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INTRODUCTION

In recent years, arbitration as a form of alternative dispute resolution has grown exponentially.[1] However, with this increase in the use of arbitration comes increased disputes over the enforcement of these arbitration agreements within commercial contracts. Arbitration clauses are frequently included in commercial contracts to serve two primary purposes: (1) arbitration is typically more efficient and economical than litigation; and (2) agreeing on a method of dispute resolution at the outset of a contractual relationship prevents parties from waiting until a dispute arises to negotiate how it should be resolved.[2] An area of frequent contention within arbitration agreements is waiver of a party's contractual right to arbitrate a dispute due to a party's participation in litigation.[3]

1. *See generally* ALEXANDER J.S. COLVIN, THE GROWING USE OF MANDATORY ARBITRATION (2018), https://files.epi.org/pdf/144131.pdf [https://perma.cc/LP35-MGC6].

2. ABA, BENEFITS OF ARBITRATION FOR COMMERCIAL DISPUTES, https://www.americanbar.org/content/dam/aba/administrative/dispute_resolution/materials/aba-dr-arbitration-guide.pdf [https://perma.cc/B63B-9TGK].

3. *See generally* Thomas J. Lilly Jr., *Participation in Litigation as a Waiver of the Contractual Right to Arbitrate: Toward a Unified Theory*, 92 NEB. L. REV. 86 (2014); *see also* Timothy Leake, *Arbitration Waiver and Prejudice*, 119 MICH. L. REV. 397, 403 (2020) (noting that the right to arbitration can be waived, either expressly or impliedly, because it is a contractual right. Litigating a dispute that is subject to an arbitration clause is one way to impliedly waive that right.).

Specifically, both federal and state courts disagree as to whether a court or an arbitrator should decide if a party's participation in litigation, which is inconsistent with its agreement to arbitrate, amounts to a waiver of its right to arbitrate the dispute.[4]

Consider the following hypothetical scenario: a small, regional industrial parts supplier enters into a contract with a large refinery, agreeing to serve as the sole parts and service provider for the refinery. The agreement states that the refinery will purchase a minimum of $100,000 worth of parts each month for a total of one year, with the price falling below market rate due to the favorable terms for the supplier. The agreement also includes an arbitration clause that requires the parties to resolve all disputes arising out of the agreement through arbitration.

Suppose the refinery declines to purchase parts from the supplier for the final three months of the one-year term, alleging that the supplier's product is not up to industry standards. The refinery sues the supplier for misrepresentation, ignoring the arbitration clause. Fully aware that the refinery has the deeper pockets, the supplier hopes to settle the dispute as efficiently as possible and files a counterclaim, alleging that the refinery breached the contract when it failed to perform during the final three months of the term. Both parties spend large sums of money on discovery and other filing fees. After the parties filed pretrial motions, the refinery realizes its case is not as strong as it initially thought. Perhaps some contested evidence that is admitted has the potential to be highly prejudicial and damaging to the refinery's case. The refinery, thus, belatedly invokes the arbitration clause, asking the court to stay the proceedings and order the parties to arbitrate the dispute pursuant to the contract. The supplier objects, arguing that the refinery waived its right to arbitrate when it filed its claim in court and went through the pretrial process, which resulted in the supplier spending significant money and time to defend itself.

The critical issue is whether the court or the arbitrator will decide if the refinery waived its right to arbitration because of its litigation conduct. If the court does not resolve the issue but instead sends it to an arbitrator, the consequences for the supplier may be severe. Once the court sends the issue to an arbitrator, the time, effort, and money the supplier spent to defend itself in court is all for naught. The supplier will now have to pay its share of filing fees for arbitration and hope the arbitrator finds that the refinery waived its right to arbitrate. If the arbitrator does so find, the supplier will resume where it left off in the same court. If the arbitrator does not find that the refinery waived its right to compel arbitration, then

4. *See* discussion *infra* Part I.

the time and money the supplier spent to defend itself in court was wasted. To make matters worse, the small supplier has yet to receive any of the $300,000 owed to it under the contract.

Conversely, if the court itself decides whether the refinery waived its right to arbitrate, both parties have a definite answer and are informed as to which direction they must proceed to resolve the dispute. If the court finds that the refinery waived its right to arbitrate, the time and money spent in litigation by both parties is put to good use when the court proceeds to hear the merits of the case. If the court rules that the refinery did not waive its right to arbitrate and directs the parties to proceed to arbitration, the litigation expenses cease, and the parties are left with no doubt that the resolution of their dispute lies in an arbitration forum.

This is the issue that litigants face in Louisiana courts today; state courts no longer resolve waiver allegations themselves, instead holding that waiver is an issue for an arbitrator to decide.[5] Louisiana litigants waste time and money bouncing between courts and arbitration forums, enabling wealthy litigants to forum shop and evaluate the merits of their claim in a trial court setting before later invoking the right to arbitrate pursuant to an agreement. Traditionally, the courts decided whether a party waived its right to arbitrate due to engaging in litigation conduct that was inconsistent with how a party seeking to retain its right to arbitrate would conduct itself.[6] Following the United States Supreme Court's decision in *Howsam v. Dean Witter Reynolds, Inc.*,[7] the Louisiana Supreme Court, in *International River Center v. Johns-Manville Sales Corp.*, held that the issue of waiver is for the arbitrator to decide, not the court.[8] Seven of the eight federal circuit courts of appeals that have addressed this issue ruled that the Supreme Court's holding in *Howsam* does not affect the traditional stance courts have taken: the determination of waiver by litigation conduct is still a decision to be made by the court.[9] Yet, following the Louisiana Supreme Court's misinterpretation of *Howsam* in its *International River*

5. *See* discussion *infra* Part I; *see also, e.g.*, Wilson v. Allums, 94 So. 3d 908, 910 (La. Ct. App. 2d Cir. 2012) (citing Int'l River Ctr. v. Johns-Manville Sales Corp., 861 So. 2d 139 (La. 2003)); Univ. of La. Monroe Facs., Inc. v. JPI Apartment Dev., L.P., 151 So. 3d 126, 133 (La. Ct. App. 2d Cir. 2014) ("[T]he issue of alleged waiver is a question for the arbitrator, not for the court."); Fla. Gas Transmission Co. v. Tex. Brine Co., 285 So. 3d 1093, 1095 (La. Ct. App. 1st Cir. 2019).

6. *See, e.g.*, Atwater v. Young, 96 So. 2d 487, 488–89 (La. 1957); Simpson v. Pep Boys–Manny Moe & Jack, Inc., 847 So. 2d 617 (La. Ct. App. 4th Cir. 2003).

7. Howsam v. Dean Witter Reynolds, Inc., 537 U.S. 79 (2002).

8. *Int'l River Ctr.*, 861 So. 2d 139.

9. *See* discussion *infra* Part II.

decision, Louisiana courts continue to rule that waiver by litigation conduct is an issue for the arbitrator to decide, not the court.[10] In addition to being out of step with a majority of other appellate courts in the United States, the Louisiana Supreme Court in *International River* misinterpreted a controlling provision of the Louisiana Binding Arbitration Law (LBAL) that *directs* trial courts to resolve allegations of waiver.[11]

While the Federal Arbitration Act preempts state law in matters that involve interstate transactions affecting commerce, "the states do retain the ability to regulate contracts involving arbitration agreements and may do so under general contract law as is referenced in the final section of 9 U.S.C. § 2."[12] Thus, although Louisiana courts are not obligated to apply and interpret the LBAL in the same manner that the federal courts apply the Federal Arbitration Act, "the disuniformity created by a split between a state supreme court and its regional federal circuit court of appeals is especially problematic because it leaves citizens in a single state subject to conflicting legal standards."[13] This disuniformity is especially true in Louisiana, where the Louisiana Supreme Court resolves the waiver of arbitration differently than its federal regional circuit court of appeals, the United States Court of Appeals for the Fifth Circuit.[14] A Louisiana lawsuit filed in federal court that involves waiver allegations, where the federal district court is bound by the Fifth Circuit precedent, will be addressed under the traditional rule that a court is to resolve allegations of waiver. Alternatively, if the same lawsuit is filed in Louisiana state court, the court will be bound by the erroneous holding in *International River* that prevents the trial court from resolving this allegation of waiver.[15]

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10. *See id.*

11. *See id.* The Louisiana Supreme Court heavily relied on the United States Supreme Court's *Howsam* decision when interpreting Louisiana law, which explains the presence of a large amount of federal jurisprudence in this Comment.

12. 9 U.S.C § 2; Aguillard v. Auction Mgmt. Corp., 908 So. 2d 1, 8 (La. 2005) (citing Allied-Bruce Terminix Cos., Inc. v. Dobson, 513 U.S. 265, 281 (1995)).

13. Amanda Frost, *Inferiority Complex: Should State Courts Follow Lower Federal Court Precedent on the Meaning of the Federal Law?*, 68 VAND. L. REV. 53, 93 (2015).

14. *See* discussion *infra* Part II. Many Louisiana practitioners also represent parties before the United States Court of Appeals for the Fifth Circuit, thus subjecting them to two different legal standards when it comes to the issue of waiver.

15. *See, e.g.*, Mary Garvey Algero, *Considering Precedent in Louisiana: Balancing the Value of Predictable and Certain Interpretation with the Tradition of Flexibility and Adaptability*, 58 LOY. L. REV. 113, 119 (2012). While Louisiana does not recognize the principle of *stare decisis*, another principle known as *jurisprudence constante* is recognized. This principle essentially states that a long

To resolve this issue, the Louisiana Supreme Court should correct and clarify its holding in *International River*. This can be done by instructing the lower courts to follow the plain language of the LBAL, which directs courts to determine the waiver issue themselves.[16] By correcting this improper application and instructing Louisiana courts themselves to determine whether a party has waived the right to arbitration through its litigation conduct, the Louisiana Supreme Court would provide clarity and fairness to litigants, align with the majority of federal and state courts that hold the same, and better promote the efficiency and affordability for which arbitration was created.

Part I of this Comment first introduces arbitration law in general and the concept of waiver, highlighting the relevant provisions of the Federal Arbitration Act and the LBAL. Part I also discusses *Howsam*, the United States Supreme Court's decision that led to confusion regarding waiver, and will then provide examples of how the federal circuit courts interpret and apply the United States Supreme Court's decision. Lastly, this Part highlights the Louisiana Supreme Court's *International River* decision that heavily relied on *Howsam* when it addressed whether a court or an arbitrator should decide waiver due to a party's litigation conduct. It concludes by providing examples of subsequent Louisiana circuit courts of appeal decisions that relied on the Louisiana Supreme Court's holding.

Part II of this Comment explores both the Louisiana Supreme Court's interpretation and application of the *Howsam* decision as well as the current application of the LBAL. It also highlights the policy issues created by the Louisiana courts' approach to waiver. Part III of this Comment argues that the approach Louisiana courts have taken is erroneous and subsequently demonstrates that following the approach of the federal circuit courts aligns with the overall goals of arbitration, follows the traditional rule that is yet to be revoked, and protects parties from prejudice. Finally, this Part addresses how, contrary to the Louisiana Supreme Court's holding, the Louisiana legislature, via the LBAL, has not prevented trial courts from determining the issue of waiver.

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line of consistent decisions is highly indicative of how the law is to be applied and interpreted and, thus, in a way can serve as highly persuasive, nearly binding precedent. *Id.*

16. *See* LA. REV. STAT. § 9:4202 (2023).

I. ARBITRATION IN GENERAL, WAIVER OF THE RIGHT TO COMPEL ARBITRATION, AND THE CURRENT ROLE OF THE JUDICIARY REGARDING ALLEGATIONS OF WAIVER

Arbitration is a form of alternative dispute resolution in which adverse parties can settle their dispute by referring it to a private party instead of filing a lawsuit in court.[17] When a dispute arises, the parties typically choose an impartial third party, known as an arbitrator, to hear the dispute.[18] After both parties are given an opportunity to be heard, the arbitrator issues a ruling that is generally binding on the parties.[19] While parties can voluntarily enter into a standalone agreement to arbitrate a dispute instead of litigating it, most arbitration agreements are in the form of arbitration clauses located within commercial and employment contracts.[20] An arbitration clause is a part of a comprehensive contractual undertaking and has the effect of obligating the parties to resolve disputes covered by the agreement outside of court, in an arbitration forum.[21]

A. Arbitration's History, the Federal Arbitration Act, and Questions of Arbitrability

Parties use arbitration as an alternative to litigation because it is supposed to be expeditious, informal, and economical.[22] While it is firmly established as a viable alternative to litigation, some judges initially disfavored arbitration.[23] The early animosity towards arbitration can be traced back to English common law, where judges were paid on the basis of cases they heard and, thus, viewed alternative dispute resolution as an infringement on their profession; this judicial hostility followed common law to American courts.[24]

Congress enacted the Federal Arbitration Act (FAA) in 1925 to "reverse the longstanding judicial hostility to arbitration agreements . . .

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17. 21 RICHARD A. LONG, WILLISTON ON CONTRACTS § 57.1 (4th ed. 2021).
18. *Id.*
19. *Id.*
20. *See* Lewis L. Maltby, *Out of the Frying Pan, Into the Fire: The Feasibility of Post-Dispute Employment Arbitration Agreements*, 30 WM. MITCHELL L. REV. 313, 321 (2003).
21. LONG, *supra* note 17, § 57.1.
22. *Id.*
23. *Id.* § 15:11.
24. *See* Preston D. Wigner, *The United States Supreme Court's Expansive Approach to the Federal Arbitration Act: A Look at the Past, Present, and Future of Section 2*, 29 U. RICH. L. REV. 1499, 1502 (1995).

and . . . place arbitration agreements upon the same footing as other contracts."[25] The FAA requires courts to enforce arbitration agreements according to their terms.[26] The United States Supreme Court has noted that because arbitration is a contractual matter, a party will not be required to submit a dispute to arbitration if that party has not agreed to do so.[27] Since the FAA's enactment, the United States Supreme Court has also held that courts are to resolve ambiguities concerning the scope of arbitration agreements in favor of arbitration.[28] Whether parties have submitted their dispute to arbitration is known as a question of arbitrability.[29] Questions of arbitrability are issues for the judiciary to resolve unless the parties clearly indicated otherwise in the contract,[30] and that judicial determination is to be made with the federal policy favoring arbitration in mind.[31] The Supreme Court also indicated that there are certain procedural questions of arbitrability, such as whether a party commenced arbitration before the expiration of a certain time limit, that are presumptively for an arbitrator to decide.[32] This distinction within questions of arbitrability, designating some issues to a court and other issues to an arbitrator, poses problems for federal and state courts alike.[33] In particular, one troublesome area within this distinction is waiver.

B. Waiver of the Right to Compel Arbitration and the Relevant Federal Arbitration Act Provisions

Parties can waive their contractual rights, and because arbitration is a matter of contract, parties can waive their right to arbitration either

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25. Gilmer v. Interstate Johnson/Lane Corp., 500 U.S. 20, 24 (1991) (citing Dean Witter Reynolds, Inc. v. Byrd, 470 U.S. 213, 219–20 n.6 (1985); Scherk v. Alberto-Culver Co. 417 U.S. 506, 510 n.4 (1974)).

26. 9 U.S.C. § 2.

27. United Steelworkers of Am. v. Warrior & Gulf Nav. Co., 363 U.S. 574, 582 (1960).

28. *See* Lamps Plus, Inc. v. Varela, 139 S. Ct. 1407, 1418–19 (2019) (citing Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc. 473 U.S. 614, 626 (1985); Moses H. Cone Mem'l Hosp. v. Mercury Constr. Corp., 103 S. Ct. 927, 941 (1983)).

29. Howsam v. Dean Witter Reynolds, Inc., 537 U.S. 79, 83 (2002).

30. AT&T Techs., Inc. v. Commc'ns Workers of Am., 475 U.S. 643, 649 (1986).

31. Volt Info. Scis. v. Bd. of Trs., 489 U.S. 468, 475 (1989).

32. *See Howsam*, 537 U.S. at 79; Lilly, *supra* note 3, at 98.

33. *See* Michael P. Scharpf, *Court v. Arbitrator: Who Should Decide Whether Prelitigation Conduct Waives the Right To Compel an Arbitration Agreement?*, 84 ST. JOHN'S L. REV. 363, 367 (2010).

explicitly or impliedly.[34] Parties can intentionally waive their rights to arbitration by engaging in litigation conduct, as this conduct is a form of implied waiver that indicates that one or both parties do not intend to proceed with arbitration, instead choosing to litigate.[35] There is disagreement among the federal courts as to the proper standard for determining whether a party's litigation conduct amounts to waiver of the right to arbitrate.[36] This issue frequently arises when a party changes its mind during the middle of the litigation process and wishes to shift an action into arbitration, perhaps after realizing that the trial will not end in its favor.[37] The disagreement amongst courts centers on whether the party in opposition to the motion to compel arbitration should be required to show that it suffered prejudice from the opposing party's litigation activity.[38] There is a wide range of opinions amongst the courts when it comes to defining prejudice, spanning from only requiring a party to demonstrate that expenses were incurred all the way to a required showing that the party who allegedly waived its right to arbitrate gained an unfair advantage by first litigating in court.[39]

The relevant provisions of the FAA for resolving waiver allegations are United States Code title 9, §§ 3 and 4. Section 3 states that if a lawsuit is brought in a United States court upon an issue that is referable to arbitration under a valid contractual agreement, the court must stay the proceedings and order arbitration upon the request of one of the parties so long as the moving party is not in default.[40] Although the FAA does not define the term *default*, federal courts have interpreted it to include *waiver*.[41] To reach this interpretation, courts have relied on common law

34. *See* United Steelworkers of Am. v. Warrior & Gulf Nav. Co., 363 U.S. 574, 582 (1960); Restatement (Second) of Contracts § 84 cmts. a, b (Am. L. Inst. 1981).

35. Scharpf, *supra* note 33, at 364 (citing Ehleiter v. Grapetree Shores, Inc., 482 F.3d 207, 217 (3d Cir. 2007); Marie v. Allied Home Mortg. Corp., 402 F.3d 1, 3 (1st Cir. 2005)).

36. *See* Leake, *supra* note 3, at 403.

37. *See* Lilly, *supra* note 3, at 89.

38. Leake, *supra* note 3, at 403.

39. *Id.* at 405.

40. *See* 9 U.S.C. § 3. See also *New Prime Inc. v. Oliveira*, 139 S. Ct. 532, 537 (2019), which states that "[i]f two parties agree to arbitrate future disputes between them and one side later seeks to evade the deal, §§ 3 and 4 of the Act often require a court to stay litigation and compel arbitration 'accord[ing to] the terms' of the parties' agreement." (alteration in original).

41. *See, e.g.*, Marie v. Allied Home Mortg. Corp., 402 F.3d 1, 12–13 (1st Cir. 2005) (citing Patten Grading & Paving, Inc. v. Skanska USA Bldg., Inc., 380 F.3d 200, 204–05 (4th Cir. 2004); Ivax Corp. v. B. Braun of Am., Inc., 286 F.3d 1309, 1316 n.17 (11th Cir. 2002); MicroStrategy, Inc. v. Lauricia, 268 F.3d 244, 249

doctrine in the absence of a statutory definition.[42] Waiver, defined as "[t]he voluntary relinquishment or abandonment—express or implied—of a legal right or advantage[,]"[43] is an equitable doctrine to further promote justice.[44] Thus, courts have found that a party's litigation activity can amount to an implied relinquishment of the right to arbitrate and therefore, that party may be in default.[45]

Section 4 of the FAA, which applies when a lawsuit has not yet been filed, states that an aggrieved party may petition a United States court with jurisdiction over the matter for an order directing the parties to comply with the agreement and proceed to arbitration when an adverse party has failed or refused to arbitrate under a valid agreement.[46] Thus, § 4 acts as a statutorily granted right that provides a party with a means to seek a court order to initiate the arbitration proceedings.[47] Section 4 hints at waiver when it further states that if the failure to perform under the agreement is at issue and a party has waived its right to arbitrate, then the court should not order arbitration but instead proceed to trial to settle the dispute.[48]

Federal courts have, therefore, traditionally held that §§ 3 and 4 of the FAA give courts the authority to determine whether a party has waived its right to arbitrate and is thus in default.[49] Louisiana courts, when applying nearly identical state arbitration statutes that are modeled after the FAA, also customarily hold that the court is the proper entity to resolve waiver allegations.[50] However, following the United States Supreme Court's

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(4th Cir. 2001); Cnty. of Middlesex v. Gevyn Constr. Corp., 450 F.2d 53, 56 n.2 (1st Cir. 1971)). *See also* Scharpf, *supra* note 33, at 367 (citing 6 C.J.S. *Arbitration* § 57 (2009)).

42. Leake, *supra* note 3, at 400.

43. *Waiver*, BLACK'S LAW DICTIONARY (11th ed. 2019).

44. Leake, *supra* note 3, at 400 (citing 28 AM. JUR. 2D *Estoppel and Waiver* § 183 (2020)).

45. *See generally* Leake, *supra* note 3, at 405.

46. *See* 9 U.S.C. § 4.

47. *See id.*

48. *See id.*

49. *See, e.g.*, Dr.'s Assocs., Inc. v. Distajo, 66 F.3d 438, 456 (2d Cir. 1995); *see also* David LeFevre, *Whose Finding is it Anyway?: The Division of Labor Between Courts and Arbitrators with Respect to Waiver*, 2006 J. DISP. RESOL. 311 (2006) ("The federal circuits later diverged from their fairly consistent waiver analysis, particularly in their attempts to interpret the Supreme Court's discussion of arbitrability in *Howsam* . . . .").

50. *See, e.g.*, Atwater v. Young, 96 So. 2d 487, 488 (La. 1957) (Defendant "waived any right she had in the matter by failing to ask for arbitration and going to trial on the merits.").

Howsam decision in 2002, some courts abandoned this traditional approach.[51]

C. Howsam v. Dean Witter Reynolds, Inc.*: A Change in Tradition?*

In 2002, the United States Supreme Court addressed whether it was the role of a federal district court or a National Association of Securities Dealers (NASD) arbitrator to apply and enforce a rule governing the eligibility of a dispute to be submitted to arbitration.[52] The client, Howsam, alleged that the investment firm Dean Witter Reynolds, Inc. misrepresented the virtues of an investment and submitted the dispute to arbitration.[53] The client service agreement that the parties entered into contained an arbitration clause that required disputes arising from the investment relationship be resolved in arbitration.[54] The agreement also provided that the client was to select the arbitration forum, with Howsam selecting the NASD and signing the NASD's Uniform Submission Agreement.[55] By signing the NASD's submission agreement, Howsam subjected herself to the NASD's Code of Arbitration Procedure.[56] The Code provided that no dispute was arbitrable before the NASD if the events upon which it was based occurred more than six years before submission to arbitration.[57] Dean Witter subsequently filed suit in federal district court, requesting that the court declare the dispute ineligible for arbitration because the six-year time limitation had elapsed before the client submitted the dispute to the arbitration forum.[58]

The Supreme Court began by noting that the question of "whether the parties ha[d] submitted a particular dispute to arbitration, i.e., the '*question of arbitrability*,' is 'an issue for judicial determination . . . .'"[59] However, the Court recognized that there is an exception, stating that not all

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51. *See, e.g.*, Nat'l Am. Ins. Co. v. Transamerica Occidental Life Ins. Co., 328 F.3d 462 (8th Cir. 2003). This court relied on *Howsam* and stated that "the presumption is that the arbitration should decide 'allegation[s] of waiver, delay, or a like defense to arbitrability.'" *Id.* at 466 (alteration in original) (citing Howsam v. Dean Witter Reynolds, Inc., 537 U.S. 79 (2002)). *See generally Howsam*, 537 U.S. 79.

52. *Howsam*, 537 U.S. at 81.

53. *Id.*

54. *Id.*

55. *Id.* at 82.

56. *Id.*

57. *Id.*

58. *Id.* at 83.

59. *Id.* (citing AT&T Techs., Inc. v. Commc'ns Workers, 475 U.S. 643, 649 (1986)).

procedural questions are considered questions of arbitrability.[60] Instead, there will be "'procedural' questions, which grow out of the dispute and bear on its final disposition" that are for the arbitrator to decide.[61] The Court held that the issue as to whether the plaintiff acted in compliance with the time requirements of the arbitration agreement, a question of procedural arbitrability, was for the arbitrator to decide, not the court.[62] The Supreme Court supported its decision using an argument based on a party's expectations.[63] The Court noted that parties would likely expect an arbitrator, as a forum-based decisionmaker, to resolve procedural matters specific to its arbitration forum. The Court also acknowledged that, through a comparative expertise argument, arbitrators are more knowledgeable about the meaning of their own arbitration forum's rules when compared to judges.[64] The Court went on to state that "the presumption is that the arbitrator should decide 'allegation[s] of waiver, delay, or a like defense to arbitrability[,]'" and it was this statement that created the resulting confusion amongst the lower courts.[65]

D. Subsequent Federal Circuit Courts of Appeals Decisions Interpreting Howsam

Following *Howsam*, federal appellate courts disagreed on whether the court or the arbitrator should decide if a party waived its right to arbitration due to its litigation conduct.[66] Nevertheless, seven of the eight federal circuit courts that have addressed this issue eventually agreed that the court

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60. *Id.*

61. *Id.* at 84 (citing John Wiley & Sons, Inc. v. Livingston, 376 U.S. 543, 557 (1964)). The Court in *Wiley* held that prerequisite steps to arbitration, in this case whether the first two steps of a grievance procedure were complete, were for an arbitrator to decide. Procedural questions are prerequisites to arbitration and include time limits, notice, and other conditions that are required to be met before arbitration can begin. *John Wiley & Sons*, 376 U.S. at 556–57.

62. *Howsam*, 537 U.S. at 83.

63. *Id.* at 86.

64. *Id.*

65. *Id.* at 84 (alteration in original) (citing Moses H. Cone Mem'l Hosp. v. Mercury Constr. Corp., 460 U.S. 1, 24–25 (1983)); *see* LeFevre, *supra* note 49, at 310–11 ("The federal circuits later diverged from their fairly consistent waiver analysis, particularly in their attempts to interpret the Supreme Court's discussion of arbitrability in *Howsam* . . . .").

65. *Howsam*, 537 U.S. at 84. (citing *Moses H. Cone Mem'l Hosp.*, 460 U.S. 1).

66. Scharpf, *supra* note 33, at 363.

should determine waiver by litigation conduct.[67] These federal appellate courts have distinguished waiver by litigation conduct, which is for courts to decide under the commonly accepted interpretation of the FAA, from procedural questions of arbitrability, which are for an arbitrator to decide, such as whether perquisites to the arbitration proceeding have been satisfied.[68] The only federal appellate court that held differently was the United States Court of Appeals for the Eighth Circuit.[69] However, while the Eighth Circuit's decision did directly rely on *Howsam* to reach its conclusion that the arbitrator was to resolve the issue, the facts of that case indicate that its opinion is not necessarily at odds with the consensus of the other federal appellate courts that have addressed the issue.[70]

The Eighth Circuit was the first federal appellate court to address whether the court or an arbitrator should resolve whether a party waived its right to arbitrate due to its litigation conduct following the Supreme Court's decision in *Howsam*.[71] The case in which the Eighth Circuit addressed this issue was *National American Insurance Company v. Transamerica Occidental Life Insurance Company*, where two insurers, National American and Transamerica, argued over two different reinsurance contracts.[72] Transamerica argued that National American

67. *See* JPD, Inc. v. Chronimed Holdings, Inc., 539 F.3d 388, 393–94 (6th Cir. 2008); Ehleiter v. Grapetree Shores, Inc., 482 F.3d 207, 217 (3d Cir. 2007); Tristar Fin. Ins. Agency, Inc. v. Equicredit Corp. of Am., 97 F. App'x 462, 464 (5th Cir. 2004); Grigsby & Assocs., Inc. v. M Sec. Inv., 664 F.3d 1350, 1353 (11th Cir. 2011) (holding that "questions of waiver based on a party's litigation conduct are for the courts to resolve"); Martin v. Yasuda, 829 F.3d 1118, 1124 (9th Cir. 2016) (holding that the district court did not err in determining waiver by litigation conduct itself); LG Elecs., Inc. v. Wi-LAN USA, Inc., 623 F. App'x 568, 571 (2d Cir. 2015); Marie v. Allied Home Mortg. Corp., 402 F.3d 1, 3 (1st Cir. 2005); *but see* Nat'l Am. Ins. Co. v. Transamerica Occidental Life Ins. Co., 328 F.3d 462, 466 (8th Cir. 2003) (holding that all waiver challenges due to litigation conduct should be committed to an arbitrator); *see also* Lilly, *supra* note 3, at 113.

68. *See JPD, Inc.*, 539 F.3d at 394–94; *Ehleiter*, 482 F.3d at 217; *Tristar Fin. Ins. Agency, Inc.*, 97 F. App'x at 464; *Grigsby & Assocs., Inc.*, 664 F.3d at 1353 (holding that "questions of waiver based on a party's litigation conduct are for the courts to resolve"); *Martin*, 829 F.3d at 1124 (holding that the district court did not err in determining waiver by litigation conduct itself); *LG Electronics, Inc.*, 623 F. App'x at 571; *Marie*, 402 F.3d at 3; *but see Nat'l Am. Ins. Co.*, 328 F.3d at 466 (holding that all waiver challenges due to litigation conduct should be committed to an arbitrator).

69. *See Nat'l Am. Ins. Co.*, 328 F.3d at 466.

70. *Id.*

71. *See id.*

72. *Id.* at 463.

waived its right to arbitrate because National American litigated reinsurance contracts to which Transamerica was a party in an Oklahoma state court.[73] The Eighth Circuit only dedicated one paragraph of its opinion to this waiver allegation and simply quoted the Supreme Court in *Howsam* to hold that allegations of waiver are for an arbitrator to decide.[74] Yet the Eighth Circuit's opinion did not clarify whether the litigation in Oklahoma was over a similar reinsurance contract that required disputes to be resolved in arbitration.[75] Furthermore, the Oklahoma litigation that Transamerica alleged amounted to waiver was clearly not in the same court in which Transamerica was currently making this waiver argument.[76] The United States Court of Appeals for the Third Circuit, in declining to follow the Eighth Circuit's lead, stated that the "rather unique procedural circumstances" of *National American Insurance Company* explained why the Eighth Circuit held that the arbitrator was the appropriate party to resolve allegations of waiver.[77] The waiver allegations only arose after the parties had been arbitrating the underlying dispute in an arbitration forum for roughly a year.[78] Furthermore, the litigation that took place was before another court, and, thus, the Eighth Circuit was not familiar with just how much litigation had taken place.[79]

In *Marie v. Allied Home Mortgage Corp.*, the United States Court of Appeals for the First Circuit determined whether an employer waives its right to compel arbitration when it does not seek arbitration after an employee files an Equal Employment Opportunity Commission complaint but instead waits to compel arbitration once the employee files a civil suit against it in federal court.[80] While the court held that compliance with a contractual time limit is an issue for the arbitrator to address, it explained that the United States Supreme Court in *Howsam* did not intend to disturb the traditional rule that waiver by litigation conduct is an issue for the court to decide.[81] Addressing waiver by litigation conduct, the First Circuit began by noting that the FAA only permits a court to stay the proceedings pending arbitration if the party applying for the stay is not in *default* in proceeding with arbitration.[82] Acknowledging that *default* is usually

73. *Id.* at 466.
74. *Id.* (quoting Howsam v. Dean Witter Reynolds, Inc., 537 U.S. 79 (2002)).
75. *Id.*
76. *Id.*
77. Ehleiter v. Grapetree Shores, Inc., 482 F.3d 207, 220 (3d Cir. 2007).
78. *Id.*
79. *Id.*
80. *See* Marie v. Allied Home Mortg. Corp., 402 F.3d 1, 3 (1st Cir. 2005).
81. *Id.* at 14.
82. *Id.* at 12–13 (quoting 9 U.S.C. § 3).

viewed to include *waiver*, the court recognized the existence of a statutory command on courts to determine waiver in this type of situation.[83]

The First Circuit noted that the Supreme Court relied heavily on the Revised Uniform Arbitration Act of 2000 (RUAA) in its *Howsam* decision.[84] The RUAA establishes that the arbitrator generally decides procedural issues while the court decides substantive ones, but it also states that waiver of the right to arbitrate is an issue that is normally resolved by courts, not arbitrators.[85] After citing to the RUAA, the First Circuit then stated that "the district court has power to control the course of proceedings before it and to correct abuses of those proceedings" by ruling on allegations of waiver when those allegations arise out of the litigation conduct that takes place before the court.[86] The First Circuit also relied upon the same comparative expertise rationale the Supreme Court used in *Howsam* and found that judges have more expertise than arbitrators to determine whether a party has waived its right to compel arbitration due to its conduct in litigation.[87] Lastly, the court acknowledged that letting the arbitrator decide claims of waiver by litigation conduct would be inefficient.[88] It noted that if the arbitrator were to decide that a party waived the right to arbitration, then the case would end up back before the same court without making any progress.[89]

In addition to the First Circuit, a majority of the fellow federal circuit courts that have addressed the impact of *Howsam* ruled that the court should decide waiver by litigation conduct.[90] The United States Court of Appeals for the Third Circuit squarely addressed this issue in *Ehleiter v. Grapetree Shores, Inc.* when it determined whether a trial court or an arbitrator should decide if a party waived its right to compel arbitration by litigating the case in court.[91] The Third Circuit found the First Circuit's analysis in *Marie* to be persuasive and held that the Supreme Court's decision in *Howsam* was not intended to revoke the traditional rule that

83. *Id.* at 13.

84. *See id.*

85. *Id.* (citing REVISED UNIFORM ARBITRATION ACT § 6, cmt. 2, 7 U.L.A. 14–15 (Supp. 2004)).

86. *Id.*

87. *Id.* The First Circuit also noted that judges are more experienced than arbitrators in identifying abusive forum shopping. *Id.*

88. *Id.*

89. *Id.*

90. Scharpf, *supra* note 33, at 377.

91. Ehleiter v. Grapetree Shores, Inc., 482 F.3d 207, 209 (3d Cir. 2007).

courts are to decide whether a party's litigation conduct amounts to waiver.[92]

The United States Court of Appeals for the Fifth Circuit addressed the same issue in *Tristar Financial Insurance Agency, Inc. v. Equicredit Corporation of America*, where the plaintiff argued that Equicredit waived its right to compel arbitration when it conducted discovery and filed motions in pursuit of litigation for eight months before filing its motion to compel arbitration.[93] The Fifth Circuit first acknowledged that waiver can be characterized as a procedural issue, such as whether a party complied with the procedural requirements of an arbitration agreement, and in that situation, the court stated that it is for the arbitrator to decide whether the parties complied with the procedural rules of the agreement.[94] However, aware of the Court's statement in *Howsam* that questions of arbitrability are for the court to decide when contracting parties would expect a court to decide the gateway matter, the Fifth Circuit stated that parties would also expect the court to decide whether the litigation conduct before the court amounted to waiver.[95] Therefore, because the waiver in the case at issue was dependent on the parties' conduct before the court, the Fifth Circuit held that the court is best positioned to decide whether a party's conduct amounts to waiver under applicable law.[96]

The United States Courts of Appeals for the Second, Sixth, Eleventh, and Twelfth Circuits also distinguished *Howsam* to hold that allegations of waiver are for the court to decide when those allegations are based on litigation activity.[97] Thus, with the exception of the Eighth Circuit's opinion that can be easily distinguished, all federal courts that have addressed the waiver issue have held that, pursuant to the FAA, when the litigation conduct alleged to constitute a waiver of the right to arbitration by the moving party takes place before a court, the court is the proper

92. *Id.* The Third Circuit also noted that "considerations of comparative expertise and judicial economy, among others, dictate that a waiver defense raised in this context be decided by the court, rather than being referred to an arbitrator with no prior involvement with the case." *Id.*

93. Tristar Fin. Ins. Agency v. Equicredit Corp. of Am., 97 F. App'x 462, 464 (5th Cir. 2004).

94. *Id.*

95. *Id.*

96. *Id.*

97. *See* LG Elecs., Inc. v. Wi-LAN USA, Inc., 623 F. App'x 568, 571 (2d Cir. 2015); JPD, Inc. v. Chronimed Holdings, Inc., 539 F.3d 388, 393–94 (6th Cir. 2008); Martin v. Yasuda, 829 F.3d 1118, 1122–23 (9th Cir. 2016); Grigsby & Assocs., Inc. v. M. Sec. Inv., 664 F.3d 1350, 1353 (11th Cir. 2011).

authority to rule on that waiver allegation.[98] However, Louisiana state courts failed to distinguish *Howsam* and instead view the United States Supreme Court's opinion as one that upsets the traditional rule that courts rather than arbitrators are to decide whether waiver by litigation conduct has taken place.

E. The Relevant Provisions of the Louisiana Binding Arbitration Law

Louisiana adopted the LBAL in 1948, and the legislature modeled it after the FAA.[99] The language of the LBAL and the language of the FAA are nearly identical.[100] The Louisiana Supreme Court noted this when it relied on federal jurisprudence for guidance in its interpretation of LBAL due to the "strong and substantial similarities between [Louisiana's] arbitration provisions and the federal arbitration law . . . ."[101] The relevant provisions of the LBAL that address waiver of the right to compel arbitration are Louisiana Revised Statutes §§ 9:4202–4203.[102]

Section 9:4202 states that if a lawsuit is brought upon an issue that is referable to arbitration under a valid contractual agreement, the court must stay the proceedings and order arbitration upon the request of one of the parties so long as the moving party is not in default.[103] Section 9:4203, which applies when a lawsuit has not yet been filed, states that a party who is aggrieved by the adverse party's failure or refusal to arbitrate under a valid agreement may petition any court having jurisdiction over the parties or property for an order directing the parties to comply with the agreement

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98. *JPD, Inc.*, 539 F.3d at 393–94; Ehleiter v. Grapetree Shores, Inc., 482 F.3d 207, 217 (3d Cir. 2007); *Tristar Fin. Ins. Agency, Inc.*, 97 F. App'x 462; *Grigsby & Assocs., Inc.*, 664 F.3d at 1353 (holding that questions of waiver based on a party's litigation conduct are for the courts to resolve); *Martin*, 829 F.3d at 1122–23 (holding that the district court did not err in determining waiver by litigation conduct itself); *LG Elecs., Inc.*, 623 F. App'x at 571; Marie v. Allied Home Mortg. Corp., 403 F.3d 1, 3 (1st Cir. 2005); *but see* Nat'l Am. Ins. Co. v. Transamerica Occidental Life Ins. Co., 328 F.3d 462, 466 (8th Cir. 2003) (holding that all waiver challenges should be committed to an arbitrator).

99. Bert K. Robinson & Kevin P. Landreneau, *Tension Between Arbitration and Judicial Review*, 48 LA. BAR J. 214, 214 (2000); *see generally* LA. REV. STAT. §§ 9:4202–4217 (2023); 9 U.S.C. §§ 1–16.

100. *See* Aguillard v. Auction Mgmt. Corp., 908 So. 2d 1, 18 (La. 2005).

101. *Id.*

102. *See* LA. REV. STAT. §§ 9:4202–4203 (2023).

103. *Id.* § 9:4202 ("[T]he court . . . shall on application of one of the parties stay the trial of the action until an arbitration has been had . . . providing the applicant for the stay is not in default in proceeding with the arbitration.").

and proceed to arbitration.[104] While the relevant provisions of the LBAL also do not define the term *default*, Louisiana courts, similar to federal courts, have included *waiver* within the meaning of *default*.[105]

The relevant provisions of the FAA and the LBAL are practically identical and carry the same effect, as the United States Supreme Court and the Louisiana Supreme Court read the respective statutes, 9 U.S.C. § 3 and Louisiana Revised Statutes § 9:4202, to require district courts to stay the litigation until the claim referable to arbitration is had so long as the moving party is not in default.[106] The two Courts also interpret 9 U.S.C. § 4 and Louisiana Revised Statutes § 9:4203, respectively, in the same manner.[107] The Louisiana Supreme Court has noted that, like federal law, Louisiana law favors arbitration, and, thus, when the construction of an arbitration clause is in question, it should be construed in favor of arbitration.[108] While these two sets of statutes have traditionally been interpreted the same way in their respective jurisdictions, the Louisiana Supreme Court's interpretation and subsequent application of *Howsam* has resulted in two different approaches to practically identical statutory language, which has given rise to an unnecessary discrepancy between the Louisiana and federal standards.[109]

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104. *Id.* § 9:4203.

105. *See, e.g.*, Simpson v. Pep Boys–Manny Moe & Jack, Inc., 847 So. 2d 617, 623 (La. Ct. App. 4th Cir. 2003); Thomas v. Desire Cmty. Housing Corp., 773 So. 2d 755 (La. Ct. App. 4th Cir. 2000).

106. *See* New Prime Inc. v. Oliveira, 139 S. Ct. 532, 537 (2019); *see also* Int'l River Ctr. v. Johns-Manville Sales Corp., 861 So. 2d 139, 140 (La. 2003).

107. *See* Harry Schein, Inc. v. Archer & White Sales, Inc., 139 S. Ct. 524, 530 (2019) ("Section 4 says that a court, in response to a motion by an aggrieved party, must compel arbitration 'in accordance with the terms of the agreement' when the court is 'satisfied that the making of the agreement for arbitration or the failure to comply therewith is not in issue.'"). *See also Int'l River Ctr.*, 861 So. 2d at 142 ("Section 4203 makes clear that the only two issues with which the trial court may concern itself are (1) whether there is a dispute as to the making of the agreement and (2) whether a party has failed to comply with the agreement.").

108. Aguillard v. Auction Mgmt. Corp., 908 So. 2d 1, 18 (La. 2005) ("[T]his Court, in conjunction with the Supreme Court, requires resolution of the doubt [of the scope of an arbitration clause] in favor of arbitration.").

109. *See* discussion *infra* Part II.

F. The Louisiana Supreme Court's Application of Howsam *to* International River v. Johns-Manville Sales Corp.*: Right Result for the Parties Involved, Wrong Reasoning*

The narrow applicability of *Howsam* was not nearly as apparent to the Louisiana Supreme Court as it was to the federal appellate courts. In *International River v. Johns-Manville Sales Corp.*, the Louisiana Supreme Court attempted to determine whether the courts or an arbitrator should decide if a party's actions amount to waiver of a contractual arbitration agreement.[110] The plaintiff, International River Center (IRC), entered into a contract with Henry C. Beck Company in 1975 to act as the general contractor for the construction of a hotel, and the contract included an arbitration agreement.[111] IRC was displeased with the hotel's roofing and, in 1985, filed a lawsuit against the general contractor and the manufacturer of the roofing system alleging defects in the roof.[112] However, IRC did not serve the suit on the defendants until 1989.[113] At that point, IRC then filed a third-party demand against the roofing subcontractor.[114] The lawsuit was not intensely pursued, and there were periods of dormancy until IRC retained new counsel in 2000.[115] The subcontractor filed a motion to stay pending arbitration in 2002, and the general contractor and roof manufacturer also joined in the motion.[116] The motion alleged that IRC had not complied with the arbitration agreement and that the arbitrator was the proper entity to resolve the issue of waiver.[117] IRC opposed the motion, arguing that the defendants waived their right to arbitrate because they took depositions, produced documents, and caused significant delay between the filing of the lawsuit and the invocation of the arbitration clause, thereby subjecting IRC to prejudice.[118]

The trial court denied the defendant's motion to stay because the defendants allowed an unreasonable amount of time to pass between the filing of the suit and the invoking of the arbitration clause.[119] The court of appeal denied supervisory writs from the trial court's ruling, prompting

110. *Int'l River Ctr.*, 861 So. 2d at 140.
111. *Id.*
112. *Id.*
113. *Id.*
114. *Id.*
115. *Id.*
116. *Id.*
117. *Id.*
118. *Id.*
119. *Id.*

the Louisiana Supreme Court to grant certiorari.[120] The Court began its opinion by noting that the LBAL controlled the issue.[121] Since IRC filed the lawsuit prior to the defendant's invocation of the arbitration clause, Louisiana Revised Statutes § 9:4202 applied.[122] The language of § 9:4202 requires a court to stay the proceedings and direct the parties to arbitrate so long as the party that invoked the arbitration clause is not in default.[123]

Noting that the relevant arbitration statutes do not define the term *default*, the Court relied on § 4203 of the LBAL for guidance.[124] The Court interpreted that statute to mean that the party who failed or refused to perform under the arbitration agreement is in default, meaning IRC was in default and the defendants were not.[125] As a result, the Court stated that the trial court should have granted the defendants' motion to stay.[126] Louisiana Revised Statutes § 9:4203 pertains to cases where a party defaults before suit has been filed, and according to the Louisiana Supreme Court, that statute allows the trial court "to ascertain only two basic facts before ordering arbitration . . . : (1) whether there is a dispute as to the making of the agreement and (2) whether a party has failed to comply with the agreement."[127] Thus, the Court held:

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120. *Id.* at 140–41.

121. *Id.* at 141; LA. REV. STAT. §§ 9:4203–4217 (2023). The LBAL controlled the issue because the issue did not pertain to a transaction that affected interstate commerce, thus avoiding preemption by the FAA. *See* Aguillard v. Auction Mgmt. Corp., 908 So. 2d 1, 7 (La. 2005) (citing Collins v. Prudential Ins. Co. of Am., 752 So. 2d 825, 827 (La. 2000)) ("The United States Supreme Court has made it clear that the substantive provisions of the FAA preempt state law and govern all written arbitration agreements in contracts connected to transactions involving interstate commerce.").

122. *Int'l River Ctr.*, 861 So. 2d at 141 (La. 2003) (quoting LA. REV. STAT. § 9:4202 (2003)).

123. LA. REV. STAT. § 9:4202 (2023).

124. *See Int'l River Ctr.*, 861 So. 2d at 141 (citing LA. REV. STAT. § 4203 (2003)). This statute, in pertinent part, states the following:

> The party aggrieved by the alleged failure or refusal of another to perform under a written agreement for arbitration, may petition any court of record having jurisdiction of the parties, or of the property, for an order directing that the arbitration proceed in the manner provided for in the agreement. Five days' written notice of the application shall be served upon the party in default . . . .

LA. REV. STAT. § 9:4203 (2023).

125. *Int'l River Ctr.*, 861 So. 2d at 141.

126. *Id.*

127. *Id.* at 141–42. The second paragraph of Louisiana Revised Statutes § 9:4203 states:

> Section 4202, controlling when suit has been brought on the issue referable to arbitration, and Section 4203, controlling when such a suit has not yet been filed, mandates that the trial court shall order arbitration when the elements contained within the statutes are proved or not disputed. Neither statute allows the trial court to determine waiver issues.[128]

The Court supported its decision by relying on three prior Louisiana Supreme Court decisions addressing waiver.[129] The three prior cases also resulted in similar rulings, holding that the arbitrator holds the authority to decide issues of waiver.[130] Yet, the cited cases were not fully applicable, as they provided similar factual situations to the facts of *International River*; the parties requesting arbitration in those cases were not the parties in default.[131] Thus, while the Louisiana Supreme Court granted certiorari in *International River* to resolve whether the court or an arbitration resolves allegations of waiver, it did not fully address the issue because the Court relied on its own precedent where it refused to address waiver when the moving party was not in default.

The Louisiana Supreme Court never addressed a court's role when the party moving to compel arbitration is in default.[132] In addition to its reliance on the three prior Louisiana Supreme Court opinions, the Court in *International River* recognized that the FAA is very similar to the LBAL; therefore, the Court relied heavily on the United States Supreme

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> The court shall hear the parties, and upon being satisfied that the making of the agreement for arbitration or the failure to comply therewith is not an issue, the court shall issue an order directing the parties to proceed to arbitration in accordance with the terms of the agreement. If the making of the arbitration agreement or the failure or refusal to perform is an issue, the court shall proceed summarily to the trial thereof.

LA. REV. STAT. § 9:4203 (2023).

128. *Int'l River Ctr.*, 861 So. 2d at 142.

129. *Id.*

130. *See* Bartley, Inc. v. Jefferson Par. Sch. Bd., 302 So. 2d 280 (La. 1974); Standard Co. of New Orleans, Inc. v. Elliot Constr. Co., 363 So. 2d 671 (La. 1978); Matthews-McCracken Rutland Corp. v. City of Plaquemine, 414 So. 2d 756 (La. 1982).

131. *See Bartley*, 302 So. 2d 280; *Standard Co. of New Orleans, Inc.*, 363 So. 2d 671; *Matthews-McCracken Rutland Corp.*, 414 So. 2d 756.

132. *Int'l River Ctr.*, 861 So. 2d at 142. For reasons that will be addressed below, the failure to consider situations when the moving party is in default greatly undercuts the Court's holding that trial courts are not allowed to address waiver.

Court's *Howsam* decision.[133] Acknowledging *Howsam*, the Louisiana Supreme Court found it "apparent that the Supreme Court agrees with this [C]ourt's earlier statements that waiver is reserved for the arbitrator to decide."[134] Ironically, the Court concluded by stating that "[a]lthough we do not believe that the arbitrator is necessarily in the best position to determine if waiver has occurred, the legislature has determined that it is the arbitrator who will make that decision and it is not the province of this court to second guess such policy decisions."[135]

G. Louisiana Circuit Courts of Appeal Decisions after International River

The Louisiana circuit courts of appeal continue to strictly follow the holding from *International River*. For example, in *University of Louisiana Monroe Facilities, Inc. v. JPI Apartment Development, L.P.*, the Louisiana Second Circuit relied on *International River* and held that the arbitrator should resolve allegations of waiver, not the court.[136] In that case, the University of Louisiana Monroe Facilities (ULM) entered into a contract with JPI Apartment Development (JPI) to renovate dorm rooms and construct apartments and a student health center on ULM's campus.[137] The contract included an arbitration clause and required the contractor to sign a performance bond.[138] JPI also entered into an agreement with the roofing subcontractor Central Roofing Inc. (CRI), in which CRI consented to be enjoined in any arbitration proceeding that may occur between the contractor and owner, pursuant to the arbitration clause in the agreement.[139] A few years after the construction project, ULM personnel noticed structural damage on the new buildings as a result of water intrusion.[140] ULM contacted JPI to schedule arbitration, but JPI stated that it declared bankruptcy and would not participate.[141] ULM then filed a lawsuit against JPI and its insurer of the performance bond as well as the

133. *Id.*
134. *Id.* at 144.
135. *Id.*
136. Univ. of La. Monroe Facs., Inc. v. JPI Apartment Dev., L.P., 151 So. 3d 126, 133 (La. Ct. App. 2d Cir. 2014).
137. *Id.*
138. *Id.*
139. *Id.*
140. *Id.*
141. *Id.* JPI informed ULM that it had collapsed and was finishing up payments on creditor's claims and, thus, was unwilling to participate in arbitration because it had no funds remaining to defend ULM's claim or pay a judgment.

subcontractor.[142] However, roughly two years after filing the lawsuit ULM then filed a motion in the trial court to stay the litigation and compel arbitration.[143] The defendants alleged that ULM waived its right to arbitrate by failing to invoke the arbitration clause within a reasonable time, instead filing a lawsuit as well as several amended petitions with the court.[144] The trial court denied the motion to compel arbitration, and ULM appealed to the Louisiana Second Circuit Court of Appeal.[145]

On appeal, the Second Circuit reversed the trial court's judgment decision, relying on *International River* to hold that the question of waiver is for the arbitrator to decide, not the court.[146] The court did not consider the merits of the defendant's waiver claim at all, pretermitting any such consideration because "the law is firmly established that once the court finds that the parties made an arbitration agreement and failed to comply with it, the issue of alleged waiver is a question for the arbitrator, not for the court."[147] Several additional Louisiana circuit courts of appeal relied on the Louisiana Supreme Court's *International River* decision and declined to rule on the issue of waiver. For example, the Second Circuit stated that "the [S]upreme [C]ourt apparently closed the door to courts deciding, without the consent of the parties, whether the right to arbitration has been waived."[148] Numerous other Louisiana appellate courts would go on to echo this sentiment.

For example, in *Arkel Constructors, Inc. v. Duplantier & Meric Architects, L.L.C.*, the Louisiana First Circuit Court of Appeal questioned the applicability of the *International River* decision to the case before it but ultimately held that the trial court erred in deciding the waiver issue,

142. *Id.* at 132.
143. *Id.* at 129.
144. *Id.* at 126.
145. *Id.*
146. *Id.* (citing Int'l River Ctr. v. Johns-Manville Sales Corp., 861 So. 2d 139, 142 (La. 2003)).
147. *Id.* at 133 (citing *Int'l River Ctr.*, 861 So. 2d at 142).
148. Wilson v. Allums, 94 So. 3d 908, 910 (La. Ct. App. 2d Cir. 2012) (citing *Int'l River Ctr.*, 861 So. 2d 139); *see also Univ. of La. Monroe Facs., Inc.*, 151 So. 3d at 133 ("[T]he issue of alleged waiver is a question for the arbitrator, not for the court."); Fla. Gas Transmission Co. v. Tex. Brine Co., 285 So. 3d 1093, 1095 (La. Ct. App. 1st Cir. 2019) ("Guided by jurisprudence from both the United States Supreme Court and the Louisiana Supreme Court . . . we find [defendant's] waiver claim must be decided by the arbitration panel."); Iberia Bank v. Dalton Constr., LLC, 277 So. 3d 829, 833 (La. Ct. App. 2d Cir. 2019); Nelson v. H20 Hair, Inc., 274 So. 3d 747, 749 (La. Ct. App. 5th Cir. 2019) ("[T]he issue of waiver should be addressed to the arbitrator.").

stating that the resolution of that issue is a function of the arbitrator.[149] In the case, a general contractor, Arkel Constructors, Inc., sued structural engineering and architectural firms, the state of Louisiana, and various insurers for their roles in causing delayed performance by Arkel on a project.[150] Arkel alleged that its delay was because of the defendants' defective drawings, specifications, and installation of vinyl sheet piling.[151] Arkel did not name Professional Construction Services, Inc. (PCS), the subcontractor who was responsible for the installation of the vinyl sheet piling, as a defendant in this lawsuit.[152] However, roughly seven months later, PCS brought a separate lawsuit against Arkel to recover money that Arkel owed to PCS for its work on the same project.[153] PCS then filed a motion to compel arbitration and stay the proceedings due to the arbitration clause in the contract between the two companies.[154] Arkel argued that PCS waived its right to arbitrate because it failed to assert the arbitration clause before filing a lawsuit.[155] The trial court found that PCS was in default because it filed suit without first demanding arbitration and, thus, held that since it was in default, the court was the proper party to decide the waiver issue.[156] The Louisiana First Circuit reversed the trial court's decision and, like the other state circuit courts, expressly relied on the Louisiana Supreme Court's *International River* decision and held that issues of waiver are clearly for the arbitrator to decide.[157]

This shift away from the traditional rule that courts are to resolve allegations of waiver by litigation conduct can be traced back to *International River*, in which the Louisiana Supreme Court improperly relied on the United States Supreme Court's holding in *Howsam*. The Louisiana Supreme Court strictly adhered to *Howsam* to guide its interpretation of the relevant LBAL provisions when it noted that the United States Supreme Court agrees that the statutes do not allow a trial

149. Arkel Constructors, Inc. v. Duplantier & Meric Architects, L.L.C., 965 So. 2d 455, 461 (La. Ct. App. 1st Cir. 2007).

150. *Id.* at 457.

151. *Id.*

152. *Id.*

153. *Id.*

154. *Id.*

155. *Id.* at 458.

156. *Id.*

157. *Id.* at 461 (alteration in original) (quoting Int'l River Ctr. v. Johns-Manville Sales Corp., 861 So. 2d 139, 142 (La. 2003)) (The First Circuit quoted the Louisiana Supreme Court's statement that "[n]either statute allows the trial court to determine waiver issues.").

court to resolve the waiver issue.[158] Although this shift is now firmly grounded in Louisiana jurisprudence, it is all based upon a misinterpretation of *Howsam*, which led to a subsequent misapplication of the relevant provisions of the LBAL.

II. WHERE THE LOUISIANA SUPREME COURT WENT WRONG IN *INTERNATIONAL RIVER*

The Louisiana Supreme Court had the misfortune of addressing this waiver issue only roughly one year after the Supreme Court's *Howsam* decision.[159] Thus, it did not have the benefit of the federal appellate court opinions that would eventually explain the narrow applicability of *Howsam* as applied to litigation conduct.[160] Bad timing, however, does not justify the current situation in which Louisiana courts are stuck following the Louisiana Supreme Court's decision in *International River*. The Louisiana Supreme Court's misconstruction of the United States Supreme Court's *Howsam* decision is apparent by a reading of the federal appellate court opinions that distinguish *Howsam* from the traditional rule that courts still resolve allegations of waiver by litigation conduct themselves.[161] While reaching a different conclusion on an issue from that of federal appellate courts is perfectly acceptable for a state court to do when it comes to state matters, declining to apply the plain language of the LBAL is not.[162] Furthermore, the Louisiana state court decisions following *International River* obscure the benefits of arbitration law and subject litigants to unnecessary prejudice and expenses.

158. *Int'l River Ctr.*, 861 So. 2d at 142.

159. *See* Howsam v. Dean Witter Reynolds, Inc., 537 U.S. 79 (2002); *Int'l River Ctr.*, 861 So. 2d at 140 (La. 2003). The exact dates of the opinions are as follows: The Supreme Court of the United States decided *Howsam* on December 10, 2002, and the Louisiana Supreme Court decided *International River* on December 3, 2003.

160. The Louisiana Supreme Court decided *International River* in 2003, while the first federal appellate court to clearly distinguish the *Howsam* decision, notwithstanding the Eighth Circuit, was the United States Court of Appeals for the Fifth Circuit in 2004. *See* Tristar Fin. Ins. Agency v. Equicredit Corp. of Am., 97 F. App'x 462, 464 (5th Cir. 2004).

161. *See* discussion *supra* Part I.D.

162. *See* LA. REV. STAT. §§ 9:4202–4203 (2023).

A. The Louisiana Supreme Court Misinterpreted the Applicability of Howsam *to Waiver Determinations*

The majority of the federal circuit courts have retained the traditional rule that the courts have the authority and are the proper entity to rule on waiver by litigation conduct, distinguishing their holdings from the issue in *Howsam*, which was centered on a contractual time limit in the arbitration agreement and did not pertain to the party's use of a judicial forum.[163] In fact, the United States Supreme Court granted certiorari in *Howsam* to decide whether it was for the court or an arbitrator to interpret and apply a particular NASD rule.[164] As the United States Court of Appeals for the Sixth Circuit stated in *Ehleiter v. Grapetree Shores*, the reference to *waiver* in the Supreme Court's *Howsam* decision was used in reference to conditions precedent to arbitration, not in a litigation activity sense.[165] Thus, as one scholar suggested, the inclusion of *waiver* "in the Supreme Court's exemplar list of issues presumed to be for an arbitrator was not necessary to the holding in *Howsam* and should not be determinative."[166]

In *International River*, the Louisiana Supreme Court granted certiorari for a different reason: "to determine which entity determines whether a contractual arbitration agreement has been waived by a party's actions—the courts or an arbitrator."[167] Yet, the Court still quoted *Howsam* when it held, "The U.S. Supreme Court, like this court, has stated that waiver and other 'procedural arbitrability' issues should be reserved to arbitrators rather than the courts."[168] Thus, the Louisiana Supreme Court in *International River* extended the United States Supreme Court's holding in *Howsam* to a situation far beyond its facts—to a situation the Court did not consider in *Howsam*. Although the Louisiana Supreme Court extended

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163. LeFevre, *supra* note 49, at 316 (citing *Howsam*, 537 U.S. at 79). In fact, the decision in *Howsam* had hardly anything to do with the use of a judicial forum; the plaintiff only filed suit to seek a declaration that the arbitration of the dispute was time-barred due to the terms of the arbitration agreement. *See Howsam*, 537 U.S. at 82–83.

164. *Howsam*, 537 U.S. at 82–83.

165. *See* Ehleiter v. Grapetree Shores, Inc., 482 F.3d 207, 218–19 (3d Cir. 2007).

166. LeFevre, *supra* note 49, at 316.

167. Int'l River Ctr. v. Johns-Manville Sales Corp., 861 So. 2d 139, 140 (La. 2003).

168. *See id.* at 142 (citing *Howsam*, 537 U.S. at 82–83); *see also* LA. REV. STAT. § 9:4202 (2023). The relevant portion of this provision states that a trial court is to compel arbitration "providing the applicant for the stay is not in default in proceeding with the arbitration."

Howsam beyond its facts, seven of the eight federal circuit courts of appeals have recognized *Howsam*'s limits.[169] Furthermore, the Louisiana Supreme Court, in quoting *Howsam*, also quoted the RUAA and its comments.[170] Specifically, the Louisiana Supreme Court noted the RUAA language, which states that an "arbitrator shall decide whether a condition precedent to arbitrability has been fulfilled . . . ."[171] However, like the decision in *Howsam*, this section of the RUAA addresses procedural questions that are conditions precedent to arbitration. Yet, in this same exact section of the RUAA, the comment states that "[w]aiver is one area where courts, rather than arbitrators, often make the decision as to enforceability of an arbitration clause," especially where the waiver allegation relates to litigation activity.[172]

Lastly, while the Louisiana Supreme Court was quick to rely on *Howsam*, it failed to address the notion that a party's expectations of who will resolve an issue is a factor to be considered. Specifically, while the Supreme Court in *Howsam* stated that parties would expect an arbitrator to decide whether a party submitted its dispute to the arbitrator in compliance with the time limit, the federal appellate courts that followed *Howsam* were quick to note that, conversely, parties would also expect a judge to decide whether a party's litigation activity in court amounts to

169. *See* JPD, Inc. v. Chronimed Holdings, Inc., 539 F.3d 388, 393–94 (6th Cir. 2008); *Ehleiter*, 482 F.3d at 217; Tristar Fin. Ins. Agency, Inc. v. Equicredit Corp. of Am., 97 F. App'x 462, 464 (5th Cir. 2004); Grigsby & Assocs., Inc. v. M Sec. Inv., 664 F.3d 1350, 1353 (11th Cir. 2011) (holding that "questions of waiver based on a party's litigation conduct are for the courts to resolve"); Martin v. Yasuda, 829 F.3d 1118, 1124 (9th Cir. 2016) (holding that the district court did not err in determining waiver by litigation conduct itself); LG Elecs., Inc. v. Wi-LAN USA, Inc., 623 F. App'x 568, 571 (2d Cir. 2015); Marie v. Allied Home Mortg. Corp., 402 F.3d 1, 3 (1st Cir. 2005); *but see* Nat'l Am. Ins. Co. v. Transamerica Occidental Life Ins. Co., 328 F.3d 462, 466 (8th Cir. 2003) (holding that all waiver challenges due to litigation conduct should be committed to an arbitrator); *see also* Lilly, *supra* note 3, at 113. These seven federal circuit courts have held that *Howsam* does not change the longstanding rule that the court resolves the issue of whether a party waived its right to arbitrate due to its litigation conduct.

170. *Int'l River Ctr.*, 861 So. 2d at 143 (quoting *Howsam*, 537 U.S. at 82–83); *see generally* Revised Unif. Arb. Act, 7 U.L.A. 16 (NAT'L CONF. OF COMM'RS ON UNIF. STATE L. 2000).

171. Revised Unif. Arb. Act § 6(c), 7 U.L.A. 16 (NAT'L CONF. OF COMM'RS ON UNIF. STATE L. 2000).

172. *Id.* § 6, cmt. 5.

waiver of the right to arbitration.[173] Although the Louisiana Supreme Court failed to consider a party's expectations as a factor in *International River*, it did ironically acknowledge that an arbitrator is not "necessarily in the best position to determine if waiver has occurred" and thus indicated that, had it applied the factor, it would have joined the federal appellate courts in finding that a party normally expects a court to resolve allegations of waiver.[174] In sum, the Louisiana Supreme Court applied the use of the term *waiver* in a procedural sense from *Howsam* to a situation where the alleged waiver was based on the filing and pursuit of a remedy in court for several years before the invocation of an arbitration clause.

B. The Louisiana Legislature Has Not Precluded Louisiana Courts from Deciding Waiver Under the Louisiana Binding Arbitration Law

The Louisiana Supreme Court in *International River* was correct to overturn the district court's decision and order arbitration because the moving party was not in default, but the Court's statement that neither § 9:4202 nor § 9:4203 of the LBAL allow a trial court to determine waiver issues[175] was not correct. This erroneous conclusion continues to reveal itself in state court decisions today.[176] Louisiana circuit courts of appeal strongly rely on *International River* and refuse to determine waiver issues themselves, even when the moving party is in default.[177]

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173. *Compare Howsam*, 537 U.S. at 79, *with Tristar Fin. Ins. Agency*, 97 F. App'x at 464.

174. *Int'l River Ctr.*, 861 So. 2d at 144.

175. *Id.* 142. The district court refused to order arbitration, finding that IRC had waived its right to arbitrate due to its litigation conduct.

176. *See* Wilson v. Allums, 94 So. 3d 908, 910 (La. Ct. App. 2d Cir. 2012) (citing *Int'l River Ctr.*, 861 So. 2d 139); *see also* Univ. of La. Monroe Facs., Inc. v. JPI Apartment Dev., L.P., 151 So. 3d 126, 133 (La. Ct. App. 2d Cir. 2014) ("[T]he issue of alleged waiver is a question for the arbitrator, not for the court."); Fla. Gas Transmission Co. v. Tex. Brine Co., 285 So. 3d 1093, 1095 (La. Ct. App. 1st Cir. 2019) ("Guided by jurisprudence from both the United States Supreme Court and the Louisiana Supreme Court . . . we find [defendant's] waiver claim must be decided by the arbitration panel."); Iberia Bank v. Dalton Constr., LLC, 277 So. 3d 829, 833 (La. Ct. App. 2d Cir. 2019); Nelson v. H20 Hair, Inc., 274 So. 3d 747, 749 (La. Ct. App. 5th Cir. 2019) ("[T]he issue of waiver should be addressed to the arbitrator.").

177. *See Wilson*, 94 So. 3d at 910 (citing *Int'l River Ctr.*, 861 So. 2d 139); *see also Univ. of La. Monroe Facs., Inc.*, 151 So. 3d at 133 ("[T]he issue of alleged waiver is a question for the arbitrator, not for the court."); *Fla. Gas Transmission Co.*, 285 So. 3d at 1095 ("Guided by jurisprudence from both the United States Supreme Court and the Louisiana Supreme Court . . . we find [defendant's] waiver

The Louisiana First Circuit Court of Appeal's decision in *Arkel* was the closest a Louisiana circuit court of appeal came to questioning the holding in *International River*. The *Arkel* case was a 3–2 decision, and both dissenting judges assigned compelling reasons.[178] PCS, the party who filed a motion to compel arbitration and stay the proceedings under § 9:4202, was also the same party that had previously filed suit against Arkel for monetary damages.[179] PCS agreed to consolidate its own suit with the suit Arkel filed against the owner of the same project and, thus, have those matters heard in court rather than in arbitration.[180] Therein, the trial court found that PCS was in default and had waived its right to arbitrate.[181] However, the majority opinion of the First Circuit Court of Appeal reversed the district court's decision, stating that the trial court erred as a matter of law by deciding the waiver issue because determining waiver is a function of the arbitrator.[182]

Judge Hughes, the first dissenter in *Arkel*, agreed with the trial court that PCS waived its right to arbitration, as it "indicate[d] an intention to litigate rather than arbitrate" by entering into a consent judgment and agreeing to have the dispute heard in the district court.[183] Judge Hughes distinguished this case from *International River*, noting that unlike in *International River* where the party seeking arbitration was not in default, the party in *Arkel* that sought a motion to compel arbitration "chose and agreed to litigate, thus defaulting on and waiving its prior arbitration agreement."[184] Judge Hughes, in his dissent, strictly applied the language of § 9:4202, which requires a court to stay the trial of the action and order arbitration providing the party requesting a motion to compel arbitration is not in default.[185] Finding that the party requesting the court to stay the proceedings and compel arbitration sought relief through litigation, Judge Hughes stated that contrary to the majority's position, the trial court was correct when it refused to order arbitration due to PCS being in default.[186]

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claim must be decided by the arbitration panel."); *Iberia Bank*, 277 So. 3d at 833; *Nelson*, 274 So. 3d at 749 ("[T]he issue of waiver should be addressed to the arbitrator.").

178. *See generally* Arkel Constructors, Inc. v. Duplantier & Meric Architects, L.L.C., 965 So. 2d 455 (La. Ct. App. 1st Cir. 2007).

179. *Id.* at 457.

180. *Id.* at 461 (Hughes, J., dissenting).

181. *Id.* at 458.

182. *Id.* at 461.

183. *Id.* (Hughes, J., dissenting).

184. *Id.* (Hughes, J., dissenting).

185. *Id.* (Hughes, J., dissenting) (citing LA. REV. STAT. § 9:4202 (2007)).

186. *Id.* (Hughes, J., dissenting).

The second dissenting opinion, authored by Judge McClendon, began with a direct interpretation of § 9:4202.[187] Judge McClendon stated that by enacting the statute, Louisiana's legislature "clearly chose to maintain the court's authority to determine whether a party applying for a stay of proceedings pending arbitration has defaulted, and thereby lost the right to stay the court proceeding and compel arbitration."[188] Finding that the applicant for stay, PCS, appeared to be in default, the judge disagreed with the majority and held that § 9:4202 gave the trial court jurisdiction to determine whether PCS had waived its right to arbitration due to inconsistent litigation conduct.[189]

Although only dissenting opinions, these two judges highlighted the major flaw that not only their own circuit court, but also all other courts in Louisiana exhibit when they apply the erroneous *International River* holding and disregard the plain language of the LBAL.[190] As Judge McClendon stated, the majority in *Arkel* was incorrect to "interpret[] *International River* to remove from the trial court the issue of default under La. R.S. 9:4202."[191] However, numerous other opinions have also been wrong,[192] and this misapplication of the LBAL arose from the Louisiana Supreme Court's decision in *International River*, in which it stated that "[n]either statute allows the trial court to determine waiver issues."[193]

Although the longstanding approach of Louisiana courts resolving waiver allegations themselves is currently abandoned, judges in Louisiana traditionally did not have any issue deciding whether a party's litigation conduct that amounted to waiver was encompassed within the meaning of

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187. *Id.* (McClendon, J., dissenting) (citing LA. REV. STAT. § 9:4202 (2007)).

188. *Id.* at 462.

189. *Id.* at 462 n.1 (McClendon, J., dissenting) (citing LA. REV. STAT. § 9:4202 (2007)).

190. *See id.* (McClendon, J., dissenting).

191. *Id.* (McClendon, J., dissenting) (citing LA. REV. STAT. § 9:4202 (2007)).

192. *See, e.g.*, Wilson v. Allums, 94 So. 3d 908, 910 (La. Ct. App. 2d Cir. 2012) (citing Int'l River Ctr. v. Johns-Manville Sales Corp., 861 So. 2d 139 (La. 2003)); *see also* Univ. of La. Monroe Facs., Inc. v. JPI Apartment Dev., L.P., 151 So. 3d 126, 133 (La. Ct. App. 2d Cir. 2014) ("[T]he issue of alleged waiver is a question for the arbitrator, not for the court."); Fla. Gas Transmission Co. v. Tex. Brine Co., 285 So. 3d 1093, 1095 (La. Ct. App. 1st Cir. 2019) ("Guided by jurisprudence from both the United States Supreme Court and the Louisiana Supreme Court . . . we find [defendant's] waiver claim must be decided by the arbitration panel."); Iberia Bank v. Dalton Constr., LLC, 277 So. 3d 829, 833 (La. Ct. App. 2d Cir. 2019); Nelson v. H20 Hair, Inc., 274 So. 3d 747, 749 (La. Ct. App. 5th Cir. 2019) ("[T]he issue of waiver should be addressed to the arbitrator.").

193. *Int'l River Ctr.*, 861 So. 2d at 142.

default found in the statute.[194] Louisiana Revised Statutes § 9:4202 states that when a lawsuit is filed on an issue that is covered in an arbitration agreement, the trial court is to stay the proceedings and grant the moving party's motion to compel arbitration unless the moving party is in default.[195] In other words, to grant the motion and compel arbitration, a court must first determine if the moving party is in default. However, it is impossible for a court to properly apply § 9:4202 when it refuses to resolve whether a party waived its right to arbitrate and is, therefore, in default. Thus, the current approach used by Louisiana courts essentially ignores the final two lines of the statute.[196] Section 9:4203, which applies when a suit has not yet been filed, also uses substantially similar language to give courts authority to order arbitration when one party refuses to comply so long as the moving party is not in default.[197] Following the same reasoning as applied to § 9:4202, it is impractical for a court to apply the statute as written and order arbitration if it does not first ensure that the moving party is not in default by waiving its right to arbitrate.

Applying a strict interpretation of the LBAL will not force Louisiana courts to address waiver by litigation conduct *de novo*. The Louisiana jurisprudence prior to *International River* provided a rule to guide courts in determining waiver by litigation conduct.[198] For example, the Louisiana Fourth Circuit Court of Appeal set out a standard for determining whether a party waived its right to arbitration in the 1994 case of *Rauscher Pierce Refsnes, Inc. v. Flatt*.[199] In its holding, the Louisiana Fourth Circuit relied on the United States Court of Appeals for the Fifth Circuit's standard, which states, "Waiver will be found when the party seeking arbitration substantially invokes the judicial process to the detriment or prejudice of the other party."[200] The Louisiana court went on to note that the finding of

194. *See, e.g.*, Simpson v. Pep Boys–Manny Moe & Jack, Inc., 847 So. 2d 617, 624 (La. Ct. App. 4th Cir. 2003).

195. *See* LA. REV. STAT. § 9:4202 (2023); *see also Simpson*, 847 So. 2d at 624 (rejecting a motion to stay under § 9:4202 because the moving party waived its right to arbitrate).

196. *See* LA. REV. STAT. § 9:4202 (2023).

197. *See id.*

198. *See, e.g.*, Rauscher Pierce Refsnes, Inc. v. Flatt, 632 So. 2d 807, 810 (La. Ct. App. 4th Cir. 1994).

199. *See id.* The Louisiana Fourth Circuit Court of Appeal ultimately concluded that the plaintiff did not waive its right to arbitrate because the defendant failed to meet the required burden; defendant did not show that it was subjected to any prejudice. *Id.*

200. *Id.* (citing Miller Brewing Co. v. Fort Worth Distrib. Co., 781 F.2d 494, 497 (5th Cir. 1986)).

waiver requires a very heavy burden of proof.[201] Thus, not only is there already a standard in place for Louisiana courts to apply, but, furthermore, that standard does not affect the traditional rule that the judge must find a substantial showing to rule in favor of the party asserting waiver.[202]

In sum, the improper Louisiana circuit courts of appeal decisions can be traced back to blind reliance on the Louisiana Supreme Court's erroneous interpretation of United States Supreme Court's decision in *Howsam*.[203] As the United States Court of Appeals for the First Circuit's holding in *Marie* clearly demonstrates, the United States Supreme Court's decision in *Howsam* did not change the longstanding rule that it is for the trial courts to resolve allegations of waiver by litigation conduct.[204] However, the Louisiana Supreme Court in *International River* improperly relied on *Howsam* for guidance in its interpretation of Louisiana Revised Statutes §§ 9:4202 and 4203, essentially disregarding language in the statute which delegates the waiver issue to trial courts when it held that neither statute allows trial courts to determine waiver issues.[205] This decision has since been strictly followed and continues to tie the hands of the Louisiana circuit courts of appeal.[206] Until this erroneous decision is overturned, parties to arbitration agreements in Louisiana are at risk of never realizing the benefits of private dispute resolution, the primary reason that many enter into such agreements.

C. The Current Louisiana Approach of Assigning Allegations of Waiver to the Arbitrator for Resolution Hinders the Goals of Arbitration and Exposes Litigants to Unfair Prejudice

The popularity and frequency of arbitration as a form of alternative dispute resolution has surged in recent decades.[207] This increasing

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201. *Id.* (citing Walker v. J.C. Bradford & Co., 938 F.2d 575, 579 (5th Cir. 1991); Elec. Instrumentation Unlimited v. McDermott, 627 So. 2d 702 (La. Ct. App. 4th Cir. 1993)).

202. *See, e.g.*, *Miller Brewing Co.*, 781 F.2d at 497; *Walker*, 938 F.2d at 579; *Elec. Instrumentation Unlimited*, 627 So. 2d 702.

203. *See generally* Howsam v. Dean Witter Reynolds, Inc., 537 U.S. 79 (2002).

204. Marie v. Allied Home Mortg. Corp., 402 F.3d 1, 14 (1st Cir. 2005) ("We hold that the Supreme Court in *Howsam* . . . did not intend to disturb the traditional rule that waiver by conduct, at least where due to litigation-related activity, is presumptively an issue for the court.").

205. *See* Int'l River Ctr. v. Johns-Manville Sales Corp., 861 So. 2d 139, 142 (La. 2003); *see also* LA. REV. STAT. §§ 9:4202–4203 (2023).

206. *See* discussion *supra* notes 146–48.

207. *See* COLVIN, *supra* note 1.

preference for arbitration over litigation is largely attributable to the benefits of arbitration, which include "lower costs, greater efficiency and speed, and the ability to choose expert adjudicators to resolve specialized disputes."[208] Louisiana courts have also echoed this sentiment, describing arbitration as way to settle differences in a fast and inexpensive manner.[209]

The speed and efficiency of arbitration is thwarted when a court is either unable or chooses not to determine whether a party before its tribunal waived its right to arbitrate due to its inconsistent litigation conduct.[210] When a court leaves this decision to an arbitrator and the arbitrator finds that a party waived its right to arbitrate, then the lawsuit ends up before the same court again without any progress having been made.[211] Instead, both parties spend months, if not years, waiting for the court to hear their dispute before being told that the court cannot even rule on the issue of waiver.[212]

Additionally, the potential cost-saving aspect of arbitration may be completely negated when a court declines to decide allegations of waiver. For example, JAMS, a commonly used arbitration forum, has a filing fee of $1,750.[213] In a jurisdiction like Louisiana where the court declines to rule on allegations of waiver, an arbitrator making that decision may conclude that there was no waiver by a party's extensive litigation conduct. This leaves the opposing party with incurred expenses from attorney's fees and court costs from the litigation, in addition to the party's share of filing fees owed to the arbitral institution. Furthermore, if an arbitrator deciding the waiver allegation concludes that a party did waive its right to arbitration, the parties will spend even more time and money,

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208. *See* ABA, *supra* note 2; Stolt-Nielsen S.A. v. AnimalFeeds Int'l. Corp., 559 U.S. 662, 686–87 (2010).

209. Johnson v. 1425 Dauphine, L.L.C., 52 So. 3d 962, 967 (La. Ct. App. 4th Cir. 2010).

210. Marie v. Allied Home Mortg. Corp., 402 F.3d 1, 13–14 (1st Cir. 2005).

211. *Id. See also* RUAA § 6, cmt. 5, 7 U.L.A. 22–23 (Supp. 2004) ("It is also a matter of judicial economy to require that a party, who pursues an action in a court proceeding but later claims arbitrability, be held to a decision of the court on waiver.").

212. *See, e.g.*, JPD, Inc. v. Chronimed Holdings, Inc., 539 F.3d 388, 393–94 (6th Cir. 2008) (citing *Marie*, 402 F.3d at 13) ("[R]eferring waiver-through-inconsistent-conduct claims to an arbitrator would often prove 'exceptionally inefficient' because just deciding that a party waived arbitration fails to advance the substance of the case—it just gets referred back to the court.").

213. *See Arbitration Schedule of Fees and Costs: How Much Does Arbitration Cost at JAMS?*, JAMS, https://www.jamsadr.com/arbitration-fees [https://perma.cc/JA5S-P2PZ] (last visited June 29, 2022). As an aside, JAMS was formerly known as Judicial Arbitration and Mediation Services.

as they will now return to the court to settle the dispute. Thus, courts that decline to decide whether a party has waived its right to arbitrate due to its inconsistent litigation conduct hinder the efficiency and cost-effective rationales that underlie the purpose of arbitration.

III. RESOLVING THE ISSUE: A PLAIN READING OF THE LOUISIANA BINDING ARBITRATION LAW WITH A PROPER UNDERSTANDING OF *HOWSAM*

The Louisiana Supreme Court should reverse its longstanding *International River* decision by applying the language of the relevant sections of the LBAL as written in accordance with the Louisiana Civil Code's statutory interpretation provisions.[214] Such an application would result in the trial court, not the arbitrator, resolving whether a party waived its right to compel arbitration due to its litigation conduct. Following this approach will allow Louisiana courts to align with the majority of the federal courts, better promote the goals of arbitration, and protect parties from unnecessary expenses and delays. In addition, it will create clearer expectations through the development of jurisprudence when it comes to how much litigation activity, if any, is permitted before a party is deemed to have waived its right to arbitrate.

A. Applying the Louisiana Civil Code's Provisions on Statutory Interpretation Indicates that the Relevant Provisions of the Louisiana Binding Arbitration Law Directs Courts to Resolve Allegations of Waiver

Louisiana Civil Code article 9 provides Louisiana courts with guidance pertaining to statutory interpretation.[215] Article 9 states that "[w]hen a law is clear and unambiguous and its application does not lead to absurd consequences, the law shall be applied as written and no further interpretation may be made in search of the intent of the legislature."[216] The law at issue here, Louisiana Revised Statutes § 9:4202, instructs Louisiana courts to "stay the trial of the action until an arbitration [is] had . . . providing the applicant for the stay is not in default in proceeding with the arbitration."[217] Louisiana Civil Code article 11 requires that words of a law be given their generally prevailing meaning.[218] The generally

214. *See* LA. REV. STAT. §§ 9:4202–4203 (2023).
215. *See* LA. CIV. CODE art. 9 (2023).
216. *Id.*
217. LA. REV. STAT. § 9:4202 (2023).
218. LA. CIV. CODE art. 11 (2023).

prevailing meaning of the word *providing* is "on condition that."[219] Thus, the LBAL mandates courts to order arbitration when the issue is covered by a valid arbitration agreement *on the condition that* the party requesting the court to do so is not in *default*. *Default*, defined in *Black's Law Dictionary* as "[t]he omission or failure to perform a legal or contractual duty[,]"[220] has long been understood to be synonymous with waiver.[221] Waiver itself is defined as the "voluntary relinquishment or abandonment—express or implied—of a legal right or advantage . . . ."[222] In the arbitration context, the voluntary behavior is the litigation activity, and the legal right is the contractual duty to have a dispute settled in arbitration. A party, therefore, waives its right and is in default by failing to perform with the arbitration agreement, and this failure is brought about by actively litigating in court and failing to comply with a contractual agreement to settle a dispute in arbitration. Thus, § 4202 of the LBAL unambiguously permits courts to order arbitration only if the party requesting it has not waived its right to arbitrate.[223]

Furthermore, interpreting the language of Louisiana Revised Statutes § 9:4202 in this manner would not lead to the absurd consequences prohibited by Louisiana's Civil Code; it is far from absurd to have the court, with the record already in front of it, decide whether a party substantially invoked the litigation process and prejudiced its opponent.[224] Thus, under the LBAL, a court cannot properly comply with the statute unless it first addresses whether the requesting party waived its right to

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219. *Providing*, MERRIAM-WEBSTER, https://www.merriam-webster.com/dictionary/providing [https://perma.cc/5M5Q-UP56] (last visited Mar. 16, 2023).

220. *Default*, BLACK'S LAW DICTIONARY (11th ed. 2019).

221. *See* Leake, *supra* note 3, at 400 (citing Newirth ex rel. Newirth v. Aegis Senior Cmtys., LLC, 931 F.3d 935, 940 (9th Cir. 2019); Messina v. N. Cent. Distrib., Inc., 821 F.3d 1047, 1050 (8th Cir. 2016); *In re* Cox Enters., Inc Set-top Cable Television Box Antitrust Litig., 790 F.3d 1112, 1116 (10th Cir. 2015); Joca-Roca Real Est., LLC v. Brennan, 772 F.3d 945, 949 (1st Cir. 2014); Wheeling Hosp., Inc. v. Health Plan of the Upper Ohio Valley, Inc., 683 F.3d 577, 586 (4th Cir. 2012) (explaining that default "resembles waiver"); *In re* Pharm. Benefit Managers Antitrust Litig., 700 F.3d 109, 117 (3d Cir. 2012); La. Stadium & Exposition Dist. V. Merrill Lynch, Pierce, Fenner & Smith Inc., 626 F.3d 156, 159 (2d Cir. 2010); Hurley v. Deutsche Bank Tr. Co. Ams., 610 F.3d 334, 338 (6th Cir. 2010); Nicholas v. KBR, Inc., 565 F.3d 904, 907–08 (5th Cir. 2009); Ivax Corp. v. B. Braun of Am., Inc., 286 F.3d 1309, 1315 n.17 (11th Cir. 2002) ("[T]he term 'default' carries the same meaning as 'waiver.'")).

222. *Waiver*, BLACK'S LAW DICTIONARY (11th ed. 2019).

223. *See* LA. REV. STAT. § 9:4202 (2023).

224. *See id.*

arbitrate due to its litigation conduct.[225] In fact, assigning waiver determinations to arbitrators is absurd considering the Louisiana Supreme Court "do[es] not believe that the arbitrator is necessarily in the best position to determine if waiver has occurred . . . ."[226] Furthermore, this delegation of the waiver issue to arbitrators inhibits the goals of arbitration.

B. Permitting Courts to Decide Waiver Allegations Promotes the Goals of Arbitration and Does Not Inhibit the Policy of Resolving the Scope of Arbitration Disputes in Favor of Arbitration

When a court resolves the issue of whether a party waived its right to compel arbitration due to its litigation conduct, the record to make that determination is directly in front of the court. The parties have already filed their lawsuit in that court, presenting their reasons as to why they should prevail. Thus, the court possesses the best idea of how heavily a party has involved the judiciary, prejudiced the opposing party, and acted inconsistently with its agreement to arbitrate.[227] Furthermore, if the court determines a party waived its right, the pleadings identifying the root cause of the dispute are at the court's fingertips, allowing them to proceed quickly to trial to resolve the matter. Conversely, when a court finds the party did not waive its right, it can quickly order the dispute to arbitration, providing the parties a definite answer as to whether they should be in a court or an arbitration forum. Taking this approach to waiver increases judicial efficiency, reduces costs, and provides clearer expectations to parties by developing a body of jurisprudence that defines what amount of litigation activity constitutes waiver. Perhaps more importantly, this approach presents the waiver issue to the decisionmaker best positioned to resolve it. The court, not the arbitrator, is the one that knows best what occurred in its own tribunal and whether a party engaged in forum-shopping.[228]

Furthermore, as both the United States Supreme Court and the Louisiana Supreme Court have made evident, when analyzing arbitration

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225. *See id.*

226. Int'l River Ctr. v. Johns-Manville Sales Corp., 861 So. 2d 139, 144 (La. 2003).

227. *See, e.g.*, JPD, Inc. v. Chronimed Holdings, Inc., 539 F.3d 388, 394 (6th Cir. 2008) (citing Marie v. Allied Home Mortg. Corp., 402 F.3d 1, 13 (1st Cir. 2005)) ("Waiver-through-conduct issues ordinarily turn on whether a plaintiff abused the litigation or pre-litigation process, and a court is most adept at policing procedure-abusing conduct.").

228. *See Marie*, 402 F.3d at 13.

agreements and the waiver issue, courts are to resolve that dispute in favor of arbitration.[229] Thus, requiring the judiciary to resolve allegations of waiver by litigation conduct will not inhibit corporations, contractors, or any of the like from continuing to rely heavily on arbitration agreements for fear that the judiciary will not favor them. When deciding waiver, the judges must make that determination with the policy favoring arbitration in mind, precluding them from making waiver determinations based on their individual support or disdain for arbitration.[230] This proposed solution that assigns the decision-making authority to the courts to resolve allegations of waiver by litigation conduct abides by a proper interpretation of the LBAL and results in increased judicial efficiency, while also saving time and money for the interested parties.

CONCLUSION

The Louisiana Supreme Court misconstrued the holding of the United States Supreme Court when it relied on the decision from *Howsam* to support its interpretation of the LBAL and held that the issue of waiver by litigation conduct is for the arbitrator to decide, not the courts. Additionally, the Louisiana Supreme Court itself issued an overbroad holding when it stated that neither § 4202 nor § 4203 of the LBAL allows trial courts to determine waiver issues, as it failed to acknowledge the fact that the final clause of § 4202 explicitly requires trial courts to determine waiver issues before granting the moving party's motion to compel arbitration.[231] Consequently, Louisiana's lower courts are bound by the state Supreme Court's holding in *International River* and continue to incorrectly rule that the issue of waiver is solely for the arbitrator, not the court.[232] To correct this problem and comply with the language of the

229. *Compare* Moses H. Cone Mem'l Hosp. v. Mercury Constr. Corp., 460 U.S. 1, 24 (1983) (stating the courts are to follow a liberal policy favoring arbitration), *with* Aguillard v. Auction Mgmt. Corp., 908 So. 2d 1, 7 (La. 2005) (stating that the positive law of Louisiana favors arbitration).

230. *See Aguillard*, 908 So. 2d at 7.

231. *See* LA. REV. STAT. § 9:4202 (2023). The relevant portion of this provision states that a trial court is to compel arbitration "providing the applicant for the stay is not in default in proceeding with the arbitration." *Id.*

232. *See, e.g.*, Wilson v. Allums, 94 So. 3d 908, 910 (La. Ct. App. 2d Cir. 2012) (citing Int'l River Ctr. v. Johns-Manville Sales Corp., 861 So. 2d 139 (La. 2003)); *see also* Univ. of La. Monroe Facs., Inc. v. JPI Apartment Dev., L.P., 151 So. 3d 126, 133 (La. Ct. App. 2d Cir. 2014) ("[T]he issue of alleged waiver is a question for the arbitrator, not for the court."); Fla. Gas Transmission Co. v. Tex. Brine Co., 285 So. 3d 1093, 1095 (La. Ct. App. 1st Cir. 2019) ("Guided by jurisprudence from both the United States Supreme Court and the Louisiana

statutes, promote the goals of arbitration, and help create uniformity with the many federal circuits and state courts who hold otherwise, the Louisiana Supreme Court should reverse part of its decision in *International River* and clarify that it is in fact the role of the court to resolve allegations of waiver due to litigation conduct.

Supreme Court . . . we find [defendant's] waiver claim must be decided by the arbitration panel."); Iberia Bank v. Dalton Constr., LLC, 277 So. 3d 829, 833 (La. Ct. App. 2d Cir. 2019); Nelson v. H20 Hair, Inc., 274 So. 3d 747, 749 (La. Ct. App. 5th Cir. 2019) ("[T]he issue of waiver should be addressed to the arbitrator.").