

# Kluwer Arbitration Blog

## Mandatory Laws Applicable to an Arbitration: A View from Australia

Vicky Priskich (Howells' List) · Saturday, July 24th, 2021

There have been significant legal developments in recent times in Australia concerning the proper choice of law applicable to an arbitration agreement. Cases have centred on how to give effect to parties' choice. But there are other laws which, despite not being chosen by the parties as the law applicable to the arbitration agreement, may nonetheless impact on the validity of the arbitration agreement. A mandatory law of the forum where the contract is to be performed may render the arbitration agreement invalid. Applicable mandatory laws may also affect the arbitrability of claims.

### Proper context

As a preliminary point, the proper choice of law may differ depending on the precise issue raised. The choice of law in question may concern:

- Formation and existence of an arbitration agreement (in Australia, the proper choice of law is the law of the forum, see *Dialogue Consulting Pty Ltd v Instagram Inc (Dialogue)* [2020] FCA 1846 at [215]); or
- Validity or scope of an arbitration agreement (see a previous [Kluwer Blog](#) for a detailed reference to the choice of law principles in *Enka Insaat Ve Sanayi AS v OOO Insurance Company Chubb (Enka v Chubb)* [2020] UKSC 38).

The choice of law principles enunciated by the majority and minority judges in *Enka v Chubb* place weight on the law chosen by the parties. The majority at [60] (and Lord Sales at [266]) concluded that an express choice of law applicable to the main contract will often also constitute an express choice of law for the arbitration agreement. Failing an express choice, the second stage involves considering whether an implied choice has been made. The third stage is the law that has the closest and most real connection with the arbitration agreement, which will usually be the seat.

Lord Burrows (dissenting) also placed weight on the law chosen by the parties in deciding that an implied choice of law for the main contract should be carried across to the arbitration agreement (at [260]).

Presently, no Australian court has considered the choice of law principles enunciated in *Enka v Chubb*, although the “three-stage” choice of law approach to determine questions of validity and scope of an arbitration agreement was recently affirmed in *Dialogue* (at [474], [483]). Australian

choice of law principles thereby also place significant weight to the parties' choice of law.

However, it is questionable whether Australian courts will wholly adopt the majority's approach in *Enka v Chubb* regarding the validation principle. In *Rinehart v Hancock Propsecting Pty Ltd* [2019] HCA 13 at [21], the majority were not prepared to adopt the presumptive interpretive principle in *Fiona Trust & Holding Coporation v Privalov* [2007] UKHL 40. However, Edelman J (at [83]) indicated that as part of the conventional contextual approach to contractual interpretation weight should be placed on the consideration that reasonable parties would wish to have a dispute determined in a single forum. See also *Lepcanfin Pty Ltd v Lepfin Pty Ltd* [2020] NSWCA 155 at [92]-[93].

Recently, an Australian Federal Court judge expressed, extra-judicially, a preference for the minority's approach in *Enka v Chubb*; see [CIArb Australian Branch and Federal Court of Australia Webinar](#).

### **Federal Court decision in *Freedom Foods***

There are other laws, despite not being chosen by the parties as the law applicable to the arbitration agreement, may nonetheless impact on its validity. Australian examples include an arbitration agreement found in:

- a contract for the carriage of goods to/from Australia, which is of no effect unless the arbitration is conducted in Australia (see *Carriage of Goods by Sea Act 1991 (Cth)* s 11(3));
- an insurance contract made in Australia, which is void unless it is made after the dispute has arisen (see *Insurance Contracts Act 1984 (Cth)* s 43(1)); or
- a franchise agreement where the franchise business is conducted within Australia, the arbitration agreement will be invalid (see Franchising Code, Schedule 1 to the *Competition and Consumer (Industry Codes – Franchising) Regulation 2014(Cth)* s 21(2)(a)(ii) and (3)).

The last example was recognised in *Freedom Foods Pty Ltd v Blue Diamond Growers (Freedom Foods)* [2021] FCA 172 at [138].

*Freedom Foods* involved a licence agreement for the manufacture and sale of almond milk products in Australia. After a careful analysis, the licence agreement was held to not qualify as a franchise agreement within the meaning of the Franchising Code with the consequence that the arbitration agreement was valid (*Freedom Foods* at [140]).

The case nonetheless highlights that mandatory forum laws applying by virtue of where the contract is to be performed can impact on the validity of an arbitration agreement despite the parties expressly choosing a different law to govern the contract and choosing a seat in different country (*Freedom Foods* at [138]).

### **Mandatory laws impacting on substantive dispute**

Another feature worth highlighting from *Freedom Foods* is that a mandatory law can affect the outcome of a substantive dispute where the parties have chosen a different law to apply to the main contract.

In *Freedom Foods* an Australian mandatory statutory law prohibiting misleading or deceptive conduct occurring in trade or commerce applied to the dispute despite the parties explicitly

choosing the law of California to govern their contract and selecting Sacramento in California as the seat of the arbitration (see s 18 of the [Australian Consumer Law](#)).

This result is uncontroversial. Mandatory laws form the framework of laws that may apply to a dispute that the parties have agreed to resolve by arbitration. Party autonomy does not override applicable laws; Gary Born, *International Commercial Arbitration* (Kluwer Law International, 3<sup>rd</sup> edition) Chapter 19, p.2913-5, cited with approval in *PT Prima International Development v Kempinski Hotels SA* [2012] SGCA 35 at [72].

### **Mandatory laws impacting on arbitrability**

Another complication is whether such statutory claims are arbitrable and by which law that should be determined.

The question in *Freedom Foods* was whether the statutory claims of misleading or deceptive conduct made against Blue Diamond Growers were arbitrable in the Californian arbitration. Specifically, whether the claims were “capable of settlement by arbitration” under s 7(2)(b) of Australia’s *International Arbitration Act 1974 (Cth)*, being Australian domestic law implementation of Article II of the New York Convention.

Blue Diamond Growers (a Californian company) gave undertakings accepting that the arbitrator must apply Australian statutory laws prohibiting misleading or deceptive conduct (at [66]) and that it would be applied in the arbitration (at [141]). The issue in contention was whether the arbitrator could actually do so (at [87]). There was differing expert opinion presented to the court, with one expert expressing an opinion that such claims could be heard and determined in a Californian arbitration and the other that it could not.

Ultimately, the Court preferred the expert evidence that concluded that such Australian statutory claims were arbitrable in the Californian arbitration (at [87]).

### **Comments**

The outcome in *Freedom Foods* affirms the ability of parties to choose to resolve their dispute in a single forum, that includes mandatory statutory claims, notwithstanding their choice of a foreign law applicable to the contract and a foreign seat.

The consideration given to the arbitrability of mandatory statutory claims with reference to a foreign law in *Freedom Foods* appears to involve a departure from *Comandate Marine Corporation v Pan Australia Shipping Pty Ltd (Comandate)* [2006] FCAFC 192, where the Full Court considered that arbitrability of the dispute should be determined according to Australian law, being the domestic law of the judicial enforcement forum.

Further, in *Comandate* the question of how the dispute would be resolved by the arbitrator in light of mandatory Australian statutory law, when English law was chosen by the parties, was considered to be a matter for the arbitrator, which would not be pre-empted by the court; [237], [241]. This approach has been reiterated in *Dialogue* (at [436]). The court in *Comandate* was content to rely on an undertaking by Comandate Marine to allow the arbitrator to determine all the issues between the parties (at [241]) which was noted in the orders (at [255]). The court found it unnecessary in view of the undertaking to consider evidence as to how the mandatory law would

be applied in the arbitration (at [241]).

The approach in *Freedom Foods* seems to accord more closely with *Tomolugen Holdings Ltd v Silica Investors Ltd* [2015] SGCA 57 at [72], where the Singapore Court of Appeal considered that it “would be pointless for a court to stay court proceedings in favour of arbitration where the applicable law does not permit the subject matter of the dispute to be resolved by arbitration as it may lead to an award without force or legal value”.

When is it appropriate to leave the matter to the arbitrator? In *Larsen Oil and Gas Pte Ltd v Petroprod Ltd* [2011] SGCA 21 at [26], the court was well placed to anticipate the enforceability of an award where the contract was governed by Singapore law. Australian courts, predominately, are content to accept undertakings to ensure that the foreign arbitration will not circumvent the application of mandatory Australian law and not compromise award enforceability.

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