



**SOTERIS PITTAS & CO LLC.**

Advocates & Legal Consultants

# **WAIVER OF A RIGHT TO ARBITRATE UNDER AN INTERNATIONAL COMMERCIAL ARBITRATION AGREEMENT BY RESORTING TO LITIGATION**

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# INTRODUCTION

- (1) My Presentation will focus on the law in common law jurisdictions, particularly England and Australia.





## WAIVER

- (2) The term “*waiver*”, means the deliberate, intentional and unequivocal release, or abandonment of a right, which is later sought to be enforced.
- (3) In **common law jurisdictions**, the term “*waiver*”, is often used imprecisely. Most of the cases, which purport to apply the doctrine of waiver, are really cases of contract, estoppel or election.





(4) FUNDAMENTAL Character of International Arbitration Agreements:  
Positive & Negative Obligations

4.1 Positive Obligation: includes the commitment, to arbitrate the dispute, in accordance with the agreed procedure.

4.2 Negative Obligation: includes the undertaking, not to resort to litigation, in the event of a dispute, which falls within the ambit of the arbitration agreement.





- (5) The Negative Obligation is contained in International Convention, like for example, the New York Convention e.g. see Article III of New York Convention which mandatorily requires national Courts to either stay, or dismiss litigation proceedings, brought in breach of an arbitration agreement.



(6) The existence of Negative Obligations, appears also in inter alia the following:

6.1 UNCITRAL MODEL LAW ON INTERNATIONAL COMMERCIAL ARBITRATION → see Article 8, which incorporates Article III of New York Convention, requiring mandatory stay of Court proceedings, filed in violation of an arbitral clause.

6.2 LCIA RULES → see Articles 26 (9)

6.3 ICC RULES → see Article 28 (6)

6.4 Leading International Arbitration Textbooks:

(a) Davit, Arbitration in International Trade (1985) → see pages 232-233

(b) Fouchard Gaillard Goldman, On International Commercial Arbitration (1999) → see page 367

(c) Poudret & Benson, Corporate Law on International Arbitration (2007) → see page 367

(d) Born, International Commercial Arbitration (2009) → see page 1024



(7) Negative consequences of resort to litigation proceedings, despite the existence of an arbitration agreement:

7.1 the parties could be brought before the very for a, from which they had contracted out;

7.2 all perceived advantages of arbitration as a process, as compared to court litigation, would be lost (whether it be confidentiality; efficiency; procedural flexibility; expertise etc);

7.3 the parties would be subjected to substantial expense and delay, arising from parallel proceedings in different unintended fora. One of the benefits of international arbitration is to offer a *“single, centralized dispute resolution mechanism in one contractual forum.”* To permit parallel proceedings despite the existence of an arbitration clause, would be to undermine this essential characteristic;



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- 7.4 there would exist the prospect of jurisdiction disputes, over the scope of each set of proceedings;
  - 7.5 ultimately, the benefit of any award in a party's favour, could be nullified by an adverse judicial determination, before the national court;
  - 7.6 the risk of inconsistent decisions would arise (a risk arbitration agreements seek to avoid); and
  - 7.7 difficult questions of enforceability, res judicata and estoppels will entail.

## APPROACH OF ENGLISH COURTS

- (8) English law, focuses less on the concept of waiver as such. Rather, English law uses ordinary contract law principles, to identify repudiation (repudiatory breach) of the agreement to arbitrate. Only if the repudiation is accepted, will the parties both be discharged from further performance of the agreement to arbitrate. Acceptance of a repudiation, is irrevocable and it can be undone only, by both parties agreeing again to arbitrate..





(9) The English Courts have on several occasions considered whether by commencing parallel litigation, a party has repudiated the arbitration agreement. The following general principles are observable from those cases:

9.1 The question of whether or not a party has repudiated an international arbitration agreement governed by English law is to be assessed by application of the principles of English contract law, governing the repudiation of contracts generally. (see *Downing –v- Al Tameer Establishment & Another* (2002) 2 All ER 545 at page 553)



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- 9.2 The critical test is whether an objective observer would conclude that the party commencing legal proceedings, had evinced to the other, an intention not to be bound by the arbitration agreement. (see NATIONAL NAVIGATION CO-v-ENDESA GENERATION SA (2004)1 Lloyds Rep.666 at paragr. 115)
- 9.3 Such conduct is not lightly to be inferred.(see THE MERCANAUT (1980) 2 Lloyds Rep 183 at page 185)
- 9.4 While conduct after the alleged acceptance of the repudiation is irrelevant,(see BEA HOTELS NV-v-BELLWAY LLC(2007) EWHC 1363 at paragr. 26) regard may be had to the subsequent conduct of the party alleged to have repudiated the arbitration agreement in order to properly assess its objective intentions at the time.(see BEA HOTELS NV-v-BELLWAY LLC (Supra))





## APPROACH OF AUSTRALIAN COURTS

- (10) Under Australian law, a waiver may be sourced from several different principles, or doctrines, like for example the concept of waiver per se, which is synonymous with the notion of abandonment, the doctrine of election, and the doctrine of estoppel.





## RELEVANT CASE LAW

- 11.1 COMMANDATE MARINE CORP. –V- PAN AUSTRALIA SHIPPING PTY LTD (1006) FCA FC 192
- 11.2 LA BONNA PTY LTD –V- WOLFORD AG (2005) VSC 359
- 11.3 ACD TRIDON –V- TRIDON AUSTRALIA (2002) NSWSC 896.
- 11.4 ZHANG –V- SHANGHAI WOOL & JUTE TEXTILE CO LTD (2006) VSCA 133



## LEGAL EFFECT OF WAIVER

When a party waives its right to have a dispute determined by arbitration by initiating proceedings, it waives this right in respect of ALL matters that can be properly brought before the Court, in relation to that particular dispute.

# THANK YOU

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