

Law Trends & News

Practice Area Newsletter



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Survival of Arbitration Clauses After Termination of Contract

By Kenneth J. Ashman & Neal D. Kitterlin

Your client, a large widget manufacturer, comes to you with a commercial dispute

• Past Issues

with one of its main suppliers of raw materials. Upon review of the governing contract, you notice that it contains a procedure compelling arbitration for any dispute that arises under its terms. You also notice, however, that the contract expired four years ago. When you ask the client about this fact, he confirms that the contract technically expired then, but says that the two companies “just kept doing business together like we always had under the contract.” Because the parties continued to behave as if the contract were still in effect, must your client initiate arbitration in order to resolve its dispute? According to a recent federal court decision, the answer is no.

In *Vantage Technologies Knowledge Assessment, LLC v. College Entrance Examination Board*, 2008 WL 5264908 (E.D.Pa. Dec. 18, 2008), the court ruled that parties are not bound to submit to arbitration absent a written agreement compelling arbitration. In *Vantage*, the parties entered into a written contract in May 1998, under which Vantage agreed to oversee the online administration of the College Board’s proprietary writing assessment tool, “WritePlacer.” The terms of the contract included an agreement that all disputes arising out of or relating to the contract would be subject to arbitration. The contract expired in 1999, but was retroactively renewed by a further written agreement in 2001, which also contained an arbitration clause. In 2002, this agreement expired, and a draft agreement which included the same arbitration clause as that found in the parties’ previous agreements was circulated, but never agreed to. Despite the parties’ inability to agree on the terms of a new agreement, Vantage and the College Board continued to do business with one another without a written contract. In July 2008, the parties entered into a new contract that did not contain an arbitration provision.

In August 2008, the College Board initiated arbitration seeking a declaratory judgment with respect to unpaid amounts claimed by Vantage. In September 2008, Vantage filed an action in Pennsylvania state court (later removed by College Board to the Eastern District of Pennsylvania) alleging unjust enrichment, breach of contract, fraud in the inducement, negligent misrepresentation, and false prosecution of an arbitration claim. In deciding the College Board’s motion to stay the proceedings before the federal court, as allowed by the Federal Arbitration Act, the court analyzed whether the parties had agreed to submit the dispute to arbitration, characterizing the issue as “whether the parties continued to be bound by the arbitration clause of an expired commercial contract when the parties have continued to do business after that contract’s expiration.”

In answering the issue in the negative—the arbitration provision did not survive the contract’s termination—the court distinguished the case of *Luden’s Inc. v. Local Union No. 6 of Bakery, Confectionery and Tobacco Workers’ International Union of America*, 28 F.3d 347 (3rd Cir. 1994), relied upon by the College Board, holding that the determination there that the arbitration clause survived applied only in the labor context. The *Vantage* court noted that labor contracts include arbitration clauses for the express benefit of labor, in exchange for a promise not to strike. The *Vantage* court found no such exchange to be present where “two

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sophisticated commercial entities mutually decide to continue their relationship on a day-to-day basis in the absence of an agreement signed by both.” It also relied on a New Jersey district court case, *Bogen Communications, Inc. v. Tri-Signal Integration, Inc.*, 2006 WL 469963 (Feb. 27, 2006), which reached the same conclusion under a set of similar facts.

Finally, the *Vantage* court noted that, while federal law favors arbitration and requires any doubt about the scope of coverage to be resolved in favor of arbitration, a court may not invoke federal policy to “create an arbitration provision in a contractual relationship where no such provision exists.” Thus, under the *Vantage* ruling, a court will not imply the continued existence of an arbitration clause based on the conduct of the parties, but will require that such a clause be part of an express agreement in order to be enforced.

As a notable caveat, not all courts may follow this approach, and it may instead turn on the intent of the parties. For example, the authors litigated a similar case last year, and, in an unreported Illinois lower court decision, the court ruled that an expired contractual provision providing for the shifting of attorneys’ fees to a prevailing party in a dispute was nonetheless enforceable after the contract’s expiration because the parties continued to behave as though the contract was still in force, under a contract implied-in-fact theory. It would be no tremendous leap of logic to apply the same analysis if the contractual provision at issue were an arbitration provision rather than a fee-shift provision, so although the *Vantage* decision provides support for one side of the dispute, it does not resolve the question definitively.

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Note

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