Assessing 2 Years Of High Court's Arbitration Waiver Ruling

By **Andrew Price, Rafe Schaefer and Timothy Shinn** (March 15, 2024)

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In Morgan v. Sundance in 2022, the U.S. Supreme Court made clear that no special rules apply to a waiver of an arbitration provision.[1]

Though the case was decided less than two years ago, it has already been cited hundreds of times at the federal district court level, by every circuit other than the U.S. Courts of Appeals for the First and Federal Circuits, and by seven state supreme courts.

As evidenced by those citations, Sundance has had immediate ramifications in federal courts regarding whether a party has waived the right to arbitrate, but it may take time for its impact to be felt on other federal issues and in state courts — creating either unity in waiver analyses or differences in waiver law depending on whether a party's motion to compel arbitration is brought in state or federal court.

But the thoughtful practitioner will not cabin the impact of Sundance merely to analysis of a waiver. Sundance makes clear that courts are not to analyze agreements to arbitrate through any special lens. Ordinary rules of contract interpretation apply across the board.

Sundance Decision

The Supreme Court has long affirmed that arbitration is a creature of contract. Despite that well-known phrase, though, lower courts have not always treated agreements to arbitrate the same as other contractual rights, particularly when examining waiver of a right to arbitrate.

For decades, courts wrestled with whether a party waived its right to arbitrate by taking actions inconsistent with enforcement of its bargained-for dispute resolution procedures. Many federal circuits and state supreme courts applied an additional requirement — a showing of prejudice — to the common law doctrine of waiver that applied only in the arbitration context.

In Sundance, the Supreme Court clarified that, although federal courts had written decades of case law regarding the favored status of arbitrations, that mandate was intended to reflect the Federal Aviation Administration's policy to make "arbitration agreements as enforceable as other contracts, but not more so."

That means that courts are not supposed to treat arbitration contracts differently than other agreements — including when analyzing waivers. This meant that no showing of prejudice was necessary for finding waiver of a right to arbitrate.

Key Federal Decisions Relying on Sundance

At the federal level, the Supreme Court has already been petitioned several times to expand its core holding in Sundance, although certiorari has not yet been granted in any case. For

example, in 2022 in Oceltip Aviation 1 Pty Ltd. v. Gulfstream Aerospace Corp., the Supreme Court was asked to expand Sundance to apply to choice of law provisions.[2]

In Oceltip, the parties' agreement contained an arbitration provision, as well as a choice of law provision that Georgia law applied to any dispute under the agreement.[3] An application to vacate the award on the ground of manifest disregard of the law — a vacatur standard under the Georgia Arbitration Act but not the Federal Arbitration Act — was removed to federal court and denied under the FAA.[4]

In its petition to the Supreme Court, Oceltip challenged the Eleventh Circuit's application of a clear and unmistakable standard for finding that the parties had contracted for the FAA's substantive provisions to trump Georgia law.[5]

The clear and unmistakable standard is utilized by several circuits. But Oceltip argues that the clear and unmistakable standard is inconsistent with state law contract principles.[6]

In other words, Oceltip argues that the clear and unmistakable standard is another example of an arbitration-specific rule made verboten by Sundance. But the Supreme Court denied Oceltip's petition.

Key State Cases Analyzing Sundance

Sundance has also affected arbitration law at the state level. Despite the Supreme Court's decision being expressly cabined to "a matter of federal law,"[7] many arbitration provisions incorporate the FAA, and most state arbitration acts either expressly incorporate or persuasively follow cases interpreting the FAA.

The California Supreme Court is set to determine whether it will adopt Sundance's prohibition on a prejudice-waiver requirement into the California Arbitration Act.

In Quach v. California Commerce Club Inc., a California appellate court reviewed the denial of a motion to compel arbitration on the grounds that the moving party had waived its right to arbitration.[8] The appellate court recognized that under California law, a showing of prejudice "is critical in waiver determinations."[9]

The court relied on California Supreme Court precedent that observed California and federal case law were consistent in requiring a consideration of prejudice.[10] The California appellate court thus held that while the moving party had participated in litigation, it was an error to find waiver absent a showing of prejudice.[11]

The U.S. Supreme Court issued its opinion in Sundance days after that opinion was released. The California Supreme Court granted the petition for review in Quach on the issue, "Does California's test for determining whether a party has waived its right to compel arbitration by engaging in litigation remain valid after the United States Supreme Court decision in Morgan v. Sundance, Inc."[12]

While California has directly taken up the issue, other states have yet to tackle Sundance head-on. For example, several Texas appellate courts have flagged the question of whether Sundance abrogates the prejudice-waiver requirement under the Texas Arbitration Act.[13]

But the Texas Supreme Court has yet to grant a petition for review, possibly because the factual scenario necessary for a Sundance inquiry — intentional relinquishment of a right to arbitrate but no resulting prejudice — is unusual.

The Wyoming Supreme Court similarly recognized that its precedent considers prejudice a factor in assessing waiver of an arbitration right, but has yet to consider whether that remains the case under Wyoming law post-Sundance.[14]

Future Implications for Sundance

Avenues for expanding, contracting or distinguishing Sundance abound. Consider the following hypothetical examples that seem ripe for courts to apply to Sundance, or not.

Contractual Arbitrator Qualifications

Arbitration agreements often set forth qualifications and requirements for arbitrators. Since arbitration is a creature of contract and arbitration agreements must be enforced like any other agreement, would Sundance require vacatur of an arbitration award rendered by an unqualified arbitrator?

If a party does not object to the arbitrator's qualifications, will waiver of the contractual qualification turn on whether a party was prejudiced by the lack of adherence to the contractual requirements?

Of course, Sundance abolished the prejudice requirement needed to show waiver of a right to arbitrate, meaning it would be heavily featured in analysis of any waiver question.

Similarly, when and where is a party entitled to enforce its contractual bargain?

If a facially unqualified arbitrator is appointed to oversee a dispute, the complaining party can seek redress from the arbitrator themself, from an administrative body — like the American Arbitration Association or JAMS — assuming the arbitration is administered, or from the courts.

Sundance leaves open the question of where the issue should be raised in the first instance, and whether, to what extent and when courts have the authority to weigh in on the issue.

Reasoned Award Requirement

As another example, arbitration agreements often require the arbitrator's decision be reflected in a reasoned award. But despite the obligation, some arbitrators fail to issue the contractually required reasoned awards.

Courts have struggled with how to address awards that fail to comply with contractual requirements, sometimes vacating awards for a failure to comply with required reasoned awards, such as in the U.S. Court of Appeals for the Ninth Circuit's 1992 decision in Western Employers Insurance Co. v. Jefferies & Co.,[15] and other times allowing arbitrators to clarify their awards after they initially failed to provide a reasoned award, such as in the U.S. Court of Appeals for the Second Circuit's 2023 ruling in Smarter Tools Inc. v. Chongqing Senci Import & Export Trade Co.[16]

Indeed, some cases, like the 2015 Texas First District Court of Appeals case Stage Stores Inc. v. Gunnerson, have even grappled with what is — and is not — a reasoned award.[17]

Will Sundance unify these various lines of case law? Arbitration agreements are contracts, and there is no such thing as a do-over for breaching a contract, even when it is the

arbitrator themself who fails to comply with the contract.

Conclusion

These questions and more are likely to be tested in the coming years as courts continue to digest Sundance and analyze agreements to arbitrate with the same rigor as other contract rights, no more and no less.

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[1] Morgan v. Sundance, 596 U.S. 411 (2022).

[2] Oceltip Aviation 1 Pty Ltd. v. Gulfstream Aerospace Corp., pet. for rev. filed, 2022 WL 17094372 (U.S. Nov. 16, 2022).

[3] Gulfstream Aerospace Corp. v. Oceltip Aviation 1 Pty. Ltd., 451 F. Supp. 3d 1370, 1378 (S.D. Ga. 2020), aff'd sub nom. Gulfstream Aerospace Corp. v. Oceltip Aviation 1 Pty Ltd., 31 F.4th 1323 (11th Cir. 2022).

[4] Oceltip Aviation 1 Pty Ltd. v. Gulfstream Aerospace Corp., pet. for rev. filed, 2022 WL 17094372 (U.S. Nov. 16, 2022).

[5] Id. at 8.

[6] Id.

[7] Sundance, 596 U.S. at 416.

[8] 78 Cal. App. 5th 470, 476, 293 Cal. Rptr. 3d 737, 741 (2022).

[9] Id. at 478.

[10] Id. (citing St. Agnes Med. Ctr. v. PacifiCare of California, 31 Cal. 4th 1187, 1205, 82 P.3d 727, 739 (2003)).

[11] 78 Cal. App. 5th at 484.

[12] Quach v. California Commerce Club Inc., No. S275121, pet. for rev. granted (Aug. 24, 2022).

[13] See, e.g. Eades v. Doe 1, No. 04-22-00472-CV, 2023 WL 9007839, at *4 (Tex. App. -

San Antonio Dec. 29, 2023, no pet. h.) ("[I]t remains an open question how our supreme court will interpret and apply Morgan to Texas state law.); Munro v. Jagpal, No. 05-21-00125-CV, 2023 WL 3914554, at *6 n.4 (Tex. App. - Dallas June 9, 2023, no pet.) (mem. op.) ("Whether our supreme court will [remove the arbitration-preferring prejudice prong] is an open question."); Green v. Velocity Investments LLC, No. 05-20-00795-CV, 2022 WL 3655232, at *9 (Tex. App. - Dallas Aug. 25, 2022, no pet.) (Whether [Sundance] would govern in state court as a matter of procedure generally, or in cases said to be subject to state arbitration statutes, is unsettled and a matter for the Texas Supreme Court to determine in the first instance.").

[14] EmpRes at Riverton LLC v. Osborne, 2023 WY 112, 538 P.3d 670, 674 (Wyo. 2023)

[15] E.g., Western Employers Insurance. Co. v. Jefferies & Co., 958 F.2d 258 (9th Cir. 1992) (vacating an award that did not have contractually-required "findings of fact and conclusions of law" because the arbitrators "clearly failed to arbitrate the dispute according to the terms of the arbitration agreement").

[16] E.g., Smarter Tools Inc. v. Chongqing Senci Import & Export Trade Co., 57 F.4th 372 (2d Cir. 2023) (confirming an award "clarified" by an arbitrator after the arbitrator had initially failed to provide a reasoned award).

[17] E.g., Stage Stores Inc. v. Gunnerson, 477 S.W.3d 848 (Tex. App. - Houston [1st Dist.] 2015, no pet.).