

NEWSLETTERS**Arbitration Agreement Does Not Relieve Company
Of Need To Respond To Lawsuit**

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An arbitration agreement can be a valuable tool for businesses. It provides certainty regarding the method of dispute resolution. Compared to litigation, arbitration may be less expensive and generally leads to a quicker resolution. But those benefits are of no use if the dispute ends up in litigation instead of arbitration, despite the arbitration agreement.

So, the question then becomes, what do you do when you have an arbitration agreement and yet are sued by the other party to the arbitration agreement? First, you likely must respond to the litigation. While you want to expressly reserve your right to later arbitrate the dispute, failure to respond is dangerous as it would be with any litigation. Second, don't try to respond to the lawsuit without involving counsel. These important lessons, and several others, can be gleaned from a recent Ohio case. *Dan Eynon Enterprises v. Mid-America Diesel*, 2015 WL 1291661 (Ohio Ct. App. March 23, 2015).

In this case, one company agreed to sell a rebuilt diesel engine to another company specializing in leasing transportation services. The parties orally agreed to the terms. After the oral agreement, the seller sent the buyer an invoice via email, which the buyer paid. The invoice included a clause referring disputes between the parties to arbitration, but the buyer never acknowledged, or agreed to, the arbitration agreement.

Shortly thereafter, the rebuilt engine stopped working, and the buyer filed suit. The seller did not answer the complaint until well after the deadline to answer had passed and after the buyer filed a motion for default judgment. After the filing of the default judgment motion, the seller, without counsel, filed an "Answer" that attempted to invoke the arbitration agreement. The buyer moved to strike the answer and opposed the attempt to invoke the arbitration agreement. The court set a hearing on these issues.

Six months after the filing of the complaint, and less than two weeks before the hearing, the seller finally hired counsel. Two days before the hearing, the seller, through counsel, filed a formal motion to compel arbitration. The seller never filed a motion for leave to file a late answer and the seller's attorney never filed an answer. Apparently, the seller did not take any additional action in the case out of concern that by doing so they would waive their right to compel arbitration.

The court began by focusing on the seller's mistaken impression that answering a complaint would have waived its right to seek arbitration. Under Ohio law, waiver of an agreement to arbitrate is found only when the totality of the circumstances indicates that the party now seeking to

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compel arbitration was aware of the right to compel arbitration and acted inconsistently with that right. In determining this, courts look at four factors:

1. The delay in the requesting party's demand to arbitrate;
2. The extent of the participation in the litigation of the party now seeking arbitration;
3. Whether the party seeking arbitration filed a counterclaim or a third-party complaint; and
4. Whether the inconsistent action of the party requesting arbitration will prejudice the other party.

As a result, the seller had several options in responding to the complaint which would have left open the option to later seek to compel arbitration. Ohio courts are required to stay litigation upon a motion to stay the litigation premised on an enforceable arbitration agreement. This motion could have been filed simultaneously with an answer. In lieu of answering the complaint, the seller could also have moved to dismiss the suit based on the arbitration agreement.

In this case the seller chose none of those options. Because the seller failed to timely answer the complaint, the appellate court affirmed the trial court's decision to grant the buyer a default judgment. The seller compounded this issue by never filing a valid answer. Corporations are not permitted to proceed pro se. This means that, unlike individuals, corporations cannot file court pleadings on their own. Instead, corporations must file pleadings through counsel.

In this case, the problem could have been solved had the seller filed a motion with the court seeking permission to file an answer after the answer deadline. The appellate court also affirmed the trial court's ruling denying the seller's motion to compel arbitration, although this ruling was premised more on the seller's delay in answering and the procedural problems with the seller's "answer" than the enforceability of the arbitration agreement.

There are several takeaways from this case for companies wanting to ensure that their disputes are resolved through arbitration instead of litigation. First and foremost, the arbitration agreement itself must be enforceable. Like any contract, this requires a meeting of the minds. Though not addressed by the court in this case, that was an issue here. It was not clear that the buyer agreed to the added term of the arbitration agreement, included for the first-time in the post-agreement invoice. Arbitration agreements are contracts, and there is a strong presumption in favor of written arbitration agreements, which can only be set aside on limited grounds. For these reasons, arbitration agreements should always be written and they should be a part of the initial agreement between the parties, not added later.

However, having an enforceable arbitration agreement is only half the battle. To get the benefits of an arbitration agreement, it is imperative to know how to properly invoke an arbitration agreement. For all the issues with the arbitration agreement in this case, the outcome of this case would have been the same even if the arbitration agreement was enforceable. That is a strong reminder to not become complacent when facing litigation of a dispute that should be subject to arbitration. Companies must respond to the suit, or they risk a default judgment, as

happened in in this case. To respond to the suit, companies must hire an attorney, because they cannot proceed in litigation without an attorney. The longer the delay in hiring an attorney, the more difficulty the business faces. A long delay may mean that the deadline to answer the complaint has already passed, which creates procedural hurdles. Even if the answer can still be filed, a long delay increases the possibility that the court will find waiver of the arbitration agreement.

For more information about this topic and the issues in this article, please contact David Dirisamer in our Columbus office at (614)-628-1451 or david.dirisamer@btlaw.com.

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