

HIGH COURT RULES ON ARBITRATION CLAUSES

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Legal Briefings - By **Leon Chung, Andrew Mason, Christopher Chiam and Mark Peters**

In an important and clarifying decision, the High Court of Australia has handed down its decision in *Rinehart & Anor v Hancock Prospecting Pty Ltd & Ors.*¹

The decision is significant for the conduct of international arbitration in Australia because:

- a. the High Court held that the phrase “any dispute under this deed” in an arbitration clause was sufficiently broad in the context of the deeds in question to encompass disputes about the validity of the arbitration agreement as well as substantive claims; and
- b. the High Court found that in this case, third parties who were not contractual parties to the deed in question, but who wished to rely on certain releases and clauses in the deed containing the arbitration agreement could be treated as a party to the arbitration under the *Commercial Arbitration Act 2010* (NSW) (**Commercial Arbitration Act**).

THE FACTS AND PROCEEDINGS BEFORE THE FEDERAL COURT AND THE FULL COURT

In a previous [Legal Briefing](#), we outlined the background of the case before the Federal Court and Full Court. In short, the dispute concerned the actions of Gina Rinehart in her capacity as trustee of a trust (the **HFMF Trust**). The beneficiaries of that trust (**the Plaintiffs**) commenced Federal Court proceedings against Ms Rinehart and others (**the Respondents**) alleging a breach of equitable and contractual duties that she owed in her capacity as trustee of the HFMF Trust. The Plaintiffs also commenced court proceedings against a number of companies controlled by Gina Rinehart (the **Third Party Companies**), who were the recipients of commercial assets from the HFMF Trust.

The Respondents sought to have the court proceedings stayed and the matter referred for arbitration on the basis that the dispute was the subject of an arbitration agreement contained in deeds which had been entered into between the parties.

The Third Party Companies also made an application to have the claims against them referred for arbitration, on the basis that they were a party claiming “through or under” the Respondents, and therefore were parties within the meaning of section 2(1) of the *Commercial Arbitration Act*.

THE HIGH COURT’S DECISION

WAS THE DISPUTE SUBJECT TO AN ARBITRATION AGREEMENT?

The arbitration clause in the deeds stated that “any dispute under this deed” should be referred for arbitration. The High Court unanimously held that this clause was sufficiently broad to encompass claims relating to the validity of the deeds and the arbitration agreements themselves as well as other substantive claims. The Court found that the background to and the purposes of the deeds, as reflected in their terms, pointed clearly to arbitral clauses of wide coverage with respect to what was to be the subject of confidential arbitration.² Having regard to those matters, the Court held that it could not have been understood by the parties to the deeds that any challenge to the efficacy of the deeds was to be determined in the public spotlight, as opposed to through a confidential arbitration.³

WERE THE THIRD PARTY COMPANIES A “PARTY” TO THE ARBITRATION CLAUSE?

Section 2(1) of the *Commercial Arbitration Act* states that “a party to an arbitration agreement” includes “any person claiming through or under a party to the arbitration agreement”. A majority of the High Court found that the Third Party Companies were persons claiming through or under the Respondents, and therefore were parties for the purposes of the *Commercial Arbitration Act*.⁴

The majority reasoned that as the Third Party Companies were assignees of the mining tenements under the deed, there was no good reason why the claims against the Third Party Companies should not be determined as between the Plaintiffs and the Third Party Companies in the same way as it would be determined between the Plaintiff and the Respondent (as the assignor of the mining tenements under the Deeds).⁵

The majority reasoned that to exclude the Third Party Companies from the scope of the arbitration agreement would give the arbitration agreement an uncertain operation, and would potentially lead to duplication of proceedings. For this reason, the Court held that it would frustrate the evident purpose of the statutory definition of a “party” in the *Commercial Arbitration Act*.⁶

The majority of the Court also held that the rights of the Respondents under the Deed were an “essential element” of the Third Party Companies’ defence which vested in and was exercisable by the parties to the Deed.⁷

THE IMPORTANCE OF THE DECISION

THE IMPORTANCE OF CONTEXT IN CONSTRUING THE WORDS OF AN ARBITRATION AGREEMENT

The High Court’s decision emphasises the importance of construing the words of an arbitration clause, like any clause in an agreement, in its context. Specifically, the context of the substantive agreement will be important to construing the words of the arbitration agreement.

While on one level the Court’s decision conforms with the pro-arbitration approach adopted in recent years by various Australian courts and legislatures, the Court’s decision falls short of providing a general endorsement because it was not necessary for the Court to consider broader issues such as the separability principle which treats an arbitration agreement as distinct and limits attacks upon its validity or the related kompetenz-kompetenz principle by which an arbitral tribunal is competent to rule on its jurisdiction. Nor was it necessary for the Court to consider the correctness of *Fiona Trust & Holding Corporation v Privalov*,⁸ a decision by the House of Lords as to the construction of arbitral clauses, or previous authorities which had given a more restrictive meaning to clauses featuring the words “under this agreement”. In this case, the Court was able to resolve the issues by reference to orthodox principles of interpretation.

WHO IS A PARTY TO THE ARBITRATION AGREEMENT?

The majority decision has provided some additional clarity as to the circumstances when a third party will be able to bring an action under an arbitration agreement. However, the majority expressly limited its opinion on the scope of who is a “party” for the purposes of the *Commercial Arbitration Act* to the discrete controversy raised by this case.⁹

The Court observed that it was not necessary to consider cases involving multiple contracts where a defendant’s purported reliance on an arbitral clause in a contract to which the defendant is not a party is precluded by the absence of an arbitral clause from the contract to which it is a party. In addition, the Court noted that it did not receive submissions about the wider and complex issues of arbitral consent and privity and third party claims more generally.

Accordingly, while there will be some cases where third parties who are not a party to a contract may be able to rely on an arbitration clause in that contract, that is not a principle of general application. The most prudent course is for parties to expressly contract for arbitration, if they wish to have their disputes resolved by arbitration.

ENDNOTES

1. *Rinehart & Anor v Hancock Prospecting Pty Ltd & Ors* [2019] HCA 13.
2. [2019] HCA 13 [44]-[48] (Kiefel CJ, Gageler, Nettle and Gordon JJ).
3. [2019] HCA 13 [48] (Kiefel CJ, Gageler, Nettle and Gordon JJ) and [83] (Edelman J).
4. [2019] HCA 13 [74] (Kiefel CJ, Gageler, Nettle and Gordon JJ).
5. [2019] HCA 13 [73] (Kiefel CJ, Gageler, Nettle and Gordon JJ).
6. [2019] HCA 13 [73] (Kiefel CJ, Gageler, Nettle and Gordon JJ).
7. [2019] HCA 13 [79] (Kiefel CJ, Gageler, Nettle and Gordon JJ).
8. [2007] 4 All ER 951.
9. [2019] HCA 13 [78] (Kiefel CJ, Gageler, Nettle and Gordon JJ).

KEY CONTACTS

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



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