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# Contractual Agreements to Arbitrate Disputes: Waiver of the Right to Compel Arbitration

Arbitration<sup>1</sup> has long served as a dispute resolution mechanism in numerous legal systems.<sup>2</sup> Today, arbitration is increasingly utilized as an alternative to litigation or pre-trial settlement of disputes,<sup>3</sup> particularly in the contractual setting. Agreements to arbitrate are commonly found in labor, commercial, and personal services contracts.<sup>4</sup> They are especially frequent in contracts for medical services.<sup>5</sup> Such agreements are generally favored by the courts because arbitration relieves the congestion in the court system while still enabling justice to be rendered to the disputing parties.<sup>6</sup> Under an arbitration agreement, either party has an enforceable right to compel the other party to arbitrate any contractual dispute covered by the agreement.<sup>7</sup>

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1. Arbitration is a method of private adjudication whereby parties to a contract choose one or more persons—usually lawyers or businessmen—to decide their contractual disputes. See text accompanying notes 52-56 *infra*. Although arbitration is generally thought to have grown out of Roman law, which did not use professionally trained judges, there is evidence suggesting that arbitration methods may have been used to resolve disputes as long ago as 3100 B.C. Jalet, *Judicial Review of Arbitration: The Judicial Attitude*, 45 CORNELL L.Q. 515, 519 & n.2 (1960); Wolaver, *The Historical Background of Commercial Arbitration*, 83 U. PA. L. REV. 132, 132 (1934). The roots of arbitration in Anglo-American law have been traced to the Kentish laws of Aethelbeht in the seventh century. Note, *Enforceability of Commercial Agreements to Arbitrate Future Disputes: Judicial Alteration of the Florida Arbitration Code*, 30 U. FLA. L. REV. 615, 616 & n.10 (1978). For a description of modern arbitration proceedings, see Menschikoff, *Commercial Arbitration*, 61 COLUM. L. REV. 846, 862-65 (1961).

2. See Jalet, *supra* note 1, at 519; Wolaver, *supra* note 1, at 132.

3. See Henderson, *Contractual Problems in the Enforcement of Agreements to Arbitrate Medical Malpractice*, 58 VA. L. REV. 947, 955 (1972); Jones, *Arbitration and the Dilemma of Possible Error*, 35 L.A.B. BULL. 216, 216 (1960). No less an authority than the Chief Justice of the United States Supreme Court has stated that “we should encourage . . . the use of private arbitration for the settlement of private disputes.” U.S. NEWS & WORLD REP., Dec. 14, 1970, at 35 (interview with Chief Justice Warren Burger).

4. See Henderson, *supra* note 3, at 947-48, 948 n.4, 958-59.

5. Henderson, *supra* note 3, at 955-60.

6. Utah Constr. Co. v. Western Pac. R., 174 Cal. 156, 159, 162 P. 631, 632-33 (1916); Coulson, *Texas Arbitration—Modern Machinery Standing Idle*, 25 Sw. L.J. 290, 291 (1971); Henderson, *supra* note 3, at 956 n.37; see Robert Lawrence Co. v. Devonshire Fabrics, Inc., 271 F.2d 402, 410 (2d Cir. 1959), cert. granted, 362 U.S. 909, cert. dismissed, 364 U.S. 801 (1960); Vernon v. Drexel Burnham & Co., 52 Cal. App. 3d 706, 715, 125 Cal. Rptr. 147, 152 (1975).

7. See text accompanying notes 44-45 *infra*.

As with most contractual rights, the right to arbitrate may be waived by a party to the contract.<sup>8</sup> Explicit waiver is unusual and presents few difficulties for a court—by definition, an explicit waiver clearly indicates the waiving party's intention not to invoke the contractually sanctioned arbitration mechanism. When waiver of arbitration rights is allegedly implied, however, courts often have difficulty deciding whether waiver has actually occurred. For example, a party to a contract that contains an agreement to arbitrate may file suit on an arbitrable issue. The defendant then answers the suit by pleading, among other defenses, the arbitration agreement. The parties take depositions and exchange interrogatories. Six months later, when the suit is ready to be calendared for trial, the defendant moves to compel arbitration pursuant to the contractual agreement to arbitrate. Should the defendant, by his participation in the judicial process and by his delay in moving for arbitration, be held to have waived his contractual right to compel arbitration?

The problem can also arise from the plaintiff's conduct. Assume the same facts as in the previous hypothetical, except that the defendant answers the plaintiff's complaint on the merits, without pleading the agreement to arbitrate as a defense. Can the plaintiff then change his mind, drop the suit, and move to compel arbitration, or should his initial resort to a judicial forum be viewed as a waiver of his contractual right to arbitration?

The courts have given no clear answers. Under the old California standard, the "reasonableness" of the putative waiving party's conduct in delaying enforcement of his arbitration rights was the crucial issue—"unreasonable" delay constituted waiver.<sup>9</sup> The California Supreme Court, however, has recently rejected this reasonableness standard for another test—"actual litigation."<sup>10</sup> Regardless of any unreasonable delay in enforcement, or even conduct presumptively inconsistent with an

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8. *Gunderson v. Superior Court*, 46 Cal. App. 3d 138, 143, 120 Cal. Rptr. 35, 38 (1975), *disapproved on other grounds*, *Doers v. Golden Gate Bridge, Highway and Transp. Dist.*, 23 Cal. 3d 180, 188, 588 P.2d 1261, 1265, 151 Cal. Rptr. 837, 841 (1979); *see Stewart v. Meyers*, 353 F.2d 691, 694 (7th Cir. 1965). *See generally* 3A A. CORBIN, CONTRACTS §§ 752-71, at 478-560 (1960).

9. *See* text accompanying note 111 *infra*.

10. *Doers v. Golden Gate Bridge, Highway and Transp. Dist.*, 23 Cal. 3d 180, 588 P.2d 1261, 151 Cal. Rptr. 837 (1979) (disapproving the "filing suit" test of waiver articulated in *Maddy v. Castle*, 58 Cal. App. 3d 716, 130 Cal. Rptr. 160 (1976); *Gunderson v. Superior Court*, 46 Cal. App. 3d 138, 120 Cal. Rptr. 35 (1975); *Titon Enterprises, Inc. v. Armo Constr. Co.*, 32 Cal. App. 3d 828, 108 Cal. Rptr. 456 (1973); *Schwartz v. Leibel*, 249 Cal. App. 2d 761, 57 Cal. Rptr. 831 (1967)). This case is discussed at text accompanying notes 124-41 *infra*.

intent to arbitrate,<sup>11</sup> implied waiver under this standard cannot occur until a suit reaches the point of "actual litigation" in the judicial process.<sup>12</sup> The federal courts offer yet a third test—the presence or absence of "prejudice." Under this standard, waiver occurs when one party's intent to arbitrate is ambiguous or misleading, and the other party is significantly disadvantaged thereby.<sup>13</sup> Both the California and the federal courts consider waiver a factual issue to be resolved at trial upon the individual circumstances of each case.<sup>14</sup>

Serious problems exist with all three standards. This Note argues that these tests tend to subvert the policy goals of arbitration by encouraging litigation<sup>15</sup> and increasing the delay and expense of the arbitration process.<sup>16</sup> It then argues that these tests conflict with general principles of contractual waiver.<sup>17</sup> Finally, this Note proposes a clear and specific standard conducive to attaining the policy goals of arbitration and consistent with contract waiver law in general.<sup>18</sup>

## I. DEVELOPMENT OF EXISTING ARBITRATION LAW

Current law regarding waiver of the right to compel arbitration is in a state of confusion. Although the policy goals of arbitration have been widely and clearly articulated, and the procedures for enforcement of an arbitration agreement carefully delineated, there is a lack of consensus as to when a party to an arbitration agreement waives the right to compel arbitration under that agreement.

### A. ARBITRATION LAW GENERALLY

Common law courts were traditionally antagonistic toward agreements to arbitrate and refused to enforce these agreements. Modern courts, however, are supportive of arbitration, and most states currently have statutory provisions providing for judicial enforcement of an agreement to arbitrate upon petition by a party to the agreement. Arbitration is favored by modern courts because it reduces congestion in the judicial system by providing a fast, adaptable, and inexpensive forum for parties desiring resolution of a dispute.

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11. Both standards rely to a limited extent on judge-made rules whereby waiver is conclusively presumed from specified acts. See notes 108-09 *infra*.

12. See text accompanying notes 124-41 *infra*.

13. See text accompanying notes 142-71 *infra*.

14. See text accompanying note 108 *infra*.

15. See text accompanying notes 172-85 *infra*.

16. See text accompanying notes 186-206 *infra*.

17. See text accompanying notes 207-21 *infra*.

18. See text accompanying notes 222-54 *infra*.

### 1. *The Traditional Common Law View of Arbitration*

Under traditional common law doctrine, an arbitration agreement is not specifically enforceable.<sup>19</sup> This nonenforceability stems from the judicial doctrine of revocability, first articulated by Lord Coke in a dictum in *Vynior's Case*:<sup>20</sup> "[I]f I submit myself to an arbitrament [arbitration] . . . yet I may revoke it, for my act, or my words cannot alter the judgement of the law to make that irrevocable, which is of its own nature revocable."<sup>21</sup> Later cases used Lord Coke's doctrine of revocability to deny the specific enforcement of arbitration agreements.<sup>22</sup> Although a remedy for damages may be had for breach or repudiation of an arbitration agreement, it is grossly inadequate because only nominal damages are ever awarded.<sup>23</sup> In effect, either party to an arbitration agreement under common law can defeat an attempt by the other party to arbitrate simply by unilaterally revoking the agreement.<sup>24</sup>

The common law antagonism to arbitration probably originated from the loss of income<sup>25</sup> and social power by common law judges when they were ousted from jurisdiction by private, lay arbitration tribunals.<sup>26</sup> The modern judiciary, however, is generally supportive of

19. Henderson, *supra* note 3, at 948; Wolaver, *supra* note 1, at 138.

20. 8 Coke 80a, 77 Eng. Rep. 595 (1609).

21. *Id.* at 82a, 77 Eng. Rep. at 599-600. This case was a debt action upon a bond, brought by Vynior against the defendant. The question before the court was whether the defendant's revocation of his consent to an agreement to arbitrate violated a condition of the bond, thus forfeiting its face amount to Vynior. The court held that the revocation was indeed a violation. *Id.* at 82b, 77 Eng. Rep. at 600-01. The propriety and legality of the revocation, however, was not disputed by the parties. See 8 Coke at 80a-81a, 77 Eng. Rep. at 595-97. Lord Coke's language on revocability was unnecessary to his disposition of the case, Wolaver, *supra* note 1, at 138-39, and it has been argued that this dictum directly contradicted law of over two hundred years standing. Comment, *Arbitration and Award: Commercial Arbitration in California*, 17 CALIF. L. REV. 643, 643 (1929). *But see* Wolaver, *supra* note 1, at 138 n.40. For good discussions of the doctrine of revocability and the deficiencies of *Vynior's Case*, see Kulukundis Shipping Co. v. Amtorg Trading Corp., 126 F.2d 978, 982-84 (2d Cir. 1942); Sayre, *Development of Commercial Arbitration Law*, 37 YALE L.J. 595, 598-605 (1928).

22. Wolaver, *supra* note 1, at 138; Comment, *supra* note 21, at 643.

23. Henderson, *supra* note 3, at 949 & n.6.

24. Henderson, *supra* note 3, at 948; Wolaver, *supra* note 1, at 138; Comment, *Judicial Deference to Arbitral Determinations: Continuing Problems of Power and Finality*, 23 U.C.L.A. L. REV. 936, 938 n.14 (1976).

25. Common law judges had no fixed salaries and their fees depended on the volume of litigation in their respective courts. Wolaver, *supra* note 1, at 141-42. This same fear of losing significant work and income may have been at the root of modern judicial and legal opposition to compulsory arbitration. See Kagel, *Labor and Commercial Arbitration Under the California Arbitration Statute*, 38 CALIF. L. REV. 799, 800-01 & n.9 (1950).

26. Henderson, *supra* note 3, at 948; Wolaver, *supra* note 1, at 141-42. For example, the King's Court did not enforce private contractual agreements made in other courts, O. W. HOLMES, *THE COMMON LAW* 202-03 nn.24 & 28 (M. Howe ed. 1963), because to do so would have impeded

arbitration,<sup>27</sup> and modern statutes providing for the enforcement of arbitration agreements have largely superseded the common law doctrine of revocability. Common law arbitration and the doctrine of revocability, however, are not totally without significance; they are applicable whenever deviation from proper form or procedure precludes use of a relevant enforcement statute.<sup>28</sup>

## 2. Modern Arbitration Law

Modern statutory law has been much more supportive of agreements to arbitrate than the common law. A 1920 New York statute was the first in a common law jurisdiction to make arbitration agreements irrevocable and to provide for their enforcement upon the petition of any party to the agreement.<sup>29</sup> A comparable federal statute was passed in 1925,<sup>30</sup> and California passed an arbitration law closely resembling the New York statute<sup>31</sup> in 1927.<sup>32</sup> The statutes provided that a court could, upon the petition of one of the parties to an arbitration agreement, stay any action filed in a judicial forum on an arbitrable issue, pending arbitration of that issue. Upon proper motion by one of the parties, the court could also order the parties to arbitrate any issue arbitrable under their agreement.<sup>33</sup>

These statutes did not immediately result in judicial enforcement

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the unification of the King's realm and reduced the fees collected for the royal treasury, Sayre, *supra* note 21, at 597-98. Similar jurisdictional confrontations occurred between temporal and ecclesiastical courts during the reign of Henry II, and between the courts of law and equity at the outset of the sixteenth century. Comment, *supra* note 24, at 936.

27. See text accompanying notes 29-42 *infra*.

28. *Dickson v. Hoffman*, 305 F. Supp. 1040 (D. Kan. 1969) (application of revocability doctrine); *Henderson*, *supra* note 3, at 950-51.

29. 1920 N.Y. Laws, ch. 275 (current version at N.Y. CIV. PRAC. LAW §§ 7501-7514 (McKinney 1963)); see Feldman, *Arbitration Modernized—The New California Arbitration Act*, 34 S. CAL. L. REV. 413, 414 (1961).

30. Pub. L. No. 66-401, §§ 1-15, 43 Stat. 883, 883-86 (1925) (current version at 9 U.S.C. §§ 1-14 (1976)).

31. See *Clogston v. Schiff-Lang Co.*, 2 Cal. 2d 414, 416, 41 P.2d 555, 557 (1935) (per curiam); Feldman, *supra* note 29, at 414; Comment, *supra* note 21, at 645. The California law was modeled after the New Jersey law which was itself modeled after the New York law. Feldman, *supra* note 29, at 414.

32. 1927 Cal. Stats., ch. 225 (current version at CAL. CIV. PROC. CODE §§ 1280-1297 (West Cum. Supp. 1979)); see Note, *Commercial Arbitration in California*, 15 CALIF. L. REV. 289, 289 (1927). Since 1927, over thirty other states have passed legislation providing for some enforcement of arbitration agreements, *Henderson*, *supra* note 3, at 949 n.7; Note, *supra* note 1, at 617, and of the remaining states, only Oklahoma and Vermont have no arbitration statutes whatsoever, *id.* at 617 n.21.

33. Pub. L. No. 66-401, §§ 3-4, 43 Stat. 883, 883-84 (1925) (current version at 9 U.S.C. §§ 3-4 (1976)); 1927 Cal. Stats., ch. 225 (current version at CAL. CIV. PROC. CODE § 1281.2 (West Cum. Supp. 1979)).

of agreements to arbitrate. Courts circumvented the enforcement statutes by means of the "no dispute" doctrine enunciated in *International Association of Machinists v. Cutler-Hammer*,<sup>34</sup>

It is for the court to determine whether the contract contains a provision for arbitration of the dispute tendered, and . . . the court must determine whether this is such a dispute. If the meaning of the provision sought to be arbitrated is beyond dispute, there cannot be anything to arbitrate and the contract cannot be said to provide for arbitration.<sup>35</sup>

In other words, in any dispute covered by an agreement to arbitrate, it was up to the courts to decide whether a genuine dispute existed and whether such a dispute was indeed arbitrable under the arbitration agreement. Because a judicial ruling that a case lacked substantive merit or was not covered by the arbitration agreement could prevent its arbitration, the courts, for a time, retained the effect, if not the form, of the common law revocability doctrine.<sup>36</sup> The *Cutler-Hammer* rule, however, has been disavowed both judicially<sup>37</sup> and legislatively<sup>38</sup> in California and federal jurisdictions. Presently, the federal courts' function in an action to compel arbitration does not extend beyond determining whether the party seeking arbitration has made a claim that appears on its face to be governed by the contract between the parties.<sup>39</sup>

In California, judges are *required* to enforce an agreement to arbitrate unless the right to compel arbitration has been waived by petitioner, grounds exist for revocation or invalidation of the agreement (*e.g.*, fraud) or pending, collateral litigation will resolve the issue(s) sought to be arbitrated.<sup>40</sup> Because modern-day courts generally look very favorably on the enforcement of agreements to arbitrate,<sup>41</sup> courts

34. 271 App. Div. 917, 67 N.Y.S.2d 317 (1946) (per curiam), *aff'd mem.*, 297 N.Y. 519, 74 N.E.2d 464 (1947).

35. 271 App. Div. at 918, 67 N.Y.S.2d at 318.

36. See text accompanying notes 20-24 *supra*.

37. *United Steelworkers v. American Mfg. Co.*, 363 U.S. 564, 566-68 (1960); *Posner v. Grunwald-Marx, Inc.*, 56 Cal. 2d 169, 176, 363 P.2d 313, 316, 14 Cal. Rptr. 297, 300 (1961).

38. CAL. CIV. PROC. CODE §§ 1281.2 (West Cum. Supp. 1979); see 9 U.S.C. § 2 (1976).

39. *National R.R. Passenger Corp. v. Missouri Pac. Ry.*, 501 F.2d 423, 427 (8th Cir. 1974); *Galt v. Libby-Owens-Ford Glass Co.*, 376 F.2d 711, 714 (7th Cir. 1967); *Aeronaves de Mexico, S.A. v. Triangular Aviation Serv., Inc.*, 389 F. Supp. 1388, 1390 (S.D.N.Y. 1974), *aff'd without opinion*, 515 F.2d 504 (2d Cir. 1975).

40. CAL. CIV. PROC. CODE § 1281.2 (West Cum. Supp. 1979); see Note, *supra* note 32, at 289.

41. *E.g.*, *Seaboard Constr. R.R. v. National Rail Passenger Corp.*, 554 F.2d 657, 660 (5th Cir. 1977); *Penalver v. Compagnie de Navigation Frutiere*, 428 F. Supp. 1070, 1072 (E.D.N.Y. 1977); *Lehto v. Underground Constr. Co.*, 69 Cal. App. 3d 933, 939, 138 Cal. Rptr. 419, 422 (1977); *Vernon v. Drexel Burnham & Co.*, 52 Cal. App. 3d 706, 715, 125 Cal. Rptr. 147, 152 (1975).

usually try to reach a decision that allows arbitration.<sup>42</sup>

Judicial action with respect to arbitration is generally restricted to enforcement of the agreement to arbitrate and the resulting arbitration award.<sup>43</sup> The agreement may be enforced by an order to arbitrate, which forces a party to pursue or defend his claim at arbitration rather than in court.<sup>44</sup> This order also requires that the parties to the dispute participate in the arbitration process and not impede its progress; failure to do so would risk a default judgment.<sup>45</sup>

An order to arbitrate is not directly appealable because it is an interlocutory decree.<sup>46</sup> The rationale for nonappealability is that increased delay and expense in the arbitration process would inevitably result if the defendant in the dispute could litigate every intermediate ruling;<sup>47</sup> the delays, costs, and other disadvantages of litigation are precisely what arbitration is designed to avoid.<sup>48</sup> Although an order compelling arbitration is nonappealable, upon final judgment confirming the award<sup>49</sup> the party compelled to arbitrate is entitled to judicial review of the order to arbitrate.<sup>50</sup> The unavailability of immediate challenge to an order to arbitrate works no hardship on the party who

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42. Gavlik Constr. Co. v. H.F. Campbell Co., 526 F.2d 777, 783 (3d Cir. 1975) ("waiver is not to be lightly inferred"); Doers v. Golden Gate Bridge, Highway and Transp. Dist., 23 Cal. 3d 180, 189, 588 P.2d 1261, 1266, 151 Cal. Rptr. 837, 843 (1979) ("Because arbitration is a highly favored means of settling such disputes, the courts have been admonished to 'closely scrutinize any allegation of waiver of such favored right' and to 'indulge every intendment to give effect to such proceedings'") (citations omitted).

43. McRae v. Superior Court, 221 Cal. App. 2d 166, 170, 34 Cal. Rptr. 346, 348 (1963).

44. 9 U.S.C. § 4 (1976); CAL. CIV. PROC. CODE § 1281.2 (West Cum. Supp. 1979); see, e.g., Zimmerman v. Cohen, 236 N.Y. 15, 17, 139 N.E. 764, 765 (1923); Feldman, *supra* note 29, at 423.

45. See Feldman, *Arbitration Law in California: Private Tribunals for Private Government*, 30 S. CAL. L. REV. 414, 435 (1957).

46. Aerojet-General Corp. v. American Arbitration Ass'n, 478 F.2d 248, 251 (9th Cir. 1973); *In re Pahlberg Petition*, 131 F.2d 968, 969 (2d Cir. 1942); Sjoberg v. Hastorf, 33 Cal. 2d 116, 119, 199 P.2d 668, 670 (1948); Wheeler v. St. Joseph Hosp., 63 Cal. App. 3d 345, 353, 133 Cal. Rptr. 775, 780-81 (1976); Maddy v. Castle, 58 Cal. App. 3d 716, 719, 130 Cal. Rptr. 160, 161 (1976), *disapproved on other grounds*, Doers v. Golden Gate Bridge, Highway and Transp. Dist., 23 Cal. 3d 180, 188, 588 P.2d 1261, 1265, 151 Cal. Rptr. 837, 841 (1979); see CAL. CIV. PROC. CODE § 1294 (West 1972).

47. Aerojet-General v. American Arbitration Ass'n, 478 F.2d 248, 251 (9th Cir. 1973); Wheeler v. St. Joseph Hosp., 63 Cal. App. 3d 345, 353, 133 Cal. Rptr. 775, 780-81 (1976).

48. Gulf Cent. Pipeline Co. v. Motor Vessel Lake Placid, 315 F. Supp. 974, 977 (E.D. La. 1970); see text accompanying notes 64-91 *infra*.

49. An arbitration award that has not been confirmed or vacated has the force and effect of a written contract between the parties. Jones v. Kvistad, 19 Cal. App. 3d 836, 840, 97 Cal. Rptr. 100, 103 (1971). An award acquires the force of a judgment upon confirmation. *Id.*

50. Wheeler v. St. Joseph Hosp., 63 Cal. App. 3d 345, 353, 133 Cal. Rptr. 775, 780-81 (1976); Maddy v. Castle, 58 Cal. App. 3d 716, 719, 130 Cal. Rptr. 160, 161 (1976), *disapproved on other grounds*, Doers v. Golden Gate Bridge, Highway and Transp. Dist., 23 Cal. 3d 180, 188, 588 P.2d



wishes to avoid arbitration; he may win the dispute at arbitration, and even if he does not, he may still attack the order upon confirmation of the award.<sup>51</sup>

The selection of the arbitrator is the most crucial phase of the arbitration process because it is the arbitrator who renders final judgment on the substantive merits of the dispute, and because judicial review of that judgment is severely limited.<sup>52</sup> The selection process is almost always specified in the agreement to arbitrate. One practice in commercial arbitration is for the parties to designate in their agreement an arbitration agency, such as the American Arbitration Association, that will choose the arbitrator if the agreement is invoked.<sup>53</sup> Alternatively, parties often opt for the formation of a "tripartite tribunal"—each party appoints his own arbitrator, and the two appointees select a third.<sup>54</sup> The tripartite tribunal has the advantage of ensuring that each party has an advocate in the decisionmaking process.<sup>55</sup> When the two appointed arbitrators cannot agree on a third arbitrator, or when the contract does not provide for a specific selection process, most state enforcement statutes provide for court appointment of the third arbitrator.<sup>56</sup>

The arbitration award itself is appealable only on narrow grounds. Statutorily, an award may be vacated only when there exists fraud or corruption in obtaining the award; corruption of any of the arbitrators; misconduct by the arbitrators that prejudiced the rights of any party; or when the arbitrators exceed their power.<sup>57</sup> Case law has further limited the scope of appeal. The findings of an arbitrator have been held to be conclusive as to both law and fact;<sup>58</sup> neither the merits of a dispute,<sup>59</sup>

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1261, 1265, 151 Cal. Rptr. 837, 841 (1979); *Wetsel v. Garibaldi*, 159 Cal. App. 2d 4, 8, 323 P.2d 524, 527 (1958).

51. *Maddy v. Castle*, 58 Cal. App. 3d 716, 719-20, 130 Cal. Rptr. 160, 161-62 (1976), *disapproved on other grounds*, *Doers v. Golden Gate Bridge, Highway and Transp. Dist.*, 23 Cal. 3d 180, 188, 588 P.2d 1261, 1265, 151 Cal. Rptr. 837, 841 (1979).

52. See text accompanying notes 57-63 *infra*.

53. M. DOMKE, *THE LAW AND PRACTICE OF COMMERCIAL ARBITRATION* § 20.01, at 189-90 (1968).

54. *Id.* § 20.03, at 197; L. MAYERS, *THE AMERICAN LEGAL SYSTEM* 552 (rev. ed. 1964).

55. M. DOMKE, *supra* note 58, § 20.03, at 197.

56. *Id.* § 20.02, at 195-96, § 20.04, at 201; e.g., 9 U.S.C. § 5 (1976); CAL. CIV. PROC. CODE § 1281.6 (West 1972). For a general elucidation of the actual process of an arbitration, see L. MAYERS, *supra* note 54, at 553-55.

57. 9 U.S.C. § 10 (1976); CAL. CIV. PROC. CODE § 1286.2 (West 1972).

58. *Harvey Aluminum, Inc. v. United Steelworkers*, 263 F. Supp. 488, 493 (C.D. Cal. 1967); *General Constr. Co. v. Herring Realty Co.*, 201 F. Supp. 487, 491 (E.D.S.C. 1962), *appeal dismissed*, 312 F.2d 538 (4th Cir. 1963); *Safeway Stores v. Brotherhood of Teamsters*, 83 Cal. App. 3d 430, 437, 147 Cal. Rptr. 835, 838-39 (1978).

59. *United Steelworkers v. Enterprise Wheel & Car Corp.*, 363 U.S. 593, 596 (1960); *Harvey*

the credibility of the parties,<sup>60</sup> nor the sufficiency of the evidence supporting an award<sup>61</sup> is a proper subject for review. Moreover, an award is not invalidated either by an arbitrator's erroneous legal reasoning,<sup>62</sup> or his failure to state any reasoning at all.<sup>63</sup>

### 3. Policy Goals of Arbitration

One of the most important purposes of arbitration law is to provide disputants with a speedy alternative to litigation;<sup>64</sup> disputes are generally resolved more quickly if arbitrated rather than litigated in the judicial system.<sup>65</sup> Because arbitrating parties need not cope with hopelessly crowded court calendars,<sup>66</sup> they can avoid the long delay that inevitably accompanies litigation.<sup>67</sup> In addition, arbitrators are usually more

Aluminum, Inc. v. United Steelworkers, 263 F. Supp. 488, 493 (C.D. Cal. 1967); Safeway Stores v. Brotherhood of Teamsters, 83 Cal. App. 3d 430, 437, 147 Cal. Rptr. 835, 838-39 (1978); Horn v. Gurewitz, 261 Cal. App. 2d 255, 261, 67 Cal. Rptr. 791, 796 (1968).

60. Pacific Vegetable Corp. v. C.S.T., Ltd., 29 Cal. 2d 228, 238, 174 P.2d 441, 448 (1946).

61. *Id.*; Safeway Stores v. Brotherhood of Teamsters, 83 Cal. App. 3d 430, 437, 147 Cal. Rptr. 835, 838-39 (1978); Horn v. Gurewitz, 261 Cal. App. 2d 255, 261, 67 Cal. Rptr. 791, 796 (1968).

62. Raytheon Co. v. Rheem Mfg. Co., 322 F.2d 173, 182-83 (9th Cir. 1963); Grunwald-Marx, Inc. v. Los Angeles Joint Bd., Amal. Clothing Workers, 52 Cal. 2d 568, 589, 343 P.2d 23, 35 (1959); Safeway Stores v. Brotherhood of Teamsters, 83 Cal. App. 3d 430, 437, 149 Cal. Rptr. 835, 838-39 (1978); see note 76 and accompanying text *infra*.

63. Atkinson v. Sinclair Ref. Co., 370 U.S. 238, 244 n.4 (1962); Pacific Vegetable Oil v. C.S.T., Ltd., 29 Cal. 2d 228, 232, 174 P.2d 441, 441 (1946); Lauria v. Soriano, 180 Cal. App. 2d 163, 168, 4 Cal. Rptr. 328, 331 (1960); see note 76 and accompanying text *infra*.

64. Radiator Specialty Co. v. Cannon Mills, Inc., 97 F.2d 318, 319 (4th Cir. 1938); Utah Constr. Co. v. Western Pac. Ry., 174 Cal. 156, 159, 162 P. 631, 632-33 (1916); Vernon v. Drexel Burnham & Co., 52 Cal. App. 3d 706, 715, 125 Cal. Rptr. 147, 152 (1975).

65. Vernon v. Drexel Burnham & Co., 52 Cal. App. 3d 706, 715, 125 Cal. Rptr. 147, 152 (1975); Allstate Ins. Co. v. Superior Court, 35 Cal. App. 3d 137, 140, 110 Cal. Rptr. 622, 624 (1973), *disapproved on other grounds*, Freeman v. State Farm Mut. Auto Ins. Co., 14 Cal. 3d 473, 486, 535 P.2d 341, 349, 121 Cal. Rptr. 477, 485 (1975); *The Biannual Survey of New York Practice: Part III*, 39 ST. JOHN'S L. REV. 181, 241 (1964); Note, *Compulsory Arbitration to Relieve Trial Calendar Congestion*, 8 STAN. L. REV. 410, 418-19 (1956); see Note, *supra* note 32, at 294.

66. Waits of five years or longer for trial are not uncommon for certain types of cases. J. COUND, J. FRIEDENTHAL, & A. MILLER, CIVIL PROCEDURE: CASES AND MATERIALS 771 (2d ed. 1974). Of all civil jury cases tried in the superior courts of California during June 1977, delay from complaint to trial ranged from five to thirty-two months; fifteen of the twenty superior court districts had delays in excess of ten months. JUDICIAL COUNCIL OF CALIFORNIA, ANNUAL REPORT TO THE GOVERNOR AND THE LEGISLATURE—PART I, at 94 (1978). The delay in federal district court averages nine months. ADMINISTRATIVE OFFICE OF THE U.S. COURTS, ANNUAL REPORT OF THE DIRECTOR 96 (1977). In one study of medical malpractice litigation, ten percent of the jury trials studied were still pending after seven years. Note, *California Medical Malpractice Arbitration and Wrongful Death Actions*, 51 S. CAL. L. REV. 401, 409 n.48 (1978).

67. Vernon v. Drexel Burnham & Co., 52 Cal. App. 3d 706, 715, 125 Cal. Rptr. 147, 152 (1975); Allstate Ins. v. Superior Court, 35 Cal. App. 3d 137, 140, 110 Cal. Rptr. 622, 624 (1973),

experienced<sup>68</sup> in the particular area of contention than is the average judge or jury,<sup>69</sup> meaning that far less time need be spent by the parties helping the trier of fact to understand complicated issues and specialized evidence and testimony.<sup>70</sup> Finally, the informal process of arbitration, particularly the absence of strict procedural and evidentiary constraints,<sup>71</sup> facilitates expeditious resolution of disputes.<sup>72</sup>

A second purpose of arbitration law is to provide disputing parties with a forum that is more adaptable to their specific needs than is the court system.<sup>73</sup> The judicial system is constrained by a broad range of legal and social values that may prevent individualized judicial consideration of the unique demands and aspects of parties in a business relationship.<sup>74</sup> Every judge must consider not only the effect of his decision on the case at hand, but also its effect on prior and subsequent case law.<sup>75</sup> The arbitrator, however, is neither bound by strict legal doctrine

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*disapproved on other grounds*, Freeman v. State Farm Mut. Auto Ins. Co., 14 Cal. 3d 473, 486, 535 P.2d 341, 349, 121 Cal Rptr. 477, 485 (1975); Note, *supra* note 65, at 410-11, 419.

68. Note, *supra* note 32, at 294-95.

69. United Steelworkers v. Warrior & Gulf Navigation Co., 363 U.S. 574, 582 (1960); Davey, *The Supreme Court and Arbitration: The Musings of an Arbitrator*, 36 NOTRE DAME LAW. 138, 139 (1961); Jones, *supra* note 3, at 218; see Henderson, *supra* note 3, at 997; Jalet, *supra* note 1, at 521 n.15. But see Davey, *supra* at 140 ("Arbitrators . . . cannot fail to be impressed with the respect which the [Supreme] Court manifests for the superior knowledge, ability and wisdom of arbitrators, which the court feels apparently cannot be equalled by the 'ablest judge' . . . [S]uch unstinted praise is in many cases probably not deserved") (citation omitted).

70. Note, *supra* note 32, at 295.

71. Pacific Vegetable Oil Corp. v. C.S.T., Ltd., 29 Cal. 2d 228, 241, 174 P.2d 441, 449 (1946); Horn v. Gurewitz, 261 Cal. App. 2d 255, 262, 67 Cal. Rptr. 791, 796 (1968); Note, *supra* note 65, at 419. For example, exclusionary rules of evidence, which do not apply in arbitration, make it more difficult for the parties to prove factual propositions. Damaska, *Evidentiary Barriers to Conviction and Two Models of Criminal Procedure: A Comparative Study*, 121 U. PA. L. REV. 506, 520 (1973).

72. See East San Bernardino Water Dist. v. City of San Bernardino, 33 Cal. App. 3d 942, 950-51, 109 Cal. Rptr. 510, 515-16 (1973); Note, *supra* note 65, at 419; cf. Damaska, *supra* note 71, at 551, 563-64 (discussing the highly technical nature of adversary proceedings in continental and common law criminal justice systems). Such expeditiousness, however, is not without its costs. The procedural and evidentiary constraints of the judicial process exist to protect defendants and ensure the integrity of the judicial process. The absence of such constraints may leave the arbitration process more susceptible to unfairness and bias. Presumably, parties to an arbitration agreement find that the speed and other advantages of arbitration outweigh the dangers inherent in the elimination of some procedural and evidentiary protections.

73. Note, *supra* note 32, at 295; see Jones, *supra* note 3, at 216.

74. See Note, *supra* note 32, at 293. For example, in common law systems, truth-seeking and reliability values are routinely sacrificed in favor of such social values as human dignity, privacy, and preservation of an atmosphere of freedom. Damaska, *supra* note 71, at 578-87. The operation of the exclusionary rule on evidence obtained in unconstitutional searches and seizures is a good example of the weight accorded this latter set of values.

75. This is not to minimize the value of precedential constraints; they guard against caprice and arbitrariness on the part of the trier of fact, and aid in predicting litigation outcomes. Nevertheless, because the judicial decision is the outcome of so many factors not directly related to the

nor by precedent.<sup>76</sup> Thus, he can freely consider the particular economic, ethical, and practical attributes of a dispute without concern for consistency with precedent or application of his decision in subsequent cases. Because traditional rules of evidence do not control, the introduction of highly probative books, records, and other writings that would normally be excluded at trial by the hearsay and best evidence rules is permitted.<sup>77</sup> Arbitration also allows an attorney to follow a case to its logical place of hearing without regard to jurisdictional boundaries, local rules of practice, or requirements of state bar membership.<sup>78</sup>

Arbitration is also particularly conducive to common business needs. Because arbitration proceedings are not matters of public record, arbitration enables a party to avoid the loss of business customers and trade secrets, and other damage that may accompany the extensive and often adverse publicity of a public trial.<sup>79</sup> Moreover, arbitration is a convenient and relatively painless method of enforcing contractual obligations.<sup>80</sup> Because arbitration is less adversarial than litigation, it is easier to resolve a contractual dispute in arbitration without irreparably damaging valuable commercial relationships.<sup>81</sup>

Finally, arbitration is far less costly than litigation. Out-of-pocket

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merits of the dispute at hand, the parameters of any decision are greatly expanded, and litigation is often considered a greater business risk than arbitration. See generally Note, *supra* note 32, at 294.

76. *Wetsel v. Garibaldi*, 159 Cal. App. 2d 4, 12-13, 323 P.2d 524, 530 (1958); *Wolaver*, *supra* note 1, at 132; see *Aerojet-General Corp. v. American Arbitration Ass'n*, 478 F.2d 248, 252 (9th Cir. 1973); *Horn v. Gurewitz*, 261 Cal. App. 2d 255, 262, 67 Cal. Rptr. 791, 796; *Henderson*, *supra* note 3, at 967; Note, *supra* note 32, at 295. Arbitrators are not required to give reasons for their decisions, *Lauria v. Soriano*, 180 Cal. App. 2d 163, 168, 4 Cal. Rptr. 328, 331 (1960), and "erroneous reasoning will not invalidate an otherwise proper award," *Grunwald-Marx, Inc. v. Los Angeles Joint Bd., Amal. Clothing Workers*, 52 Cal. 2d 568, 589, 343 P.2d 23, 35 (1959).

77. See note 71 and accompanying text *supra*. For a detailed description of the proof problems that these evidentiary rules create for the commercial litigant, see *Sturges, Commercial Arbitration or Court Application of Common Law Rules of Marketing?*, 34 YALE L.J. 480, 485-89 (1925).

78. *Coulson*, *supra* note 6, at 292. Although a client does not expect the services of his attorney to be affected by territorial boundaries, when a court case crosses jurisdictional lines, a local attorney must often be retained to avoid violation of state bar regulations and local rules of court practice. *Id.* at 291-92. In a complex legal area, a mere difference in the substantive law of two jurisdictions may require the services of a local attorney.

79. Note, *supra* note 32, at 295; Note, *supra* note 66, at 413; see *Coulson*, *supra* note 6, at 291. *But see also Jones*, *supra* note 3, at 232-33. Such lack of publicity may be just as valuable to non-business plaintiffs, such as public figures. To the extent that the spectre of trial publicity deters socially undesirable conduct, however, elimination of such publicity is disadvantageous to the legal process. See generally *O.W. HOLMES*, *supra* note 26, at 40.

80. *Coulson*, *supra* note 6, at 291.

81. Note, *supra* note 32, at 293-294. Of course, when personal association looms large in the

administrative and legal costs to the disputants are substantially less in arbitration than in litigation, principally because many expensive court formalities are eliminated.<sup>82</sup> Arbitration is also less expensive because it takes less time.<sup>83</sup> To the injured plaintiff seeking redress, the costs of delay can be considerable,<sup>84</sup> including loss of evidence;<sup>85</sup> loss of witnesses' testimony through death, relocation, or fading memory;<sup>86</sup> delay of compensation or reimbursement for loss of income or needed medical care;<sup>87</sup> a risk of business or personal insolvency for lack of timely redress, as well as a risk of no recovery should the defendant become insolvent,<sup>88</sup> and forced acceptance of an inequitable settlement because of financial inability to wait for trial.<sup>89</sup>

Although arbitration is not without its disadvantages,<sup>90</sup> it does result in significant social savings. Arbitration operates with much less governmental support than does the judicial system. The parties themselves bear all the costs, and most arbitration cases never enter the judicial system.<sup>91</sup> Moreover, to the extent that injured persons are deterred from pressing valid claims by the costs of litigation, social costs are generated in the form of disaffection with the legal system. Arbitration is a relatively inexpensive remedy for persons who might otherwise fail to seek redress.<sup>92</sup>

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contractual relation, as with certain professional services contracts involving doctor-patient or attorney-client relationships, preservation of the relationship is unlikely even with arbitration.

82. Discovery proceedings, the production of transcripts, and the necessity of obtaining expert witnesses are among the court formalities eliminated in arbitration. Note, *supra* note 66, at 409-10. *But see also* Note, *supra* note 32, at 295-96.

83. Henderson, *supra* note 4, at 947; Note, *supra* note 32, at 295-96.

84. "[D]elay of justice is itself injustice." *Gulf Cent. Pipeline Co. v. Motor Vessel Lake Placid*, 315 F. Supp. 974, 977 (E.D. La. 1970); Note, *supra* note 65, at 410. Because it takes some minimum amount of time to adequately prepare *any* case for adjudication, however, some interval of delay is optimal. R. POSNER, *ECONOMIC ANALYSIS OF LAW* § 21.10, at 456 (2d ed. 1977). For a complete description of the difficulties that judicial delay creates for the commercial litigant, see Sturges, *supra* note 77, at 481-84.

85. Note, *supra* note 32, at 295.

86. *Id.*; Note, *Trial Calendar Advancement*, 6 STAN. L. REV. 323, 323-24 (1954).

87. Note, *supra* note 86, at 324.

88. *Id.*; *see* Note, *supra* note 32, at 294.

89. R. POSNER, *supra* note 84, § 21.8, at 447-48; Note, *supra* note 65, at 410; *see, e.g.*, Henderson, *supra* note 3, at 955 n.33 (quoting *ARB. NEWS*, Mar.-Apr. 1972, at 4).

90. *See* notes 72, 75, 79, 84 *supra*.

91. Coulson, *supra* note 7, at 291.

92. Note, *supra* note 65, at 410; *e.g.*, Note, *supra* note 66, at 410-11. *But see* *Spence v. Omnibus Indus.*, 44 Cal. App. 3d 970, 976-77, 119 Cal. Rptr. 171, 174 (1975). Contingent fees may mitigate this deterrent effect but they do not eliminate it. The percentage of recovery that an attorney takes as his fee under a contingent arrangement reflects not only a charge for services rendered in the case at hand but also includes a premium that covers the cost of the attorney's uncompensated legal services in *unsuccessful* cases; in other words, *successful* contingent fee plain-

## B. WAIVER OF THE RIGHT TO COMPEL ARBITRATION

The courts have long held that like other contractual rights, the right to compel arbitration may be waived.<sup>93</sup> Such waiver may be implicit as well as explicit.<sup>94</sup> Waiver is implied from inaction or delay in enforcing the right to arbitrate,<sup>95</sup> subject to certain tests such as reasonableness,<sup>96</sup> prejudice,<sup>97</sup> or actual litigation.<sup>98</sup> Thus, a party entitled to arbitration must take timely affirmative steps to enforce the agreement to arbitrate or risk being found to have waived by default the right to arbitrate.<sup>99</sup>

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tiffs pay the legal fees not only for their own cases but also for those of *unsuccessful* contingent fee plaintiffs. R. POSNER, *supra* note 84, § 21.8, at 448-49. Moreover, even if legal services were costless, plaintiffs' time and inconvenience during litigation would still go uncompensated. *Id.* at 451; Note, *supra* note 66, at 411. Finally, the plaintiff with a relatively small claim that cannot be handled on a contingent fee basis may have trouble finding a lawyer to represent him in court. Note, *supra* note 66, at 410-11 n.60 ("23% of claims rejected by lawyers were rejected because the potential dollar settlements were too small"). Therefore, even under a contingent fee arrangement, the expected costs of litigation may often outweigh expected benefits to a potential plaintiff, thereby deterring him from pressing a valid claim. See R. POSNER, *supra* note 84, § 21.8, at 451.

93. *Slinto Shipping Co. v. Fibrex & Shipping Co.*, 572 F.2d 1328, 1330 (9th Cir. 1978); *Morales Rivera v. Sea Land of Puerto Rico, Inc.*, 418 F.2d 725, 726 (1st Cir. 1969); *Cornell & Co. v. Barber & Ross Co.*, 360 F.2d 512, 513 (D.C. Cir. 1966); *Sawday v. Vista Irrigation Dist.*, 64 Cal. 2d 833, 836, 415 P.2d 816, 818, 52 Cal. Rptr. 1, 3 (1966); *Landreth v. South Coast Rock Co.*, 136 Cal. App. 457, 461, 29 P.2d 225, 226-27 (1934). Factors that have been viewed as significant in determining whether waiver has occurred include failure to pursue arbitration remedies, *Charles J. Rounds Co. v. Joint Council of Teamsters No. 42*, 4 Cal. 3d 888, 484 P.2d 1397, 95 Cal. Rptr. 53 (1971); excessive delay in asserting arbitration rights, *Sawday v. Vista Irrigation Dist.*, 64 Cal. 2d 833, 415 P.2d 189, (1966); failure to plead the arbitration agreement in one's answer, *Local 659, I.A.T.S.E. v. Color Corp. of America*, 47 Cal. 2d 189, 302 P.2d 294 (1956); filing a counterclaim to an action filed in a judicial forum, *Case v. Kadota Fig Ass'n*, 35 Cal. 2d 596, 220 P.2d 912 (1950); filing suit in a judicial forum, *Maddy v. Castle*, 58 Cal. App. 3d 716, 130 Cal. Rptr. 160 (1976), *disapproved*, *Doers v. Golden Gate Bridge, Highway and Transp. Dist.*, 23 Cal. 3d 180, 188, 588 P.2d 1261, 1265, 151 Cal. Rptr. 837, 841 (1979); failure to designate an arbitrator after having demanded arbitration, *Gunderson v. Superior Court*, 46 Cal. App. 3d 138, 120 Cal. Rptr. 35 (1975), *disapproved*, *Doers v. Golden Gate Bridge, Highway and Transp. Dist.*, 23 Cal. 3d 180, 188, 588 P.2d 1261, 1265, 151 Cal. Rptr. 837, 841 (1979); and failure to request arbitration until 24 hours before trial, *Pneucrete Corp. v. United States Fidelity & Guar. Co.*, 7 Cal. App. 2d 733, 56 P.2d 1000 (1935).

94. See *Stewart v. Meyers*, 353 F.2d 691, 694 (7th Cir. 1965). See generally 3A A. CORBIN, *supra* note 8, §§ 752-771, at 478-560.

95. *Romnes v. Bache & Co.*, 439 F. Supp. 833, 839 (W.D. Wis. 1977); *Sucrest Corp v. Chimo Shipping, Ltd.*, 236 F. Supp. 229, 230 (S.D.N.Y. 1964); *Sawday v. Vista Irrigation Dist.*, 64 Cal. 2d 833, 836, 415 P.2d 816, 818, 52 Cal. Rptr. 1, 3 (1966). For a clear case of waiver by delay, see *McKeeby v. Arthur*, 7 N.J. 174, 81 A.2d 1 (1951).

96. See text accompanying notes 111-23 *infra*.

97. See text accompanying notes 142-71 *infra*.

98. See text accompanying notes 124-41 *infra*.

99. *Yench v. Stockmar*, 483 F.2d 820, 823 (10th Cir. 1973); *Martin v. Boulger Destructor Co.*, 221 F.2d 218, 221 (2d Cir. 1955); *Romnes v. Bache & Co.*, 439 F. Supp. 833, 839 (W.D. Wis. 1977); *Charles J. Rounds Co. v. Joint Council of Teamsters No. 42*, 4 Cal. 3d 888, 899, 484 P.2d

Implied waiver by delay or inaction is premised on the nonself-executing nature of an arbitration agreement; such an agreement does not automatically prevent a court from exercising jurisdiction over contractual disputes, nor is an injured party automatically entitled to relief upon its breach.<sup>100</sup> An agreement to arbitrate is construed by the courts as a choice of forum mechanism, whereby the party seeking redress chooses between arbitration and litigation. When a judicial forum is chosen, the opposing party has the option of acquiescing in the choice, or acting to bring about arbitration:<sup>101</sup>

[W]here a suit [is] pending involving a contract containing an arbitration agreement, and the defendant [makes] no request or application to the court to stay the action pending such arbitration, he waiv[es] his right to demand such a proceeding, and submit[s] to the jurisdiction of the court. . . . [Cal. Code Civ. Pro. § 1284] does not by its terms intend to deprive the superior court of jurisdiction . . . , but merely to provide a summary means by which the arbitration agreement may be enforced should one of the parties desire to rely upon it. It would seem to be the right of the party to invoke this summary power *which would be waived if he did not avail himself of it*.<sup>102</sup>

Thus, the courts must order arbitration only when the parties have signed an agreement to arbitrate that covers the dispute sought to be resolved,<sup>103</sup> and one of the parties acts to compel use of the arbitration forum.<sup>104</sup>

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1397, 1404, 95 Cal. Rptr. 53, 60 (1971); *Landreth v. South Coast Rock Co.*, 136 Cal. App. 457, 461-62, 29 P.2d 225, 226 (1934).

100. *Ross v. Blanchard*, 251 Cal. App. 2d 739, 742, 59 Cal. Rptr. 783, 785 (1967); *Landreth v. South Coast Rock Co.*, 136 Cal. App. 457, 461-62, 29 P.2d 225, 226 (1934); *McKeeby v. Arthur*, 7 N.J. 174, 180-81, 81 A.2d 1, 4 (1951); *see Charles J. Rounds Co. v. Joint Council of Teamsters No. 42*, 4 Cal. 3d 888, 899 & n.1, 484 P.2d 1397, 1404 & n.1, 95 Cal. Rptr. 53, 60 & n.1 (1971); text accompanying note 103 *infra*.

101. *Gallion Iron Works & Mfg. Co. v. J.D. Adams Mfg. Co.*, 128 F.2d 411, 413 (7th Cir. 1942); *Radiator Specialty Co. v. Cannon Mills, Inc.*, 97 F.2d 318, 319 (4th Cir. 1938); *Sucrest Corp. v. Chimo Shipping, Ltd.*, 236 F. Supp. 229, 230 (S.D.N.Y. 1964); *Charles J. Rounds Co. v. Joint Council of Teamsters No. 42*, 4 Cal. 3d 888, 899, 484 P.2d 1397, 1404, 95 Cal. Rptr. 53, 60 (1971); *Landreth v. South Coast Rock Co.*, 136 Cal. App. 457, 462, 29 P.2d 225, 226 (1934); *e.g.*, *Oklahoma Publishing Co. v. Parsons & Whittemore, Inc.*, 255 App. Div. 589, 8 N.Y.S.2d 432 (1938).

102. *Landreth v. South Coast Rock Co.*, 136 Cal. App. 457, 462, 29 P.2d 225, 226 (1934) (emphasis added).

103. *United Steelworkers v. American Mfg. Co.*, 363 U.S. 564, 568 (1960); *Charles J. Rounds Co. v. Joint Council of Teamsters No. 42*, 4 Cal. 3d 888, 892, 484 P.2d 1397, 1399, 95 Cal. Rptr. 53, 55 (1971) (quoting *Butchers' Union Local 229 v. Cudahy Packing Co.*, 66 Cal. 2d 925, 931, 428 P.2d 849, 852, 59 Cal. Rptr. 713, 716 (1967)); *Pneucrete Corp. v. United States Fidelity Guar. Co.*, 7 Cal. App. 2d 733, 741, 46 P.2d 1000, 1003-04 (1935).

104. *Sauter v. Superior Court*, 2 Cal. App. 3d 25, 29, 82 Cal. Rptr. 395, 397 (1969); *Pneucrete*

The actual enforcement procedure is relatively simple. The party desiring arbitration must petition the trial court for an order to compel arbitration and, if necessary, to stay pending litigation.<sup>105</sup> Such petitions are heard in summary fashion on the usual notice required for the hearing of motions.<sup>106</sup> If the order is granted, petitioner may proceed to arbitration in accordance with the agreement to arbitrate.<sup>107</sup>

The issue of whether a party by inaction or delay has waived his right to compel arbitration under an agreement to arbitrate is a question of fact determined at trial.<sup>108</sup> The courts, however, disagree over the proper test of waiver to be used in making that determination. The California courts have, at different times, employed two tests—reasonableness of the delay and actual litigation. The federal courts consider the decisive factor to be the presence or absence of prejudice to the nonwaiving party.

### 1. *The "Reasonableness" Standard*

The traditional "reasonableness" test was clearly articulated in *Sawday v. Vista Irrigation District*.<sup>109</sup>

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Corp. v. United States Fidelity & Guar. Co., 7 Cal. App. 2d 733, 741, 46 P.2d 1000, 1003-04 (1935).

105. 9 U.S.C. § 3 (1976); CAL. CIV. PROC. CODE § 1281.2 (West Cum. Supp. 1979); see text accompanying notes 102-03 *supra*.

106. 9 U.S.C. § 4 (1976); 6 CAL. JUR. 3d, *Arbitration and Award* § 12, at 29 (1973).

107. See, e.g., *Gunderson v. Superior Court*, 46 Cal. App. 3d 138, 144, 120 Cal. Rptr. 35, 39 (1975), *disapproved on other grounds*, *Doers v. Golden Gate Bridge, Highway and Transp. Dist.*, 23 Cal. 3d 180, 188, 588 P.2d 1261, 1265, 151 Cal. Rptr. 837, 841 (1979).

Before *Doers*, it had been widely held in California that failure to plead an arbitration agreement in one's answer constituted waiver of rights under the agreement. *E.g.*, *Local 659, I.A.T.S.E. v. Color Corp. of America*, 47 Cal. 2d 189, 194, 302 P.2d 294, 297 (1956); *Butchers Union Local 532 v. Farmers Mkts.*, 67 Cal. App. 3d 905, 913, 136 Cal. Rptr. 894, 899 (1977); *Gunderson v. Superior Court*, 46 Cal. App. 3d 138, 143-44, 120 Cal. Rptr. 35, 39 (1975). This is still the law in federal jurisdictions. *E.g.*, *Cornell & Co. v. Barber & Ross Co.*, 360 F.2d 512, 513 n.3 (D.C. Cir. 1966); *Necchi Sewing Mach. Sales Corp. v. Carl*, 260 F. Supp. 665, 668 (S.D.N.Y. 1966). Under the *Doers* actual litigation standard, see text accompanying notes 124-41 *infra*, however, such failure to plead may not constitute waiver. See *Doers v. Golden Gate Bridge, Highway and Transp. Dist.*, 23 Cal. 3d 180, 188 & n.2, 588 P.2d 1261, 1265 & n.2, 151 Cal. Rptr. 837, 841 & n.2 (1979).

108. *Daugherty Co. v. Kimberly-Clark Corp.*, 14 Cal. App. 3d 151, 158, 92 Cal. Rptr. 120, 124 (1971); *Ted Stoppick & Co. v. Ernest Glick Co.*, 110 N.Y.S.2d 850, 854 (Sup. Ct. 1952). Although waiver of the right to compel arbitration is a question of fact, waiver may also be found as a matter of law. When the record establishes waiver as a matter of law, the trial judge's order to arbitrate nonetheless has been held to be an abuse of discretion. See *Gunderson v. Superior Court*, 46 Cal. App. 3d 138, 143, 120 Cal. Rptr. 35, 38 (1975), *disapproved on other grounds*, *Doers v. Golden Gate Bridge, Highway and Transp. Dist.*, 23 Cal. 3d 180, 188, 588 P.2d 1261, 1265, 151 Cal. Rptr. 837, 841 (1979); *Sawday v. Vista Irrigation Dist.*, 64 Cal. 2d 833, 836, 415 P.2d 816, 818, 52 Cal. Rptr. 1, 3 (1966). *But see* note 107 *supra*.

109. 64 Cal. 2d 833, 415 P.2d 816, 52 Cal. Rptr. 1 (1966).



Where an arbitration agreement does not specify a time within which arbitration must be demanded, a reasonable time is allowed, and what constitutes a reasonable time is a question of fact, depending upon the situation of the parties, the nature of the transaction, and the facts of the particular case.<sup>110</sup>

As *Sawday* indicates, the question of waiver was determined on a case-by-case basis, depending upon the particular factual situation involved.

Underlying the reasonableness test was the notion that unreasonable delay in invoking arbitration evidences an intent inconsistent with the intention to arbitrate.<sup>111</sup> This was the principal rationale in *Gunderson v. Superior Court*.<sup>112</sup> In *Gunderson*, one plaintiff signed a standardized form, including an agreement to arbitrate, so as to obtain treatment at a medical clinic for the second plaintiff, her minor son.<sup>113</sup> The plaintiffs subsequently filed a medical malpractice suit against the clinic, a local hospital, and various doctors.<sup>114</sup> Two months later, the defendants made a demand for arbitration which the plaintiffs refused.<sup>115</sup> Subsequently, the plaintiffs served a set of interrogatories, and the defendants took the deposition of one of the plaintiffs.<sup>116</sup> Finally, nearly six months after the suit was filed, the defendants petitioned the superior court for an order to compel arbitration, which was ultimately granted.<sup>117</sup> The plaintiffs sought to overturn the order by writ of mandate,<sup>118</sup> arguing that the defendants had waived their arbitration rights by failing to plead the arbitration agreement in their answer,<sup>119</sup> and that the defendants had actively litigated the matter to the extent that they should be estopped from asserting the right to compel

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110. *Id.* at 836, 415 P.2d at 818, 52 Cal. Rptr. at 3.

111. *Medico-Dental Bldg. Co. v. Horton & Converse*, 21 Cal. 2d 411, 432, 132 P.2d 457, 468 (1942).

112. 46 Cal. App. 3d 138, 120 Cal. Rptr. 35 (1975), *disapproved in part*, *Doers v. Golden Gate Bridge, Highway and Transp. Dist.*, 23 Cal. 3d 180, 188, 588 P.2d 1261, 1265, 151 Cal. Rptr. 837, 841 (1979).

113. 46 Cal. App. 3d at 141, 120 Cal. Rptr. at 36-37.

114. *Id.* at 141, 120 Cal. Rptr. at 37.

115. *Id.* at 142, 120 Cal. Rptr. at 37.

116. *Id.*

117. *Id.*

118. Because an order to arbitrate is not appealable, *see* text accompanying notes 46-47 *supra*, a party nevertheless wishing to appeal such an order must resort to an extraordinary writ such as mandamus. *E.g.*, *Maddy v. Castle*, 58 Cal. App. 3d 716, 719, 130 Cal. Rptr. 160, 161 (1976), *disapproved on other grounds*, *Doers v. Golden Gate Bridge, Highway and Transp. Dist.*, 23 Cal. 3d 180, 188, 588 P.2d 1261, 1265, 151 Cal. Rptr. 837, 841 (1979).

119. 46 Cal. App. 3d at 142, 120 Cal. Rptr. at 37.

arbitration.<sup>120</sup> The court issued the writ of mandate that overturned the order to arbitrate,<sup>121</sup> holding that “the conduct of [the defendants] was clearly inconsistent with any real intent to arbitrate.”<sup>122</sup> Using the case-by-case analysis, the court pointed to three particular aspects of the defendants’ behavior in support of its holding: (1) the defendants’ failure to plead the agreement in their answer; (2) their delay in seeking judicial enforcement of the agreement; and (3) their failure to carry out their portion of the agreement to designate an arbitrator.<sup>123</sup>

## 2. *The New California Standard: “Actual Litigation”*

What appears to be a new standard for waiver of the right to compel arbitration—“actual litigation”—was articulated by the California Supreme Court in *Doers v. Golden Gate Bridge, Highway and Transportation District*.<sup>124</sup> Appellant Doers was a member of the Amalgamated Transit Union and was employed at the Greyhound Bus Company’s Santa Rosa terminal.<sup>125</sup> Appellee Golden Gate Bridge, Highway and Transportation District began, with federal funds, a commuter bus service between San Francisco and Santa Rosa. The result of this new service was that Greyhound significantly reduced the size and scope of its Santa Rosa operation and transferred Doers from full-time to relief employment.<sup>126</sup>

Because the district was receiving federal assistance, it had a statutory obligation to protect the interests of workers affected by the use and disposition of such assistance.<sup>127</sup> To that end, the district had entered into an agreement with the union, providing that displaced employees of preexisting transportation systems were to have first

120. *Id.* This sounds a great deal like a claim under the federal prejudice standard, *see* text accompanying notes 142-71 *infra*. The court, however, ignored the implication.

Petitioners also alleged that the contract containing the agreement was invalid and unenforceable in that there was a lack of mutual assent, that the contract violated public policy and that the contract was one of adhesion. The court’s disposition of the case made consideration of these issues unnecessary. 46 Cal. App. 3d at 143, 120 Cal. Rptr. at 38.

121. *Id.* at 145, 120 Cal. Rptr. at 38.

122. *Id.* at 144, 120 Cal. Rptr. at 38.

123. *Id.*

124. 23 Cal. 3d 180, 588 P.2d 1261, 151 Cal. Rptr. 837 (1979). Although the *Doers* court did not explicitly announce a new standard, it disapproved parts of four appellate court decisions and reinterpreted a number of other precedents in reaching its holding, thus making it clear that judicial determination of whether the right to compel arbitration has been waived rests on new criteria. *See id.* at 185-88, 588 P.2d at 1263-65, 151 Cal. Rptr. at 839-41; text accompanying notes 134-41 *infra*; note 10 *supra*.

125. 23 Cal. 3d at 183, 588 P.2d at 1262, 151 Cal. Rptr. at 838.

126. *Id.*

127. *Id.*; *see* Urban Mass Transit Act of 1964, 49 U.S.C. § 1609(c) (1976).

opportunity for comparable employment with the district.<sup>128</sup> The agreement provided for arbitration of all disputes.<sup>129</sup>

Doers filed a complaint in federal district court against the transportation district and the union, citing numerous grievances.<sup>130</sup> The suit was dismissed for lack of subject matter jurisdiction.<sup>131</sup> Doers and the union then filed a motion in the superior court to compel arbitration pursuant to California Code of Civil Procedure sections 1281.2 and 1290.<sup>132</sup> The motion was denied on the grounds that Doers had waived his right to compel arbitration by filing suit in district court.<sup>133</sup>

The sole issue on appeal was whether merely filing suit in a judicial forum amounts to waiver of the right to arbitrate.<sup>134</sup> The court held that it does not.<sup>135</sup> Although the court looked for support in federal case law<sup>136</sup> and the public policy favoring arbitration,<sup>137</sup> the foundation of the opinion is a reinterpretation of prior case law. Before *Doers*, it was settled law in California that the mere filing of an action in a judicial forum waived any rights to compel arbitration.<sup>138</sup> The *Doers* court, however, found that such cases spoke in terms of actually litigating the suit, rather than merely filing it, as the proper test for

128. 23 Cal. 3d at 183-84, 588 P.2d at 1262, 151 Cal. Rptr. at 838.

129. *Id.* at 184, 588 P.2d at 1262, 151 Cal. Rptr. at 838.

130. *Id.*

131. *Id.*

132. *Id.* Section 1281.2 requires a court to order two-disputing parties to arbitrate if it determines that a valid agreement to arbitrate exists between them. CAL. CIV. PROC. CODE § 1281.2 West Cum. Supp. 1979). Section 1290 provides that an order to arbitrate may be requested by either of one of the parties. *Id.* § 1290 (West 1972).

133. 23 Cal. 3d at 184-85, 185 n.1, 588 P.2d at 1262-63, 1263 n.1, 151 Cal. Rptr. at 838-39, 839 n.1.

134. *Id.* at 185, 588 P.2d at 1263, 151 Cal. Rptr. at 839.

135. *Id.* at 183, 588 P.2d at 1262, 151 Cal. Rptr. at 838.

136. "Under federal law, it is clear that the mere filing of a lawsuit does not waive contractual arbitration rights. The presence or absence of prejudice from the litigation of the dispute is the determinative issue under federal law." *Id.* at 188, 588 P.2d at 1265, 151 Cal. Rptr. at 841; see text accompanying notes 142-71 *infra*.

137. The court stated that

"strong public policy in California favor[s] peaceful resolution of employment disputes by means of arbitration." Because arbitration is a highly favored means of settling such disputes, the courts have been admonished to "closely scrutinize any allegation of waiver of such favored right" and to "indulge every intendment to give effect to such proceedings."

*Id.* at 189, 588 P.2d at 1266, 151 Cal. Rptr. at 842 (citations omitted); see text accompanying notes 41-42 *supra*.

138. *E.g.*, Local 659, I.A.T.S.E. v. Color Corp. of America, 47 Cal. 2d 189, 194, 302 P.2d 294, 297 (1956); Butchers Union Local 532 v. Farmers Mkts., 67 Cal. App. 3d 905, 913, 136 Cal. Rptr. 894, 899 (1977); Gunderson v. Superior Court, 46 Cal. App. 3d 138, 143, 120 Cal. Rptr. 35, 38 (1975); Fejer v. Paonessa, 104 Cal. App. 2d 190, 198, 231 P.2d 507, 511 (1951).

waiver.<sup>139</sup> The court thus concluded that the "filing suit" test of waiver is unsupported by a proper reading of precedent,<sup>140</sup> and that "the relevant early precedents . . . support only the proposition that it is the judicial *litigation* of the merits of arbitrable issues which waives a party's right to arbitration."<sup>141</sup>

### 3. *The Federal "Prejudice" Test*

Federal law differs significantly from both California tests. It has been widely held in the federal courts that waiver "may not rest mechanically on some act such as the filing of a complaint or answer but must find a basis in prejudice to the objecting party."<sup>142</sup> The prejudice standard originated with language from *The Belize*:<sup>143</sup>

When a party who has agreed to arbitrate any controversy that may arise prefers to take a controversy to court in the ordinary way, there comes a time in the course of the litigation when it would be unfair to permit one side to resort to arbitration over the protest of the other.<sup>144</sup>

Examples of prejudice include being forced to bear the expenses of a lengthy trial,<sup>145</sup> loss of evidence due to the delay in seeking arbitration,<sup>146</sup> taking advantage of judicial discovery procedures not available in arbitration,<sup>147</sup> and, by reason of delay, having taken any steps in litigation to one's detriment or expended any amounts of money.<sup>148</sup>

The federal mode of analysis is amply illustrated by *Carcich v. Rederi A/B Nordie*,<sup>149</sup> in which the court considered two consolidated appeals involving longshoremen who had been injured while loading freighters.<sup>150</sup> In one appeal, the plaintiff longshoreman filed suit

139. 23 Cal. 3d at 185-88, 588 P.2d at 1263-65, 151 Cal. Rptr. at 839-41.

140. *Id.* at 185-86, 188, 588 P.2d at 1263-64, 1265, 151 Cal. Rptr. at 839-40, 841.

141. *Id.* at 188, 588 P.2d at 1265, 151 Cal. Rptr. at 841 (emphasis in original).

142. *Carolina Throwing Co. v. S & E Novelty Corp.*, 442 F.2d 329, 331 (4th Cir. 1971) (quoting *Balson Yarn & Fabric Mach. Group, Inc. v. Saurer-Allma GmbH-Allgauer Maschinenbau*, 311 F. Supp. 68, 73 (D.S.C. 1970)); *accord*, *Shinto Shipping Co. v. Fibrex & Shipping Co.*, 572 F.2d 1328, 1330 (9th Cir. 1978); *ITT World Communications Inc. v. Communications Workers*, 422 F.2d 77, 82 (2d Cir. 1970); *Michael v. Steamship Thonasis*, 311 F. Supp. 170, 181 (N.D. Cal. 1970).

143. 25 F. Supp. 663 (S.D.N.Y. 1938).

144. *Id.* at 664.

145. *E.C. Ernst, Inc. v. Manhattan Constr. Co. of Texas*, 559 F.2d 268, 269 (5th Cir. 1977).

146. *N & D Fashions, Inc. v. DHJ Indus., Inc.* 548 F.2d 722, 728 (8th Cir. 1977).

147. *Carcich v. Rederi A/B Nordie*, 389 F.2d 692, 696 n.7 (2d Cir. 1968).

148. *Commercial Metals Co. v. International Union Marine Corp.*, 294 F. Supp. 570, 574 (S.D.N.Y. 1968). These factors would also seem to be relevant in a reasonableness test. Compare text accompanying notes 145-47 *supra* with factors enumerated in note 93 *supra*.

149. 389 F.2d 692 (2d Cir. 1968).

150. *Id.* at 693.

against Cunard Steamship Co., which had chartered the vessels.<sup>151</sup> Nearly six months later, the defendant answered, pleading the agreement to arbitrate contained in the charter agreement.<sup>152</sup> Plaintiff filed a note of issue one month later<sup>153</sup> without objection from the defendant.<sup>154</sup> Over a year later, a pretrial conference was held, and more than a year after that, the parties filed a pretrial order, wherein the defendant reiterated its desire to arbitrate the dispute.<sup>155</sup> The defendant also took the plaintiff's deposition.<sup>156</sup> Nearly three years later, shortly before the case was to be calendared for trial, the defendant moved for a stay of litigation pending arbitration.<sup>157</sup> The motion was denied.<sup>158</sup> In the other appeal, the plaintiff longshoreman filed suit against the shipowner, who impleaded Cunard as a third-party defendant.<sup>159</sup> Cunard again asserted an agreement to arbitrate.<sup>160</sup> Several months later, plaintiff filed a note of issue, without Cunard's objection,<sup>161</sup> and shortly thereafter Cunard produced evidence pursuant to plaintiff's discovery motion.<sup>162</sup> Pretrial conferences were held<sup>163</sup> and finally, when the case had reached the pretrial stage,<sup>164</sup> Cunard moved for a stay of litigation pending arbitration.<sup>165</sup> This motion was also denied.<sup>166</sup> The basis of both denials was that Cunard had waived its right to arbitrate by its participation in litigation, failure to object, and delay in formally asserting its right to arbitrate.<sup>167</sup>

On consolidated appeal, the court held that the trial court erred in both cases in finding waiver.<sup>168</sup> The rationale for the decision was the absence of any showing of prejudice.<sup>169</sup> Despite Cunard's extensive in-

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151. *Id.* at 694.

152. *Id.*

153. *Id.*

154. *Id.* at 695 n.5.

155. *Id.* at 694.

156. *Id.* at 695 n.5.

157. *Id.* at 694.

158. *Id.*

159. *Id.*

160. *Id.*

161. *Id.* at 695 n.5.

162. *Id.* at 694.

163. *Id.*

164. *Id.* at 695 n.5.

165. *Id.* at 694.

166. *Id.*

167. *Id.* at 693, 695 n.5.

168. *Id.* at 696.

169. *Id.*

volvement in litigation, and long delay in formally moving for arbitration, the court found that,

It is . . . the presence or absence of prejudice which is determinative of the issue. As an abstract exercise in logic it may appear that it is inconsistent for a party to participate in a lawsuit for breach of a contract, and later to ask the court to stay that litigation pending arbitration. Yet the law is clear that such participation, standing alone, does not constitute a waiver, . . . and mere delay in seeking a stay of the proceedings without some resultant prejudice to a party cannot carry the day.<sup>170</sup>

Reasoning that the plaintiff would not have proceeded differently had a stay been requested earlier, and that Cunard took no advantage of discovery proceedings that were unavailable in arbitration, the court held that prejudice to the plaintiff was absent, and, therefore, the motions to stay litigation pending arbitration should have been granted.<sup>171</sup>

## II. DEFICIENCIES OF CURRENT ARBITRATION LAW

All three standards of waiver—reasonableness, actual litigation, and prejudice—have serious flaws. Far from promoting the policy goals of arbitration, they tend to subvert those goals. Moreover, all the standards are in conflict with the general principles of contract waiver law.

### A. FRUSTRATION OF POLICY GOALS

Current law tends to frustrate the policy goals of arbitration by encouraging litigation and increasing the delay and expense of arbitration. These factors also result in substantive unfairness to plaintiffs in the arbitration process.

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170. *Id.* (citations omitted).

171. *Id.*

The federal prejudice standard appears to borrow heavily from the equitable principles of estoppel and laches by requiring not only inconsistent action, but also detrimental reliance on such action by the party asserting waiver. Compare text accompanying and preceding note 170 *supra* with D. DOBBS, HANDBOOK ON THE LAW OF REMEDIES § 2.3, at 41-44 (1973) (defining laches and estoppel). Nevertheless, the federal courts write in terms of waiver, which does not require detrimental reliance by the party asserting it. A misleading aspect of case law generally in the area of waiver of the right to compel arbitration is the failure of the courts to carefully delineate the limits of each of these doctrines—waiver, estoppel, and laches—in the context of contractual agreements to arbitrate. Articulation of these limits is beyond the scope of this Note and, in any case, would not be particularly helpful—regardless of its legal title, the operation of the waiver principle is the same. Cf. W. SHAKESPEARE, *Romeo and Juliet*, Act II, scene 2, in THE COMPLETE WORKS OF SHAKESPEARE 752 (1973) (“What’s in a name? that which we call a rose/By any other name would smell as sweet”). For a collection of cases dealing with forfeiture of arbitration rights because of laches, see Annot., 37 A.L.R.2d 1125 (1954).

### 1. *Increase in Litigation*

In direct contradiction to the established policy of arbitration to remove cases from the over-crowded court system,<sup>172</sup> the reasonableness and prejudice tests for waiver<sup>173</sup> actually *encourage* litigation. This is a result of the uncertainty that surrounds the tests: Whenever the law is indefinite to the extent that the ability to predict the outcome of cases is significantly impaired, litigation will increase.<sup>174</sup> Under the prejudice and reasonableness tests, two factors foster uncertainty and its correspondent increase in litigation: the case-by-case mode of analysis,<sup>175</sup> and judicial reluctance to find prejudice or unreasonableness when waiver is alleged.

Uncertainty inheres in any case-by-case method of legal decision-making.<sup>176</sup> Courts resort to this method in an area of law because generally applicable rules are thought to be nonexistent or too difficult to apply.<sup>177</sup> Thus, the resolution of individual cases turns on the presence or absence of numerous factors, the significance of each varying according to the mix of factors present in the particular case.<sup>178</sup> Because factual circumstances vary so widely, disputing parties often have little indication of which factors in the unique mix of factual circumstances the court will consider controlling. Hence, the parties are unable to predict the outcome of the case.<sup>179</sup> Both parties will appear to have significant and approximately equal chances of having their interpreta-

172. See text accompanying notes 6, 64-67 *supra*.

173. The actual litigation test is criticized separately. See text accompanying notes 197-206 *infra*.

174. R. POSNER, *supra* note 84, § 20.2, at 422, § 20.5, at 426-27; see Hoenig & Goetz, *A Rational Approach to "Crashworthy" Automobiles: The Need for Judicial Responsibility*, 6 SW. U.L. REV. 1, 1-2 (1974). Posner also argues that increased litigation actually decreases litigation in the long run by forcing the formulation of more definite common law rules. R. POSNER, *supra* note 84, § 20.2, at 422. This, however, assumes the production of rationally reconcilable precedents; such consistency is not found in the law of waiver of arbitration rights. Compare text accompanying notes 111-23 *supra* with text accompanying notes 124-41 *supra* and text accompanying notes 142-71 *supra*.

175. See text accompanying note 108 *supra*.

176. This uncertainty results because the holding of each case is substantially dependent on factual context, which varies widely even among cases involving similar subject matter. See text accompanying notes 177-79 *infra*.

177. Cf. *Rakas v. Illinois*, 99 S. Ct. 421, 432 (1978) ("Where the factual premises for a rule are so generally prevalent that little would be lost and much would be gained by abandoning case-by-case analysis, we have not hesitated to do so"); Rosenberg, *Judicial Discretion of the Trial Court, Viewed From Above*, 22 SYRACUSE L. REV. 635, 662 (1971) (many complex fact situations are better resolved by judicial discretion than general rules).

178. See, e.g., Note, *Equitable Enforcement of Negative Covenants in Employment Contracts*, 6 CASE W. RES. L. REV. 72, 72 (1954); note 93 and text accompanying notes 145-48 *supra*.

179. See, e.g., *id.* at 72-73; Hoenig & Goetz, *supra* note 174, at 1-2.

tion of the issue accepted by the court in litigation, and thus there will be little incentive for either party to settle out of court or to acquiesce in the other's interpretation of the issue.

Such a problem is evident in the law of waiver of arbitration rights. Under both the prejudice and the reasonableness standards, courts consider a multiplicity of factors in adjudicating the issue of waiver—*e.g.*, delay, assertion, in the answer of the arbitration agreement, filing suit, participation in discovery or other litigation proceedings, answering to the merits—few of which are themselves dispositive of the waiver issue.<sup>180</sup> Moreover, the adjudicative significance of each factor varies widely according to factual context; a combination of factors that dispose of the issue in one case may be deemed insignificant in another case.<sup>181</sup> The parameters of judicial decisionmaking are so uncertain that unless the factual implications of a waiver case are clear and almost indisputable, parties will find it in their interest to litigate the issue of waiver.

As previously mentioned, most modern courts look very favorably on arbitration.<sup>182</sup> As a result, in litigation involving arbitration agreements, courts usually strive to reach a result that will permit arbitration.<sup>183</sup> Unfortunately, this strict judicial adherence to a policy favoring arbitration has exacerbated uncertainty in the law of waiver. Factual circumstances that clearly indicate the appropriateness of a waiver finding are often disregarded or superficially distinguished so that the favored arbitration process may be implemented.<sup>184</sup> Consequently, a party who appears to have waived his arbitration rights may nevertheless be well advised to litigate the waiver issue in the hope that

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180. *E.g.*, *Shinto Shipping Co. v. Fibrex & Shipping Co.*, 572 F.2d 1328, 1330 (9th Cir. 1978) (inconsistent action insufficient); *Carcich v. Rederi A/B Nordie*, 389 F.2d 692, 696 (2d Cir. 1968) (inconsistent action insufficient); *Chatan Shipping Co. v. Fertex S.S. Corp.*, 352 F.2d 291, 293 (2d Cir. 1965) (filing complaint insufficient); *Reynolds v. Jamaica Mines, Ltd. v. La Societe Navale Caennaise*, 239 F.2d 689 (4th Cir. 1956) (asserting counterclaim insufficient); *Rootes Motors, Inc. v. S.S. Carina*, 1964 A.M.C. 2754 (S.D.N.Y. 1964) (filing answer without pleading arbitration insufficient).

181. *Compare* *Carolina Throwing Co. v. S & E Novelty Corp.*, 442 F.2d 329 (4th Cir. 1971) with *American Locomotive Co. v. Chemical Research Corp.*, 171 F.2d 115 (6th Cir. 1948).

182. *See* text accompanying notes 41-42 *supra*.

183. *See id.*

184. *See, e.g.*, *Hilti v. Oldach*, 392 F.2d 368, 372 & n.9 (1st Cir. 1968); *Pacific Inv. v. Townsend*, 58 Cal. App. 3d 1, 11-12, 129 Cal. Rptr. 489, 494 (1976); *Seidman & Seidman v. Wolfson*, 50 Cal. App. 3d 826, 836-37, 123 Cal. Rptr. at 879 (1975); *see* *Gavlik Constr. Co. v. H.F. Campbell Co.*, 526 F.2d 777, 783 (3d Cir. 1975) ("recent cases have only found waiver where the demand for arbitration came *long* after the suit commenced and when both parties had engaged in *extensive* discovery") (emphasis added).



the court will ignore facts militating for waiver in deference to arbitration.<sup>185</sup>

## 2. Increase in the Delay and Expense of Arbitration

Litigation of the waiver issue substantially increases the costs of arbitration. Whenever steps in the arbitration process must be litigated before arbitration can proceed, the disadvantages of litigation are injected into arbitration,<sup>186</sup> possibly to the extent that eventual resolution under arbitration takes longer than normal litigation would have.<sup>187</sup> Because the very purpose of submitting matters to arbitration is to avoid litigation and its disadvantages,<sup>188</sup> there is a strong public policy in favor of resolving arbitrations speedily and with a minimum of judicial interference.<sup>189</sup> Arbitration law must discourage litigation of intermediate steps in the arbitration process if it is to function as the streamlined and efficient dispute-resolution mechanism it is meant to be.<sup>190</sup>

Another problem, apart from increased litigation, that increases the delay and expense of arbitration is that all three tests for waiver—reasonableness, actual litigation, and prejudice—permit the defendant to tactically delay final resolution of the dispute.<sup>191</sup> Under the reasona-

185. Cf. Hoenig & Goetz, *supra* note 174, at 3 n.8 (judicial reluctance to determine liability issues results in the litigation of virtually any kind of personal injury claim).

186. Comment, *supra* note 24, at 949. Such litigation is likely where the costs of delay to the litigating party are relatively low. *Id.* at 946 n.65.

187. See, e.g., *Weight Watchers of Quebec, Ltd. v. Weight Watchers Int'l, Inc.*, 398 F. Supp. 1057, 1061 (E.D.N.Y. 1975).

188. See text accompanying notes 64-92 *supra*.

189. *Lesser Towers, Inc. v. Roscoe-Ajax Constr. Co.*, 271 Cal. App. 2d 675, 702, 77 Cal. Rptr. 100, 117 (1969); *McRae v. Superior Court*, 221 Cal. App. 166, 170, 34 Cal. Rptr. 346, 349 (1963); Comment, *supra* note 24, at 949; see *World Brilliance Corp. v. Bethlehem Steel Co.*, 342 F.2d 362, 365 (2d Cir. 1965); cf. *Laufman v. Hall-Mack Co.*, 215 Cal. App. 2d 87, 88, 29 Cal. Rptr. 829, 831 (1963) (quoting *Jardine-Matheson Co. v. Pacific Orient Co.*, 100 Cal. App. 572, 576, 280 P. 697, 698 (1929)) (“[i]f at the very threshold of the proceeding the defaulting party could appeal and thereby indefinitely delay the matter of arbitration, the object of the law and the purpose of the written [arbitration] agreement of the parties would be entirely defeated”).

190. *East San Bernadino County Water Dist. v. City of San Bernardino*, 33 Cal. App. 3d 942, 951 n.3, 109 Cal. Rptr. 510, 516 n.3 (1973); *Henderson*, *supra* note 3, at 972-73; see text accompanying notes 41-48, 58-72 *supra*.

191. The tests also permit manipulation for delay by the plaintiff but this is not a significant problem because delay will rarely be in the plaintiff's interest. See text accompanying notes 58-69 *supra*. Nevertheless, it is not uncommon for a plaintiff to act against his immediate interest in an expeditious resolution of the dispute in an attempt to mislead the defendant into waiving his right to compel arbitration. See, e.g., *Shinto Shipping Co. v. Fibrex & Shipping Co.*, 425 F. Supp. 1088, 1092 (N.D. Cal. 1976), *aff'd*, 572 F.2d 328 (9th Cir. 1978); *Doers v. Golden Gate Bridge, Highway and Transp. Dist.*, 23 Cal. 3d 180, 184-85, 185 n.1, 588 P.2d 1261, 1262-63, 1263 n.1, 151 Cal. Rptr. 837, 838-39, 839 n.1 (1979).

bleness and prejudice tests, whereas a plaintiff party to an agreement to arbitrate waives his arbitration rights upon his filing an action in a judicial forum,<sup>192</sup> the defendant to such action is not legally required to choose his preferred forum until the pretrial litigation process is well underway.<sup>193</sup> The plaintiff must push his action forward in the courts if he is to obtain redress, yet he does so facing the probability that the defendant will eventually move for arbitration.<sup>194</sup> To the extent that trial preparation and preparation for arbitration do not duplicate each other,<sup>195</sup> time and money are wasted by both sides in preparing for litigation that never occurs. Society also loses in that scarce legal and judicial resources are expended without contributing to the resolution of a dispute. Rather than permit such a waste of time and money, it is a function of arbitration to provide a speedy and inexpensive alternative to litigation.<sup>196</sup>

The actual litigation standard of *Doers* is particularly susceptible to tactical abuse. Under that standard, the right to compel arbitration of a case is not waived until the dispute is "actually litigated" in another forum.<sup>197</sup> This presumably means that, regardless of the implications that a party's conduct has with respect to his intention to arbitrate, such a party can retain his arbitration rights until the case goes to

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192. *Charles J. Rounds Co. v. Joint Council of Teamsters No. 42*, 4 Cal. 3d 888, 899, 484 P.2d 1397, 1404, 95 Cal. Rptr. 53, 60-63 (1971); *Maddy v. Castle*, 58 Cal. App. 3d 716, 721-22, 130 Cal. Rptr. 160, 162-63 (1976), *disapproved*, *Doers v. Golden Gate Bridge, Highway and Transp. Dist.*, 23 Cal. 3d 180, 188, 588 P.2d 1261, 1265, 151 Cal. Rptr. 837, 841 (1979); *Gunderson v. Superior Court*, 46 Cal. App. 3d 138, 144, 120 Cal. Rptr. 35, 38 (1975) (dictum), *disapproved*, *Doers v. Golden Gate Bridge, Highway and Transp. Dist.*, 23 Cal. 3d 180, 188, 588 P.2d 1261, 1265, 151 Cal. Rptr. 837, 841 (1979). *Contra* *Mitchum, Jones & Templeton, Inc. v. Chronis*, 72 Cal. App. 3d 596, 602, 140 Cal. Rptr. 160, 164 (1977); text accompanying notes 124-41 *supra*.

193. This is a result of the courts excessively favoring arbitration and refusing to find waiver from delay alone. See notes 176, 180-81 *supra*.

194. When the plaintiff wishes to litigate, arbitration will generally be in the best interests of the defendant. *E.g.*, *Main v. Merrill Lynch, Pierce, Fenner & Smith, Inc.*, 67 Cal. App. 3d 19, 31, 136 Cal. Rptr. 376, 385 (1977); see note 202 *infra*. Moreover, the defendant will often have pled the arbitration agreement as a defense in his answer, even though he has not moved to compel arbitration.

195. Preparation for trial is often very different from preparation for arbitration. *American Locomotive Co. v. Chemical Research Corp.*, 171 F.2d 115, 121 (6th Cir. 1948), *cert. denied*, 336 U.S. 909 (1949). Trial preparation is likely to be more extensive and technical (and hence expensive) than preparation for arbitration because of the rigid procedural formality of a trial. *Id.*; *Milectic v. Holm & Wonsild*, 294 F. Supp. 772, 776 (S.D.N.Y. 1968); text accompanying notes 47, 51-53 *supra*; see, *e.g.*, *Graig Shipping Co. v. Midland Overseas Shipping Corp.*, 259 F. Supp. 929, 931 (S.D.N.Y. 1966).

196. *Utah Constr. Co. v. Western Pac. Ry.*, 174 Cal. 156, 162 P. 631, 632 (1916); *Pneucrete Corp. v. United States Fidelity & Guar. Co.*, 7 Cal. App. 2d 733, 740, 46 P.2d 1000, 1003 (1935); see text accompanying notes 41-48, 58-69 *supra*.

197. See text accompanying notes 124-41 *supra*.

*trial*.<sup>198</sup> Under this standard, then, most of the pretrial judicial process will be a deadweight loss of resources whenever arbitration is invoked.<sup>199</sup> Moreover, the plaintiff in such a case is unfairly burdened. Although a plaintiff's needless expenditure of time and money for litigation that never takes place is balanced somewhat by the fact that the defendant also wastes his resources, it remains that delay imposes greater costs and risks on plaintiffs than on defendants.<sup>200</sup> Any plaintiff who endures considerable delay in attempting to obtain redress runs the risk that his case will be significantly, even fatally, weakened in the process.<sup>201</sup> The plaintiff chooses litigation expecting that the risks of delay will be outweighed by what he perceives as advantages of litigation over arbitration.<sup>202</sup> What actually happens is that the plaintiff in-

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198. The *Doers* court did not explicitly undertake to define "actually litigated." Four of the cases from which the court sought to elucidate the actual litigation standard, however, involved litigation to a judgment on the merits. See *Doers v. Golden Gate Bridge, Highway and Transp. Dist.*, 23 Cal. 3d at 187-88, 588 P.2d at 1263-64, 151 Cal. Rptr. at 839-40 (discussing *Local 659, I.A.T.S.E. v. Color Corp. of America*, 47 Cal. 2d 189, 302 P.2d 294 (1956); *Case v. Kadota Fig Ass'n*, 35 Cal. 2d 596, 220 P.2d 912 (1950); *Jones v. Pollock*, 34 Cal. 2d 863, 215 P.2d 733 (1950); *Landreth v. South Coast Rock Co.*, 136 Cal. App. 457, 29 P.2d 225 (1934)). It is, therefore, a reasonable inference that "actually litigated" means having gone to trial. Under such a standard, even if a party actively participates in pretrial actions such as depositions and interrogatories, or has joined issue on the merits, such party may nevertheless move to compel arbitration so long as the case has not yet proceeded to trial.

199. Although some duplication occurs in preparing for arbitration as opposed to preparing for trial, the complex nature of litigation in the judicial forum demands significant preparations that are not called for in an arbitration. See notes 71-72, 195 and accompanying text *supra*.

The *Doers* court is open to a further criticism, beyond the actual effects of its waiver standard—that in formulating the actual litigation test for waiver it committed the same error for which it criticized other courts. The majority opinion in *Doers* roundly criticizes earlier cases as lacking support for their holding that "a party waives his contractual arbitration right by merely filing a lawsuit." 23 Cal. 3d at 185-86, 588 P.2d at 1263-64, 151 Cal. Rptr. at 839-40. It then reinterprets earlier cases and reads them as articulating the actual litigation test of waiver. *Id.* at 188, 588 P.2d at 1265, 157 Cal. Rptr. at 841. The cases discussed, however, provide support only for the far narrower proposition that mere filing of a lawsuit in a judicial forum does not constitute waiver of the right to compel arbitration, which, indeed, is the true holding of *Doers*. Compare *id.* at 183, 588 P.2d at 1262, 151 Cal. Rptr. at 838 with *id.* at 186-87, 588 P.2d at 1264-65, 151 Cal. Rptr. at 840-41.

200. See text accompanying notes 84-89 *supra*.

201. *Id.*

202. Cf. R. POSNER, *supra* note 84, § 4.12, at 96 ("the reason behind a breach of contract . . . is less often the bad faith of the promisor than the occurrence of some event . . . which makes performance uneconomical"). Because the lay adjudicator is much more likely to be swayed by evidence of a plaintiff's injury (both in determining liability and in calculating damages) than is the professional adjudicator, see *Damaska*, *supra* note 71, at 538-39, it is sometimes contended that favorable verdicts are more common and damage awards larger at a jury trial than at arbitration; see Note, *supra* note 66, at 410; e.g., *Wheeler v. St. Joseph Hosp.*, 63 Cal. App. 3d 345, 361, 133 Cal. Rptr. 775, 786 (1976). But see *Henderson*, *supra* note 3, at 994 n.195. This is particularly the case in personal injury litigation. See Note, *supra* note 66, at 410 nn.56 & 57. In other cases, the law may be thought to be on the plaintiff's side, making it safer to have the case adjudicated in

curs those risks, often weakening his case by waiting for trial, and ends up in arbitration anyway.<sup>203</sup> The plaintiff, therefore, bears much of the cost of both arbitration and litigation while enjoying the full advantages of neither.<sup>204</sup>

It can be argued that the plaintiff brings the consequences of delay on himself by choosing to litigate in contradiction to his contractual agreement to arbitrate. This argument, however, is fallacious. While the defendant is certainly entitled to specific performance of the arbitration agreement if he desires to arbitrate,<sup>205</sup> it hardly follows that he is also entitled to the significant advantage that delay may grant him when it weakens the plaintiff's case.<sup>206</sup>

## B. INCONSISTENCY WITH THE CONCEPT OF CONTRACTUAL WAIVER

Waiver is the *voluntary* and *intentional* relinquishment of a *known*

a judicial forum strictly bound by legal doctrine and precedent, rather than in an arbitration forum that is not. *See, e.g.,* Charitable Promotions v. Anka, 58 App. Div. 2d 165, 168-69, 396 N.Y.S.2d 228, 231 (1977).

203. *See* text accompanying notes 191-94 *supra*.

204. A famous maxim of equity is "he who comes into equity must come with clean hands," 31 B.U.L. REV. 434, 435 (1951) (quoting *Bently v. Tibbals*, 223 F. 251 (2d Cir. 1915)), or, less obliquely, "he who seeks equity must do equity," *Faddeley, The Clean-Hands Doctrine in Oregon*, 37 ORE. L. REV. 160, 160-61 (1958). Although never applied in the context of waiver of the right to compel arbitration, the maxim is nevertheless relevant because a motion to compel arbitration is in origin and effect an equitable petition for specific performance of a contractual agreement to arbitrate. *See Trubowitch v. Riverbank Canning Co.*, 30 Cal. 2d 335, 347, 182 P.2d 182, 190 (1947).

The party requesting equitable relief appeals to the conscience of the court, which has broad discretionary powers to render a substantively just decision without regard to strict legal forms or doctrines. 31 B.U.L. REV. at 435. Because the purpose of equity is to enable a court to grant a just remedy not available at law, equity courts do not act to grant relief when to do so would lead to an unjust result. Note, "*He Who Comes into Equity Must Come With Clean Hands*," 32 B.U.L. REV. 66, 67 (1952). It developed, therefore, that as a condition for receiving equitable relief, he who appeals to the conscience of the court must not himself have offended that conscience by any "inequitable" conduct. *Faddeley, supra* at 161. Such conduct includes not only clearly illegal or immoral actions, but also sharp business dealings, omissions or misrepresentations not amounting to fraud, violations of good faith, or taking undue advantage of the situation out of which the suit arose. Newman, *The Hidden Equity: An Analysis of the Moral Content of the Principles of Equity*, 19 HASTINGS L.J. 147, 167-68 & n.103 (1967).

The application of the "clean hands" maxim to the waiver of arbitration situation is clear. When a defendant has delayed asking for a motion to compel arbitration, he gains an unfair advantage by reason of his own delay. *See* text accompanying notes 83-89 *supra*. Thus, when the defendant finally does move for specific performance of the agreement to arbitrate, he has not come into court with "clean hands," and the court should therefore deny his motion to compel arbitration.

205. *See* text accompanying notes 101-03 *supra*.

206. *See* text accompanying notes 84-89 *supra*.

right.<sup>207</sup> "Voluntary," "intentional," and "known" are words that imply a totally subjective inquiry into the putative waiving party's state of mind, *i.e.*, regardless of the reasonable inferences that may have been drawn from his actions, did the party actually possess the state of mind necessary for waiver to have occurred? Obviously, however, an absolutely subjective test has serious problems; it is hard to prove (and easy to fabricate) a person's thoughts.<sup>208</sup> Waiver, therefore, is determined by an objective evaluation of the waiving party's state of mind.<sup>209</sup> Specifically, waiver occurs when a party's acts, or failures to act, enable one to reasonably conclude that such party has willingly and knowingly abandoned a right.<sup>210</sup> For example, when a party knowingly holds contractual rights whose purpose is to protect certain contractual interests, such party may reasonably be expected to act consistently with such interests by exercising his protective rights when his interests are infringed; failure to do so implies that the party has acquiesced in the infringement and chosen not to invoke the contractual protections.<sup>211</sup>

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207. *American Locomotive Co. v. Chemical Research Corp.*, 171 F.2d 115, 121 (6th Cir. 1948); *Lehigh Valley R.R. v. Insurance Co.*, 172 F. 364, 365 (2d Cir. 1909). Often, however, such relinquishment is an ineffective waiver unless supported by consideration or its equivalent, detrimental reliance. J. CALAMARI & J. PERILLO, *THE LAW OF CONTRACTS* § 11-34, at 448 (2d ed. 1977). In the context of a contractual agreement to arbitrate, consideration in support of a waiver of the right to compel arbitration is usually not lacking no matter which party relinquishes the right. A plaintiff is disadvantaged by a defendant's delay in enforcing the right to compel arbitration because he must spend time and other resources prosecuting a lawsuit that he believes is no longer subject to a stay pending arbitration because of the defendant's failure to enforce arbitration. A defendant is disadvantaged because he spends time and resources defending a lawsuit that he believes is no longer subject to a stay because of his acquiescence in the plaintiff's choice of a judicial forum.

208. *Cf.* note 239 and accompanying text *infra* (the law of contracts shifted to objective theories of liability because of the difficulty of proving a party's actual state of mind).

209. *Auxiliary Power Corp. v. Eckhardt & Co.*, 266 F. Supp. 1020, 1022 (S.D.N.Y. 1966).

210. The law is rich with examples of this principle. Acceptance and retention of an installment delivery of contractually substandard goods constitute waiver of the right to reject subsequent deliveries of goods of similar quality, notwithstanding an explicit contractual right in the buyer to reject goods of inferior quality. J. CALAMARI & J. PERILLO, *supra* note 207, § 11-37, at 449-51. A criminal defendant's silence in the face of prosecutorial infringement of the defendant's waivable rights amounts to waiver of such rights. *E.g.*, *In re Etherington*, 35 Cal. 2d 863, 867, 221 P.2d 942, 945 (1950) (right to notice of hearing in juvenile proceeding); *People v. Robinson*, 266 Cal. App. 2d 261, 264-65, 72 Cal. Rptr. 33, 35 (1968) (right to speedy trial). Under the Federal Rules of Evidence, failure to object to the introduction of evidence prevents the attacking of such introduction on appeal. *E.g.*, *Sandez v. United States*, 239 F.2d 239, 242 (9th Cir. 1956) (fruits of an illegal search and seizure). Indeed, one of the best known maxims of the old common law is "silence shows consent." *Hatch v. Benton*, 6 Barb. 28, 35 (App. Div. N.Y. 1849) (emphasis in original).

211. *E.g.*, *Yench v. Stockmar*, 483 F.2d 820, 823 (10th Cir. 1973) (" "Acquiescence" is where a person knows or ought to know that he is entitled to enforce his right . . . , and neglects to do so

The election of performance doctrine of contract law provides a good illustration of this principle. Under this doctrine, a party's violation of a material contractual provision gives rise to an election in the aggrieved party to either cease performance or continue it.<sup>212</sup> In the usual contractual setting, such as the sale and delivery of goods, ceasing performance, *e.g.*, not accepting contractually substandard goods, preserves the validity and effectiveness of the violated provision, whereas continued performance, *e.g.*, accepting and paying for the goods, removes the violated provision by waiver.<sup>213</sup> In other words, failure to object to the substandard goods implies an election—that of waiving the violated provision and continuing performance<sup>214</sup>—as much as does accepting the goods. Election of performance doctrine, therefore, operates to prevent a party from preserving two inconsistent remedies:

The law simply does not permit a party . . . to exercise two alternative or inconsistent rights or remedies. Even though he expressly states that he intends to reserve a right, he will, nevertheless, lose it if he takes an inconsistent course. Thus, one who continues to receive benefits under a contract and assert rights under it after knowledge of a breach which would justify him in refusing to go on, cannot subsequently set up this breach as an excuse for his own non-performance even though he asserted from the outset, and consistently, that he proposed to do so . . . .<sup>215</sup>

This analysis may be profitably applied to waiver of a contractual right to compel arbitration. Under an agreement to arbitrate, the parties are contractually bound to arbitrate rather than litigate any dispute arising out of the contract. This duty to arbitrate is thus violated by either party upon resort to litigation. Such violation of the agreement

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for such a length of time as would imply that he intended to waive or abandon his right' ") (quoting *Humboldt Livestock Auction, Inc. v. B & H Cattle Co.*, 261 Iowa 419, 432, 155 N.W.2d 478, 487 (1967)); *Radiator Specialty Co. v. Cannon Mills*, 97 F.2d 318, 319 (4th Cir. 1938) ("By its course, the defendant waived its right under the arbitration clause . . . . [D]efendant under the provisions of the Arbitration Law could have applied to the court to enforce arbitration and to stay all proceedings in the action. Instead of doing so, the defendant answered' ") (quoting *Zimmerman v. Cohen*, 236 N.Y. 15, 18-19, 139 N.E. 764, 765 (1923)); *Mayron's Bake Shops, Inc. v. Arrow Stores, Inc.*, 149 Conn. 149, 154, 176 A.2d 574, 576 (1961); *Board of Educ. v. Delle Cese*, 65 Misc. 2d 473, 479, 318 N.Y.S.2d 46, 52 (1971) ("A defendant proceeding with and acquiescing in the procedures of the action at law is by that fact deemed to have elected it and waives his right to reliance on the arbitration agreement"); see *Dugdale & Yates, Variation, Waiver and Estoppel—A Re-Appraisal*, 39 MOD. L. REV. 680, 689-91 (1976).

212. J. CALAMARI & J. PERILLO, *supra* note 207, § 11-37, at 449; 3A A. CORBIN, *supra* note 8, § 755, at 497; S. WILLISTON & G. THOMPSON, SELECTIONS FROM WILLISTON'S TREATISE ON THE LAW OF CONTRACTS § 683, at 566 (rev. ed. 1938).

213. J. CALAMARI & J. PERILLO, *supra* note 207, § 11-37, at 450.

214. S. WILLISTON & G. THOMPSON, *supra* note 212, § 684, at 568.

215. *Id.*

to arbitrate gives rise to an election in the nonviolating party: He may treat the arbitration agreement as at an end and acquiesce in the other party's choice of a judicial forum, or he may reaffirm the agreement by insisting on arbitration.<sup>216</sup>

The problem with current law is that it permits parties to retain the right to arbitrate and avoid waiver upon mere repetition of the agreement to arbitrate, as when a defendant pleads the agreement in his answer without moving to enforce it; such parties are not required to make an election of remedies nor will the law imply one. A party can, therefore, preserve two inconsistent remedies simultaneously—the right to a judicial hearing on the merits and the right to compel arbitration—in direct contradiction to what would be the result under the election of performance doctrine in contract law.

There is nothing about the context in which an agreement to arbitrate is formed that justifies this anomalous result. The very existence of a clause compelling arbitration is evidence that, at the time they entered into the contract, the parties felt that their interests would be better served by arbitrating, rather than litigating, contractual disputes. When a dispute does arise, therefore, and one or both of the parties still desire arbitration,<sup>217</sup> one would reasonably expect that one or both parties would exercise their respective rights to compel arbitration to protect those interests that initially prompted inclusion of an arbitration

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216. See text accompanying notes 101-03 *supra*. Courts have refused to allow a party to an arbitral dispute to preserve both the legal and the arbitration remedy. See, e.g., *Second Congressional Soc'y v. Hugh Stubbins & Assoc.*, 108 N.H. 446, 449, 237 A.2d 673, 675 (1968) ("any attempt to go to the merits and to retain still the right to arbitrate is clearly impermissible") (quoting *Graig Shipping Co. v. Midland Overseas Shipping Corp.*, 259 F. Supp. 929, 931 (S.D.N.Y. 1966)).

217. A party to an arbitration agreement may nevertheless *not* desire arbitration when a contractual dispute arises if conditions have changed substantially between the time of contracting and the arising of the dispute. For example, at the time of contracting neither party can predict which of them will be in the dominant legal position when a future dispute arises. Therefore, the inclusion of an agreement to arbitrate in their contract may have been motivated by the desire of both parties to mitigate the adverse consequences of being in the weaker legal position in a future dispute by providing for a dispute resolution mechanism, such as arbitration, that is not bound by legal precedent. See text accompanying note 76 *supra*; cf. J. RAWLS, *A THEORY OF JUSTICE* 11-17 (1971) (a person determining and implementing rules of justice for a new society, who does not know what his own status will be in such a society, will choose and implement fair and egalitarian rules in order to protect against the possibility that he could end up in the most vulnerable and exploitable status in the new society). When an actual dispute does arise, however, the parties are able to assess which of them is in the better legal position, if a better position exists in the dispute. Indeed, *both* of them may think themselves in the dominant position. Thus one or both may not wish to arbitrate, so as to take advantage of legal precedent. Even when conditions have changed, therefore, the failure of a party to move to compel arbitration at the outset of a dispute implies an intention to waive arbitration rights and rely on litigation.

clause in the contract. A plaintiff's resort to litigation rather than arbitration is clearly inconsistent with the exercise of, or the intent to exercise, arbitration rights. Likewise, a defendant's failure to immediately move to compel arbitration, after the adverse contractual party has initiated litigation, is equally inconsistent with reliance on arbitration rights. In both cases, one can reasonably infer that the parties have voluntarily, intentionally, and knowingly waived their arbitration rights.<sup>218</sup>

Nevertheless, neither the California nor the federal courts find waiver of the right to compel arbitration on the basis of inaction alone,<sup>219</sup> and the federal courts are generally uninterested in the extent that a party is involved, or has avoided involvement, in litigation.<sup>220</sup> Under the actual litigation standard, neither a party's involvement in litigation nor his inaction or delay is material so long as the judicial action has not yet gone to trial, *i.e.*, has not yet been "actually litigated."<sup>221</sup>

### III. TWO PROPOSED STANDARDS FOR WAIVER OF THE RIGHT TO COMPEL ARBITRATION

The substantial problems resulting from current arbitration waiver law can be avoided by preventing, from the outset of a dispute, any procedural equivocation by the parties as to their intention to arbitrate or litigate. If arbitration is to be a speedier, more adaptable, and less expensive alternative to litigation, and still render justice for the parties, delaying tactics and misleading conduct must be eliminated. Once a plaintiff decides to litigate a grievance, or a defendant appears in a lawsuit, neither should be permitted to preserve adjudicative rights in both arbitration and litigation, while testing the procedural waters to see which forum is preferable.<sup>222</sup> When there is disagreement over the best forum, the party desiring arbitration should invoke the right to compel arbitration, or else be deemed to have waived it.<sup>223</sup> Any standard that permits postponement of the choice beyond the outset of a dispute creates the problems of delay, expense, and inconsistency that were dis-

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218. See text accompanying notes 93-122 *supra*.

219. See text accompanying note 180 *supra*.

220. See text accompanying notes 142-49 *supra*.

221. See text accompanying notes 124-41; note 198 *supra*.

222. Cf. *DeSapio v. Kohlmeyer*, 35 N.Y.2d 402, 406, 321 N.E. 2d 770, 773, 362 N.Y.S.2d 843, 847 (1974) ("The courtroom may not be used as a convenient vestibule to the arbitration hall so as to allow a party to create his own unique structure combining litigation and arbitration").

223. See text accompanying notes 101-03 *supra*.



cussed previously.<sup>224</sup> In general, it is when a party files suit in a judicial forum that an agreement to arbitrate is put in question, and other parties to the agreement are faced with the choice of acquiescing in the selection of a judicial forum or acting to compel arbitration of the dispute.<sup>225</sup> Therefore, the first procedural moves that are relevant to the arbitration agreement are the plaintiff's complaint, and the defendant's response. This Note proposes that a judge should deem the right to compel arbitration to have been waived: (1) for a plaintiff party, when he files suit on an arbitrable issue in a judicial forum, rather than seeking redress through arbitration;<sup>226</sup> (2) for a defendant party, when he fails to file a motion to compel arbitration concurrent with his initial appearance in court in response to a plaintiff's suit.<sup>227</sup>

The rationale of the proposal is simple: Waiver of the right to compel arbitration is implied by any action inconsistent with an intention to arbitrate.<sup>228</sup> Therefore, when an arbitrable issue is put at issue in litigation, and a party entitled to compel arbitration fails to exercise his right, the court should construe his inaction as waiver because of its

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224. See text accompanying notes 172-221 *supra*.

225. See text accompanying note 100 *supra*.

226. This waiver standard has been used in a number of California cases. See, e.g., *Maddy v. Castle*, 58 Cal. App. 3d 716, 130 Cal. Rptr. 160 (1976); *Gunderson v. Superior Court*, 46 Cal. App. 3d 138, 120 Cal. Rptr. 35 (1975). These cases, however, were disapproved by *Doers v. Golden Gate Bridge, Highway and Transp. Dist.*, 23 Cal. 3d 180, 188, 588 P.2d 1261, 1265, 151 Cal. Rptr. 837, 841 (1979). For a discussion of *Doers*, see text accompanying notes 124-41 *supra*.

227. See generally FED. R. CIV. P. 8(c); CAL. CIV. PROC. CODE § 430.80 (West 1973). A defendant's first appearance in a judicial proceeding will usually be the filing of his answer, although defendants often demur or make other motions before answering a complaint. Insofar as concerns this Note's proposal, however, there is no basis for distinguishing demurrers and preliminary motions from an answer. Conceptually, both represent the defendant's resort to a judicial body, rather than arbitration, for resolution of some issue in the dispute, even if only a procedural issue such as venue or the sufficiency of the plaintiff's prima facie case is raised. From a policy standpoint, as much delay and expense can result from a succession of demurrers and other pre-answer motions as from postanswer delaying tactics. Cf. Comment, 33 CORNELL L.Q. 285, 287-88 (1947) (for arbitration policy reasons, a motion to dismiss should be treated the same as an answer and joining on the merits).

Although the standard for waiver of the right to compel arbitration is amenable to codification, in most jurisdictions the waiver standard has remained a judge-made rule. See, e.g., text accompanying notes 109-23 (the reasonableness standard), 124-41 (the actual litigation standard), 142-71 (the prejudice standard).

It should be noted further that parties to an arbitration agreement can avoid the need to resort to the courts for adjudication of a waiver issue by including in their agreement a standard for determining when the agreement has been waived.

228. See *Gunderson v. Superior Court*, 46 Cal. App. 3d 138, 144, 120 Cal. Rptr. 35, 38 (1975), disapproved, *Doers v. Golden Gate Bridge, Highway and Transp. Dist.*, 23 Cal. 3d 180, 188, 588 P.2d 1261, 1265, 151 Cal. Rptr. 837, 841 (1979); text accompanying note 111 *supra*. But see note 226 *supra*.

inconsistency with an intention to arbitrate.<sup>229</sup>

#### A. THE PLAINTIFF STANDARD: FILING SUIT

Under this Note's proposal, a plaintiff who files suit over an arbitrable contractual issue is deemed to have waived his arbitration rights under the agreement. It may be argued that this proposal is unnecessarily harsh in that it forces a plaintiff to choose his dispute resolution forum before he may be ready to do so. Attorneys often file suit in a dispute as a matter of course to preserve litigation rights that might otherwise expire because of a statute of limitations. Such complaints are often not immediately served, but are held in reserve in the event that settlement or arbitration efforts fail. This argument suggests that a later procedural event, such as service of the complaint or defendant's joining issue on the merits in his answer, would be a more appropriate test for waiver.

Such later tests would, however, entail significant problems. Because a policy goal of arbitration is the reduction of litigation,<sup>230</sup> it is hardly a persuasive argument against the proposal that it would prevent the routine filing of complaints to toll a statute of limitations and preserve litigation rights.<sup>231</sup> It is not clear why a plaintiff should be able to preserve both litigation and arbitration rights during the period before service of defendant's answer; filing suit certainly evidences an intention not to rely for redress on the agreement to arbitrate. Even if a plaintiff does intend to rely on arbitration, filing such a complaint amounts to an attempt to preserve two inconsistent remedies.<sup>232</sup> When a prospective plaintiff is aware of his arbitration rights, he should be required to choose between arbitration and litigation as the forum for

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229. Under the proposal then, mere pleading of an arbitration agreement in an answer will not save the right to compel arbitration; such right would have to be affirmatively asserted by motion to be saved. See text accompanying notes 101-03 *supra*.

230. See text accompanying notes 6, 64, 91 *supra*.

231. The primary purpose of statutes of limitations is to prevent the prosecution of actions based on old and unreliable evidence. See *American Pipe & Constr. Co. v. Utah*, 414 U.S. 538, 554 (1974). Plaintiff's filing of a complaint that is not immediately served, to preserve litigation rights, is really a subtle method of extending the statutory period while the plaintiff explores alternative settlement or arbitration options. The diligent and timely plaintiff has ample time to weigh litigation advantages against those of settlement and arbitration. That this Note's proposal penalizes dilatory plaintiffs, who take action at the end of the statutory period, is more a criticism of statutes of limitations than it is of the proposal to make filing suit a test for waiver of the right to compel arbitration.

232. Cf. S. WILLISTON & G. THOMPSON, *supra* note 212, § 684, at 568 (contract law does not permit the election of two inconsistent remedies); see text accompanying notes 212-18 *supra*.

resolving his grievances.<sup>233</sup>

#### B. THE DEFENDANT STANDARD: FAILING TO MOVE TO COMPEL ARBITRATION IN ONE'S INITIAL COURT APPEARANCE

Under this Note's proposal, a party to an arbitration agreement who is named as a defendant in an action brought in violation of the agreement must move to compel arbitration at the same time that he responds to the action by appearing in court, or else be held to have waived his arbitration rights. An alternative would be to require the motion to be made within a specified number of days following the defendant's being served with the plaintiff's lawsuit. The problem with such a standard is that to be effective, such a period would have to be relatively short—less than a month<sup>234</sup>—and in the early stages of a lawsuit, procedural events are far more significant than mere passage of time.<sup>235</sup>

The proposed defendant standard parallels that for the plaintiff. If the defendant wishes to rely on the arbitration agreement, he must do so without delay; there is generally no reason to give a defendant more time to make a motion to compel arbitration than he is given to respond to a plaintiff's complaint.<sup>236</sup> A defendant has the answer period in which to weigh, along with other alternatives, the advantages of arbitration as opposed to litigation. Permitting the defendant any significant period of delay is likely to disadvantage the plaintiff regardless of which forum is ultimately chosen.<sup>237</sup>

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233. The assertion here is that a plaintiff who files suit may later wish to arbitrate, and that this Note's proposal interferes with the option to arbitrate at a later date. The proposal, however, takes from the plaintiff neither his arbitration rights nor his opportunity to attempt to shift the dispute to a judicial forum; it merely requires him to do one or the other at the outset of the dispute.

234. If any more than a month is allotted, the standard would begin to codify the problems it is intended to resolve by allowing parties to equivocate for a significant period of time on the choice between arbitration and litigation.

235. For example, it is not nearly so important that the defendant may have let 10 or 20 days pass from the filing of the plaintiff's suit without moving to compel arbitration, as it is that he has answered the suit without so moving. Any given time period would be arbitrary; it makes much more sense to tie the deadline for moving to compel arbitration to a significant procedural event, such as the defendant's first court appearance. Moreover, rigid time constraints require exceptions for the inevitable deserving party who has failed to meet them.

236. A possible exception to this general proposition may arise in the event of surprise of the plaintiff by the defendant's making of the motion to compel arbitration. The plaintiff is unlikely to be truly "surprised," however, at such a motion because he is probably aware that his original suit is in contravention of the arbitration agreement.

237. See text accompanying notes 84-89 *supra*.

Criticism of a strict defendant standard for waiver on the basis that it creates hardships for the defendant in choosing a forum borders on the trivial. When the defendant is uncertain as to

## C. JUSTIFICATION OF THE PROPOSED STANDARDS

1. *The Case for Objective Standards*

Professor Corbin writes that the purpose of the law of contracts is to protect, insofar as possible, the reasonable expectations of the parties to a contract.<sup>238</sup> Contract law has long abandoned interpretative theories based on subjective intent in favor of those based on the reasonable implications of a party's conduct;<sup>239</sup> the actual subjective beliefs of a party to a contract are not accorded legal consequence if they are determined to be unreasonable.<sup>240</sup> Regardless of a party's subjective intent as to his right to compel arbitration, therefore, a court can deem that right to have been waived if the party's objective acts or omissions do not reasonably indicate a desire to preserve that right. This Note's proposal promotes clarity, consistency, and ease of proof: It is far easier to prove that the plaintiff has filed a complaint in a judicial forum, or that the defendant has failed to make a motion concurrent with his initial court appearance than it is to show that a party subjectively intended to relinquish the right to compel arbitration.<sup>241</sup> This Note argues, in part,

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the better forum, he need only choose arbitration. The plaintiff has already manifested his preference for litigation by filing suit in a judicial forum. Therefore, should the defendant decide at a later date that litigation would be more advantageous, he will likely receive the plaintiff's support in seeking change to a judicial forum. While the delay and waste of resources that such tactics would entail are hardly to be applauded, they do illustrate that a defendant is not disadvantaged by a strict time constraint on his choice of forum.

238. 1 A. CORBIN, *supra* note 8, § 1, at 1-2. Professor Corbin also writes:

The law does not attempt the realization of every expectation that has been induced by a promise; the expectation must be a reasonable one. Under no system of law that has ever existed are all promises enforceable. The expectation must be one that most people would have; and the promise must be one that most people would perform.

*Id.* at 2.

239. Canadian Nat'l Ry. v. George M. Jones Co., 27 F.2d 240, 242 (6th Cir. 1928); Brant v. California Dairies, 4 Cal. 2d 128, 133, 48 P.2d 13, 16 (1935); Houghton v. Kerr Glass Mfg. Corp., 261 Cal. App. 2d 530, 537, 68 Cal. Rptr. 43, 48 (1968); e.g., Gateway Co. v. Charlotte Theatres, Inc., 297 F.2d 483, 484-85 (1st Cir. 1961). As early as 1881, Oliver Wendell Holmes wrote that, "The law has nothing to do with the actual state of the parties' minds. In contract, as elsewhere, it must go by externals, and judge parties by their conduct." O.W. HOLMES, *supra* note 26, at 242. *See also id.* at 40-43 (the criminal law is not concerned with the actual blameworthiness of the defendant, but with his blameworthiness as compared with the average, reasonable, and prudent man). The reason for the shift to objectivity was that a person's subjective state of mind is so difficult to prove that the parties must usually resort to objective criteria anyway:

[T]he actual intent of the one party and the actual understanding of the other are matters of fact that may be difficult of proof; and in the process of making this proof, the expressions that would be used and the meanings that would be given by *other* men may be decisive.

1 A. CORBIN, *supra* note 8, § 106, at 157 (emphasis added).

240. Bronaugh, *Agreement, Mistake, and Objectivity in the Bargain Theory of Contract*, 18 WM. & MARY L. REV. 213, 243-44 (1976).

241. *See id.* at 244. Specific and detailed records exist to show the former, whereas findings of

that current standards of waiver approximate more closely the latter rather than the former, with the resulting inconsistency and lack of clarity that have largely frustrated the policy goals of arbitration.<sup>242</sup>

The strongest argument against objective standards is that, because such standards involve little inquiry into the waiving party's *actual* state of mind regarding relinquishment of arbitration rights, they can result in inadvertent waiver of such rights by a party genuinely unaware of his contractual right to arbitrate, or of the legal standard for waiver of such right. For example, a party may sign a contract containing an arbitration agreement without noticing, reading, and understanding the agreement.<sup>243</sup> Or, a party may be aware of his right to compel arbitration but ignorant of the legal standard of waiver, *i.e.*, that he waives his arbitration rights by filing suit or by appearing in response to a suit without also moving to compel arbitration.

Because they are unaware of their arbitration rights or the applicable waiver standard, such parties will assent to litigation when an unresolvable contractual dispute arises, either by filing suit themselves as plaintiffs or by appearing in court in answer to a suit, without moving for arbitration, as defendants. By so doing, they will waive, under this Note's proposal, their right to compel arbitration.<sup>244</sup> If arbitration would have been a more favorable dispute resolution mechanism to such a waiving party than litigation, the party has unwittingly damaged itself. Under a subjective standard, this presumably would not happen because the party's actual state of mind is considered in deciding whether waiver has occurred.

It must be remembered that the general standard for contractual waiver is not purely subjective. Rather, it is an objective evaluation of the reasonable implications of a party's actions, such actions being taken as evidence of the party's actual state of mind.<sup>245</sup> The issue, therefore, is not whether a party is *genuinely* ignorant of his right to

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unreasonableness or prejudice vary according to the facts. The findings ultimately depend on the whims of the trier of fact in deciding which characterization of the facts—the plaintiff's, the defendant's, or his (their, if a jury) own—he (they) will accept as true. See text accompanying notes 176-78 *supra*. Although the actual litigation standard has significant deficiencies, see text accompanying notes 197-203 *supra*, it does not have the inherent uncertainty of an abstract concept such as unreasonableness or prejudice. It will take repeated litigation, however, before the California courts will be able to define adequately when a case has been "actually litigated." See note 198 *supra*.

242. See text accompanying notes 180-85 *supra*.

243. Or, having read and understood the agreement, the party may have simply forgotten it.

244. See text accompanying notes 226-27 *supra*.

245. See text accompanying note 209 *supra*.

compel arbitration or the legal standard of waiver, but whether he is *reasonably* ignorant. If such ignorance is not reasonable, then a party's failure to compel arbitration can be construed as evidence of his intent to knowingly and voluntarily relinquish contractual rights to arbitration.<sup>246</sup>

This Note argues that it is rarely, if ever, reasonable for a party to be unaware of his contractual right to arbitrate or the legal standard of waiver under circumstances that would implicate this Note's proposed standards for waiver of the right to compel arbitration. An agreement to arbitrate must be in writing to be enforceable.<sup>247</sup> In order for a party to remain ignorant of his right to arbitrate, and to waive inadvertently that right by filing or answering a suit in a judicial forum, both the party and his attorney must have failed to read the contractual document or otherwise failed to discover the arbitration agreement.<sup>248</sup> While such dual omissions undoubtedly occur, it certainly is not reasonable for a party and his attorney to file or answer a suit based on a contract that neither has read.

It is a well established principle of traditional contract law that a party to a contract is held to have constructive knowledge of each part of the written instrument that he signs.<sup>249</sup> Indeed, the California courts have generally held that failure to read a contractual agreement to arbitrate is not a defense to the enforceability of the agreement.<sup>250</sup> This Note's proposal is thus consistent with this line of cases. That a party may unknowingly waive his right to compel arbitration merely reflects the fundamental notion that to receive the benefit of a contractual provision, a party must make himself aware of it when he has a reasonable opportunity to do so. When the contract is in writing, as are all en-

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246. See notes 210-11 and accompanying text *supra*.

247. See CAL. CIV. PROC. CODE § 1281.2 (West Cum. Supp. 1979).

248. Although agreements to arbitrate occasionally are documents separate from the substantive contractual agreement, most such agreements are a separate clause in the substantive contract.

249. Under this principle, a party is held to have read and understood every provision of the contract that he has signed, regardless of whether he has actually done so. *Burt v. Olive Growers Ass'n*, 175 Cal. 668, 675, 166 P. 993, 996 (1917); *Maw v. McAlister*, 252 S.C. 280, 284-85, 166 S.E.2d 203, 204-05 (1969); *Calamari, Duty to Read—A Changing Concept*, 43 *FORDHAM L. REV.* 341, 341-42 (1974).

250. *E.g.*, *Madden v. Kaiser Foundation Hosps.*, 17 Cal. 3d 699, 710, 552 P.2d 1178, 1185, 131 Cal. Rptr. 882, 889 (1976); *N.A.M.E.S. v. Singer*, 90 Cal. App. 3d 653, 655, 153 Cal. Rptr. 472, 473 (1979); *Vernon v. Drexel Burnham & Co.*, 52 Cal. App. 3d 706, 125 Cal. Rptr. 147 (1975); *Federico v. Frick*, 3 Cal. App. 3d 872, 875, 84 Cal. Rptr. 74, 75 (1970). *But see Windsor Mills, Inc. v. Collins & Aikmen Corp.*, 25 Cal. App. 3d 987, 992-94, 101 Cal. Rptr. 347, 350-51 (1972) (party held not responsible for failing to read, and thus not bound by, an arbitration agreement inconspicuously printed on the back of an apparently noncontractual document).

forceable agreements to arbitrate, the party has a duty to read it, and he may be held legally responsible for the contents.<sup>251</sup>

This Note also argues that it is not an excuse that a party was ignorant of the legal standard of waiver. Putting aside the merits of the common law presumption that every person knows the law,<sup>252</sup> it is indisputable that every attorney is expected to know the law. Rarely is the legal knowledge of an attorney immaterial to the resolution of the substantive issues in a case. When a party is prejudiced by a mistake of his attorney, as when arbitration rights are waived because of the attorney's ignorance of the legal standard of waiver, the party might have an

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251. There is a growing feeling among judges and commentators that in those standard form contractual transactions in which one of the parties has such a distinct lack of bargaining power and is presented with a long and complex contractual instrument authored by the other party, it is not good policy to automatically hold such a party to knowledge of the instrument that he signs. *E.g.*, *Madden v. Kaiser Foundation Hosps.*, 17 Cal. 3d 699, 710, 552 P.2d 1178, 1185, 131 Cal. Rptr. 882, 889 (1976); *Wheeler v. St. Joseph Hosp.*, 63 Cal. App. 3d 345, 357-62, 133 Cal. Rptr. 775, 783-87 (1976); *Calamari*, *supra* note 249, at 351-58; *Slawson*, *Standard Form Contracts and Democratic Control of Lawmaking Power*, 84 HARV. L. REV. 529, 529-33 (1971). To hold a party in such a standard form transaction to knowledge and understanding of all contractual provisions contained in the form assumes a level of diligence and sophistication that most consumers probably lack. This suggests that, at least in those situations involving contracts of adhesion where one party is unaware of his arbitration rights, the strict objective standard of waiver proposed by this Note should not apply. That a contract clause is adhesive, however, does not necessarily absolve a weaker party from imputed knowledge and understanding of the contractual terms; it merely suggests that the dominant party should be estopped from enforcing terms that are patently unfair, and of which the weaker party could not reasonably have been expected to be aware at the time of contracting. When a party unknowingly waives, under this Note's proposal, his right to compel arbitration, and is damaged by such waiver, *see* text accompanying and following note 244 *supra*, such party would want to *preserve* the agreement to arbitrate once he becomes aware of it, not invalidate it. This type of waiver of arbitration is thus distinguishable from the growing number of contracts that are being invalidated on theories of adhesion. The former seeks to retain the validity of a contractual term, whereas the latter operates to invalidate contractual terms. If the weaker party to an adhesion contract nevertheless wishes to enforce a contractual term, such as an agreement to arbitrate, it follows a fortiori that such term must be considered as being fair to the weaker party. The unfairness of other terms notwithstanding, no more reason exists to absolve the weaker party from knowledge of a fair nonadhesive term than exists to absolve parties of equal bargaining power from knowledge of the provisions of their contract. This Note's proposal, therefore, should also apply to adhesion contracts.

It should be noted that a party's knowledge of his arbitration rights is likely to be at issue in the consumer setting—where one party of superior knowledge and experience offers a product or service to the public at large by means of a standard form contract, *e.g.*, prepaid medical plans such as the Kaiser Health Plan. In the commercial setting, such as a sale of goods from a manufacturer to a wholesaler, the parties are usually represented by attorneys and the terms of the contract are generally the result of extensive negotiation. The arbitration agreement itself is likely to be the subject of substantial discussion. Thus, rarely could a party to a commercial contract, as opposed to a consumer contract, assert a genuine lack of knowledge of arbitration rights. *Furnish, Arbitration and Long-Term Commercial Agreements*, 26 AM. J. COMP. L. 123, 123 (Supp. 1978); *see* *Henderson*, *supra* note 3, at 987-88.

252. *See* W. LAFAVE & A. SCOTT, CRIMINAL LAW § 47, at 362-65 (1972).

action for malpractice against the attorney, but he is still subject to the law, and not excused from conforming to it.<sup>253</sup>

Because it is not reasonable for a party to an agreement to arbitrate either to be unaware of the existence of such an agreement or of the legal standard for waiver, objective standards will not create injustice even when a party unknowingly waives his right to compel arbitration. When one also considers the inherent difficulties of meeting a subjective or abstract test such as reasonableness or prejudice, it becomes apparent that objective standards are most appropriate as the standards for waiver of the right to compel arbitration.<sup>254</sup>

## 2. *Correction of Deficiencies in Present Standards of Waiver*

a. *Frustration of policy goals:* The proposal requires that arbitration be invoked quickly and early in a dispute to facilitate the speedy entry of cases into the arbitration process. It precludes plaintiffs from testing the litigation waters before deciding to arbitrate. Likewise, a defendant party to an arbitration agreement who wishes to assert arbitration in response to litigation must do so quickly; delay beyond the initial appearance in moving to compel arbitration results in surrender of that right. This eliminates the opportunity, existent under current waiver standards, for a defendant to use the right to compel arbitration as a delaying tactic.<sup>255</sup> Because a defendant must exercise that right at the outset of a dispute if he is to exercise it at all, a plaintiff will have to endure the risks of delay only when he also receives the balancing advantages of litigation and trial.<sup>256</sup> Plaintiffs are not left in the odd posi-

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253. See I A. CORBIN, *supra* note 8, § 9, at 21 ("one may be 'bound' by a contract in ways that he did not intend, foresee, or understand. The juristic effect (the resulting legal relations) of a man's expressions in word or act may be very different from what he supposed it would be"); cf. BRONAUH, *supra* note 240, at 244 ("the possibility that one might be committed to certain unforeseen consequences of contracting occurs because one has placed oneself into an objective, institutional structure by the exercise of that power of acceptance that obligates the offeror").

It should be noted that, even where a party has unknowingly or unintentionally waived his right to compel arbitration, only rarely will such waiver be to his disadvantage. The arbitration provision is presumably included in the contract because the parties feel that it will usually be more advantageous to arbitrate than litigate. Should the waiving party subsequently wish to arbitrate, he would conform to the original design of the parties in including an agreement to arbitrate in the first place, and thus is likely to find support from the other party in choosing an arbitration forum. This is particularly the case in a standard form transaction, when the waiving party was not the author of the form. *But see* note 217 *supra*.

254. Cf. C. MCCORMICK, HANDBOOK OF THE LAW OF EVIDENCE § 342, at 802-06 (2d ed. 1972) (reason for formulation of presumptions in the law is that experience has proven that they are usually true). See also B. CARDOZO, THE GROWTH OF THE LAW 30-34 (1961).

255. See text accompanying notes 191-206 *supra*.

256. Some plaintiffs would undoubtedly be willing to undergo the risks of litigation if they



tion of having to force arbitration by proceeding with litigation in order to obtain an adjudication of their claim.

At least as important, the proposal generates no new inequities for either party. Plaintiffs have virtually the full period of the applicable statute of limitations to determine their preferred forum. Defendants have the normal period allowed for filing an answer,<sup>257</sup> which can be extended upon showing of good cause.<sup>258</sup> Neither party is allowed to gain tactical advantage by equivocation, delay, or otherwise misleading conduct as permitted under current law. When a party reasonably lacks knowledge of his arbitration rights, such as in a standard form or adhesion contract situation, arbitration rights that were inadvertently ignored by such party may be restored at the trial judge's discretion.<sup>259</sup>

The proposal also discourages litigation, another important policy goal of arbitration,<sup>260</sup> in two ways. First, it greatly diminishes uncertainty over the proper forum for resolving a dispute. "Filing suit in a judicial forum" and "failing to make a motion to compel in one's answer" are more defined and predictable standards than "reasonableness of delay," "actual litigation," or "prejudice." Disagreements over the waiver issue, therefore, are more likely to be settled, if they arise at all, rather than litigated because the probable winner of the disagreement will be clear at the outset. Second, the proposal makes merely filing a suit more costly because it amounts to sacrifice of arbitration rights. Plaintiffs will likely give more careful consideration to arbitration before resorting to litigation.

Finally, the proposal decreases the expense of arbitration by eliminating the personal and social waste that occurs when scarce legal and judicial resources are expended in preparing a suit for trial, only to have it sent to arbitration.<sup>261</sup>

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were to be assured of receiving its benefits—such as binding precedent, generally larger damage awards, *see* notes 72, 74-76, 195, 202 and accompanying text *supra*—as well, rather than being forced into arbitration at the eleventh hour before trial.

257. Under the federal rules, a defendant generally has 20 days from the time the complaint is served on him in which to answer it. FED. R. CIV. P. 12(a). In California, the defendant generally has 30 days. CAL. CIV. PROC. CODE § 412.20(a)(3) (West 1973).

258. FED. R. CIV. P. 6(b); CAL. CIV. PROC. CODE § 1054 (West 1973). Generally, what constitutes "good cause" is left to the discretion of the trial judge. *See, e.g., In re Buckingham Super Mkts., Inc.*, 534 F.2d 976 (D.C. Cir. 1976).

259. *See* text accompanying notes 242-54 *supra*.

260. *See* text accompanying notes 83-92 *supra*.

261. *See* text accompanying notes 242-54 *supra*. Because the proposal dictates waiver of arbitration rights in situations that do not constitute waiver under present law, it arguably results in the litigation of cases that would otherwise be arbitrated, and, therefore, generates social costs by adding to the caseload of the courts. This increased litigation is more than balanced, however, by

b. *Inconsistency with the concept of contractual waiver:* Current law makes the wrong judgment about the legal implications of a party's subjective intent when waiver of the right to compel arbitration is at issue. Under all three standards—reasonableness, prejudice, and actual litigation—a party can file suit in a judicial forum or significantly delay making a motion to compel arbitration, either of which implies an intention to disregard arbitration rights, without actually waiving the right to compel arbitration.<sup>262</sup> The choice between arbitration and litigation is clear and relevant the moment that a dispute arises under a contract with an arbitration agreement; there is no legitimate reason for either party to wander down the path of litigation before proceeding to arbitration. An objective view of the conduct of parties to an arbitration agreement suggests that failure to move to compel arbitration at the outset of a contractual dispute reasonably implies relinquishment of arbitration rights. The proposal makes the proper judgment by requiring that a court find waiver of the right to compel arbitration in such circumstances.

### CONCLUSION

Present standards of waiver of the right to compel arbitration create substantial problems. They subvert the policy goals of arbitration by increasing litigation, by increasing the delay and expense of arbitration, and by rewarding dilatory and misleading conduct by parties to an agreement to arbitrate. They are also inconsistent with general contract waiver law. These problems are best solved by imposition of a clear standard that forces a party to choose between arbitration and litigation at the outset of an arbitrable dispute. Under this Note's proposal, a plaintiff party to an arbitration agreement will be held to have waived his right to compel arbitration if he files suit over an arbitrable issue in a judicial forum; a defendant party waives his arbitration rights by failing to make a motion to compel arbitration at the time he makes his initial court appearance in response to the plaintiff's suit. This proposal corrects the deficiencies of current arbitration law by ensuring procedural certainty at the beginning of a dispute.

Although arbitration has long been an alternative to judicial resolution of disputes, it has taken on increased importance in an era in which the resources of our traditional legal system are seriously taxed

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the decrease in litigation that will come because of the clarity and certainty that the proposal injects into the question of whether a party has waived his right to compel arbitration.

262. See text accompanying notes 207-21 *supra*.

by the demands of vastly increased litigation. By providing a faster, cheaper, and more adaptable forum for dispute resolution, arbitration helps relieve congestion in the court system and provides for fair adjudication of individual disputes. The courts must take care to safeguard the advantages of the arbitration forum, and avoid injecting into the arbitration process the disadvantages of litigation if arbitration is to remain a truly viable alternative to litigation.

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