DONALD HARUO,
Appellant,

v.

RESORT TRUST, INC.,
Appellee.

CIVIL APPEAL NO. 10-007
Civil Action No. 03-125

Supreme Court, Appellate Division
Republic of Palau

Decided: July 2, 2010

[1] **Appeal and Error:** Standard of Review

We review *de novo* the issue of whether the undisputed facts of defendant's participation in litigation and delay in seeking arbitration constitute a waiver of arbitration.

[2] **Arbitration:** Waiver of Right to Arbitrate

The right to arbitrate given by a contract may be waived, and the arbitration process is intended to expedite the settlement of disputes and should not be used as a means of furthering and extending delays.

[3] **Arbitration:** Waiver of Right to Arbitrate

It is undisputed that a litigant may waive its right to invoke arbitration by so substantially utilizing the litigation machinery that to subsequently permit arbitration would prejudice the party opposing the stay.

[4] **Arbitration:** Waiver of Right to Arbitrate

Reduced to its essentials, to determine the existence of waiver of a right to arbitrate requires a synthesized evaluation of the extent of the litigation to date and the extent of the prejudice incurred by the nonmoving party. Put another way, whether a party has waived its right to arbitrate involves a case-by-case analysis of the degree to which a party has substantially invoked the judicial process and prejudiced the other party in doing so.

[5] **Arbitration:** Waiver of Right to Arbitrate

Prejudice is the touchstone for determining whether a right to arbitrate has been waived.

[6] **Arbitration:** Waiver of Right to Arbitrate

Neither delay nor the filing of pleadings by the party seeking a stay will suffice, without more, to establish waiver of arbitration. However, delay and the extent of the moving party's trial oriented activity are material factors in assessing a plea of prejudice.

[7] **Arbitration:** Waiver of Right to Arbitrate

Waiver of the right to compel arbitration is not to be inferred lightly and courts should resolve any doubts about waiver of the right to arbitrate in favor of arbitration. American courts have routinely held that the party asserting waiver bears a very heavy burden of proof to prove the elements of waiver.

[8] **Arbitration:** Waiver of Right to Arbitrate

Factors used to determine whether a party has been prejudiced are: (1) timeliness or lack thereof of a motion to compel arbitration; (2) the degree to which a party seeking to compel arbitration, or to stay court proceedings pending arbitration, has contested the merits of its opponent's claims; (3) whether the party has informed its adversary of an intention to seek arbitration even if it has not yet filed a motion to stay district court proceedings; (4) extent of its non-merits practice; (5) its assent to trial court's pretrial orders; and (6) extent to which both parties have engaged in discovery.

[9] **Arbitration:** Waiver of Right to Arbitrate

Where a party has chosen to save litigation costs awaiting the outcome of a related case that party cannot now argue the delay was prejudicial.

[10] **Arbitration:** Waiver of Right to Arbitrate

Particularized assertions of prejudice must be accompanied by particularized evidence of costs and of the nonmoving party's financial inability to pay.

Counsel for Appellant: William L. Ridpath

Counsel for Appellee: Rachel A. Dimitruk

BEFORE: ARTHUR NGIRAKLSONG, Chief Justice; KATHLEEN M. SALII, Associate Justice; ALEXANDRA F. FOSTER, Associate Justice.

Appeal from the Trial Division, the Honorable LOURDES F. MATERNE, Associate Justice, presiding.

PER CURIAM:

Appellant Donald Haruo ("Haruo") appeals a January 29, 2010 Order Granting a Motion to Dismiss in favor of Appellee Resort Trust, Inc. ("RTI"), in which the court concluded, *inter alia*, that RTI had not waived its right to compel arbitration. Specifically, Haruo contends that, because RTI substantially invoked the judicial process during the seven-year time period between the filing of his Complaint and RTI's filing of its Motion to Dismiss, RTI caused Haruo to suffer actual prejudice—thus, the court should have retained jurisdiction over the case, instead of ordering the dispute to arbitration in Japan. Despite the admittedly lengthy delay in the underlying case, we nonetheless AFFIRM the Trial Division's Order Granting the Motion to Dismiss for the reasons outlined below.

FACTUAL BACKGROUND AND PROCEDURAL HISTORY

On October 30, 1997, Haruo and RTI entered into an "Agreement for Services" ("Agreement"), under which Haruo promised to further RTI's plans to construct a golf course and resort in Aimeliik State. After a dispute arose over RTI's obligation to pay, Haruo filed a complaint alleging breach of contract against RTI on April 9, 2003. RTI filed its answer, along with a litany of counterclaims, on July 31, 2003. In its answer, RTI did not assert arbitration as an affirmative defense. As noted by both the trial court and the parties, the case essentially sat stagnant for several years. In addition to the delay caused by the unforseen cancer diagnosis and subsequent treatment of RTI's counsel, the parties also mutually agreed to delay the case to allow the resolution of *Republic of Palau v. Airai*, Civil Action Nos. 99-186, 99-209, in which the contract between RTI and Haruo was a central issue. The Special Prosecutor ultimately dismissed his appeal in the criminal case in December, 2007.

Despite the self-imposed delay between July 2003 and December 2007, several filings did occur. Haruo not only answered RTI's counterclaims, but also filed his first discovery requests, including interrogatories, on April 6, 2004. Between early 2004 and late 2007, the parties set and subsequently postponed a number of trial dates. Then, on November 9, 2007, the court held a status conference in which the court set deadlines for discovery (March 2008) and pretrial motions (June 2008). After RTI requested to extend these deadlines, the court moved the deadline for discovery to July 12, 2008, with pretrial motions due September 13, 2008. On July 11, 2008, RTI answered Haruo's discovery requests and served its own discovery requests on Haruo. Both parties acknowledge that, at this time, RTI informed Haruo's counsel of its intent to request arbitration. RTI also encouraged Haruo not to respond to its discovery requests. Approximately two months later, RTI once again requested an extension to move the deadlines for discovery and pretrial motions. Once again, the court granted it. On February 23, 2009, only twenty-nine days prior to the March 24, 2009 trial date, RTI filed its motion to dismiss based upon the choice of law and arbitration provisions in the Agreement.

The Agreement between RTI and Haruo states in Article 11:

> Any and all disputes arising from or in connection with this Agreement or a transaction conducted under this Agreement shall be settled by mutual consultation between parties in good faith as promptly as possible, but failing an amicable settlement, shall be settled by arbitration. The arbitration shall be held in Nagoya, Japan and conducted in accordance with the rules of Japan Commercial Arbitration Association. The award of the arbitration shall be final and binding upon the parties.

Article 12 states that "[t]hat this Agreement shall be interpreted and construed in accordance with the law of Japan."

In his response to the Motion to Dismiss, Haruo raised two primary arguments against enforcement of the arbitration clause: first, Palau's common law does not allow for enforcement of arbitration agreements, and second, even if Palau law allows for the enforcement of arbitration agreements, RTI had nonetheless waived its right to arbitrate by virtue of its participation in the litigation for the past seven years. In its reply, RTI contended that Haruo had failed to produce any evidence of prejudice; the delay was a result of the mutual agreement of the parties; and neither party had substantially litigated the merits.

After a September 9, 2009 hearing, the trial court issued its Order Granting RTI's Motion to Dismiss on January 29, 2010. In its Order, the trial court (1) upheld the choice of law clause directing that Japanese law be applied to interpretations of the Agreement; (2) concluded that U.S. common law does not mandate the invalidation of arbitration clauses in Palau; and (3) found that RTI had not waived its contractual right to arbitration. With respect to the latter, the court specifically found that RTI's seven-year delay in filing its Motion to Dismiss was not sufficient by itself to constitute waiver, especially because RTI never substantially invoked the judicial process. The court noted that "[a]lthough this litigation has strung on for many years, little of substance has been litigated, and it does not appear that RTI has taken advantage of the judicial process to obtain discovery it would not be able to acquire in arbitration." *Haruo v. Resort Trust, Inc.*, Civ. Act. No. 03-125 (Tr. Div. Jan. 29, 2010). Likewise, the court noted that Haruo had failed to demonstrate that he had been prejudiced by RTI's delay. This appeal followed.

STANDARD OF REVIEW

[1] We review *de novo* the issue of whether the undisputed facts of defendant's participation in litigation and delay in seeking arbitration constitute a waiver of arbitration. *Fisher v. A.G. Becker Paribas, Inc.,* 791 F.2d 691, 694 (9th Cir. 1986); *see also* 4 Am. Jur. 2d *Alternative Dispute Resolution* § 106 (2007) ("A trial court's finding of a right to arbitrate is reviewed *de novo*.").

DISCUSSION

The gist of Haruo's argument on appeal, which largely recapitulates his briefs below, is as follows: (1) RTI substantially invoked the judicial process during the seven-year litigation with Haruo; (2) Haruo suffered actual prejudice as a result of RTI's "filing of its eleventh hour Motion to Dismiss;" thus (3) RTI waived its right to arbitrate.[1] For the reasons outlined below, we disagree and affirm the trial court's Order Granting RTI's Motion to Dismiss.

I. Basic Legal Principles

[2, 3] Even though his substantive arguments fail to carry the day, Haruo accurately outlines the rules of law governing waiver of a party's right to arbitrate. Indeed, there is no question that "[t]he right to arbitrate given by a contract may be waived" and that "the arbitration process is intended to expedite the settlement of disputes and should not be used as a means of furthering and extending delays." (Appellant's Br. at 3-4 (quoting 4 Am. Jur. 2d *Alternative Dispute Resolution* § 107)). Likewise, it is undisputed that "[a] litigant may waive its right to invoke [arbitration] by so substantially utilizing the litigation machinery that to subsequently permit arbitration would prejudice the party opposing the stay." (*Id.* at 4 (quoting *Fraser v. Merrill Lynch Pierce, Fenner & Smith, Inc.*, 817 F.2d 250, 252 (4th Cir. 1987))).

[4] Reduced to its essentials, to determine the existence of waiver of a right to arbitrate requires a synthesized evaluation of the extent of the litigation to date and the extent of the prejudice incurred by the nonmoving party. Put another way, whether a party has waived its right to arbitrate involves a case-by-case analysis of the degree to which a party has substantially invoked the judicial process and prejudiced the other party in doing so. *See e.g.* 4 Am. Jur. 2d *Alternative Dispute Resolution* § 107 (stating that merely taking part in litigation is not enough to waive a right to arbitration unless a party has substantially invoked the judicial process to its opponent's detriment); *Cotton v. Slone*, 4 F.3d 176, 179 (2d. Cir. 1993) ("waiver will be inferred if a party engages in protracted litigation that results in prejudice to the opposing party"); *Fisher,* 791 F.2d at 694 (holding that waiver of a right to arbitration has occurred if the party seeking to compel arbitration has knowledge of an existing right to compel arbitration; acts inconsistent with that existing right; and the party opposing arbitration suffers prejudice resulting from such inconsistent acts).

[5-7] To undertake this synthesized evaluation, it is helpful to consider the following. First, "prejudice is the touchstone for determining whether a right to arbitrate has been waived." *Hoxworth v. Blinder, Robinson, & Co.,* 980 F.2d 912, 925 (3d Cir. 1992); *see also Fraser*, 817 F.2d at 252 ("the dispositive question is whether the party objecting to arbitration has suffered actual prejudice").[2] Second, "neither delay nor the

[1] In his mere five-page opening brief, Haruo identifies one issue on appeal, challenging only the trial court's decision as to waiver. Accordingly, this Court will not address the portions of the trial court's Order deciding the enforceability of the Agreement's choice of law clause or the enforceability *vel non* of arbitration provisions in Palau.

[2] RTI rightly points out that some American courts do not require a particularized showing of prejudice in order to find that a party has waived

filing of pleadings by the party seeking a stay will suffice, without more, to establish waiver of arbitration. However, delay and the extent of the moving party's trial oriented activity are material factors in assessing a plea of prejudice." *Fraser*, 817 F.2d at 252. Third, as RTI points out in its response brief, "waiver of the right to compel arbitration is not to be inferred lightly and courts should 'resolve any doubts about waiver of the right to arbitrate in favor of arbitration.'" (Appellee's Br. at 6 (quoting 4 Am. Jur. 2d *Alternative Dispute Resolution* § 105)). Indeed, American courts have routinely held that the party asserting waiver bears a very "heavy burden of proof" to prove the elements of waiver. *See Sovak v. Chugai Pharmaceutical Co.*, 280 F.3d 1266, 1270 (9th Cir. 2002), *as amended by* 289 F.3d 615 (citing *Britton v. Co-op Banking Group*, 916 F.2d 1405, 1412 (9th Cir. 1990)).

[8] Factors used to determine whether a party has been prejudiced are:

> (1) timeliness or lack thereof of a motion to compel arbitration;
> (2) the degree to which a party seeking to compel arbitration, or to stay court proceedings pending arbitration, has contested the merits of its opponent's claims;
> (3) whether the party has informed its adversary of an intention to seek arbitration even if it has not yet filed a motion to stay district court proceedings;
> (4) extent of its non-merits practice;
> (5) its assent to trial court's pretrial orders; and

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its right to arbitrate, stating "[t]wo circuit courts have held that in discrete circumstances a finding of waiver does not require a determination that the party resisting arbitration suffered prejudice." (Appellee's Br. at 7 (citing *Cabintree of Wisconsin, Inc. v. Kraftmaid Cabinetry, Inc.*, 50 F.3d 388, 390 (7th Cir. 2005) (holding that removal of the case to federal court and substantial engagement in discovery before seeking to compel arbitration amounted to waiver in and of itself, without a specific showing of prejudice needed); *Khan v. Parsons Global Servs. Ltd.*, 521 F.3d 425 (D.C. Cir. 2008) (holding that no showing of prejudice was required to constitute waiver when the party had removed the case to federal court and sought summary judgment)). RTI also points out that, conversely, many American courts have "specifically rejected *Cabintree's* 'no prejudice' rule." (Appellee's Br. at 7 (citing *Nicholas v. KBR Inc.*, 565 F.3d 904 (5th Cir. 2009) (declining to "go as far as the Seventh Circuit [in *Cabintree*]" and deciding to "continue to require a showing of prejudice even if there is substantial invocation of the process.")).

The Court finds this American tension to be further evidence of the need to assess waiver on a case-by-case basis, and to encourage courts in Palau to view the two prongs—substantial use of the judicial process and prejudice to the nonmoving party—as existing on a spectrum. For example, a party seeking to compel arbitration could so invoke the judicial process as to make a particularized showing of prejudice unnecessary, as was the case in the *Cabintree*, while the same party could participate very little in the judicial process and nonetheless heavily prejudice the nonmoving party. An example of the latter would be a situation where a moving party obtained information from its very first discovery request that would have been unattainable in arbitration.

> (6) extent to which both parties have engaged in discovery.

4 Am. Jur. 2d *Alternative Dispute Resolution* § 107; *see also Cotton*, 4 F.3d at 179. As the trial court correctly noted in its Order, "[c]ommon among these factors is that each is related to the depth of the litigant's involvement in the judicial process. Of them, courts often rely most heavily on the extent to which the party requesting arbitration engaged in discovery; if the parties have conducted little or no discovery, then less prejudice likely exists." Civ. Act. No. 03-125, Order at 13 (Tr. Div. Jan. 29, 2010) (citing 4 Am. Jur. 2d *Alternative Dispute Resolution* § 107). Moreover, other pertinent factors determining the extent of prejudice include, "whether the party seeking arbitration made its request close to trial date, and whether that party filed a counterclaim concerning an otherwise arbitrable dispute without requesting arbitration." *Id.* (citing *Sobremonte v. Superior Court*, 61 Cal. App. 4th 980, 992 (2d Dist. 1998)).

II. RTI did not waive its right to arbitrate

With these principles in mind, we turn now to our *de novo* review of the law as it applies to RTI's conduct. Without question, the fact that nearly seven years have passed since the filing of the Complaint supports Haruo's argument that the delay in requesting arbitration was excessive. On the other hand, the lion's share of the delay was at the mutual agreement of the parties**,** and Haruo has failed to produce convincing evidence of actual prejudice, apart from the delay itself. The synthesized evaluation of the extent of the litigation to date and the extent of the prejudice incurred by Haruo in this case reveals a relatively close question, in which both parties have convincing arguments. However, because courts should "resolve any doubts about waiver of the right to arbitrate in favor of arbitration," we find that this close question ultimately favors RTI's position. 4 Am. Jur. 2d *Alternative Dispute Resolution* § 105. Based on the following analysis, we affirm the trial court's Order granting RTI's motion to dismiss.

A. RTI did not substantially invoke the judicial process

In his opening brief, Haruo argues that RTI waived its right to compel arbitration by substantially invoking the judicial process. He does so simply by concluding that "[t]he nearly six-year delay in bringing the arbitration demand before the court is, in and of itself, extraordinary." (Appellant's Br. at 5.) Other than a string citation to two A.L.R. articles, Haruo offers no explication of the law discussed therein nor any argument as to why, in fact, the six-year delay is extraordinary.[3] Haruo only suggests that RTI has offered no

[3] After his assertion that a six-year delay is in and of itself extraordinary, Haruo's citation reads verbatim, "See Annotations, Delay in Asserting Contractual Right to Arbitration as Precluding Enforcement Thereof, 25 A.L.R. 3d 1171; Defendant's Participation in Action as Waiver of Right to Arbitration of Dispute Involved Therein, 98 A.L.R. 3d 767." Notwithstanding that Haruo declined to point the Court to any of the purportedly persuasive law contained in these articles, Haruo neglected even to include a pinpoint page or an explanatory parenthetical to either citation, which could have at least outlined the relevant holdings mentioned therein.

explanation for its delay, even though it was fully aware of the arbitration provision in the Agreement at the time that it filed its Answer and Counterclaim.

[9] This is simply not enough. Although it is true that a delay of six-years looks to be almost prima facie excessive; that RTI was fully aware of the arbitration provision in the Agreement at the time it filed its Answer and Counterclaim; and that RTI filed its motion to dismiss a mere twenty-nine days before trial, upon closer inspection, the events that transpired are actually far less egregious. Foremost, even though the case spent the vast majority of the last six years dormant, it did so by mutual agreement of the parties. As RTI points out,

> [w]ith the exception of one discovery request made in 2004 by Haruo, which by agreement of the parties was not answered until July 2008, the parties agreed not to take any action in this case based on a pending matter against Haruo filed by the Office of the Special Prosecutor. The Special Prosecutor dismissed his appeal in those matters in December 2007. The time between the complaint's filing and RTI's response and the dismissal of the Special Prosecutor's appeal cannot be held against RTI as delay.

(Appellee's Br. at 14 (internal citations omitted).). Indeed, Haruo does not dispute that the delay was by mutual agreement of the parties, and "where a party has chosen to save litigation costs awaiting the outcome of a related case that party cannot now argue the delay was prejudicial." *See Thomas v. A.R. Baron & Co.*, 967 F. Supp. 785, 789 (S.D.N.Y. 1991). Thus, we agree with RTI that the actual delay in this case is more properly calculated from December 2007 to the time when RTI's motion to dismiss was filed—a total of about fifteen months. A delay of fifteen months is far less excessive than a delay of seven years. What is more, both parties acknowledge that RTI actually informed Haruo of its intent to arbitrate on or about July 11, 2008, around the same time that RTI answered Haruo's discovery requests and served its own discovery requests on Haruo. Thus, even though RTI ultimately filed its motion to dismiss one month before trial, Haruo had been on notice for over six months prior. RTI even encouraged Haruo not to respond to its discovery requests—and Haruo in fact did not respond—presumably because he knew of RTI's intent to compel arbitration.

Considering a fifteen-month delay instead of a seven-year delay, RTI directs the Court's attention to some compelling American case law, which supports the notion that it "is impossible to distinguish this fifteen month delay from periods of delay in cases where other courts have consistently ruled there was no waiver. (Appellee's Br. at 14 (citing *Shearson Lehman Hutton Inc. v. Wagoner*, 944 F.2d 114, 122 (2d Cir. 1991) (a delay of three years in raising an arbitration claim was insufficient to find waiver where no litigation on the merits of the case ever occurred); *Thyssen, Inc v. Calypso Shipping Corp., S.A.*, 310 F.3d 102, 105 (2d Cir. 2002) (a delay of twenty months was insufficient to find waiver); *Thomas*, 967 F. Supp. at 789 (holding no waiver despite a year and a half

delay))). Foremost, this string cite of case law, which is complete with explanatory parentheticals that accurately represent the holdings of various cases bolstering RTI's position, and which convinces the Court that RTI's fifteen-month delay was much less than "extraordinary," sits in stark contrast to Haruo's conclusory string cite to two A.L.R. articles. Moreover, RTI points to the fact that whatever involvement the parties did have in this case centered around limited discovery and procedural motions practice. There was never *any*, let alone extensive, litigation on the merits, which many courts define as the "hallmark to finding waiver." (Appellee's Br. at 16-17 (citing *Stifel*, 924 F.2d at 158-59 (finding no waiver and stating that the mere use of the judicial process through pleadings and discovery did not amount to substantial litigation on the merits)).)

Haruo finally contends that, because RTI knew about the arbitration clause in the Agreement, it should have included arbitration as a counterclaim in its Answer some seven years ago. We agree with Haruo; however, the failure to do so is simply not fatal to RTI's motion to compel arbitration under the governing decisional law, which explains fairly clearly that failure to include arbitration as a counterclaim is not sufficient to establish waiver. *Fisher*, 791 F.2d at 698 (failure to raise arbitration as an affirmative defense is inadequate by itself to support a claim of waiver); *Stifel, Nicolaus & Co. v. Freeman*, 924 F.2d 157, 158-59 (8th Cir. 1991) (finding no waiver even though movant failed to assert arbitration as an affirmative defense). Accordingly, despite the admittedly lengthy delay in this case, we find that the lion's share of it was at the mutual agreement of the parties, and that the fifteen-month portion directly attributable to RTI is simply not enough to constitute a substantial invocation of the judicial process, especially where neither party ever litigated the merits of the case.

B. Haruo did not present evidence of actual prejudice

As we mentioned above, the evaluation of the extent of the litigation to date and the extent of prejudice to the nonmoving party often requires the Court to consider both prongs together, inasmuch as the two essentially begin blending together; thus, we addressed most of Haruo's "prejudice" arguments in the section above. However, two of these arguments are worth discussing separately.[4]

Haruo points first to the substantial additional expenses he would be forced to incur, including travel, legal, and arbitration costs, and second to the fact that the fundamental policy of arbitration—that of expediting the resolution of disputes—would

[4] RTI contends that Haruo's assertions of prejudice were made for the first time on appeal and thus should not be credited. Although the Appellate Court will not consider issues on which the parties did not enter evidence before the trial court, *see Pierantozzi v. Ueki*, 12 ROP 169, 171 (2005), Palau law is silent as to the elements of an arbitration waiver argument, and, as RTI points out, there is a split in American law as to whether prejudice must be specifically pled or is instead implied in any argument asserting that the moving party substantially invoked the judicial process. Because Haruo clearly argued that RTI substantially invoked the judicial process, we will address the merits of Haruo's additional points regarding the prejudice he suffered from it.

be poorly served by allowing RTI to compel arbitration at such a late date. Although he concedes that he may have agreed to arbitration at the time he entered into the agreement, he claims that RTI's failure to timely demand the enforcement of that provision would substantially prejudice him now.

[10] Once again, ample law militates against his position. Foremost, as RTI points out, particularized assertions of prejudice must be accompanied by particularized evidence of costs and of the nonmoving party's financial inability to pay. *See Green Tree Financial Corp. v. Randolph*, 531 U.S. 79, 92 (2000) (mere assertions of the increased costs associated with arbitration in a foreign location is insufficient to prove prejudice); *Livingston v. Assocs. Fin., Inc.*, 339 F.3d 553, 557 (7th Cir. 2003). Apart from a series of conclusory assertions, Haruo has provided none. Second, even if this Court were to take Haruo at his word and accept that the costs associated with arbitration are indeed very high, the Agreement between Haruo and RTI still represents an arms-length contract between two sophisticated businesses / businesspeople, both of which held themselves out as capable of carrying on an international contractual relationship. As RTI correctly notes, "[t]hese clauses are standard fare" in international contracts. Haruo presumably had the opportunity to consider the conditions of the Agreement before signing it, and knew that he was dealing with a Japanese company that regularly conducts business there. To come now and assert prejudice as a result of travel and arbitration expenses that he could have just as easily contemplated before signing the agreement is simply not enough to prove particularized prejudice here.

Finally, with respect to arbitration's policy of swift dispute resolution being poorly served by allowing RTI to compel arbitration at such a late date, we acknowledge that the fifteen month delay was certainly enough to initiate a controversy such as this one and has produced, as we mentioned, a very close case. However, the prevailing American case law, which takes into account all of the policy considerations underpinning arbitration, has spoken almost uniformly that delays such as this one are not sufficient to constitute waiver of arbitration—and thus, by definition, are not in derogation of arbitration's policy of swift dispute resolution. Because of this, we are forced to conclude that the prevailing case law actually recognizes at least two competing policies underlying arbitration—the first being the quick and efficient resolution of disputes and the second being the creation of increased certainty and contractual freedom in arms-length business transactions. Although these policies compete closely in this case, we ultimately agree with the majority American position that a delay of this length does not constitute waiver of arbitration.

CONCLUSION

Accordingly, for the reasons set forth above, the Order Granting RTI's Motion to Dismiss is AFFIRMED.