ELR
	*	
BELLSOUTH CORPORATION,	*	
	*	
Respondent.	*	
	*	

O R D E R

Presently before the Court are five pending motions and/or requests for relief: (1) Petitioner's Motion for Stay of Arbitration and Declaratory Relief (Doc. No. 13); (2) Respondent's Cross Motion to Stay Litigation and Compel Arbitration (Doc. No. 14); (3) Petitioner's Motion for Leave to File a Surreply Brief in Response to Respondent's Motion (Doc. No. 18); (4) Respondent's request for leave to file a sur-surreply brief (Doc. No. 25); and (5) Petitioner's Motion for Permanent Injunction to Enjoin the Arbitration (Doc. No. 19). The Court's rulings on these motions are as set forth below.

I. BACKGROUND[1]

Mauricio Wior, a national of Argentina, worked for BellSouth Corporation's ("BellSouth") affiliates and subsidiaries in Latin America until BellSouth sold its Latin American interests to a third party. As a result of this sale, BellSouth terminated the employment relationship with Wior pursuant to a written agreement between the parties. The terms of Wior's termination are set forth in two contracts: (1) a Transition Agreement with BellSouth dated July 29, 2005 ("the Transition Agreement") and (2) a Termination Agreement with BellSouth Southern Cone, Inc., Wior's primary employer, also dated July 29, 2005 ("the Termination Agreement").

The Transition Agreement is at the center of this dispute, as it contains an arbitration provision, which provides for arbitration in Atlanta, Georgia, of "[a]ny dispute, controversy or claim arising out of or relating to [the Transition Agreement], or the breach, termination or invalidity of any provision hereof." (Doc. No. 1, Ex. C at § 14.) The arbitration provision specifically states that the arbitration would be held pursuant to the National Rules for the Resolution of Commercial Disputes of the American Arbitration Association ("AAA"). The Transition Agreement further contains a release wherein Wior agreed to release and forever discharge BellSouth from "any and all claims, demands, causes of

[1] The Court briefly summarizes the facts of this case as provided in the parties' briefs. Nothing contained herein shall be construed as findings of fact from this Court.

action, remedies, obligations, costs and expenses of whatever nature . . . including those arising from or in connection with the terms and conditions of employment . . . ." (Id. at § 8.) Finally, the Transition Agreement contains a provision dictating that the contract would be construed under Georgia law. (Id. at § 21.)

To make the two contracts valid under Argentine law, either the Ministry of Labor or a court of law had to formally approve it.[2] This process was never completed. Wior then sued, successfully, in an Argentine court, which found that the agreements Wior signed were unenforceable. The Argentine court ultimately awarded Petitioner significantly more in severance benefits. Appeal of the award is currently pending before the *Corte Suprema de Justicia de la Nación*, Argentina's highest court.

BellSouth filed a Demand for Arbitration on June 1, 2015, for breach of various provisions contained in the Transition Agreement, including the arbitration provision. One month later, Wior filed suit in this Court requesting a stay of arbitration and declaratory relief.

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[2] As Respondent explains, employment agreements must be registered so they can achieve *res judicata* effect, thereby eliminating an employer's exposure to future labor claims from that employee. (Doc. No. 15 at 3.)

II. ANALYSIS

BellSouth contends that the Court must stay litigation and compel arbitration, consistent with the Federal Arbitration Act's ("FAA") mandate. Wior, however, argues that the Georgia Arbitration Code ("GAC") should control because the parties incorporated a Georgia choice of law provision in the Transition Agreement. The distinction is important, as the GAC allows for application of the Georgia contract statutes of limitation, which could bar BellSouth's claims for breach. Further, the GAC allows a Court to first determine the statute of limitations defense before compelling arbitration. For reasons explained more fully herein, the Court finds that the choice of law provision relied upon by Wior does not preclude application of the FAA to the arbitration clause. Because the FAA applies, the Court must abide by the parties' selection of AAA rules, which allow the arbitrator, and not the Court, to hear arguments related to statutes of limitation in the first instance. Therefore, the Court finds that this action must be stayed pending completion of arbitration.

A. The FAA and the New York Convention

In 1925, Congress enacted the FAA "to make certain arbitration agreements enforceable." Lobo v. Celebrity Cruises, Inc., 426 F. Supp. 2d 1296, 1305 (S.D. Fla. 2006). The FAA provides that written provisions in contracts involving interstate commerce agreeing to submit disputes to arbitration "shall be valid,

irrevocable, and enforceable . . . ." 9 U.S.C. § 2. Accordingly, "upon being satisfied that the issue involved" in the lawsuit "is referable to arbitration," the Court *must* stay the action until the arbitration has been completed "in accordance with the terms of the agreement." Id. § 3. Indeed, "[t]he [FAA] establishes that, as a matter of federal law, any doubts concerning the scope of arbitrable issues should be resolved in favor of arbitration, whether the problem at hand is the construction of the contract language itself or an allegation of waiver, delay, or a like defense to arbitrability." Moses H. Cone Mem'l Hosp. v. Mercury Constr. Corp., 460 U.S. 1, 24–25 (1983). Furthermore, this "federal policy favoring arbitration" requires "ambiguities as to the scope of the arbitration clause itself [to be] resolved in favor of arbitration." Volt Info. Scis., Inc. v. Bd. of Trs. of Leland Standford Junior Univ., 489 U.S. 468, 476 (1989).

In addition to the FAA, Congress codified the United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards ("the New York Convention"), "which was designated the Convention Act, and was enacted as an amendment to the FAA." Lobo, 426 F. Supp. 2d at 1305. "Together, the two acts operate to enforce arbitration agreements in both domestic and foreign employment contracts." Id.

The Convention Act provides that the New York Convention "shall be enforced in United States courts in accordance with this chapter." 9 U.S.C. § 201.

> In turn, the New York Convention provides that the United States "shall recognize an agreement in writing under which the parties undertake to submit to arbitration all or any differences which have arisen or which may arise between them in respect of a defined legal relationship, whether contractual or not, concerning a subject matter capable of settlement by arbitration." New York Convention, art. II(1).

Escobar v. Celebration Cruise Operator, Inc., 805 F.3d 1279, 1284 (11th Cir. 2015), cert. denied, 136 S. Ct. 1158 (U.S. Feb. 29, 2016) (No. 15–371). Generally speaking, the New York Convention "requires the courts of signatory nations to give effect to private arbitration agreements and to enforce arbitral awards made in other signatory nations." Id.[3]

"In determining whether to compel arbitration under the Convention Act, a district court conducts 'a very limited inquiry.'" Id. at 1285 (quoting Bautista v. Star Cruises, 396 F.3d 1289, 1294 (11th Cir. 2005)). The New York Convention controls where four jurisdictional prerequisites are met:

> (1) there is an agreement in writing within the meaning of the Convention; (2) the agreement provides for arbitration in the territory of a signatory of the Convention; (3) the agreement arises out of a legal relationship, whether contractual or not, which is considered commercial; and (4) a party to the agreement is not an American citizen, or that the commercial relationship has some reasonable relation with one or more foreign states.

Bautista, 396 F.3d at 1294 n.7. "An action or proceeding falling under the [New York] Convention shall be deemed to arise under the laws and treaties of the

[3] Both the United States and Argentina are signatories to the New York Convention. Int'l Ins. Co. v. Caja Nacional De Ahorro y Seguro, 293 F.3d 392, 394 n.4 (7th Cir. 2002).

United States. The district courts of the United States . . . shall have original jurisdiction over such an action or proceeding, regardless of the amount in controversy." 9 U.S.C. § 203.

B. Application of the New York Convention

Wior does not dispute that all four elements required for application of the New York Convention are met in this case. There was an agreement in writing, which provided for arbitration in Atlanta, Georgia. The agreement arose out of a commercial relationship, and Wior is not an American citizen. Instead, Wior challenges the application of the New York Convention in three other respects.

First, he argues that this action does not fall under the New York Convention because there has been no arbitral award to enforce. (Doc. No. 16 at 23 n.9.) However, the Eleventh Circuit has routinely addressed application of the New York Convention on motions to compel arbitration, where no arbitral award had been entered. See Escobar, 805 F.3d at 1283; Lindo v. NCL (Bahamas), Ltd., 652 F.3d 1257, 1261–62 (11th Cir. 2011); Bautista, 396 F.3d at 1294. Accordingly, the Court finds that the New York Convention may still apply even where no arbitral award has been entered.

Next, Wior argues that his "Complaint does not depend on any question of federal law and no right created by federal law is essential to the relief sought in

the Complaint." (Doc. No. 18-1 at 12.)[4] Accordingly, Wior contends, the Court has only diversity jurisdiction over the Complaint and should apply Georgia state law to interpret the Transition Agreement. Stated differently, Wior contends that because he drafted the Complaint stating only that the GAC controls and seeking to stay arbitration based on Georgia statutes, no federal question is present on the face of the Complaint, even if this case might otherwise be controlled by the New York Convention.[5]

The New York Convention controls where the four aforementioned elements are met. Because the Court finds that all four elements are met in this case, Wior's attempts to plead around federal question jurisdiction fails. Indeed, "courts will not permit [a] plaintiff to use artful pleading to close off [a] defendant's right to a federal forum . . . and occasionally the removal court will seek to determine whether the real nature of the claim is federal, regardless of [the] plaintiff's characterization." Federated Dep't Stores, Inc. v. Moitie, 452 U.S. 394, 397 n.2 (1981) (quoting 14 C. WRIGHT, A. MILLER, & E. COOPER, FEDERAL PRACTICE AND

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[4] The Court **GRANTS** Petitioner's Motion for Leave to File a Surreply Brief. (Doc. No. 18.)

[5] To this end, Wior additionally argues that BellSouth admitted in its answer that this Court has diversity jurisdiction, and therefore is barred from challenging that "admission" and arguing that federal question jurisdiction exists. First, the Court is obligated to inquire into the basis for its jurisdiction, irrespective of any admissions by the parties. Indeed, many complaints present both diversity and federal question jurisdiction, and subject matter jurisdiction cannot be waived. Second, in its answer, BellSouth clearly stated that diversity jurisdiction and jurisdiction under the Convention Act were present. Accordingly, the Court finds no basis for determining jurisdiction based on Wior's interpretation of BellSouth's answer.

PROCEDURE § 3722, pp. 564–66 (1976) (internal alteration and quotations omitted)). Otherwise, a plaintiff wishing to avoid the Convention Act and application of the FAA could simply limit its lawsuit to state law claims, thereby precluding application of an internationally negotiated treaty.[6]

Finally, Wior argues that BellSouth's attempt to invoke federal question jurisdiction ignores the fact that the Transition Agreement contained a Georgia choice of law provision, which would override any application of federal law. As the Eleventh Circuit held in Escobar, at the arbitration-enforcement stage, the only affirmative defense available pursuant to the New York Convention is one that demonstrates the arbitration agreement is "null and void, inoperative or incapable of being performed." 805 F.3d at 1286 (quoting New York Convention, art. II(3)). There, Escobar sought to assert an affirmative defense to the arbitration provision, arguing that the clause was unenforceable because it required his claims to be governed by Bahamian law. Id. at 1288. More specifically, Escobar argued that "(1) Bahamian law does not afford the same rights and remedies as American law, (2) this choice-of-law clause results in a prospective waiver of his right to pursue statutory remedies under American law, and thus (3) his arbitration agreement

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[6] Wior additionally argues that the FAA is not a statute conferring federal jurisdiction, and for that reason cannot provide a basis for federal question jurisdiction. The Convention Act, however, *is* a jurisdiction-conferring statute. 9 U.S.C. § 203; JAY E. GRENIG, INTERNATIONAL COMMERCIAL ARBITRATION § 13:2 (2015). Accordingly, and irrespective of Wior's arguments to the contrary, this case, if filed in state court, would have a basis for removal to federal district court.

violates public policy and should not be enforced." Id. However, the Eleventh Circuit rejected Escobar's arguments as premature, holding that such defenses would only be appropriate after the arbitration-enforcement stage. Id.[7] As in Escobar, the Court finds that a defense based on the choice of law provision cannot be used to defeat a motion to compel arbitration.

Because the New York Convention applies, the Court may only conduct a "limited inquiry" in deciding a motion to compel, as the Convention Act, like the FAA, "reflects a liberal policy favoring arbitration agreements." Vacaru v. Royal Caribbean Cruises, Ltd., No. 07-023040-CIV, 2008 WL 649178, at *6 (S.D. Fla. Feb. 1, 2008). Accordingly, the Court gives full effect to the parties' decision to incorporate the AAA rules of arbitration into the Transition Agreement. Rule 7(a) of the AAA rules provides: "The arbitrator shall have the power to rule on his or her own jurisdiction, including any objections with respect to the existence, scope, or validity of the arbitration agreement or to the arbitrability of any claim or counterclaim." And, as the Eleventh Circuit has held, "[b]y incorporating the AAA Rules . . . the parties clearly and unmistakably agreed that the arbitrator should

[7] The Court is mindful of the differences between Escobar and the case at hand. For example, Escobar couched his arguments more generally based on public policy, rather than express contract language (i.e., that the parties agreed that the New York Convention would not apply when they incorporated a particular state or country's substantive law). Nevertheless, the Court finds the Eleventh Circuit's reasoning in Escobar applicable to this case. At its core, Escobar stands for the proposition that the New York Convention limits the number and type of defenses courts may entertain at the arbitration-enforcement stage. It is that holding that the Court follows today.

decide whether the arbitration clause is valid." Terminix Int'l Co., LP v. Palmer Ranch Ltd. P'ship, 432 F.3d 1327, 1332–33 (11th Cir. 2005).[8]

C. Choice of Law Provision and AAA Rules

Even without relying on application of the New York Convention, which precludes consideration of the choice of law provision as a defense to arbitration at this stage of proceedings, the Court would nevertheless reach the same result under the FAA. The Transition Agreement is a contract involving interstate commerce, which neither party disputes. Accordingly, the FAA presumptively applies. 24 Go Wireless, Inc. v. AT&T Mobility II, LLC, No. 11-20930-CIV, 2011 WL 2607099, at *1 (S.D. Fla. June 30, 2011). As noted above, the FAA creates a national policy favoring application and enforcement of arbitration provisions according to their terms. Thus, because the FAA presumptively applies to this dispute, the Court would be obliged to enforce the terms of the arbitration provision: namely, that the AAA rules would govern any arbitration.

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[8] Furthermore, the Supreme Court held in BG Group, PLC v. Republic of Argentina, 134 S. Ct. 1198, 1207 (2014), that procedural matters such as claims of "waiver, delay, or a like defense to arbitrability" such as "time limits, notice, laches, estoppel, and other conditions precedent to an obligation to arbitrate" are to be decided by the arbitrator. To that end, the Court finds that Wior's arguments regarding whether BellSouth's claims are barred by the applicable statute of limitations are to be decided by the arbitrator in the first instance. This result is entirely consistent with the Transition Agreement, wherein the parties agreed that "[a]ny dispute, controversy or claim arising out of or relating to this Agreement, or the breach, termination or invalidity of any provision hereof . . . shall be settled by arbitration . . . ." (Doc. No. 1, Ex. C at ¶ 14.)

Wior argues at length that the parties' choice of law provision overrides the general presumption in favor of applying the FAA to this case. Stated differently, Wior argues that by selecting a Georgia choice of law provision, the parties intended for Georgia rules of arbitration to govern and not the AAA rules, despite the clear contractual language to the contrary. Accordingly, Wior argues that the Court may exercise its discretion to find that the statute of limitations bars BellSouth's breach of contract claim in the arbitration.

However, two cases from the United States Supreme Court require a different result. In Preston v. Ferrer, for example, the Supreme Court addressed a contract that contained an arbitration clause incorporating the AAA rules, as well as a choice of law provision that selected California state law. 552 U.S. 346, 362 (2008). California law, in that instance, granted exclusive jurisdiction over certain disputes to the California Labor Commissioner. Id. at 351. As the Court explained, the FAA, "which rests on Congress' authority under the Commerce Clause, supplies not simply a procedural framework applicable in federal courts; it also calls for the application, in state as well as federal courts, of federal substantive law regarding arbitration." Id. at 349. Determining which provision controlled, the Court found that "the best way to harmonize the parties' adoption of the AAA rules and their selection of California law is to read the latter to encompass prescriptions governing the substantive rights and obligations of the parties, but not

the State's special rules limiting arbitrators' authority." Id. at 351 (internal quotations omitted).

In reaching this conclusion, the Preston Court relied on a 1995 case, Mastrobuono v. Shearson Lehman Hutton, Inc., 514 U.S. 52 (1995). In Mastrobuono, the petitioners opened a securities trading account with the respondents pursuant to a standard "Client's Agreement." Id. at 54. The agreement contained an arbitration provision, as well as a choice of law provision selecting New York law. Id. at 54–55. The parties proceeded to arbitration, where the arbitrator awarded punitive damages, even though New York state law only allows courts to award punitive damages. Id. Petitioners sought a ruling that the FAA, which applied to the contract, preempted New York's prohibition on arbitral awards of punitive damages, arguing that the state law evidenced a clear hostility to arbitration, which the FAA sought to defeat. Id. at 56. In contrast, the respondents answered that the choice of law provision indicated the parties' intent to incorporate New York's law regarding the award of punitive damages. Accordingly, the dispute generally spoke to the interaction between the FAA and its fundamental purpose and state laws which might inhibit achievement of that purpose. Adhering to a "cardinal principle of contract construction: that a document should be read to give effect to all its provisions and to render them consistent with each other," the Supreme Court held that the best way to give effect

to all provisions in the contract would be to apply New York substantive law, but not include any New York limitations on the authority of arbitrators which might conflict with the intent of the FAA. Id. at 62–64.[9]

Accordingly, the Court finds that because this contract is one involving interstate commerce, the FAA applies and the parties' selection of a Georgia choice of law provision does not alter that result.[10] To hold otherwise would require finding the parties' incorporation of the AAA rules meaningless based on their choice of law provision. Thus, the Court will apply Georgia law to the substantive dispute, but will adhere to the parties' decision to incorporate AAA rules for the arbitration.[11]

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[9] Of note, Wior states that both Preston and Mastrobuono "would be controlling if they interpreted the GAC or provisions analogous to O.C.G.A. §§ 9-9-5 and 9-9-6." (Doc. No. 16 at 14.) However, Petitioner argues, because they do not interpret Georgia law, they do not control this case. The Court disagrees. The Supreme Court did not base its decisions purely on the language of the state laws or statutes in dispute. Rather, the Supreme Court explained an overarching state of the law regarding the interaction of the FAA with state laws limiting an arbitrator's authority. Moreover, even if not binding on this Court, the Court would nonetheless find Preston and Mastrobuono extraordinarily persuasive. For that reason, the Court follows the reasoning of the Supreme Court with its decision today.

[10] Of note, Georgia law recognizes the same cardinal rule of contract interpretation relied upon in Preston and Mastrobuono. Cincinnati Ins. Co. v. Magnolia Estates, Inc., 648 S.E.2d 498, 500 (Ga. Ct. App. 2007) (recognizing the rule of contract construction requiring the court to consider the contract as a whole and to give effect to each provision "such that it harmonizes with the other provisions")

[11] Of note, statute of limitations issues have routinely been held to be procedural in Georgia. Hunter v. Johnson, 376 S.E.2d 371, 372 (Ga. 1989) (citing George v. Gardner, 49 Ga. 441, 450 (1873); U.S. Fidelity & Guaranty Co. v. Toombs Cty., 187 Ga. 544, 450, 1 S.E.2d 411 (1939)). Therefore, the Court finds no conflict in applying AAA rules regarding the jurisdiction of arbitrators rather than the GAC's more limited approach.

Petitioner cites a case from the Georgia Court of Appeals holding that the GAC, not FAA, controls where an agreement contains a Georgia choice of law clause and an arbitration agreement incorporating the AAA rules. Panhandle Fire Protection, Inc. v. Batson Cook Co., 653

D. Conduct-Based Waiver

Even though the Court is limited, under both the FAA and the New York Convention, in its consideration of defenses to arbitration, the Court may entertain argument regarding waiver of the right to arbitrate based on the conduct of the parties. With the New York Convention, at the arbitration-enforcement stage, the court may only consider defenses that demonstrate the arbitration agreement is "null and void." Escobar, 805 F.3d at 1286. "The null-and-void clause encompasses only those defenses grounded in standard breach-of-contract defenses—such as fraud, mistake, duress, and waiver—that can be applied neutrally before international tribunals." Id. Accordingly, the Court may consider Wior's waiver argument prior to compelling arbitration.

Moreover, the New York Convention's limitation on defenses is consistent with FAA standards generally. The Supreme Court has distinguished between two types of challenges to arbitration: (1) challenges to the contract as a whole and (2) challenges to the validity of the agreement to arbitrate specifically. "[A] party's challenge to another provision of the contract, or to the contract as a whole, does not prevent a court from enforcing a specific agreement to arbitrate." Rent-A-Center, West, Inc. v. Jackson, 561 U.S. 63, 71 (2010). In this regard, the arbitration

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S.E.2d 802, 805 (Ga. Ct. App. 2007). While the Court does not dispute that this case is similar to that at bar, the Court is persuaded by the decisions of the United States Supreme Court, and does not find Petitioner's attempts to distinguish Preston and Mastrobuono compelling.

provision is severable from the rest of the contract. Id. Where, however, a party challenges the validity of the actual agreement to arbitrate, the court must consider the challenge before ordering compliance with the arbitration provision. Id.; Nitro-Lift Techs., LLC v. Howard, 133 S. Ct. 500, 503 (2012) ("And when parties commit to arbitrate contractual disputes, it is a mainstay of the Act's substantive law that attacks on the validity of the contract, as distinct from attacks on the validity of the arbitration clause itself, are to be resolved 'by the arbitrator in the first instance, not by a federal or state court.'" (quoting Preston, 552 U.S. at 349)).

Accordingly, although the Court may not hear arguments regarding Wior's statute of limitations defense at this time, it may decide whether BellSouth, by its conduct, has waived the right to arbitrate. See also Plaintiff's S'holders Corp. v. S. Farm Bureau Life Ins. Co., 486 F. App'x 786, 790 (11th Cir. 2012) (finding that "absent clear and unmistakable evidence of an agreement to the contrary, disputes regarding conduct-based waiver are left to the courts to decide" (internal quotations omitted)); Grigsby & Assocs., Inc. v. M Securities Inv., 664 F.3d 1350, 1353 (11th Cir. 2011) (interpreting Howsam v. Dean Witter Reynolds, Inc., 537 U.S. 79 (2002) and finding that the Supreme Court's use of the term "waiver" does not refer to conduct-based waiver, but rather as a defense arising from non-compliance with contractual conditions precedent).

Even so, Respondent contends that the Supreme Court in BG Group, 134 S. Ct. 1198 (2014), silently overruled Grigsby. However, the Court in BG Group merely held that courts decide issues such as "whether the parties are bound by a given arbitration clause or whether an arbitration clause in a concededly binding contract applies to a particular type of controversy." 134 S. Ct. at 1206–07 (citing Howsam, 537 U.S. at 84) (internal quotations omitted). Alternatively, "courts presume that the parties intend arbitrators, not courts, to decide disputes about the meaning and application of particular procedural preconditions for the use of arbitration." Id. at 1207. "These procedural matters include claims of waiver, delay, or a like defense to arbitrability." Id. (internal quotations omitted).

In BG Group, the Court held that a contract's provision allowing a dispute to be submitted to arbitration so long as a period of eighteen months had elapsed qualified as a procedural condition precedent for the arbitrator, and not the Court, to decide. Id. As the Court put it, the clause "determines *when* the contractual duty to arbitrate arises, not whether there is a contractual duty to arbitrate at all." Id. The Court does not find that this decision is inconsistent with the standard set forth in Grigsby, where the Eleventh Circuit interpreted the Supreme Court's use of the term "waiver" to not include conduct-based waiver, as alleged here. 664 F.3d at 1353. Based on Eleventh Circuit precedent then, and in the absence of clear and unmistakable evidence of an agreement to the contrary, the Court shall decide the

issue of whether Respondent's conduct in the Argentina litigation qualifies as waiver of its right to arbitrate.

The Eleventh Circuit propounded a two-part test to determine if a party has waived the right to arbitrate. First, the Court must "decide if, under the totality of the circumstances, the party has acted inconsistently with the arbitration right . . . ." Ivax Corp. v. B. Braun of Am., Inc., 286 F.3d 1309, 1315–16 (11th Cir. 2002) (internal quotations omitted). Next, the Court looks "to see whether, by doing so, that party has in some way prejudiced the other party." Id. (internal quotations omitted). "Whether waiver has occurred depends upon the facts of each case" and "[t]here is no set rule as to what constitutes a waiver of the arbitration agreement." Grigsby & Assocs., Inc. v. M Secs. Inv., No. 13-15208, 2015 WL 9461341, at *2 (11th Cir. Dec. 28, 2015) (internal quotations and alterations omitted). Importantly, all doubts *must* be construed in favor of arbitration, and the party asserting waiver "bears a heavy burden of proof." Stone v. E.F. Hutton & Co., Inc., 898 F.2d 1542, 1543 (11th Cir. 1990) (quoting Belke v. Merrill Lynch, Pierce, Fenner & Smith, 693 F.2d 1023, 1025 (11th Cir. 1982)).

i. Whether BellSouth Acted Inconsistently with its Right to Arbitrate

"[P]articipating in litigation can satisfy the first prong of the waiver test when a party seeking arbitration substantially participates in litigation to a point inconsistent with an intent to arbitrate." Citibank, N.A. v. Stok & Assocs., PA, 387

F. App'x 921, 924 (11th Cir. 2010) (internal quotations omitted). For example, a party might act inconsistently with its right to arbitrate by "substantially invok[ing]" the litigation machinery prior to demanding arbitration. Garcia v. Wachovia Corp., 699 F.3d 1273, 1277 (11th Cir. 2012). However, the party must have "clearly appeared to forego arbitration, and instead sought to resolve the dispute in court." Ivax Corp., 286 F.3d at 1317.

As a preliminary matter, neither party disputes that Wior is the party who brought suit in Argentina. Thus, the Court must determine whether BellSouth's defense of that litigation, which proceeded to judgment, evidences an intent to waive its right to arbitration. Wior relies on the fact that BellSouth raised the issue of arbitration in its answer in the Argentina litigation without ever initiating arbitration or moving any court to compel arbitration. Further, Wior argues that BellSouth waited over six years after the initiation of that lawsuit to bring its demand for arbitration.

BellSouth's delay, roughly six years, was certainly lengthy. However, that delay alone is insufficient to find waiver in this case. The Eleventh Circuit has held that "[a]lthough delay is undoubtedly a factor to be considered, in our precedent where waiver was found, the delay was always coupled with other substantial conduct inconsistent with an intent to arbitrate" such as collusion, extensive litigation, or an express repudiation of arbitration. Grigsby, 2015 WL 9461341, at

*4. In Grigsby, for example, the court excused a ten-year delay in demanding arbitration. Id. at *3. Indeed, the defendant in Grigsby actually initiated four lawsuits prior to demanding arbitration. Id. Although the Eleventh Circuit noted that those lawsuits were insubstantial because they did not progress particularly far, the Court finds the reasoning from Grigsby applicable here.

The Eleventh Circuit in Grigsby considered the progression of the lawsuits in determining whether the right to arbitration was waived. Implicit in that, based on the Court's case presentations, is the amount of active involvement in the lawsuit, not just its formal progress. Here, there is no evidence that BellSouth conducted a single deposition and Wior has not directed the Court to any motion filed by BellSouth. Rather, the only involvement BellSouth had in the lawsuit was requesting an unknown number of documents from a third party.[12] Compare Grigsby, 2015 WL 9461341, at *3 with Garcia v. Wachovia Corp., 699 F.3d 1278 (11th Cir. 2012) (finding waiver where the party took more than 15 depositions and received over 900,000 pages of documents and where the district court twice invited the defendant to file motions to compel); S&H Contractors, Inc. v. A.J. Taft Coal Co., 906 F.2d 1507, 1514 (11th Cir. 1990) (finding waiver where the plaintiff

[12] BellSouth additionally states that it offered documentary evidence and affidavits of its own witnesses. However, the only discovery requests made by BellSouth were that the court obtain certain documents from third parties. (Doc. No. 25-2 at ¶ 17.)

filed a lawsuit against the defendant, which involved two motions and five lengthy depositions, prior to demanding arbitration).

In addition to the lack of any evidence of substantial involvement, the Court is mindful of the relative impact of filing a demand for arbitration early on, had one been filed. "To be sure, because this circuit does not require a litigant to engage in futile gestures, a party will not waive its right to arbitrate by failing to act whenever any motion to compel would almost certainly have been futile." Garcia, 699 F.3d at 1278 (internal quotations and alteration omitted). That said, the Eleventh Circuit has held that a motion to compel will almost never be futile, absent controlling Supreme Court or circuit precedent foreclosing the right to arbitrate. Id. Even so, the Eleventh Circuit quoted approvingly that "a party must move to compel arbitration whenever 'it should have been clear to [the party] that the arbitration agreement was at least arguably enforceable.'" Id. (quoting Se. Stud. & Components, Inc. v. Am. Eagle Design Build Studios, LLC, 588 F.3d 963, 967 (8th Cir. 2009)) (alteration in original).

As noted above, the Argentina court ruled that the Transition Agreement was unenforceable because it was never registered. Thus, it seems that any attempt to initiate arbitration would have been duplicative, at best. The Argentina court was operating on the premise that the contract was unenforceable under Argentine law. Under the Argentina court's line of reasoning then, no binding arbitration

agreement existed because no valid contract existed. If BellSouth had initiated arbitration at the outset, the Argentina litigation surely would have proceeded through its same course.

On these facts, the Court cannot find that Petitioner met his "heavy burden" of proving that BellSouth substantially invoked litigation. Stone, 898 F.2d at 1543. The Court is only presented with a delay, albeit lengthy, and Petitioner's conclusory statements regarding BellSouth's participation in the lawsuit. On the other hand, BellSouth (1) did not initiate the lawsuit, unlike in Grigsby and S&H Contractors; (2) only requested some third-party documents, without taking a single deposition; and (3) informed the Argentine court and Petitioner of its arbitration rights early in the litigation. That BellSouth never filed a motion to compel arbitration, while certainly a consideration, is not dispositive. This is particularly true where, as here, the likely outcome of any such motion is clear. Accordingly, the Court finds that BellSouth's actions were not inconsistent with its right to arbitrate.

ii. Whether Wior Suffers Any Prejudice

The Court similarly finds that Petitioner failed to meet his burden of establishing prejudice. "To determine whether the other party has been prejudiced, '[the Court] may consider the length of delay in demanding arbitration and the expense incurred by that party from participating in the litigation process.'" Garcia,

699 F.3d at 1277 (quoting S&H Contractors, 906 F.2d at 1514)). To support his assertion of prejudice, Petitioner states, in conclusory fashion, that (1) the delay in seeking arbitration was substantial; (2) he expended time and financial resources litigating against BellSouth; and (3) BellSouth benefited from conducting discovery in the Argentine litigation, which it would not have received in arbitration.

While the Court has no doubt that Wior expended time and resources litigating in Argentina, a number of other factors preclude a finding of prejudice in this case. At the forefront is whether a demand for arbitration would have made any difference. As noted above, the contracts entered into by the parties in Argentina do not have *res judicata* effect unless registered, a fact of which Petitioner was aware. Therefore, it seems at least probable that the litigation in Argentina would have proceeded regardless of a demand for arbitration, limiting the prejudice from a failure to assert the right to arbitrate earlier. See Morewitz v. West of England Ship Owners Mut. Protection & Indem. Ass'n (Luxembourg), 62 F.3d 1356, 1366 (11th Cir. 1995) (finding prejudice existed where the party demanding arbitration "had ample opportunity to demand arbitration well in advance of" a decision from the House of Lords "that significantly changed the legal position of the parties to the prejudice of [the opposing party]").

Additionally, the Court is not persuaded by Petitioner's argument related to discovery. The only allegations related to discovery before the Court are BellSouth's—that it only requested some third party documents and offered affidavits of its own witnesses. Accordingly, any "benefit" appears to be slight. Further, Petitioner presumably benefited from the receipt of discovery. In the face of the strong federal policy favoring arbitration, the Court cannot find that Petitioner met his burden of establishing prejudice.

III. CONCLUSION

Based on the foregoing, the Court **DENIES** Petitioner's Renewed Motion for Stay of Arbitration and Request for Declaratory Relief (Doc. No.13);[13] **GRANTS** Respondent's Cross Motion to Stay Litigation and Compel Arbitration (Doc. No. 14); **GRANTS** Petitioner's Motion for Leave to File a Surreply Brief (Doc. No. 18); **GRANTS** Respondent's alternative request for leave to file a sur-surreply brief (Doc. No. 25-1); and **DENIES** Petitioner's Motion for Permanent Injunction to Enjoin the Arbitration (Doc. No. 19). Furthermore, the Court **STAYS** this action until the arbitration is complete. Within **THIRTY (30) DAYS** of the

[13] Petitioner's Complaint states two causes of action. The first seeks a stay of arbitration. For the reasons stated herein, the Court denies that request. Petitioner additionally seeks a declaration that BellSouth's breach of contract claim is time-barred under Georgia law. Because the Court finds that the arbitrator must first decide the statute of limitations issue, the Court expresses no opinion on whether BellSouth's claims are barred by any applicable statute of limitation at this time.

completion of the arbitration, the parties are **DIRECTED** to file a status report with the Court.

SO ORDERED, this 28th day of June, 2016.

Eleanor L. Ross
Eleanor L. Ross
United States District Judge
Northern District of Georgia