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Arbitration

Arbitration Agreements Binding Nonparties

Asia Pacific – 16 November 2020

In Rinehart v Hancock Prospecting Pty Ltd [2019] HCA 13, the High Court of Australia stayed litigation and forced a plaintiff to arbitrate against defendants who were not party to an arbitration agreement. The defendants' defence raised matters within the scope of the arbitration agreement and meant they were claiming "through or under" a party to the arbitration agreement.

Five propositions arise from the decision:

1. The scope of an arbitration agreement – determining which disputes must be arbitrated – is determined by ordinary principles of contractual construction – see our Insight on this case "The Latest From the High Court on Interpreting the Scope of Arbitration Clauses".
2. The "presumptive liberal approach" to determining the scope of arbitration agreements that is taken in the UK, Hong Kong and Singapore – presuming that a dispute falls within the arbitration clause unless clearly intended otherwise – has not yet been accepted in Australia.
3. As a result, arguments and appeals will be more common in Australia as to the scope of arbitration agreements, as in *Inghams Enterprises Pty Limited v Hannigan* [2020] NSWCA 82 – see our Insight "Arbitration – Damages Claims not 'Under' Agreement".
4. Defendants to Australian litigation who are not party to an arbitration agreement may have the litigation stayed in favour of arbitration if the claim against them, *or* their defence, arises "through or under" a party to an arbitration agreement.
5. The corporate veil is not pierced in Australia – and probably no longer in the UK, Hong Kong, Singapore or India – through statutory provisions enabling nonparties claiming "through or under" parties to an arbitration agreement to obtain stays of litigation.

Mrs Rinehart, Her Children and a Trust

Mrs Rinehart held mining tenements on trust for her four children on the terms of a trust deed. The deed contained an arbitration clause that referred "any dispute under this deed" to arbitration. Mrs Rinehart transferred mining tenements to companies who were not party to the deed or the arbitration clause, and her children challenged the transfer by commencing litigation claiming the deed was invalid and the transfer was in breach of trust.

Mrs Rinehart and the third parties applied for the dispute to be referred to arbitration, based on the arbitration clause in the deed.

Courts are required to refer disputes to arbitration where they fall within an arbitration agreement, unless the agreement is "null and void, inoperative or incapable of being performed" s 8(1) of the Commercial Arbitration Act 2010 (NSW), part of uniform legislation in Australia enacting the UNCITRAL Model Law on International Commercial Arbitration.

Australian legislation goes further than the Model Law by requiring a referral to arbitration where a party to litigation is claiming "through or under" a party to an arbitration agreement. The UK, Singapore and India have similar extensions.

In this case, the validity of the deed was clearly a dispute "under this deed" and fell within the arbitration clause.

The question was whether the validity of the transfers were also covered by that clause. That depended on whether or not the third parties were claiming "through or under" a party to the deed. The third parties said that they were, because their defence relied on the transferors' entitlement under the deed to transfer the tenements. The trial judge and the intermediate appellate court disagreed, but the High Court agreed. The litigation was stayed and the dispute referred to arbitration.

Nonparty Defendants' Defences

It is unusual for defences to be relied on to claim nonparties are claiming through or under a party to an arbitration agreement. It is more usual for that to be determined by the plaintiff's claim. The position may be different in England, where it appears still to be doubted that a nonparty to an arbitration agreement who is invoking a defence dependent on the position of a party to the arbitration agreement should be recognised as a person "claiming through or under" that party.

What would have happened if Mrs Rinehart's children had commenced arbitration against the third parties instead of litigation? It is a fundamental of arbitration that it is based on party consent, and a party cannot usually be bound to arbitrate if it has not consented to arbitration. The third parties in this case did not have an arbitration agreement with the children, and theoretically, could have objected to the jurisdiction of an arbitral tribunal on that basis. The Commercial Arbitration Act does not have a provision entitling arbitration to be brought against parties who may defend "through or under" parties to an arbitration agreement. Had the children commenced arbitration against the third parties, a tribunal may well have ruled it did not have jurisdiction to determine the validity of the transfers. Strategically, it might be advantageous to commence litigation first instead of arbitration but it will depend heavily on the circumstances.

Scope of Arbitration Agreements – Presumptive Liberal Approach Declined

The High Court declined to adopt the "presumptive liberal approach" taken in the UK, Hong Kong and Singapore to determining the scope of arbitration agreements. It did not reject the approach but found no need to apply it in the present case. The approach presumes that the dispute falls within the arbitration clause unless clearly intended otherwise. Without the presumption, the Australian approach may require expensive, refined and lengthy arguments interpreting arbitration clauses. One such cautionary tale is Inghams Enterprises Pty Limited v Hannigan [2020] NSWCA 82 – see our Insight "Arbitration – Damages Claims not 'Under' Agreement". We analysed this aspect of Rinehart in our Insight "The Latest From the High Court on Interpreting the Scope of Arbitration Clauses".

Piercing the Corporate Veil

For years, courts and texts have explained the English High Court decision of *Roussel-Uclaf v G D Searle & Co Ltd* [1978] 1 Lloyd's Rep 225 as having pierced the corporate veil to allow a nonparty to claim arbitration under an arbitration agreement. On this view, a "mere legal or commercial connection" between a parent company and subsidiary was thought a sufficient basis for the subsidiary to claim "through or under" the parent. The High Court in *Rinehart* doubted this view of *Roussel-Uclaf*, pointing out that there, the subsidiary's liability was dependent on the parent's liability under a licence agreement that contained an arbitration clause. The subsidiary was indeed claiming "through or under" the parent without piercing the corporate veil. If this view of the case is accepted, it will remove the authority for the proposition that the provision can be used to pierce the corporate veil.

Takeaway #1: Draft Arbitration Agreements Carefully

Reinhart's controversy over the interpretation of the arbitration clause could have been avoided with more precise drafting. The word "under" in "any dispute under this deed" appeared to cover disputes involving the deed's substantive provisions, but not as to the deed's validity. This was the problem in *Inghams Enterprises Pty Limited v Hannigan* where the phrase disputes "under" an agreement was held, only by majority of the NSW Court of Appeal after a contrary judgment at trial, not to include a claim for damages for breach of the agreement.

The drafting of an arbitration clause should explicitly include "any question regarding its existence, validity or termination", or "disputes arising out of or in connection with [the agreement]" if that is what is intended. This wording would encompass disputes as to the agreement's validity. Arbitration institutions such as the Singapore International Arbitration Centre, the International Chamber of Commerce and the London Court of International Arbitration have model clauses on their websites as a starting place.

Takeaway #2: Beware of Nonparties to the Agreements

The possibility of a nonparty claiming under or through a party to the arbitration agreement should be considered at the time of drafting, and the agreement drafted inclusively or exclusively depending on the intention.

For further information and queries, please do not hesitate to reach out to **Cameron Ford**, **Christopher Bloch**, or your usual firm contact. Our thanks to Daniel Ang of the National University of Singapore and University of Melbourne law schools for his research and drafting.

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