

The Effect of Australia's Approach to Construing the Scope of an Arbitral Clause

Kluwer Arbitration Blog

July 28, 2019

Edwin Choi (Australian National University)

Please refer to this post as: Edwin Choi, 'The Effect of Australia's Approach to Construing the Scope of an Arbitral Clause', Kluwer Arbitration Blog, July 28 2019, <http://arbitrationblog.kluwerarbitration.com/2019/07/28/the-effect-of-australias-approach-to-construing-the-scope-of-an-arbitral-clause/>

For the first time, the High Court held in its decision in the *Rinehart dispute* that the ordinary principles of contractual interpretation must be applied when interpreting the scope of arbitration clauses. While this approach is consistent with modern contractual interpretation, it may deter parties from selecting Australian law to govern arbitration agreements. This post considers the significance of the High Court's decision and, in turn, highlights the importance of drafting clear arbitration clauses, particularly for parties who wish to settle disputes relating to certain aspects of a contract in courts.

Rinehart v Hancock Prospecting Pty Ltd [2019] HCA 13

This case involved a dispute between Bianca Rinehart and John Hancock (Appellants) and Hancock Prospecting Pty Ltd (Respondent), a company controlled by the appellants' mother, Gina Rinehart. The dispute concerned various deeds executed by the appellants who alleged that Gina Rinehart dealt with the companies and assets under the deeds to the respondent's benefit. These allegations were 'the substantive claims' raised by the appellants. Of the two claims raised by the appellants, the most contentious was the validity claim. Bianca Rinehart and John Hancock challenged the validity of the deeds they executed by alleging that Hancock Prospecting Pty Ltd and Gina Rinehart did not disclose all material facts to them and did not negotiate at arms' length. Relevantly, the various deeds that were entered into contained arbitration clauses that broadly required parties to resolve any dispute arising under the deed by arbitration and not in court. As it happens, the ambiguous and inconsistent language of each arbitration clause under the various deeds became the most contentious issue for the courts, as the judges sought to determine whether claims regarding the validity of the deeds should be referred to arbitration as required by the arbitration clauses. If the answer was no, then the claims could be litigated in a court proceeding.

Final decision: the approach when interpreting the scope of arbitration clauses

On 8 May 2019, the High Court decided that a commercial contract, including one that contains an arbitration clause, must be interpreted according to ordinary rules of contractual interpretation. Referencing its earlier decision in *Electricity Generation Corporation v Woodside Energy Ltd*, the High Court decided that the arbitral clauses contained in the deeds must be construed against 'the language used by the parties, the surrounding circumstances and the purposes and objects to be

secured by the contract' when determining their scope.[fn] *Electricity Generation Corporation v Woodside Energy Ltd [2014] HCA 7*[/fn]

Applying this rule, the High Court dismissed the appeal after finding that the overriding purpose of the deeds was to resolve disputes by arbitration in order to maintain the confidentiality of the affairs of Hancock Prospecting, the intra-family dispute between the Rineharts, and the underlying provisions contained in the deeds.[fn] *Rinehart v Hancock Prospecting Pty Ltd [2019] HCA 13*[/fn] Taking this into consideration, the High Court found that the arbitral clauses had a wide scope, thus extending their application to cover issues regarding the validity of the deeds themselves. The High Court considered it was 'inconceivable' to interpret the clauses otherwise.

Refusal to apply the general presumption approach adopted by the Full Federal Court

Notably, the High Court expressly declined to apply the general presumption adopted from the House of Lords case, *Fiona Trust & Holding Corporation v Privalov* ('*Fiona Trust*'), which was referred to by the Full Federal Court. The *Fiona Trust* presumption holds that parties intend that their disputes be decided in the same venue (in this case by arbitration) rather than being heard in two different venues. The presumption purports to align with the intention of commercial parties to settle all parts of a contractual dispute in one venue as opposed to separate venues for different parts of a contract. This approach provides certainty when attempting to resolve issues regarding imprecise wording of an arbitration clause, as in the current case. The general presumption also supports the doctrine of separability, which provides that an arbitral clause is separate from the underlying agreement. The effect of this is that a dispute arising about the validity of an underlying agreement will not impact the arbitral clause. The doctrine of separability has been accepted and followed in international arbitration. The approach taken by the High Court in *Rinehart* raises uncertainty about the position of this general presumption in Australia. While some lower courts have relied on it, there have been instances of courts rejecting it. In this case, the High Court expressed its view that the *Fiona Trust* approach 'may not assume so much importance for courts in the future' as arbitral clauses stated in wider terms (such as the UNCITRAL Arbitration Clause) are increasingly recommended for use when constructing commercial contracts.

This approach may disincentivise parties from choosing Australian law to govern their arbitration disputes. Given the individuality of the approach taken by the High Court to resolve the *Rinehart* dispute, parties should expect disputes regarding the scope of arbitral clauses to be resolved on a case-by-case basis. This leaves uncertainty regarding the types of disputes covered by an arbitral clause and the *Fiona Trust* approach in Australian law.

The importance of careful, precise drafting of arbitral clauses

The importance of this case lies in the fact that it indicates that the High Court will take a case-by-case approach when determining the scope of arbitral clauses through its application of the ordinary principles of contractual interpretation. This means there is no hard and fast rule that can be applied for determining the types of disputes an arbitration clause covers, reinforcing the need for careful, precise drafting of arbitral clauses in contracts.

Following this decision, it is recommended that parties who intend to settle disputes in court clearly specify their intention to do so for each respective clause. This is especially important when confidentiality is a critical aspect of the affairs of the parties and arbitration is designated the desired

venue for dispute resolution. In such circumstances, the *Rinehart* decision indicates that courts are likely rule in favour of arbitration to maintain the parties' desire for confidentiality.