HERBERT SMITH FREEHILLS

ARBITRATION CLAUSES BEFORE THE HIGH COURT OF AUSTRALIA

19 November 2018 | Australia
Legal Briefings – By **Leon Chung and Daniel Reynolds**

Last week the High Court of Australia heard the matter of *Rinehart v Hancock Prospecting*, a case that is likely to have wide-reaching implications for the interpretation of arbitration agreements in Australia.

This matter raises an important question of principle: does a contractual clause referring 'any dispute under this deed' to arbitration extend to disputes about the validity of the arbitration agreement itself?

FACTS

The appellants, Bianca Rinehart and John Hancock, are beneficiaries of a trust (the **HFMF Trust**) of which their mother, Mrs Gina Rinehart, was formerly trustee. In October 2014, the appellants commenced proceedings in the Federal Court of Australia against Mrs Rinehart (and 14 related respondents). The statement of claim alleged that while she was trustee of the HFMF Trust, Mrs Rinehart breached equitable and contractual duties owed to appellants by wrongfully transferring valuable mining assets away from the HFMF Trust to another trust in which Mrs Rinehart had a substantial financial interest.

In answer to the appellants' claims, the respondents relied on various provisions of a number of deeds, including two deeds signed in 2006 and 2007 which purport to confer broad releases on the respondents in exchange for financial benefits granted to the appellants. Each of those deeds includes a clause referring 'any dispute under this deed' to arbitration.

The appellants challenge the validity of these arbitration clauses, as well as the deeds in which they appear, on various bases including misleading and deceptive conduct, fraudulent concealment of claims, unconscionable conduct, false representations, material non-disclosures, undue influence, and duress.

THE DECISION AT FIRST INSTANCE

In December 2014, the respondents sought a stay of the proceedings and an order that the parties be referred to arbitration, relying on s 8(1) of the *Commercial Arbitration Act 2010* (NSW), which provides:

> 'A court before which an action is brought in a matter which is the subject of an arbitration agreement must, if a party so requests not later than when submitting the party's first statement on the substance of the dispute, refer the parties to arbitration unless it finds that the agreement is null and void, inoperative or incapable of being performed.'

Instead of referring the parties to arbitration, the primary judge directed that the Court try the question of whether the relevant arbitration agreements were 'null and void, inoperative or incapable of being performed', a question which her Honour considered fell outside the scope of the arbitration agreements.[1]

The respondents appealed from this decision.

THE DECISION OF THE FULL COURT

The Full Court unanimously allowed the appeal from the primary judge's decision.[2] The Court held that both the substantive and the validity claims brought by the plaintiffs fell within the scope of an arbitration clause framed to cover 'any dispute under this deed'.

In light of the Court's broader view of the scope of the arbitration clauses as compared with that of the primary judge, the Court re-exercised the discretion under s 8(1) to decide whether the validity claims should be determined by a court or by an arbitral tribunal. It decided to refer the entire dispute to arbitration, including the validity claims, on the basis of the lack of apparent strength to the validity claims, the likelihood that argument on substantive and validity claims would become entangled, and the low prospect of the parties adhering to a short hearing centred upon the validity claims alone.

THE APPEAL BEFORE THE HIGH COURT

The appellants were granted special leave to appeal on the sole ground that the Full Court erred in concluding that where an arbitration clause in an agreement is expressed to deal with disputes 'under' that agreement, such a clause extends to cover disputes as to the agreement's validity.

THE APPELLANTS' CASE

The appellants' argument was that the Full Court erred in applying an assumption, expressed by Gleeson CJ in *Francis Travel Marketing Pty Ltd v Virgin Atlantic Airways Ltd*,[3] that '[w]hen the parties to a commercial contract agree … to refer to arbitration any dispute or difference arising out of the agreement … [t]hey are unlikely to have intended that different disputes should be resolved before different tribunals.' It was argued that such an approach amounted to the application of a 'legal rule' of construction that 'emphasises liberality over language and assumptions as to motivations over text [and] obliterates real distinctions between different words and phrases'.

The appellants argued that insufficient regard had been paid to 'the ordinary usages of English', and in particular to the parties' selection of the word 'under' in the expression 'any dispute under this deed', as opposed to potentially broader formulations referring to disputes 'in connection with' or 'arising out of or in relation to' a deed. The appellants argued for a construction which would see the clause apply only to those disputes that are 'governed or controlled' by the deed (which would exclude claims that the deed itself was invalid).

THE RESPONDENTS' CASE

The respondents argued that the application of the *Francis Travel* assumption involved no departure from orthodox principles of construction, which start with, and give precedence to, the words chosen by the parties. Rather than amounting to a universal 'legal rule' of construction, the respondents submitted that *Francis Travel* showed that 'a commonsense contextual assumption could be made that parties to an arbitration agreement intended that all disputes arising out of their relationship were to be decided by a single body and that the words chosen by the parties, *which remained determinative*, were to be interpreted in light of that assumption'.

Turning to the words chosen in this case, the respondents argued that there was no warrant to read 'under' as being concerned only with 'rights and obligations that are subordinate to – that is derived from or created by – the agreement, rather than about the validity of enforceability of the agreement itself'. Rather, the respondents embraced the Full Court's conclusion that the words 'any dispute under this deed':

> 'can be seen to cover a dispute which is framed by claims that are said to be met by pleading the deed, which in turn is said to be liable to be set aside for wrongful conduct that does not amount to a plea that the deed never existed, whether by a plea of *non est factum*, or some other circumstance. In these circumstances, the deeds, in their operation if valid, and by reason of their invalidity if not, lie at the heart of the dispute.'

ACICA'S SUBMISSIONS

A number of other parties made submissions, including the Australian Centre for International Commercial Arbitration (**ACICA**) which was granted leave to file written submissions as amicus curiae. ACICA's submissions drew upon the existence of an integrated arbitration regime in Australia, brought about by the *International Arbitration Act 1974* (Cth) and the *Commercial Arbitration Acts* in each of the States and Territories, to argue that the principles of contractual construction in relation to arbitration agreements should be moulded to conform to the policy of those statutes, which was to promote and support arbitration as a method of dispute resolution.

NEXT STEPS

The Court has reserved its decision, and will likely hand down judgment in the first half of 2019. We will provide a further update at that time.

ENDNOTES

1. *Rinehart v Rinehart (No 3)* [2016] FCA 539; (2016) 337 ALR 174; (2016) 16 ACSR 1.
2. *Hancock Prospecting Pty Ltd v Rinehart* [20 17] FCAFC 170; (2017) 350 ALR 658.
3. (1996) 39 NSWLR 160 at 165.

KEY CONTACTS

If you have any questions, or would like to know how this might affect your business, phone, or email these key contacts.

LEON CHUNG
PARTNER, SYDNEY

+61 2 9225 5716
Leon.Chung@hsf.com

LEGAL NOTICE

The contents of this publication are for reference purposes only and may not be current as at the date of accessing this publication. They do not constitute legal advice and should not be relied upon as such. Specific legal advice about your specific circumstances should always be sought separately before taking any action based on this publication.
