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## So you think you have a binding arbitration agreement?

By Hon. David I. Brown (Ret.)

In the enforcement of private agreements to arbitrate employment and related consumer disputes, it is no secret that while public policy views arbitration as a means to encourage efficient and speedy dispute resolution, it may often be relatively expensive, and that expense is most often incurred by businesses or employers whose arbitration clauses require them to bear the fees and costs attendant to arbitration. Even if the fees and costs are to be shared, failure to pay arbitration fees and costs in a timely fashion may result in a waiver of the agreed-to arbitration provision.

Waiver of the right to arbitration is well established in common law. Generally, in determining waiver, a court can consider “(1) whether the party’s actions are inconsistent with the right to arbitrate; (2) whether ‘the litigation machinery has been substantially invoked’ and the parties ‘were well into preparation of a lawsuit’ before the party notified the opposing party of an intent to arbitrate; (3) whether a party either requested arbitration enforcement close to the trial date or delayed for a long period before seeking a stay; (4) whether a defendant seeking arbitration filed a counterclaim without asking for a stay of the proceedings; (5) ‘whether important intervening steps (e.g., taking advantage of judicial discovery procedures not available in arbitration) had taken place’; and (6) whether the delay ‘affected, misled, or prejudiced’ the opposing party. *Sobremonte v. Superior Court* (1998) 61 Cal.App.4th 980, 992.

Under case law, there is no single determinative test of waiver, and the question for the trial court is one of fact. *Guess? Inc. v. Superior Court* (2000) 79 Cal.App.4th 553, 557. In *Davis v. Blue Cross of Northern Cal.* (1979) 25 Cal.3d 418, the court recognized the policy favoring arbitration but noted that the ability to arbitrate “may be lost.”

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*Id.* at p. 426. A party, by its conduct, “may waive its right to arbitrate.” *Id.* Nonetheless, courts hew to the principle that arbitration is strongly favored. Courts will closely scrutinize any claims of waiver and indulge every intendment to give effect to such proceedings. *Keating v. Superior Court* (1982) 31 Cal.3d 584, 605, citations omitted, overruled on other grounds in *Southland Corp. v. Keating* (1984) 465 U.S. 1.

This, then, takes us to California Code of Civil Procedure sections 1281.97 and 1281.98. Preliminarily, it ought to be noted that the California Legislature enacted the California Arbitration Act (CAA) (§ 1280 et seq.) as a way to protect the right of private parties to resolve their disputes through the “efficient, streamlined procedures” of arbitration. *AT&T Mobility LLC v. Concepcion* (2011) 563 U.S. 333, 344, 131 S.Ct. 1740, 179 L.Ed.2d 742. The CAA also defines what those procedures are, at least in the absence of the parties’ mutual decision to adopt different procedures. *Cronus Investments, Inc. v.*

*Concierge Services* (2005) 35 Cal. 4th 376, 394, 25 Cal.Rptr.3d 540, 107 P.3d 217 (Cronus). In 2019, the California Legislature added sections 1281.97, 1281.98 and 1281.99 to the CAA.

Section 1281.97 provides:

“(a) In an employment or consumer arbitration that requires, either expressly or through appli-

are to be paid by a “company or business” that has “included a predispute arbitration provision in a contract with a consumer or employee.” §§ 1281.97, 1280, subd. (e). Once the “employee or consumer meets the filing requirements necessary to initiate an arbitration,” the company or business must then *pay its share of initiation fees or costs* “within 30 days after the due date” set by the arbitration provider. § 1281.97, subd. (a)(1) and (2). Importantly, the failure to pay the initiation fees or costs within the 30-day grace period that follows the arbitration provider’s due date constitutes a “material breach of the arbitration agreement” that simultaneously qualifies as a “waiv[er] of [the] right to compel arbitration” and a “default

of state or federal law or the rules of the arbitration administrator, the drafting party *to pay certain fees and costs before the arbitration can proceed, if the fees or costs to initiate an arbitration proceeding are not paid within 30 days after the due date*, the drafting party is in material breach of the arbitration agreement, is in default of the arbitration, and waives its right to compel arbitration under Section 1281.2 [emphasis added].

(b) If the drafting party materially breaches the arbitration agreement and is in default under subdivision (a), the employee or consumer may do either of the following:

(1) Withdraw the claim from arbitration and proceed in a court of appropriate jurisdiction.

(2) Compel arbitration in which the drafting party shall pay reasonable attorney’s fees and costs related to the arbitration.”

Section 1281.97 sets forth the procedures by which the initial arbitration-related fees and costs

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of the arbitration,” all of which confer upon the consumer or employee the choice of (1) “[w]ithdraw[ing] the claim from arbitration and proceed[ing] in a court of appropriate jurisdiction” or (2) “[c]ompel[ling] arbitration,” but requiring the company or business to “pay reasonable attorney’s fees and costs related to the arbitration.” § 1281.97, subds. (a)(1), (b). Upon its breach, the company or business is also obligated to pay the “reasonable expenses, including attorney’s fees and costs, incurred by the employee or consumer as a result of the material breach” (§ 1281.99, subd. (a)), and may also suffer an evidentiary, terminating or contempt sanction unless it “acted with substantial justification” or “other circumstances make the imposition of the sanction unjust” (§ 1281.99, subd. (b)).

CCP § 1281.98 states, in pertinent part, “(a)(1) In an employment or consumer arbitration that requires, either expressly or through application of state or federal law or the rules of the arbitration provider, that the drafting party pay certain fees and costs during the pendency of an arbitration proceeding, if the fees or costs *required to continue the arbitration proceeding* are not paid within 30 days after the due date, the drafting party is in material breach of the arbitration agreement, is in default of the arbitration, and waives its right to compel the employee or consumer to proceed with that arbitration as a result of the material breach [emphasis added].”

(2) The arbitration provider shall provide an invoice for any fees and costs required for the arbitration proceeding to continue to all of the parties to the arbitration. The invoice shall be provided in its entirety, shall state the full amount owed and the date that payment is due, and shall be sent to all parties by the same means on the same day. To avoid delay, absent an express provision in the arbitration agreement stating the number of days in which the parties to the arbitration must pay any required fees or costs, the arbitration provider shall issue all invoices to the

parties as due upon receipt. Any extension of time for the due date shall be agreed upon by all parties.

(b) If the drafting party materially breaches the arbitration agreement and is in default under subdivision (a), the employee or consumer may unilaterally elect to do any of the following:

(1) Withdraw the claim from arbitration and proceed in a court of appropriate jurisdiction. If the employee or consumer withdraws the claim from arbitration and proceeds with an action in a court of appropriate jurisdiction, the statute of limitations with regard to all claims brought or that relate back to any claim brought in arbitration shall be tolled as of the date of the first filing of a claim in any court, arbitration forum, or other dispute resolution forum.”

Subd. (c) provides “(c) If the employee or consumer withdraws the claim from arbitration and proceeds in a court of appropriate jurisdiction pursuant to paragraph

(1) of subdivision (b), both of the following apply:(1) The employee or consumer may bring a motion, or a separate action, to recover all attorney’s fees and all costs associated with the abandoned arbitration proceeding. The recovery of arbitration fees, interest, and related attorney’s fees shall be without regard to any findings on the merits in the underlying action or arbitration.

(2) The court shall impose sanctions on the drafting party in accordance with Section 1281.99.

While both California and federal law strongly favor arbitration, it is nonetheless clear that “§ 1281.97 modifies a substantive right.” (The same may be said of section 1281.98.) The statute (§ 1281.97) defines a drafting party’s failure to pay arbitration fees “within 30 days after the due date” as a “material breach” of the contract. This law, on its face, modifies substantive state contract law.” *Dekker v. Vivint Solar, Inc.*, 2020 U.S. Dist. LEXIS 147 (No. District Calif.) at \*6 (revd. and cause remanded (9th Cir., Oct. 26, 2021, No. 20-16584) 2021 WL 4958856, 2021 U.S. App. Lexis 32092). “Section 1281.97 sim-

ultaneously modifies substantive contract law and substantially determines both the forum and the relief available. It is thus applicable here.” *Id.* at \*8. In enacting § 1281.97, the legislature explicitly declared “[i]t is the intent of the Legislature ... to affirm the decision[] in ... *Sink v. Aden Enterprises, Inc.* that a company’s failure to pay arbitration fees ... constitutes a breach of the arbitration agreement and allows the non-breaching party to bring a claim in court.” See, SB 707 § 1(f); *Sink v. Aden Enterprises, Inc.*, 352 F.3d 1197 (2003). The California Legislature emphasized timely dispute resolution. The legislature acknowledged that § 1281.97’s material breach provision was a “strict yet reasonable” response in light of the needless delay of arbitration. Assemb. Judiciary Comm. Hr’g on SB 707 at 9 (Cal. June 18, 2019). This language is instructive as to the lawmakers’ intent. Plainly, in enacting sections 1281.97 et seq., the California Legislature was looking to solve a very specific problem - namely, the “procedural limbo and delay” that consumers and employees face when they are “forced to submit to mandatory arbitration to resolve a [ ] ... dispute,” and the business or company that pushed the case into an arbitral forum then “stalls or obstructs the arbitration proceeding by refusing to pay the required fees.” Assemb. Floor Analysis, 3d reading analysis of Sen. Bill No. 707 (2019-2020 Reg. Sess.) as amended May 20, 2019, p. 2; Sen. Bill No. 707 (2019-2020 Reg. Sess.) § 1, subds. (c) & (d). Section 1281.97 grants grace from the perceived procedural morass by deeming late payment to be a material breach of the arbitral agreement that gives the affected employee or consumer the choice of (1) remaining in the arbitral forum on the business’s or company’s dime or (2) treating the arbitration agreement as being rescinded and returning to a judicial forum, as the Ninth Circuit had previously held to be an appropriate remedy (e.g., *Sink v. Aden Enterprises, Inc.* (9th Cir. 2003) 352 F.3d 1197, 1200, 1201 (Sink) ; *Brown v. Dillard’s, Inc.*

(9th Cir. 2005) 430 F.3d 1004, 1012 (*Brown*)). Sen. Bill No. 707 (2019-2020 Reg. Sess.) § 1, subd. (e); Assemb. Com. on Judiciary, Analysis of Sen. Bill No. 707 (2019-2020 Reg. Sess.) as amended May 20, 2019, p. 8.

Similarly, section 1281.98 provides for various remedies when the drafting party declines to pay fees and costs “during the pendency of an arbitration proceeding” (Cal. Civ. Proc. Code § 1281.98(a)), rather than fees and costs that must be paid before the arbitration can proceed as an initial matter. See Cal. Civ. Proc. Code § 1281.97. And section 1281.99’s additional remedy applies to violations under § 1281.98(a), just as it does to violations under § 1281.97(a). Both statutes reflect a shift in public policy by permitting an employee to unilaterally withdraw from an arbitration when, for example, the employer is obligated by law to pay certain costs of the arbitration and fails to do so within 30 days of their becoming due. CCP §§ 1281.97, subd. (b)(1), 1281.98, subd. (b)(1).

The practitioner must be sensitive to these relatively recent statutory enactments. Counsel representing a party who seeks to avoid arbitration pursuant to a mandatory provision should be especially attuned to the statutory requirements, and appropriately calendar due dates; obviously, the same is true for counsel seeking to enforce such provisions. An overlooked invoice at the initiation of the arbitration may result in the finding of a material breach and waiver of the right to arbitration. A billing for services rendered during the arbitration, if left unpaid for over 30 days after the due date, will also result in a material breach and potential waiver. For its part, the arbitration provider’s billings should clearly reflect the fees required to commence the arbitration, and those invoices for services rendered to continue the arbitration.

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