

AVOIDING THE ROAD TO PERDITION WHILE SEEKING TO ENFORCE AN ARBITRATION AWARD

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- Parties to commercial contracts as well as to service agreements and other contractual relationships in this present day often seek an alternative means to resolve disputes in avoidance of litigation. Due to the confidentiality which attaches to most ADR approaches, the notoriety of litigation war stories and the attendant costs and publicity of adverse results for a litigating party are mostly avoided. The result is that many individuals, companies, governmental agencies, and other institutions prefer to resolve disputes with the assistance of a private arbitrator or mediator. Consequently, many agreements and contracts today spell out a broadly written agreement to arbitrate differences with a corresponding waiver of the rights and obligations attendant to civil litigation. Recent caselaw in Michigan now makes it clearer that participants in an ADR process such as arbitration are required to submit to civil litigation at some point if necessary to compel enforcement of an arbitration award that results from a proceeding that all participants have agreed would be binding.

The Michigan Court of Appeals released for publication on August 3, 2010 an opinion in *Jaguar Trading Limited Partnership v. Douglas Cunningham*, Docket No. 290972, that eliminates any doubt that court involvement in enforcing an arbitration award requires the filing of a lawsuit Complaint. Participants to a dispute may still proceed with their agreed upon ADR process without involving a court or judicial procedure. If a resulting arbitration award is satisfied within a year of the award, the parties will have avoided the time and expense of litigation. However, the rub comes when the *arbitration award* is *challenged* or the party against whom an award is made cannot or will not *voluntarily satisfy* the award.

In *Jaguar* the parties to the appeal had a written agreement that provided for *binding arbitration of any controversy or claim arising from the agreement*. The parties submitted a dispute to arbitration which resulted in an award on **August 13, 2007** of \$18,456.94 to the plaintiff, plus fees and costs. Just short of one year later, on **August 12, 2008**, plaintiff filed with the local trial court clerk's office a "Binding Arbitration Award" on the State Court Administrator's Office (SCAO) form "MC 284". Plaintiff checked off boxes on the SCAO form indicating the basis for the *binding arbitration award (now totaling \$25,219.44)* was *statutory* and that it was based on *contract* and was *commercial in nature*. Plaintiff did not file with the court clerk a lawsuit complaint or any other pleadings.

The Defendant in *Jaguar* later responded to Plaintiff's filing of the *Binding Arbitration Award* form by filing a Motion for Summary Disposition, arguing that MCR 3.602, which governs statutory arbitration under the Michigan Arbitration Act, provides in subsection (B) (1) that a party seeking *relief* under the rule must first file a lawsuit

complaint. Plaintiff replied by arguing that a party who is simply seeking *confirmation of an arbitration award* under MCR 3.602(1) need only file the award with the clerk of an appropriate court within one year of the issuance of the award. The trial court agreed with the Plaintiff, stating that the *filing of the award* constituted the *initiation of a proceeding* under MCR 3.602(1) which states:

(B) Proceedings to Compel or Stay Arbitration. (1) A request for an order to compel or to stay arbitration or for another order under this rule must be by motion, which shall be heard in the manner and on the notice provided by these rules for motions. If there is not a pending action between the parties, the party seeking the requested relief must first file a complaint as in other civil actions.

The Court of Appeals panel, including the Honorable Judges David Sawyer, Richard Bandstra, and William Whitbeck, disagreed with the trial court and observed that the last sentence in MCR 3.602(1) makes it clear that any request for circuit court relief, including confirmation of an arbitration award, must take place within the context of a “civil action” that is subject to all the filing procedural requirements that apply to such an action. The Appeals panel points out that MCR 2.101(A) provides for one form of action *known as a civil action* which is commenced by filing a complaint with a court. They also state that the MAA does not provide for the commencement of a *confirmation proceeding* other than by the filing of a formal lawsuit complaint. Furthermore, the Michigan Supreme Court in *Gordon Sel-Way Inc. v Spence Bros., Inc.*, 438 Mich 488, 501-502; 475 NW2d 704 (1991) opined that a successful party in an arbitration proceeding has one year after an award is rendered to *commence a civil action requesting that the court confirm the award and reduce it to judgment*. The Supreme Court observed that in Michigan a “civil action” is broadly defined as an action “commenced by filing a complaint with a court.”

The Court of Appeals, while overturning the trial court’s summary disposition in favor of Plaintiff, did disagree with Defendant Appellant’s position that Plaintiff could not now seek further relief from the trial court on the arbitration award. Defendant argued that since a formal lawsuit complaint was not filed within one year after the arbitration award, further proceedings were barred by the one year period of limitations under MCR 3.602(1). The Court distinguished the facts in *Jaguar* from those in the case relied upon by Defendant in *Huntington Woods v Ajax Paving Indus, Inc.*, 196 Mich App 71, 73; 492 NW2d 463 (1992). In *Huntington Wood*, the party seeking to enforce an arbitration award filed a lawsuit complaint seeking confirmation of the award, but did so *after the one year period expired and without the prior filing* of any other pleading or court form. In contrast, the Plaintiff’s filing in the *Jaguar* case of the arbitration award with the court clerk within one year was held to strictly comply with the time limitation and the Plaintiff was not prohibited from filing a complaint for confirmation afterwards. In a footnote to its decision, the Court of Appeals noted that it was not presented with any argument apart from the Court Rule analysis that might be a basis for time barring a lawsuit complaint. Accordingly, upon remand, the Appeals panel observed that the lower court may consider any such time bar argument if it is advanced.

It appears that the Court of Appeals in **Jaguar** employed a strict construction of MCR 3.602(1) in requiring that a lawsuit complaint must be filed to satisfy the prerequisites to having an arbitration award confirmed by the court whose subsequent Judgment will become enforceable by force of law within the civil jurisprudence system. However, it also seems evident that the Plaintiff's argument that it followed the rule by filing the SCAO form with the Court clerk satisfied the Court of Appeals panel that it would be unfair to prevent the Plaintiff from seeking confirmation of the arbitration award. The Court recognized that a good faith effort was made to "commence" a proceeding in court with the filing of the SCAO form in a timely fashion, even if the procedure of filing a lawsuit complaint was not strictly followed. The footnote also makes it clear that the Court might still consider any other persuasive argument that the proponent of an arbitration award could still be time barred by not filing a lawsuit complaint within one year of the award.

Parties to an arbitration may still avoid civil litigation time and expense if they elect to complete arbitration outside of a lawsuit proceeding and not only agree to be bound by the resulting award but also to satisfy the award in a timely manner. Absent the timely implementation or satisfaction of an arbitration award, a proponent of the award must be prepared to seek court confirmation of the award by filing not only the award itself but also a separate lawsuit Complaint with the award attached as an exhibit to the Complaint. Proponents of arbitration awards in cases after the *Jaguar* decision are well advised not to rely upon getting a similar outcome as in *Jaguar* by simply filing the SCAO form without taking further court enforcement action on a timely basis.

Court decisions concerning arbitration proceedings have continued to increase in number during the ten year period since **MCR 2.410 Alternative Dispute Resolution** was enacted in 2000. Such judicial guidance in the implementation of ADR processes and enforcement of resulting awards and settlements should make such processes more predictable and therefore more attractive to participants.

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