'BROAD, LIBERAL AND FLEXIBLE': AUSTRALIAN COURTS ON ARBITRATION DEALS

09 August 2017 | Insight

The recent *Fitzpatrick v Emerald Grain Pty* ruling confirms the Australian courts' liberal approach to language in arbitration agreements.

The decision confirms that Australian courts will take a '*broad, liberal and flexible*'[1] approach to the construction of the language used in an arbitration agreement.

BACKGROUND

The proceedings concerned a dispute between various wheat producers and Emerald Grain Pty Ltd (**Emerald**), a grain commodity pool operator, to whom the plaintiffs had delivered wheat for allocation to a pool for sale to customers.

Pursuant to clause 32 of the Emerald Pool Terms and Conditions (**Terms and Conditions**), which were expressly incorporated in the plaintiffs' contracts, any dispute '*arising out of, relating to or in connection with*' the Terms and Conditions or a grain pool contract generally were to be resolved by arbitration in accordance with the Trade Rules of Grain Trade Australia (**GTA Rules**). The GTA Rules, in turn, were said to govern '*all disputes of a mercantile, financial or commercial character*' and provided that all disputes were to be submitted to, and settled by, arbitration.

Pursuant to clause 47 of the Terms and Conditions, the parties were subject to the non-exclusive jurisdiction of the courts of Victoria.

The plaintiffs alleged that wheat they had sent to Emerald had wrongly been included in a pool with wheat purchased from elsewhere for agreed prices and that losses made upon the sale of the third party wheat had been wrongly debited to the proceeds of sale from the pool. The plaintiffs alleged that the wrongly deducted amount was held on trust by Emerald for the plaintiffs and other producers who had contributed to the pool and that Emerald had committed a breach of trust entitling the plaintiffs to relief pursuant to the *Trustees Act* 1962 (WA) which vests certain powers, including the appointment of replacement trustees, in *'the Court'*.

Emerald applied for orders referring the parties to arbitration pursuant to section 8 of the *Commercial Arbitration Act* and staying the proceedings.

THE COURT'S DECISION

Martin CJ held that clause 32 of the Terms and Conditions gave rise to an arbitration agreement that was capable of being performed and the proceedings involved matters the subject of that arbitration agreement. Section 8 of the *Commercial Arbitration Act* applied and the parties were referred to arbitration.

THE PROCEEDINGS INVOLVED A 'MATTER' THE SUBJECT OF THE ARBITRATION AGREEMENT

A party seeking a stay pursuant to section 8 of the *Commercial Arbitration Act* must prove, on the balance of probabilities, that a matter (or matters) in the court proceedings are the subject of an arbitration agreement.[2]

His Honour rejected the argument that the dispute was not of a *'mercantile, financial or commercial character'* and therefore not covered by the GTA Rules. The words '*mercantile, financial or commercial'* were sufficiently broad to capture the dispute. In any event, the GTA Rules were expressly said to be subject to the Terms and Conditions which required '*any question'* regarding the existence of a contract, its validity or termination to be resolved by arbitration.[3]

The plaintiffs' submission that the non-exclusive jurisdiction clause in clause 47 of the Terms and Conditions supported a narrow construction of the arbitration agreement was similarly rejected. There was no obvious tension between an arbitration agreement and a submission to the non-exclusive jurisdiction of the courts which maintained a role in supervising the performance of the arbitration agreement and enforcing any arbitral award.[4]

The dispute as to whether Emerald was a trustee and, if so, in breach of trust, was clearly a dispute *'arising out of, relating to or in connection with'* the contracts between the plaintiffs and Emerald.

THE ARBITRATION AGREEMENT WAS NOT INCAPABLE OF BEING PERFORMED

The plaintiffs' alternative argument that the matters raised in the proceedings were not arbitrable was rejected.

Disputes with respect to the administration of a trust were not matters so pervasively involving public rights or the interests of third parties such that agreements to resolve them by private arbitration should not be given effect.[6] While declining to determine whether an arbitrator would be able to grant all the relief that a court is empowered, by statute, to award in this context, his Honour observed that even if it were not, it is well established that this alone would not mean the dispute is incapable of arbitration.[7]

Finally, the fact that it was not possible to join all wheat producers who may have an interest in the outcome to the arbitral proceedings did not affect arbitrability. That a matter the subject of proceedings may have an effect on third party interests does not result in that matter falling outside the scope of section 8 of the *Commercial Arbitration Act*.[8]

ENDNOTES

1. [2017] WASC 206, [47].
2. Ibid, [56]-[57].
3. Ibid, [66]-[70].
4. Ibid, [76]-[80].
5. Ibid, [87].
6. Ibid, [90]-[91] citing *Rinehart v Welker* [2012] NSWCA 95, [173]-[177] (Bathurst CJ).
7. Ibid, [100].
8. Ibid, [101]-[102].

FEATURED INSIGHTS

HELPING YOU STAY AHEAD OF THE BIG ISSUES

BROWSE BY:

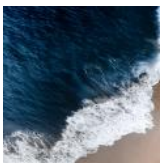
- TECH, DIGITAL & DATA

- GEOPOLITICS AND BUSINESS

- NEW BUSINESS LANDSCAPE

RELATED ARTICLES

UPDATED: UK NATIONAL SECURITY ACT 2021 - WHAT INVESTORS NEED TO KNOW



Foreign investment: Rising tides of politics in regulation

General Counsel Update, November 2021

KEY CONTACTS

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

ELIZABETH MACKNAY
MANAGING PARTNER,
PERTH OFFICE, PERTH
+61 8 9211 7806
Elizabeth.Macknay@hsf.com