Kluwer Arbitration Blog

Waiving the Right to Arbitrate: The Australian Position

Dominique Yap · Thursday, March 18th, 2021

The concept of 'waiver' is a nebulous creature, crossing into the realms of estoppel, repudiation and variation. For the purposes of ss 7(2) and 7(5) of Australia's *International Arbitration Act 1974* (Cth), Australian jurisprudence has distinguished between 'strong' and 'weak' waiver, as summarised in *ACD Tridon v Tridon Australia* [2002] NSWSC 896 ('***ACD Tridon***').

'Strong' waiver requires an 'intentional act [or omission] with knowledge'.[1] The clearest case of 'strong' waiver is waiver by election, but it is also satisfied by a failure to take up a right, 'that position having been intentionally taken with knowledge'.[2] On the other hand, 'weak' waiver has been described as the 'non-insistence upon a right either by choice or by default', which enlivens the court's discretion as to whether a subsequent attempt to exercise that right should be refused.[3]

Yet it is unclear how much this distinction really aids the search for conceptual clarity. Australian case law has confirmed that some forms of participation in court proceedings does not necessarily constitute waiver (see e.g. *ACD Tridon*; *Zhang v Shanghai Wool and Jute Textile Co Ltd* [2006] VSCA 133). Yet there remains no clear answer as to when a 'choice' to delay the application for staying curial proceedings in favour of arbitration would be intentional enough to constitute waiver in the strong sense.

Dialogue v Instagram

In December 2020, the Federal Court of Australia, in *Dialogue Consulting Pty Ltd v Instagram, Inc* [2020] FCA 1846 ('***Dialogue***') had a new opportunity to untangle the weeds. Beach J, adopting the distinction between strong and weak waiver, affirmed that the 'abandonment of a right whether expressly or implied from intentional acts with knowledge' constitutes strong waiver.[4] Moreover, he held that, because weak waiver requires a court to exercise its discretion, only strong waiver can trigger the mandatory grant of a stay under s 7(2).[5]

While the judgment clearly cements the current Australian principles on waiver, their application to the facts could use further illumination on certain points, in particular, the distinction between their application in *Dialogue* and *BHPB Freight Pty Ltd v Cosco Oceania Chartering Pty* Ltd (2008) 168 FCR 169 ('***BHPB***').

In *BHPB*, the Federal Court found three factors decisive in finding that the defendant had waived its right to arbitrate.[6] First, the entering of an unconditional appearance; second, failing to invoke its right to arbitrate until over 8 months after the court action was commenced; and third, taking steps in the proceedings, including filing a defence and participating in discovery, which showed a willingness to submit to curial determination of the merits. These factors showed an 'intentional and unequivocal choice by the defendant not to insist on its purported right to arbitrate and instead accept the curial process', thus constituting 'a strong case of waiver in the weaker sense' and warranting a denial of stay under s 7.

Yet in *Dialogue*, while Beach J rejected the suggestion in *BHPB* that 'weak' waiver could suffice, he did not go on to distinguish the facts in *Dialogue* from those in *BHPB* even though the three factors highlighted in *BHPB* seem equally applicable. First, the respondents in *Dialogue* had also filed an unconditional appearance.[7] Second, they only sought a stay of court over 12 months after court proceedings commenced.[8] Finally, the respondents have, *inter alia*, filed defences and a counter-claim and submitted to Court orders for discovery, which by *BHPB*'s standards may evince a willingness for the Court to determine the merits of the case.[9] Without further elaboration, this begs the question: do the facts in *Dialogue* constitute 'a strong case of waiver in the weaker sense', or is this merely an exercise in semantics?

The Approach in Singapore and Analysis

It may be helpful to examine the Singapore courts' approach to waiver, which is largely consistent with the approach in Australia. The definition of waiver centres around an intentional 'abandonment' or 'relinquishment' of a right with knowledge (see e.g. *Commonwealth v Verwayen* (1990) 170 CLR 394 ('***Verwayen'***) at [21]; *Aero-Gate Pte Ltd v Engen Marine Engineering Pte Ltd* [2013] 4 SLR 409 at [39]). Further, waiver by election requires 'an unequivocal choice between inconsistent rights' (see e.g. *ACD Tridon* at [58]; *BMO v BMP* [2017] SGHC 127 ('***BMO***') at [71] affirming the English position in *Motor Oil Hellas (Corinth) Refineries SA v Shipping Corporation of India (The "Kanchenjunga")* [1990] 1 Lloyd's Rep 391 at 398).

One may note that Australian jurisprudence has used the language of 'abandonment'.[10] On the other hand, Singapore courts have referred to abandonment as a 'consequence' of a choice made, instead framing the issue as whether a party has taken a 'step in the proceedings'.[11] This language is derived from s 6(1) of Singapore's *International Arbitration Act* (Cap 143A, 2002 Rev Ed), which similarly provides for a mandatory grant of stay. Nonetheless, the doctrines seek to achieve the same goal: to 'delineate the *conduct of a party*, as opposed to laying down a temporal *deadline*, by which a party may lose his right to refer a litigation case to arbitration' (Tay at 456). To have taken a 'step', a party must have demonstrated an intention to submit to the court's jurisdiction to determine the merits of the dispute. Tay's article (at 459 to 468) summarises the case law on which forms of participation in court proceedings would be considered a 'step'.

In this regard, it may be helpful to consider the English case of *Roussel-Uclaf v GD Searle and Co Ltd* [1978] 25 R.P.C. 743, which found that merely filing an interlocutory application for discharging and injunction does not constitute waiver. In doing so, the defendant is 'merely parrying a blow by the plaintiff', as opposed to committing 'some positive act by way of

offence'.[12] Further, in *La Donna Pty Ltd v Wolford AG* [2005] VSC 359 at [23]–[26], the Victorian Supreme Court held that, even the cumulative effect of contesting an injunction, participating in court-initiated mediation and acquiescing in certain court directions was insufficient. In that case, it was only the application for security for costs that was decisive in finding that the right to arbitrate had been waived.

However, looking at the facts in *Dialogue*, the steps taken by the respondent (summarised at [149] of *Dialogue*) may constitute one or multiple 'step[s] in the proceedings', and therefore may fulfil waiver in the strong sense. For one, Instagram's participation in discovery processes and requests for particulars may suffice (see e.g. the English case of *Chappell v North* [1891] 2 QB 252). It may be relevant to consider the number and nature of steps taken, including the filing of defences and amended defences, and the length of time that elapsed.

Should *Dialogue* go on appeal, it may be helpful for the Court to consider the legal propositions laid down by Singapore courts in the decision of *Carona Holdings Pte Ltd v Go Go Delicacy Pte Ltd* [2008] 4 SLR(R) 460 ('***Carona'***). The Singapore Court of Appeal held that the general rule is whether the steps taken by the defendant constitute the 'employ[ment of] court procedures to enable him to defeat or defend those proceedings on their merits and/or the applicant proceeds … beyond a mere acknowledgment of service of process by evincing an unequivocal intention to participate in the court proceedings in preference to arbitration'.[13] In so doing, should the Singapore courts have proceeded to determine the merits, a tribunal would be precluded by estoppel or *res judicata* from re-litigating the matter (see *L Capital Jones Ltd v Maniach Pte Ltd* [2017] 1 SLR 312 at [78]). Either way, it would be helpful for an Australian appellate court to provide much-needed clarity on the language to be used for a waiver of the right to arbitrate.

References

?1 *ACD Tridon* at [87].
?2 *ACD Tridon* at [62], affirming *Verwayen* at [25].
?3 *ACD Tridon* at [60], affirming *Verwayen* at [13].
?4 *Dialogue* at [593].
?5 *Dialogue* at [594]–[595].
?6 *BHPB* at [53]–[54].
?7 *Dialogue* at [528].
?8 *Dialogue* at [529].
?9 *Dialogue* at [149].
?10 See e.g. *Verwayen* at 472; *ACD Tridon* at [73]; *Dialogue* at [593].
?11 *BMO* at [69].
?12 *Roussel-Uclaf v GD Searle and Co Ltd* [1978] 25 R.P.C. 743 at 756.
?13 *Carona* at [55].

This entry was posted on Thursday, March 18th, 2021 at 7:30 am and is filed under Australia, Singapore, Stay of Proceedings, Waiver
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