

Waiver of a Right to Arbitrate by Resort to Litigation, in the Context of International Commercial Arbitration

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Abstract: This paper examines the circumstances in which a party to an arbitration agreement may be deemed to have waived its right to arbitrate a dispute comprehended by the agreement, by involvement in litigation concerning this dispute. The focus is on the law in common law jurisdictions, particularly Australia and the United States of America. United Kingdom law will also be briefly surveyed. The paper focuses on the 2006 decision of the Australian Federal Court in *Comandate Marine Corp v Pan Australia Shipping Pty Ltd*, which afforded the topic significant treatment. The theoretical bases for sustaining waiver claims are analysed, including waiver as a discrete doctrine, abandonment, estoppel, election, repudiation of contract and variation of contract. The policies that underlie and inform the development of principles for testing waiver submissions are noted.

Key words: waiver, election, estoppel, arbitration

1 Overview

This paper examines the circumstances in which a party to an arbitration agreement may be deemed to have waived their right to arbitrate a dispute comprehended by this agreement, by involvement in litigation concerning this dispute. This involvement may consist of commencing the subject action, or defending against it. The focus will be on the response of courts to this issue in three representative common law jurisdictions, Australia, the United States of America (where there is considerable case law), and the United Kingdom.

In particular, the recent decision of the Australian Federal Court in Australia in *Comandate Marine Corp v Pan Australia Shipping Pty Ltd* ([2006] FCAFC 192) which afforded the issue significant treatment, will be examined. The decision clarifies the circumstances in which Australian courts will recognise whether a party to an international commercial dispute has by involvement in litigation, waived their right to have the dispute arbitrated pursuant to an arbitration agreement. It is potentially of interest in other jurisdictions. The decision will be considered in some detail, below.

The issue of waiver will usually arise when a party seeks a stay of litigation and a reference of the subject dispute to arbitration. Commonly, the issue arises in the context of international commercial disputes, but in principle the same principles govern cases of alleged waiver in the context of domestic arbitration.

Before discussing the case law, it will be convenient to comment on the concepts of waiver and such related (and often overlapping) concepts as abandonment, election and estoppel. All of these doctrines, if indeed these concepts have attained the status of a doctrine, are potentially relevant to explaining in the jurisprudential sense how it is that a party may be prevented from enforcing their right of arbitration.

2 Waiver, Abandonment, Election and Estoppel – General Principles

It has been commented that (in common law jurisdictions) the term **waiver** is often used imprecisely (see *ACD Tridon v Tridon Australia* [2002] NSWSC 896 at [55]). It has been said that most of the cases which purport to apply the doctrine of waiver are really cases of contract, estoppel or election (see *ACD Tridon*, *ibid*, citing McHugh J in *Commonwealth v Verwayen* (1990) 170 CLR 394,491). There may not be a unified doctrine of waiver at common law. There are many instances where the general law or statute or a contractual provision may operate to deem a person to have waived a legal right. For example, Article 4 of the UNCITRAL Model Law on International Commercial Arbitration provides in substance that a party may waive a right accruing under the Law by remaining silent. This waiver can potentially be raised in litigation at any point along the spectrum from a party's attempt to invoke arbitration, to proceedings involving enforcement of the award. A party may waive performance of a contractual right by another, such as by extending the time for performance. In principle, a waiver would need to be intentional.

The term “waiver” is routinely used in alleged waiver of arbitration cases. When examined, it will frequently be found that they are instances of election or estoppel. As it will be noted in 3.2 below, there is some authority for the proposition that an independent principle of waiver exists in this context (as it does in other contexts), independently of the doctrines of election and estoppel. In this primary sense waiver is “constituted by the deliberate, intentional and unequivocal release or abandonment of the right that is later sought to be enforced” (*Zhang v Shanghai Wool and Jute Textile Co Ltd* [2006] VSCA 133, [14]). An instance where a party to an arbitration successfully submitted that the other party had waived the arbitration right is the Victorian case of *La Donna Pty Ltd v Wofford AG* ([2005] VSC 359), where a Supreme Court trial judge held that a party to an arbitration agreement had, by involvement in litigation concerning the dispute comprehended by the arbitration agreement, waived its arbitration right. The decisive act was an application by this party for security for costs. The case will be reviewed in some detail below at 3.2.

The concept of **abandonment** centres on the unqualified forsaking or abandonment of a legal right or claim, as in this case where a party establishes by extrinsic evidence that a contract purporting to be wholly in writing has in fact been abandoned by conduct of the parties. As in the case of waiver, there may not be a general doctrine of abandonment, as distinct from a plethora of situations where a discrete legal principle or statutory or contractual provision invests abandonment with legal significance. In principle, a waiver would need to be intentional. Typically “waiver” and “abandonment” are used synonymously.

The doctrine of **election** is well recognised in various legal systems including the common law: pursuant to it a party may be required to elect between two mutually inconsistent legal rights each of which has different consequences. An example would be the obligation of a party to a contract in a common law jurisdiction, who when confronted with a breach of condition, must within a reasonable period decide whether to terminate or affirm the contract. The doctrine of election has not commonly been evoked in arbitration waiver cases, but as it will be seen in the analysis of *Comandate Marine Corp v Pan Australia Shipping* (op cit), below at 3, it was employed in a decision that held that for a party to commence litigation collateral to the dispute comprehended by the arbitration agreement, did not amount to an election to litigate and not to arbitrate.

Various doctrines of **estoppel** are recognised in common law and other legal systems. The common feature of these doctrines is that a party to litigation may be prevented (estopped) by their prior conduct from relying upon a legal right on the basis that to do otherwise would produce an injustice. United States case law dealing with waiver of the right to arbitrate identifies estoppel and prejudice as the core tests for determining a waiver submission. Thus, a party who resisted arbitration with the consequence that the other party fully litigated the subject dispute, was estopped from seeking the post-litigation arbitration of the dispute, on the basis that this would represent a prejudice to the other party (see the discussion of *Menorah Insurance Company Ltd v INX Reinsurance Corporation* (72 F 3d 218 (1st Cir, 1995), below at 4).

These doctrines or principles overlap – their common feature is that they involve the relinquishing or divestiture of a legal right or claim by a party, which conduct binds the party. The subject conduct may fall within two or more of these categories.

Another possible basis for waiver is that a party has by litigating a dispute that is comprehended by an arbitration agreement, committed breach or anticipatory breach of a core term (a condition) in this agreement, thereby **entitling the other party to rescind**. Caution would need to be exercised in applying this analysis – it could represent a quite low threshold for waiver. In the English decision of *Downing v Al Tameer Establishment* (2002] EWCA Civ 721), the Court of Appeal held that a party had by its conduct repudiated the arbitration agreement, with the consequence that the other party had been entitled to rescind it and to litigate. The first party had by this conduct waived its right to arbitrate.

A further theoretical basis for determining that an arbitration waiver has occurred is contractual – can the parties by litigating be viewed as having **contracted to vary or annul** the arbitration clause or agreement? This analysis was employed in the English decision of *The Elizabeth H* ([1962] 1 Lloyd’s Rep 172), where a submission of waiver was made by a party a year and a half after the commencement of litigation by one of the parties. The court considered that the parties had by their conduct agreed to accept the court’s jurisdiction and to vary the arbitration clause (ibid at 179).

3 Australian Authority

3.1 Comandate Marine Corp v Pan Australia Shipping Pty Ltd

3.1.1 The Course of Litigation

A core issue in the 2006 decision of *Comandate Marine Corp v Pan Australia Shipping Pty Ltd* (op cit) (*Comandate v Pan*) was whether a party to an arbitration agreement had waived its right to have the subject dispute arbitrated, because prior to the commencement of arbitration it had resorted to litigation. Comandate

Marine Corp (Comandate Marine) and Pan Australia Shipping (Pan) were parties to a contract for the time charter of a ship, the *Comandate*. Pan had chartered this ship from Comandate Marine. Pan had also chartered a ship, *Boomerang I*, from a third party.

The Comandate Marine - Pan charter included a clause for the arbitration of any disputes arising from the charter, in London. In time, both parties alleged breaches of the charter. Pan commenced *in rem* proceedings against the *Comandate* in the Australian Federal Court, and arrested the ship. Comandate Marine wished to arbitrate the dispute in London. Pan wanted to litigate in Australia. Pan got an order from the Federal Court (an anti-anti-suit injunction) restraining Comandate Marine from instituting anti-suit proceedings in an English court.

Comandate Marine instituted arbitration proceedings in London, and sought a stay of Pan's injunction in the Federal Court. Concurrently it commenced *in rem* proceedings against *Boomerang I*, and had the ship arrested. Its purpose, it later submitted, was to obtain security for the arbitration.

Comandate Marine's application for a stay of Pan's injunction was dismissed by a judge of the Federal court. Pan submitted that the injunction should not be lifted, relying on a number of grounds including that Comandate Marine had waived or elected to abandon the London arbitration by its conduct. The other grounds are not relevant for present purposes. On appeal, a Full Court of the Federal Court decided that the primary judge had erred in his conclusion that Comandate had waived or elected to abandon its right to have the matter referred to arbitration, and dissolved the anti-anti-suit injunction with the consequence that Comandate was free to have the matter arbitrated in London.

The trial judge found that Comandate Marine had elected not to arbitrate, by its conduct in commencing *in rem* proceedings against *Boomerang I* without placing on the writ its intention to seek a stay under s29 of the *Admiralty Act* 1988 (Cth) or otherwise indicating on the writ that the action was commenced solely for the purpose of obtaining security for the London arbitration. He also was of the opinion that the conduct of both parties in litigating manifested an intention to abandon the arbitration. Accordingly, the arbitration agreement was either "incapable of being performed" or "inoperative" under s7(5) of the *International Arbitration Act* 1974 (Cth) (ibid at [53]). (This provision mirrors Article 8(1) of the UNCITRAL Model Law on International Commercial Arbitration).

3.1.2 Reasons for Determining that there was Not an Election to Abandon Arbitration

An election must be intentional (although this intention is to be assessed on an objective basis). If there is no intention, then in the normal case there will be no election (except where the law or a contractual or other legal obligation effects a constructive election after the passage of an interval of time, such as a reasonable time).

Prima facie, if indeed the evidence was consistent with *Comandate Marine's* claim that its *in rem* action was for the purpose of obtaining security for the London arbitration, in a situation in which the other party was adverse to arbitration, the action was not inconsistent with an intention to invoke the arbitration clause. There have been many cases where a party that wants to arbitrate, has taken court action to facilitate this arbitration.

The principal judgment of the Full Court was that of Allsop J (with Finkelstein J concurring in respect of all issues, and Finn J concurring with respect to the waiver issue). Allsop J was of the view that there had been no election to repudiate the arbitration agreement.

The resort to litigation was not as a matter of law, per se an election to litigate and not to arbitrate. The selection of a method of dispute resolution was not an election between mutually inconsistent rights (ibid at [62] citing Austin J in *ACD Tridon Inc v Tridon Aust Pty Ltd* [2002] NSWSC 896 at [58]). Rights are only inconsistent if neither may be enjoyed without the extinction of the other (as where a party rescinds a contract for breach of condition at common law – the party no longer has the legal right to affirm). Allsop J noted that

Here, the filing of the writ did not extinguish the rights under the arbitration agreement; it may or may not have constituted, or formed part of, an inconsistent course of conduct; it may or may not have amounted to a breach of contract; but it did not cause or presuppose the extinction of rights under the arbitration agreement (ibid at [62]).

That is, the *in rem* action did not extinguish the other party's legal right to arbitrate (had it been minded to arbitrate). Allsop J noted (ibid) that for there to have been an election, the situation must be one where the "elector has the power to change the legal rights and duties of himself and another with a corresponding liability in that other to submit to the change" (ibid, citing Handley, K, *Estoppel by Conduct and Election*, Sydney, Thomson/Sweet & Maxwell, 2006, at 230-231).

Allsop J considered that on the evidence Comandate Marine had consistently maintained an intention to arbitrate, a position which was inconsistent with an intention to elect otherwise, or to waive or abandon its right to arbitrate. Nine days before arresting *Boomerang I*, Comandate Marine had sought assurances that Pan would submit to arbitration, in default of which it would apply for an anti-suit injunction in the London High Court of Justice (ibid at [68]). Two days before this arrest, Comandate Marine had applied for a stay of Pan's anti-anti-suit

injunction in the Federal Court (ibid at [20]). There was nothing in the evidence of the communications between the parties “to suggest that Comandate Marine ever evinced an intention to abandon the arbitration...”

The action against Boomerang I was capable of being prosecuted as a means of obtaining security for the arbitration. The parties had discussed Pan’s provision of security and Comandate Marine had obtained orders for maritime attachment in New York plainly for that purpose. A strong, indeed strident, body of communication made plain Comandate Marine’s insistence on arbitration (ibid at [91]).

The commencement of the *in rem* action was in the context of a continuing insistence upon arbitration. The filing of this writ did not unequivocally signal abandonment or change in this position: “At most, it can be seen as the making of a tactical move to obtain an advantage in a litigation landscape which was unfolding and which was uncertain”. (ibid at [91]; and note the comment at [93] that the litigation landscape was less than clear and that the *in rem* action “can be seen as one designed to advance its position whatever the outcome of the interlocutory debate in this Court”).

The failure to endorse the writ with an intention to seek a stay of the anti-anti-suit was not decisive. It was of no more than evidential significance, and did not convert a position consistently maintained (in favour of arbitration) into an abandonment of this position.

The evidence showed that for its part Pan had not in the course of communications disputed the validity of the arbitration agreement (ibid at [77], [86]).

To reiterate – the pivotal test governing the determination of claims of election, waivers or abandonment, is the objective intention of the subject party.

3.1.3 Prejudice - Role of Estoppel

The issue of whether Pan had suffered such prejudice by Comandate Marine’s *in rem* action so as to raise an estoppel against the latter was not raised in the case (indeed, Pan had commenced earlier *in rem* proceedings against Comandate Marine). Allsop J noted, however, in an obiter comment that legal proceedings may “be conducted to such a point that the only conclusion is that the party can be taken to have waived or abandoned the right to arbitrate” (ibid at [65]). Consistently with this analysis, even where a party does not make an election between mutually inconsistent rights, it may by its subsequent conduct be estopped from arbitrating the dispute. It follows that what has been broadly characterised as a waiver of the right to arbitrate, may be sourced from an election between inconsistent rights, or an estoppel. In the latter case necessarily, the party pleading waiver will need to demonstrate that it has been prejudiced. The analysis recognises that an estoppel can ground a waiver; but it also by implication recognises that something falling short of an estoppel – such as an operative election (with or without proof of prejudice) will ground a waiver.

3.1.4 The *in rem* Action – Did it by its Nature Preclude Election?

Pan submitted that Comandate Marine had by waived its arbitration right by the commencement of *in rem* proceedings. Technically, the *in rem* proceedings were against the ship, not Pan, and thus this litigation was not one between the two parties to the arbitration agreement. On one analysis, therefore, there was no basis for saying that Comandate Marine had elected not to arbitrate by litigating against Pan.

Given his view that the litigation undertaken did not amount to an election between mutually inconsistent rights, Allsop J considered it to be unnecessary to stress the *in rem* character of the action (although he did make extensive obiter comments on this matter). Even if the action was considered to be one between Pan personally and Comandate Marine, there was no election between mutually inconsistent rights (ibid at [60]). For one party to arbitration agreement to litigate a dispute does not extinguish the other party’s right to resort to arbitration.

3.1.4 Consolidating Comandate v Pan

To consolidate this aspect of the judgment in *Comandate v Pan*, Comandate Marine had not intended to elect in favour of litigation nor waived nor abandoned its right to arbitration. The discrete and separate nature of the *in rem* action fortified this conclusion, but it was not a sine qua non of it. The judgment recognises that a waiver may be effected in the absence of a detriment to the party claiming waiver, sufficient to raise an estoppel. Equally, it recognises that an estoppel may ground a waiver, although none operated in the instant fact situation.

3.2 Other Australian Cases

Several other recent Australian decisions, both pre-dating *Comandate v Pan* may be briefly noted.

In the 2005 decision of *La Donna Pty Ltd v Wolford AG* (op cit) the court ruled that the defendant had waived its right to arbitrate after it had participated to some extent in litigation instituted by the other plaintiff in the Supreme Court of Victoria. Both parties had taken interlocutory steps in the proceedings, and participated in court-instigated mediation. The defendant had acquiesced in or agreed to certain court directions. Further, the defendant had sought security for its costs in the litigation, submitting that the plaintiff's financial position justified this. It had not reserved its position when making this application. In the court's view, the application for security was decisive. None of the antecedent acts would have constituted a waiver, but the security application evidenced an intention to see the litigation through to conclusion in the absence of a settlement. This was "an unequivocal abandonment of the alternative course, being an application for a stay and a consequent arbitration" (ibid at 31 [26]). This language is suggestive of the notion of election between mutually inconsistent rights. It contends that a waiver can occur at an early stage in litigation. (Similarly, see the Alberta case of *Millennial Construction Ltd v 1021120 Alberta Ltd* (2005 ABQB 533, [2005] AWLD 2960), which held that once a party had filed its defence to an action, both parties are to be taken to have waived arbitration).

The facts in *La Donna* parallel those in the 2002 decision in *ACD Tridon v Tridon Australia* (op cit). The defendants sought a stay of litigation commenced against them so that the matter could be arbitrated pursuant to an arbitration agreement. They had participated in pre-trial proceedings. The plaintiffs did not plead prejudice (save that which could be remedied by costs), so that the issue of estoppel did not arise. Austin J was of the view that there had been no election between mutually inconsistent rights. Selection of a method of adjudication could not per se amount to such an election (ibid at [58]). The case therefore was to be resolved as one of an alleged waiver – waiver in the sense of

the abandonment of a right in such a way that the other party is entitled to plead the abandonment by way of confession and avoidance if the right is thereafter asserted, and is either express or implied by conduct. It may sometimes resemble a form of election, and sometimes be based on ordinary principles of estoppel, although unlike estoppel, waiver must always be an intentional act with knowledge (ibid at [58], citing Toohey J in *Commonwealth v Verwayen* (1990) 170 CLR 394, 472, quoting from *Halsbury's Laws of England* 4 ed (1976), vol 16 [1471]).

In the instant case, there had been no "irrevocable abandonment" of the right to arbitration (ibid at [83]). In contrast to the determination in *La Donna*, involvement in early stage litigation by the parties did not preclude reference to arbitration.

Given his determination that no estoppel was raised in this case, and that the defendants did not make an election, Austin J by implication contended for a robust doctrine of waiver which – whatever the limitations on its broader role – is applicable in the context of arbitration waiver. This doctrine was not dependent upon any requirement of an underlying estoppel.

A claim of waiver of arbitration was also rejected in the 2002 Victorian Supreme Court of Appeal in *Zhang v Shanghai Wool and Jute Textile Co Ltd* (op cit). The court reversed the primary judge. The dispute concerned performance of a contract for the purchase of worsted fabric by the Australian appellants (who will be referred to as "Zhang") from the Chinese respondent ("Shanghai"). The contract provided for the arbitration of disputes in China. Zhang wanted the dispute arbitrated. Shanghai wanted to litigate the dispute, and instituted proceedings in the Victorian County Court. The trial judge determined that Zhang had by its conduct in the litigation, waived its right of arbitration. Among matters seen to be significant, were Zhang's filing of a defence without reserving its position, and Zhang's application for security for costs.

Paralleling *ACD Tridon*, the Court of Appeal (Chernov JA, with whom the other members of the court concurred), considered that there was a discrete doctrine of waiver operating independently of the doctrines of election and estoppel, applicable in this class of case. Waiver requires "the deliberate, intentional and unequivocal release or abandonment of the right that is later sought to be enforced (ibid at [14], citing *Commonwealth v Verwayen*, op cit at 423-424, 473, 482, and 497). The time when waiver occurs depends on the relationship between the possessor of the right and the party liable to be affected by its exercise.

When the party possessed of the right knows that a new legal relationship is to be constituted between him and the party whose interests are liable to [be affected] by the exercise of the right and that the right, if exercised, might affect the new relationship, the party possessing that right must enforce the right before the new relationship is constituted or he will be held to have waived that right (Brennan J in *Commonwealth v Verwayen*, ibid at 427, cited in *Zhang*, ibid at [14]).

The court noted that Shanghai was not submitting that Zhang had made a waiver by election between mutually inconsistent rights, and such a submission would be unlikely to prevail “given that a choice between curial and arbitral disposition of the dispute does not seem to constitute an election between inconsistent rights” (ibid at [15]).

There was not a waiver in the sense that Zhang had intentionally and unequivocally abandoned their right of arbitration, and it was not open for the primary judge on the evidence to have concluded otherwise (ibid at [16]). Zhang had consistently pressed for the dispute to be submitted to arbitration, and indeed had submitted it to arbitration in China pursuant to the arbitration clause. The mere filing of a defence did not per se constitute a waiver, especially given that it was filed with a view to identifying the correct contractual parties (in this case, that the agreement was made with one of the appellants and not the other) rather than with a view to proceeding to a full trial on the merits. The claim for security for costs was not pursued and as such was not decisive (ibid at [16] ff) (the question of what the consequences would have been had it been pursued did not need to be resolved).

In summary, *Zhang* recognises a discrete doctrine of waiver as being applicable in the waiver of arbitration context. It does not condition application of this doctrine on proof of prejudice to the party contending for waiver. It recognises that the litigation of the subject dispute can go some distance without necessarily triggering waiver. In particular, it recognises that an application for security for costs is not per se an act of waiver.

The Queensland Court of Appeal’s decision in the arbitration waiver case of *Australian Granites Ltd v Eisenwerk Hensel Bayreuth GmbH* ([2001] 1 Qd R 461) relied upon election analysis. The dispute between the parties was governed by a clause in the underlying contract providing for the arbitration of disputes through the agency of the International Chamber of Commerce. The appellant Hensel wished to arbitrate. The respondent Australian Granites instigated proceedings in the Supreme Court of Queensland. Hensel filed a defence. The primary judge determined that this was a waiver of the right to arbitrate, a decision reversed on appeal. The Court of Appeal considered that the delivery of a defence did not per se amount to an act of waiver, especially having regard to Hensel’s need to avoid imminent default judgment, and to its continuing insistence upon arbitration (ibid at [25]). The court (per Pincus JA) considered that there had been “no unequivocal election” between inconsistent legal rights (ibid).

3.3 Consolidating Australian Authority

Australian authority will ground waiver of a right to arbitrate in circumstances where the dispute has been litigated in whole or part, on a number of alternative grounds, including election, estoppel, and waiver/abandonment as a discrete doctrine. (A given waiver submission may of course be able to be tested by reference to more than one of these analyses.) It follows that Australian case law has not identified a unified waiver doctrine. The courts do not require that the person contending for waiver in every case show that they would suffer a detriment (or at least one not able to be remedied by costs) should a stay of proceedings be granted. On balance, the courts have not seen participation in early stage litigation by a party as constituting waiver. The question of whether the right of arbitration survives mature stage litigation has not been tested, but given the operative waiver grounds identified – including waiver/abandonment and estoppel – it must be doubted that the arbitration right would survive very far into the litigation.

4 United States Authority

There have been a considerable number of US decisions dealing with the question of whether a party who is seeking to invoke an arbitration agreement, has waived their right to arbitration by concurrent or antecedent litigation. They appear to found the waiver on the notion of estoppel – an estoppel described as an equitable estoppel in a Supreme Court of Ohio case, *MRK Technologies Ltd v Accelerated Systems Integration Inc* (2005 WL 23359 (Ohio App 8 Dist), [3], citing *Cleveland Thermal Energy Corp v Cleveland Elec Illuminating Co*, Cuyahoga App No 80312, 2002-Ohio-3904). In this respect the waiver doctrine may be narrower than that identified in Australian case law. Two representative decisions will be examined.

The principles governing the determination of an arbitration waiver claim in the United States are set out in the decision of United States Court of Appeal for the Eleventh Circuit in *Ivax Corp v B Braun of America Inc* (286 F3d 1309 (11th Cir 2002)) (*Ivax v Braun*). The decision dealt with a domestic arbitration issue, but the reasoning is equally applicable to the circumstances of international commercial arbitration. The court stated the test thus:

In determining whether a party has waived its right to arbitrate, we have established a two-part test. First, we decide if, “under the totality of the circumstances”, the party “has acted inconsistently with the arbitration right”, and second, we look to see whether, by doing so, that party “has in some way prejudiced the other party” (ibid at 1315-1316, citing *S & H Contractors, Inc v AJ Taft Coal Co*, 906 F2d 1507,1514 (11 Cir 1990)).

The requirement of inconsistency is in substance one that the party who is alleged to have waived its right to arbitrate have acted with an objectively determined intent to arbitrate; and the requirement of prejudice is consistent with a requirement that the circumstances be such as to raise an estoppel against this party.

The case centred on performance of a contract for the sale of a business by Braun to Ivax. The contract provided for the making of contingency payments after settlement by Braun, depending on the business's performance. Provision was made for the arbitration of any dispute concerning these payments. Pursuant to a contractual power, Ivax appointed a firm of accountants, Arthur Anderson (AA) to examine relevant records. Braun subsequently sued AA for breach of a confidentiality agreement between it and AA.

Ivax then sued Braun for breach of contract, in relation to the contingency payments. The court held that Braun had not, by its litigation against AA, waived its right to arbitrate (thereby reversing the district court). Arthur Anderson was not a party to the arbitration agreement. Suing a non-party "cannot express an intent to forego the arbitration of a dispute against Ivax" (ibid at 1316). The rights and liabilities inter se between Braun and AA on the one hand, and Braun and Ivax on the other, were distinct, separate and not inconsistent (see ibid at 1317, citing *Usher Syndicate Ltd v Figgie Int'l, Inc*, 1987 US Dist LEXIS 10340, No 87-1079, Oct 22, 1987 (SD Fla 1987)). Braun sued AA to protect its confidential information. This action could not have sabotaged the verification and dispute resolution process because the arbitrator would have unlimited access to it pursuant to the arbitration agreement (ibid at 1319).

This consideration aside, the issue of how far a party proceeds along the litigation path is highly relevant to assessing whether they have manifested an intention to waive or abandon arbitration (ibid, citing *Morewitz v West of Engl Ship Owners Mut Prot & Indem Ass'n* 62 F3d 1356 (11 Cir 1995)).

Because Braun had not acted inconsistently with the arbitration right, it was unnecessary to discuss the prejudice test. The decision parallels that in *Comandate v Pan*, in that the subject litigation was collateral to the matter sought to be arbitrated and could not in itself be inconsistent with the arbitration of this more central dispute.

In the US Court of Appeals for the First Circuit 1995 decision in *Menorah Insurance Company Ltd v INX Reinsurance Corporation* (op cit) the subject dispute had been litigated before the appellant sought to invoke the arbitration clause. Proceedings, that is, had been pursued fully along the litigation pathway, in contrast to the fact situation in *Braun v Ivax*.

Menorah Insurance Co Ltd (Menorah) had entered into certain reinsurance treaties with INX Reinsurance Corp (INX). The parties had agreed in each contract that disputes arising from the contract should be arbitrated. A dispute occurred and Menorah sought arbitration. INX refused, on the grounds that its financial situation precluded it from doing so. Menorah obtained default judgment in an Israeli court and sought to enforce it in Puerto Rico, where INX was domiciled. At this point INX sought to have the dispute arbitrated. A district court held that it had waived its right to arbitrate.

This decision was affirmed on appeal. INX when asked to arbitrate, had explicitly refused. Thereafter, its whole course of conduct constituted an implicit refusal to arbitrate. The first test (of the two-part test noted in the analysis of *Braun v Ivax*, above) was fulfilled. The prejudice test was also met. INX had delayed for over a year before seeking arbitration, during which time the other party had been compelled to litigate. Menorah had incurred costs thereby and this was sufficient prejudice (ibid at 222, noting that delay per se did not always result in prejudice, as where a party resorts to court to obtain information that would in any event be needed in a contemplated arbitration, and citing *J & S Constr Co, Inc v Travelers Indem Co*, 520 F2d 809 (1st Cir 1975); *Van Ness Townhouses v Mar Indus Co*, 862 F2d 754,759 (9th Cir 1988).

The policy considerations underpinning resort to arbitration justified this conclusion: in "the context of international contracts, the opportunities for increasing the cost, time and complexity of resolving disputes are magnified by the presence of multiple possible fora", and create "the very problems the [New York] Convention sought to avoid (ibid at 223).

To permit a party to arbitrate after litigation had been completed (this case) or after it was well progressed, would be to increase the costs, time taken and complexities of dispute resolution, considerations that commonly motivate parties to enter into agreements for binding arbitration. Moreover, to accede to INX's arguments would produce a regime where a party who suffered an adverse outcome in litigation, or who sensed an adverse verdict during litigation, would be able to resort to the arbitration agreement, compounding delay and expense (ibid at 221, citing *Jones Motor Co v Chauffeurs, Teamsters and Helpers Local Union* No 633, 671 F2d 38,43 (1st Cir), (1982)).

5 United Kingdom Authority

Several representative decisions may be noted. Scottish authority as does some Australian authority, recognises a discrete doctrine of waiver in the arbitration context. The Court of Sessions' 1996 decision in *Presslie v Cochrane McGregor Group Ltd* ([1996] SC 289) held that parties to a domestic arbitration agreement had not waived their

right to arbitration on the basis of their involvement as defendants in litigation concerning the subject dispute. The litigation was in an early stage. The court conceived of “waiver” as connoting “the abandonment of a right which may be express or inferred from the facts and circumstances”, to be determined objectively on the evidence (ibid at 3, citing *Armia Ltd v Daejan Developments Ltd* [1979] SC (HL) 56, 72). A binding waiver did not require proof that the party resisting arbitration had been prejudiced by the litigation. This principle or doctrine of waiver, was then, not dependent upon an estoppel. The same analysis was applied in the later Scottish decision of *La Pantofola D’Ora SpA v Bane Leisure Ltd* ((2000) SLT 105).

As noted in 2 above, the English Court of Appeal decision in *Downing v Al Tameer Establishment* [2002] (op cit) resolved a claim of waiver by reference to a repudiation of contract analysis. The parties were involved in a contractual dispute. The contract had an arbitration clause. The claimant had sought arbitration. The defendants refused, claiming that there was no contractual agreement between the parties. The claimant treated this assertion as a repudiation of contract and purported to rescind the contract for breach of condition. The claimant commenced litigation of the dispute, at which point the defendants then sought a stay and a reference to arbitration. The trial judge held that there had been repudiation, but that the claimant had not accepted this repudiation. The Court of Appeal rejected this finding, holding that there had been an unequivocal acceptance of repudiation that had been communicated. Proceedings were not very far advanced. The trial judge had been wrong in not viewing the commencement of litigation by the claimant, in a context in which the defendants had renounced arbitration, as a clear acceptance of their repudiation (ibid at [29]). The court noted, however, that the commencement of litigation per se, in a circumstance where the other party had repudiated, was not always to be viewed as a clear intentional acceptance of repudiation – much would depend on the background of communication between the parties (ibid at [35]).

The case inferentially raises the broader issue of whether the commencement of litigation dealing with the subject dispute, by a party to an arbitration agreement comprehending this dispute, amounts to repudiation. The overwhelming weight of authority (for example, *Comandate v Pan and Zhang v Shanghai Wool*) is of course inconsistent with such a principle. To routinely treat the commencement of litigation as repudiation would result in a very low threshold for waiver, were the other party minded to accept it. A party can only be viewed as repudiating if (on an objective view) it intends to repudiate. Perhaps out of caution, US authority does not countenance the repudiation analysis, requiring instead a situation of estoppel. The repudiation analysis has not been canvassed in Australian case law. In principle, however, a waiver submission should be upheld in the case where a party has repudiated the agreement (whether the repudiation takes the form of commencement of litigation or otherwise), and the other party has accepted this repudiation. In respect both of repudiation and acceptance, both parties must on the evidence be shown to have acted with the clear and unequivocal intention to repudiate and to accept repudiation, respectively.

As noted in 2 above, English case law has also employed another contractual analysis to test a submission of waiver, pursuant to which a waiver issue can be resolved by asking whether the parties have entered into a contract varying (or by parallel reasoning annulling) the arbitration agreement, in favour of litigation: the *Elizabeth H* ([1962] 1 Lloyd’s Rep 172, op cit).

These decisions reflect the same eclectic approach to waiver of arbitration questions in the United Kingdom as is encountered in Australian case law. That is, there is no one unified doctrine operating to test waiver claims. In these decisions waiver submissions were tested by reference to waiver/abandonment as a discrete doctrine (the preferred Scottish analysis), and contractual analyses.

6 Conclusion

What principles govern arbitration waiver, and what principles ought to govern resolution of the issue?

United States authority is straightforward – waiver of the right to arbitrate ultimately is grounded on the doctrine of estoppel. There must be conduct inconsistent with the arbitration right, viz, an objective intention to waive, but this alone is insufficient. There must as well be proof that the party pleading waiver has suffered prejudice as a result of the litigation.

Australian (and UK) authority is more eclectic, in recognising a number of independent grounds for waiver. Australian case law in theory at least, sets the threshold for an operative waiver somewhat lower, in that it does not demand proof of detriment sufficient to ground an estoppel. A waiver may be able to be sourced from several different (if sometimes overlapping) principles or doctrines. The first is **waiver** per se, a concept that appears to be synonymous with the notion of abandonment. According to *ACD Tridon v Tridon Australia* and certain other decisions, waiver/abandonment functions as a discrete doctrine grounding a right of waiver, and is not dependent on proof that the party pleading waiver suffered prejudice. The second is the doctrine of **election**. Again, there is no reason to think that the party contending for an election not to arbitrate must be shown to have suffered a detriment. In the case of waiver/abandonment, and election, the party alleged to have so acted must have had the objective intention of relinquishing the right of arbitration.

Comandate v Pan offers a useful reminder that the alleged election must be scrutinised closely. An election between litigation and arbitration is not one between mutually inconsistent legal rights, and will not in itself ground a waiver. *Comandate v Pan* is authority that merely to commence litigation, or to engage in collateral litigation, will not per se amount to a waiver or abandonment. To the extent that the decision in *La Donna v Wolford* was inconsistent with *Comandate v Pan*, the latter is to be preferred.

Clearly, **estoppel** will also ground a waiver of the right to arbitrate. This was recognised in the obiter comment in *Comandate v Pan* that notwithstanding that the commencement of litigation had not amounted to an election to litigate, if the party pleading non-waiver were to conduct the litigation to a (by implication) mature stage they might properly be viewed as having waived or abandoned the arbitration right. Unlike US authority, however, Australian authority recognises explicitly (for example, *ACD Tridon*) and implicitly (for example, *Comandate v Pan* and *La Donna v Wolford*) that waiver may be effected in the absence of prejudice sufficient to raise an estoppel.

In all of these cases, the real question is – at what point in court proceedings is the conclusion to be drawn that the subject party is to be deemed to have waived their arbitration right? Different tests have been propounded in case law, but are there any practical differences in their application? In practice there may not be any substantive differences.

It is submitted that both Australian and United States law and at least, the courts applying this law, in practice permit a party to participate in the early stages of litigation without losing their right of arbitration. United Kingdom case law is similar in this respect. It follows that the courts are cautious in too readily arriving at a waiver finding. (The Victorian decision of *La Donna* represents an exception to this approach.) On the other hand, it is likely that in both countries waiver will readily be inferred, when the parties have gone beyond the preliminary stages. When the party contending for waiver has suffered a detriment because of time and or costs, US authority will ground an estoppel against the party seeking a reference to arbitration. There is no reason to think that Australian authority is any different. Australian authority does not require proof of estoppel. On the other hand, significantly, it does not preclude application of estoppel doctrine, as *Comandate v Pan* confirmed. Likewise, where the matter is analysed in the alternative in waiver terms, the more mature the litigation the more readily it would be inferred that the party claiming right of arbitration, has by clear and unequivocal conduct, abandoned this right. There is little authority on mature phase waiver, no doubt for the practical reason that when parties participate in litigation to a mature stage neither has any interest in going to arbitration (cf the comments in *Menorah Insurance Co* on opportunistic resort to an alternative mode of dispute resolution by a party who apprehends or suffers an adverse result in court proceedings).

In summary, there may be little practical difference in the application of waiver doctrine in the common law jurisdictions reviewed.

What principles ought to govern waiver determinations? In answering this question, regard must be had to the underlying policies sought to be served by these principles.

When the parties enter into an agreement to arbitrate, it is reasonable that a presumption in favour of arbitration should be recognised. This is explicitly recognised in the US cases dealing with waiver, although Australian authority is less emphatic (indeed Austin J was of the opinion in *ACD Tridon v Tridon Aust*, op cit, [136] that there was no presumption in favour of arbitration; cf *Australian Granites Ltd v Eisenwerk Hensel Bayreuth*, op cit at [3]). This presumption would favour preservation of the arbitration right further along the litigation spectrum, with a determination of waiver being less readily made. It would (consistently with US case law) lend support for a requirement that a positive determination of waiver should be conditioned by a requirement that real prejudice to the other party be demonstrated, prejudice not remediable in by a costs order.

On the other hand, when parties enter into an arbitration agreement, they are seeking to limit the resolution of the subject dispute to one adjudication in one forum only. To permit a party who has initiated and/or participated in litigation to a substantial extent, to then enforce the arbitration agreement does, as noted, necessarily then leads to involvement in multiple fora. As this is inconsistent with a core consideration underlying the arbitration agreement, its prospect paradoxically may be viewed as rebutting the presumption in favour of arbitration.

It is submitted that the present balance achieved by case law in the several jurisdictions is correct. A waiver of arbitration ought not to be too readily inferred. Participation in the early stage of litigation ought not readily to ground a waiver determination. To the extent that Australian law countenances this (as reflected in *La Donna*) there is something to be said for conditioning waiver with a requirement of detriment in the manner of US authority. On the other hand, the progress of the litigation with the willing participation of both parties to an intermediate or mature stage should ground a waiver. To permit one of them to then shunt the dispute off to arbitration creates obvious potential for detriment to the other party – it exposes this party both to a potential for compounding costs and delays, and to an opportunistic change of forum by a party dissatisfied by the course of litigation. Authority is soundly based in precluding such a tactic. It could only be justified by the theoretical consideration that to abort mature litigation and to then arbitrate the dispute, would be quicker and less expensive

than to continue with the litigation. This may be true in some cases, but to preclude abuse a reference to arbitration in this circumstance should be consensual, rather than engineered by waiver.

Finally, where each of the disputants has on the evidence clearly and unequivocally waived their right of arbitration then, whatever analysis is adopted (waiver, abandonment, variation of contract), and whether or not the matter has proceeded some distance along the litigation spectrum, a determination of waiver should be made. The arbitration mechanism was the product of their agreement, and they must have the power to vary or annul this agreement. But, to reiterate, this inference of intention to waive ought not lightly to be drawn.

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