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EDVA Judge Grants Emergency Motion to Stay Pending Arbitration Until Issue of Arbitrability Resolved

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On June 12, Judge Hudson granted an emergency motion to stay arbitration proceedings, pending the court's resolution of the issue of arbitrability in a case pending in the U.S. District Court for the Eastern District of Virginia, Richmond Division. *See Sauer Brands, Inc. v. Polytrade Int'l, Inc.*, No. 3:23-cv-181-HEH, 2023 U.S. Dist. LEXIS 135786 (E.D. Va. June 12, 2023). As getting a case in or out of arbitration may be critical in pursuing a merits-based strategy or mitigating against excessive costs, this case provides several key considerations in structuring arbitration agreements and how to procedurally maneuver when one party proceeds to arbitration unilaterally over the other party's objection.

Background. Sauer Brand, Inc. (Sauer or plaintiff) moved to stay an arbitration proceeding initiated by Polytrade International, Inc. (Polytrade or defendant). For years, the plaintiff and the defendant had a business relationship where the defendant procured and supplied black pepper to the plaintiff. A dispute arose from three sets of emails and purchase orders between the parties. Initially, the parties had engaged in a series of price-based bids and negotiations exchanged through email.

When forming the final firm offers, Polytrade referenced "committing each other" to America Spice Trade Association (ASTA) provisions to "future delivery contract terms… including arbitration." Polytrade contends the ASTA arbitration provisions delegate the issue of arbitrability to arbitration. However, Polytrade did *not* include the ASTA contract or the specific provisions to which it was referring. In response to this email, Sauer issued purchase orders for these future deliveries without reference to the arbitration provisions at issue.

Legal Analysis. Polytrade contends that Sauer's issuance of purchase orders constituted acceptance of their offer, which included the ATSA arbitration clause, and that the issue of arbitrability was thus delegated to the arbitrator. Sauer asserts that the defendant's email did not form a binding contract — and their issuance of purchase orders was instead a counteroffer, which did not include arbitration, which Polytrade accepted.

At the outset, the court noted two preliminary propositions: questions of arbitrability are (absent agreement otherwise) undeniably ones for judicial determination, and motions to stay are proper vehicles to present arbitrability challenges when arbitration proceedings have already commenced. Further, unless there is clear and

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unmistakable evidence the parties agreed to arbitrate a dispute, the court will decide on the issue of arbitrability, not the arbitrator.

In finding that the parties have not "clearly and unmistakably" indicated that they intended to determine the issue of arbitrability as an actual part of the arbitration, Judge Hudson agreed with Sauer that a "mere general reference in an email that arbitration applied as a term of their email offer does not clearly establish that Plaintiff intended to submit the *issue of arbitrability* to be decided in arbitration." The court, therefore, found the issue of arbitrability was appropriately before it.

In deciding to grant a stay of the arbitration proceedings until the issue of arbitrability is decided, the court found two factors weighed heavily in Sauer's favor. First, there was no evidence that the defendant would suffer any harm if the plaintiff's motion were granted. Second, a stay would prevent the underlying issues at hand from being litigated both in arbitration and before this court simultaneously, benefiting both parties. The court found these two factors "dominated" its stay analysis.

Takeaways. This case demonstrates the importance of unmistakably making certain terms and conditions part of any commercial transaction. While formally reducing agreements to writing or thoughtfully and proactively developing a pre-existing master operating agreement can be cumbersome, doing so may reduce issues of contention down the line.

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