

## **Don't Lose Your Right to Arbitrate A Dispute**

Rightly or wrongly, Arbitration has been touted as a cure all for the business community over the years. As part of the arbitration push, the business community has been urged to add clauses into contracts mandating the arbitration of all or specific disputes. Having taken the trouble to add arbitration clauses into their contracts, it is troubling to see the provisions ignored by businesses either overly eager to get their dispute before a court or overly eager to respond to a complaint filed against it. By inadequately considering options either prior to racing to the courthouse or prior to responding to a filed complaint, many businesses inadvertently waive the arbitration rights they worked hard to add to their contracts. This article is designed to educate the business public about this issue and assist in the preservation of arbitration clauses.

While there are multiple cases addressing scenarios by which a party loses its right to arbitrate, the cases can be summarized by stating that a party will lose its right if the party acts in a way contrary to its contractual right to arbitrate. Obviously, then, a party's filing a complaint in a court of law, rather than with an arbitrator or arbitration panel, will typically be deemed an act contrary to an arbitration clause, and the right to arbitration will be waived. As alluded to earlier, this can happen when a party, and perhaps a hasty attorney, race to the court house without having fully read and considered the contracts implicated and the remedies available to the party pursuant to the contract terms. Complete consideration of all contractual provisions should be considered prior to seeking the jurisdiction of a court of law.

As can be imagined, it is more common for a party defending a complaint filed against it to inadvertently waive an arbitration clause. In responding to a complaint, a party is expected to immediately move to stay court proceedings in light of an applicable arbitration clause or, at the very least, reference the need for arbitration somewhere in the response to the complaint. The failure to at least mention the need arbitration will typically be deemed by a court as a waiver of the right to arbitrate.

Even if the right to arbitrate is stated in an answer to a complaint, a lengthy delay in the party's request to the court to arbitrate, demonstrated by an extensive involvement in the litigation process, will also typically be deemed a waiver of the right to arbitrate. There is not an actual pivotal point in the litigation for which an application to preserve a right to arbitrate can be determined, so a court is left to opine upon the circumstances and actions of the defending party

When a defending party invokes the jurisdiction of the court by filing a counterclaim or a third-party complaint, the right to arbitration is typically waived. A court will not typically allow the defending party to untimely state that it is seeking arbitration while aggressively countering with counterclaims or third-party complaints. A party will not be allowed to effectively forum shop by gauging its position in the litigation prior to moving to mandate arbitration.

As part of its inquiry, a court may inquire as to whether the party that is not requesting arbitration has been prejudiced by the requesting party's inconsistent acts.