

# Arbitration Alert

December 2005

## Preserving the Right to Arbitrate

In *La Donna v Wolford AG* [2005] VSC 359, the Supreme Court of Victoria considered whether a party's conduct in seeking security for costs in proceedings before a court can amount to a waiver of that party's contractual right to have a dispute resolved by arbitration.

### Background

La Donna Pty Limited (La Donna) is a Victorian company which has been selling women's lingerie on both a wholesale and retail basis for more than 20 years. Wolford AG (Wolford) is an Austrian company which designs, manufactures and sells high quality hosiery and lingerie.

Wolford appointed La Donna as its Australian and New Zealand distributor under a sole Distributorship Agreement (Agreement) dated 23 June 2003. The Agreement required all disputes to be resolved by arbitration. The arbitration clause reads as follows:

- "1. All disputes arising out of this agreement or related to its violation, termination or nullity shall be finally settled under the rules of arbitration and conciliation of the International Arbitral Centre of the Austrian Federal Economic Chamber in Vienna (Vienna Rules) ...
2. All legal issues arising or in connection with this agreement ... shall be governed by and construed in accordance with Austrian law".

### The proceedings

A dispute arose between Wolford and La Donna. On 31 March and 27 April 2005 Wolford served notices on La Donna purporting to terminate the Agreement.

As a result of Wolford's actions La Donna on 29 April 2005 filed in the Supreme Court of Victoria a generally indorsed writ. On that same day Wolford also filed a summons seeking interlocutory relief resulting in an ex parte injunction being granted. A contested application for interlocutory relief then followed. Interlocutory injunctions were granted on 13 May 2005. On 26 May 2005, Wolford sought security for its costs of the proceedings in the sum of AUD388,682. Wolford's application for security for costs were supported by two affidavits which detailed the steps to be taken on Wolford's behalf in the proceedings commenced by La Donna. The affidavits also set out the estimated costs which Wolford would incur in litigating the matter to the conclusion of the trial. The affidavits at no stage referred to any intention to apply for a stay on the basis of the arbitration clause in the Agreement. The application itself and the material in support of it proceeded on the premise that the matter was to be litigated in the Supreme Court of Victoria and that Wolford would be incurring substantial costs in that litigation.

Prior to the application for security for costs being determined, the parties attempted to resolve the dispute by way of mediation which was unsuccessful. Wolford's application for security for costs was heard and dismissed after the mediation had been concluded.

### In brief

**This decision of the Supreme Court of Victoria supports the proposition that any party to court proceedings seeking a stay of those proceedings in favour of arbitration, should foreshadow such an application as early as possible and ensure that it takes no steps in the litigation which amount to a waiver of that party's contractual right to have a dispute resolved by arbitration.**

La Donna then filed its Statement of Claim on 26 July 2005. A fundamental element of the Statement of Claim was the Agreement itself and the relationship between La Donna and Wolford created by that Agreement.

On 4 August 2005 Wolford filed a further Summons seeking leave to stay the proceedings commenced by La Donna pursuant to:

- s 7 of the *International Arbitration Act 1974* (Cth) (IAA)
- s 53 of the *Commercial Arbitration Act 1984* (Victoria)
- the inherent jurisdiction of the Supreme Court of Victoria.

The primary focus of the application was on s 7 of the IAA.

Prior to Wolford's application for a stay of the proceedings commenced by La Donna, Wolford had never indicated or foreshadowed that such an application would be made. The timing of the application was justified by Wolford on the basis that they needed to see the Statement of Claim filed by La Donna in order to determine whether the claim was capable of settlement by arbitration. La Donna opposed the application for a stay.

Section 7(2) of the IAA provides that where proceedings involve the determination of a matter that, in pursuance of the agreement, is capable of settlement by arbitration, the Court is required to stay the proceeding or so much of it as involves the determination of that matter, and refer the parties to arbitration.

## Did the proceedings involve a matter capable of settlement by arbitration?

La Donna argued that the “matters” for determination were:

- whether or not it was entitled to continue as a sole distributor of Wolford’s products in Australia, and alternatively to recover damages in accordance with a further agreement entered into in July 2004; and
- whether or not Wolford had made representations to La Donna in breach of the *Trade Practices Act 1974* (Cth).

The arbitration provision relevantly regulated all disputes “arising out of the agreement”. It also regulated all disputes related to the Agreement’s violation, termination or nullity.

The court concluded that all of the claims made by La Donna were caught by the arbitration clause. The court went on to say that arbitration clauses should not be read narrowly when considering whether a dispute is caught by the scope of the arbitration clause.

## Did Wolford waive its right to proceed to arbitration?

La Donna asserted that Wolford had abandoned its right to a stay by:

- seeking security for its costs;
- failing to reserve its position or to foreshadow a stay application;
- its conduct in contesting the injunction;
- its conduct in acquiescing or agreeing to the directions; and
- its participation in the mediation.

The court found that the steps taken by Wolford on the interlocutory injunction, the directions and the mediation did not amount to an abandonment of Wolford’s right to a stay of the proceedings commenced by La Donna in favour of arbitration. The court concluded that a party could rationally take the view that it was desirable to participate in those steps even though one believed, and intended to persuade the court at an appropriate time, that the dispute should be arbitrated.

The application for security for costs fell into an entirely different category, however. The court concluded that the application for security for costs was based on the explicit premise that the litigation would proceed to trial in the absence of a settlement, and that the matters the subject of the proceedings would be determined by the court. In the circumstance the court dismissed Wolford’s application for a stay on the basis that it had waived its rights in this regard by pursuing the security for costs application in May 2005.

Interestingly the court also suggested that even if Wolford had expressly reserved its position, that circumstance alone may not have made a difference to the outcome of the application for a stay.

## Lesson learned

Any party seeking a stay of proceedings in favour of arbitration must ensure that its conduct in the proceedings cannot be construed as or seen to be an election or an unequivocal abandonment of its contractual right to have a dispute resolved by arbitration.

Participation in interlocutory injunction proceedings, attending directions hearings and even participating in a mediation is conduct that may not be construed as an abandonment of a party’s right to proceed to have the dispute resolved by arbitration.

Finally, notwithstanding the court’s observation we would recommend that any party seeking a stay of proceedings in favour of arbitration should foreshadow such an application as early as possible, and always expressly reserve their position when undertaking a step in the proceedings.

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