

July 10, 2023 **PRACTICE POINTS**

## Supreme Court Once Again Issues a Pro-Arbitration Ruling

If a contract contains an arbitration clause—even a very narrow, limited one—a defendant intent on delaying matters will now have an incentive to argue that the clause applies and to appeal any adverse ruling.

By Stuart M. Riback

During the Supreme Court’s late-June sprint to the end of its term, the Court decided [\*Coinbase, Inc. v. Bielski\*](#) Case No. 22-105 (June 23, 2023). This case concerns arbitration—more precisely, disputes about arbitration.

Parties often put arbitration clauses into their agreements to avoid going through full discovery and motion practice of the sort done in federal and most state courts. Suppose one of the parties challenges the validity of the arbitration clause and the lower court rules that the case need not be arbitrated but instead can proceed in court. Under [§16 of the Federal Arbitration Act](#), that ruling can be appealed immediately. But what happens to the underlying litigation while the appeal goes forward? Section 16 doesn’t explicitly say what should happen.

The entire point of the appeal is to get a ruling that the dispute should go to arbitration rather than be handled in court. But if the case can proceed in the lower court while the appeal is pending, any ruling on appeal may turn out to be almost beside the point—the party resisting arbitration will have received much or all of the benefit of regular litigation even if the appellate court decides that the case shouldn’t have been in court at all.

Is that how things should be? The circuits were split on the issue. Six circuits (Third, Fourth, Seventh, Tenth, Eleventh, and D.C.) held that an appeal of the arbitrability issue divests the trial court of power to proceed with the case. Three circuits (Second, Fifth, and Ninth) disagreed, holding that it was up to the district judge to decide whether to stay proceedings while the appeal is pending.

We now have the answer. An appeal from a decision that denied arbitration requires the district court to stay the case while the appeal is pending. The general rule is that, while an appeal is pending, the district court has no jurisdiction over the issues that are the subject of the appeal. According to the Supreme Court, when “the question on appeal is whether the case belongs in arbitration or instead in the district court, the entire case is essentially ‘involved in the appeal.’” *Coinbase*, slip op. at 3.

This decision is not surprising. The Supreme Court is very pro-arbitration, and this decision preserves the utility of arbitration by denying a plaintiff the benefit of being in court once a defendant raises an arbitrability defense (at least until after an appeal is decided). The Court’s opinion stresses that allowing litigation to proceed while an appeal is pending could “waste scarce judicial resources” if the decision denying arbitration is reversed. The facts

of *Coinbase* highlight why the Court was concerned about this: the plaintiff in that case had filed a class action. Class actions are notoriously resource intensive.

What may be surprising is that this was a 5-4 decision with Justices Jackson, Kagan, Sotomayor, and Thomas dissenting. The dissent is easily summarized: if Congress meant to require litigation to be stayed while an appeal is pending, it would have said so.

This decision underscores just how heavily the law favors arbitration. There is a well-known presumption in favor of arbitration when the underlying contract can plausibly be read to require it. This decision now adds more weight on the pro-arbitration scale—even if the party resisting arbitration wins in the trial court, it still cannot benefit from the ruling until and unless it also wins on appeal.

Litigators defending disputes in which an arbitration clause is involved will doubtlessly make an obvious inference. If a contract contains an arbitration clause—even a very narrow, limited one—a defendant intent on delaying matters will now have an incentive to argue that the clause applies and to appeal any adverse ruling. Under *Coinbase*, the lawsuit will not proceed until and unless the lower court's ruling is confirmed on appeal. So, motions to refer disputes to arbitration may now increase, even ones that are a bit of a stretch.

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