Kluwer Arbitration Blog

The Arbitrability of Greenwashing Disputes: An Australian Perspective

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Greenwashing has become a key target of regulators and climate activists alike, as they bring claims against companies who now face fines, litigation and potential brand damage for misrepresenting the environmental benefits of their products, services and policies.

Regulators across the world have launched campaigns against greenwashing. In the US, prior to its recent disbandment, the Securities and Exchange Commission's ("SEC") Climate and ESG Task Force proactively brought a number of greenwashing actions against companies over its three-year operation. Notably, the SEC charged DWS Investment Management Americas Inc. ("DWS"), a subsidiary of Deutsche Bank AG, for violations including misstatements regarding its ESG investment process, with DWS agreeing to pay US$25 million in penalties. In Australia, the Australian Securities and Investments Commission won its first greenwashing case on 2 August 2024, with the Federal Court of Australia ordering Mercer Superannuation Australia to pay A$11.3 million in penalties for greenwashing misrepresentations.

Separately, climate activists are increasingly filing greenwashing related disputes before domestic courts. In Australia, an ANZ bank shareholder applied for preliminary discovery alleging that the bank may not have been properly managing the risks of climate change and biodiversity loss. In the US, a consumer filed a proposed class action against KLM Royal Dutch Airlines ("KLM") for alleged misrepresentations about the environmental benefits of its use of biofuels and carbon offset program. Another consumer filed a similar complaint against United Airlines regarding alleged misleading claims about its sustainable aviation fuel. Elsewhere in the world, we have seen a variety of greenwashing-related lawsuits, including one brought by Dutch environmental campaign group Fossil Free in the Dutch courts, also against KLM regarding the alleged breach of EU consumer law standards in advertisements promoting emissions reductions.

In this context, does arbitration offer an alternative for the resolution of greenwashing-related disputes? To answer this question, we consider the arbitrability of such disputes.

Arbitrability of Greenwashing-Related Disputes

As a starting point, greenwashing and climate-related disputes may be arbitrable by consumer-claimants through Business to Consumer ("B2C") contracts which contain an arbitration

agreement. As arbitration arises through contracts, it is hard to envision how arbitration can arise in a greenwashing context other than under B2C contracts.

B2C contracts typically include Terms of Use or Terms and Conditions which are agreed to when a consumer purchases a good or service or signs up to a service from a business. The arbitration agreements within these contracts are typically framed to be all-encompassing.

B2C contracts containing an arbitration agreement have recently gained attention with the media focus on Disney's all-encompassing arbitration clause in its Terms of Use, which the consumer-claimant had agreed to when creating a Disney+ account in 2019 and when purchasing Disney Park tickets this year. The case highlights the potential for B2C contracts to require a consumer who wishes to raise a dispute with the relevant company to arbitrate that dispute notwithstanding the type of claim. In the US, arbitration clauses are often included in B2C contracts from a variety of corporates (see Terms of Use of Uber, Airbnb, Kmart, Disney, etc.). These arbitration clauses appear with similar language and style: see below an example from Disney's Terms of Use (US):

> **8. BINDING ARBITRATION AND CLASS ACTION WAIVER**
>
> PLEASE READ THIS PROVISION CAREFULLY—YOU ARE AGREEING TO RESOLVE ALL DISPUTES BETWEEN YOU AND DISNEY THROUGH BINDING INDIVIDUAL ARBITRATION AND INCLUDE A CLASS ACTION WAIVER AND JURY TRIAL WAIVER.
>
> You and Disney agree to resolve, by binding individual arbitration as provided below, all Disputes (including any related disputes involving The Walt Disney Company, its subsidiaries, or its affiliates) except for: (i) any claim within the jurisdiction of a small claims court consistent with the jurisdictional and dollar limits that may apply, as long as it is an individual dispute and not a class action; and (ii) any dispute relating to the ownership or enforcement of intellectual property rights. "**Dispute**" includes any claim, dispute, action, or other controversy, whether based on past, present, or future events, whether based in contract, tort, statute, or common law, between you and Disney concerning the Disney Products or this Agreement, or this exclusive authority to resolve any dispute relating to the interpretation, applicability, or enforceability of these terms or the formation of this contract, including, without limitation, the arbitrability of any dispute, and any claim that all or any part of this Agreement is void or voidable.

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Evidently, these arbitration clauses are broad, employing wide language providing for arbitration of any dispute. However, these clauses are generally not in place in Australia. Companies with arbitration clauses within their US B2C contracts have explicitly removed them for their Australian

and even “rest of the world” customers (e.g. see Uber, Airbnb , Kmart, etc.). It is therefore pertinent to consider whether a consumer’s greenwashing claim may be arbitrable in Australia.

In Australia, greenwashing claims have so far been brought under the Australian Consumer Law (“ACL”), which in section 18 prohibits misleading and deceptive conduct from providers of services and goods. If there was a foreign arbitration agreement within a B2C contract, and the applicable law governing the contract was not Australian, this would effectively require the Australian consumer-claimant to make a claim of greenwashing in arbitration under the laws of the applicable governing law (thus potentially excluding the ACL if it was foreign law).

The arbitrability of consumer claims where the applicability of the ACL would be excluded has not been tested in Australia. In *Dialogue Consulting Pty Ltd v Instagram Inc* [2020] FCA 1846, Instagram’s Terms of Use (incorporating the arbitration agreement) were agreed to by Dialogue Consulting (an Australian company) when it signed up for an Instagram account. *Dialogue Consulting* sought to exclude the operation of the arbitration agreement on the basis that it was an unfair contract term under section 24 of the ACL, as it would “give Instagram, LLC the ability to avoid the operation of laws in countries in which it operates, such as the ACL in Australia” (at paragraph 331). The Court rejected this argument, largely because the arbitration agreement within the Terms of Use did not cause a “significant imbalance in the parties’ rights and obligations arising under the contract”, as the term created “a meaningful relationship between [it] and the protection of a party, and that relationship is reasonably foreseeable at the time of contracting” (at paragraphs 344, 350). The judgment was unsuccessfully appealed on other grounds.

While this demonstrates that in Australia, an arbitration agreement contained within a B2C contract may be enforced against a consumer, whether a foreign arbitration agreement may be enforced where the plaintiff’s cause of action relies on the application of the ACL has yet to be tested. Although decisions such as *Comandate Marine v Pan Australia Shipping Pty Ltd* [2006] FCAFC 192 have suggested that section 18 of the ACL is not an overriding mandatory rule, it remains uncertain what the outcome would be for a B2C contract.

The position has been somewhat explored in other jurisdictions. In the US District Court for the Eastern District of New York, a consumer brought a putative class action under the laws of all fifty US states against the manufacturer, Belkin, for misrepresenting the speed of a wireless router allegedly violating, among others, state consumer protection laws. An arbitration agreement in the Belkin End User Licensing Agreement was agreed to when the consumer-plaintiff set up his wireless router, which was found to be valid and operative. Relevantly, however, the arbitration was to be conducted under Californian law which is, for these purposes, not substantially different to the law of other US states, whereas the ACL may be substantially different to consumer protection laws under a foreign jurisdiction.

Mid-last year, the English Commercial Court refused to enforce a foreign-seated arbitration award rendered in an arbitration that arose from an arbitration agreement contained within a B2C contract. The arbitration was governed by foreign law and the arbitrator thus did not consider the protections provided to UK consumers under the UK Consumer Rights Act 2015.

In the absence of any firm direction from Australian courts, it appears that the conservative view would be that it may be preferable from a company’s perspective to include an arbitration agreement within a B2C contract, but only where that arbitration is to be governed by Australian law.

Who Benefits From Arbitrating Greenwashing Claims?

While regulatory investigation or action cannot be avoided by contractual agreement, a B2C contract containing an arbitration agreement may be beneficial for Australian companies as it could lead a consumer-brought greenwashing dispute to confidential arbitration proceedings instead of the public courtroom. Indeed, a key benefit of arbitration is its confidential and private nature which can help protect a company's reputation, particularly in an era where environmental prudence is an increasing market requirement. Other key advantages of arbitration, explored in this blog post, include flexibility, ease of enforceability and finality.

However, with collective plaintiffs, class actions in domestic courts will likely be the avenue of choice due to the underdevelopment of class arbitrations generally and the fact that courts may be more reluctant to enforce arbitration agreements where there is a group of consumer-plaintiffs. In the Australian context, it is arguable that such an arbitration agreement may amount to an unfair term under the ACL to the extent that it seeks to exclude both Australian class action and ACL regimes.

The situation may be different with individual or limited plaintiffs. As discussed, it is currently untested whether an arbitration agreement in a B2C contract would be enforced by Australian courts where the claimant's cause of action relies on the application of section 18 of the ACL. However, in a domestic arbitration agreement where the ACL is not excluded, it is hard to see why an arbitration agreement contained within a B2C contract could not be enforced against a consumer bringing a greenwashing or climate-related claim, like in *Dialogue Consulting v Instagram, Inc*.

Corporates may rely on arbitration agreements to seek to arbitrate greenwashing disputes and reap the well-known benefits of arbitration. While arbitration may also be attractive to some consumer-claimants, depending on the jurisdiction and the availability of statutory regimes such as the ACL, other consumers may feel that litigation offers the most attractive route.

In any event, this will be an interesting space to watch.

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