

The Latest From the High Court on Interpreting the Scope of Arbitration Clauses

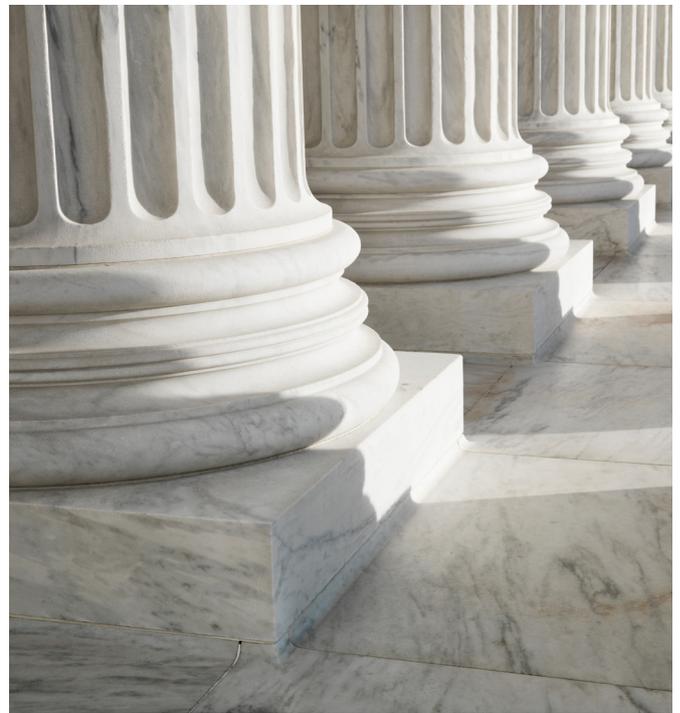
On 8 May 2019, the High Court handed down its judgment¹ on the dispute between mining magnate Mrs Gina Rinehart and her children, Bianca Rinehart and John Hancock, which provided guidance on the approach to be taken in interpreting the scope of arbitration clauses. While a number of issues were agitated in the lower courts, the High Court appeal was confined to the issue of whether arbitration clauses in deeds extended to disputes regarding the validity of the deeds themselves. The High Court also heard a cross appeal which was allowed but this cross appeal is not dealt with in this note.

Background

Against public threats of litigation made by John Hancock about Mrs Rinehart, among others, Mrs Rinehart's children executed deeds which contained releases of claims and promises not to make further claims. Mrs Rinehart's children subsequently challenged the validity of the deeds, alleging that their assent was procured by misconduct. Relevantly, each deed contained a clause which referred "any dispute under" the deed to confidential arbitration. The question for the High Court's determination was whether the claims regarding the validity of the deeds (which, if successful, would mean that the deeds could not be enforced) should be referred to arbitration under the arbitration clauses in the deeds. If this dispute was not to be referred to arbitration, it could be litigated in open court.

Considering this question at first instance, the primary judge held that any claims relating to the validity of the deeds were not within the scope of the arbitral clauses, reasoning that the words "under this deed" limited the scope of the clause to disputes regarding the operation of each deed, and not disputes about their validity. On appeal, the Full Court of the Federal Court disagreed with the primary judge's construction of the arbitral clauses, finding that the parties intended that a claim regarding the validity of the deeds was within the scope of the clauses, which ought to be given a liberal interpretation (i.e. to contemplate more, as opposed to less, of the disputes in question).

A significant portion of the Full Court's reasons concerned the approach taken by the House of Lords to the construction of arbitral clauses in *Fiona Trust & Holding Corporation v Privalov* [2007] 4 All ER 951 (*Fiona Trust*), which started from an assumption that parties are likely to have intended that any dispute arising out of their commercial relationship ought to be decided by the same Tribunal, in this case by arbitration. The position of *Fiona Trust* in Australia was somewhat unclear, because, while it had been adopted in a number of Australian lower court cases, it had also been challenged in others.



High Court Decision

The case went on appeal to the High Court, which handed down its decision on 8 May 2019. The High Court upheld the conclusion reached by the Full Court, but expressly declined to consider the *Fiona Trust* "presumption" and instead stated it would resolve the proper construction of the arbitral clauses by applying orthodox principles of contractual interpretation.

Central to the High Court's reasoning was that the deeds (including the arbitral clauses) should be construed against their context and purpose. The Court considered that the fundamental purpose of the deeds was to quell disputes about the title to commercial assets and a critical object was to maintain the confidentiality of the affairs of the Hancock Group, certain trusts, the intra-family dispute and the provisions of the deeds themselves. This confidentiality extended to the dispute resolution process contemplated by the arbitral clauses. Against this context and purpose, the High Court found that the background to, and purposes of, the deeds pointed clearly to arbitral clauses of a wide scope that would include disputes about the validity of the deeds. It was said to be "inconceivable" that parties to the deeds could have thought any challenge regarding their validity would not be the subject of confidential dispute resolution, but would rather be heard and determined publicly in open court. Accordingly, the High Court dismissed the appeals.

¹ *Rinehart v Hancock Prospecting Pty Ltd* [2019] HCA 13.

The existence of the dispute regarding the scope of the arbitral clauses, and the individualised interpretation approach taken by the High Court to their resolution, means that there will continue to be uncertainty about the type of disputes that are covered by an arbitration clause, because each clause will be construed against its context and purpose. There is no firm rule or assumption that can be applied, but this decision, instead, highlights the ongoing need for careful drafting of arbitration clauses in contracts to ensure they are both valid and appropriate in scope. The exact impact of the decision will take some time to be established. Given the broad wording more commonly used in modern arbitration clauses, parties can hope the issue of narrowly worded clauses will become less common into the future.

If you would like to discuss the impact of this case on your dispute resolution rights and obligations, or on your contract drafting, please contact us.

Contacts



Graeme Slattery

Partner

T +61 8 9429 7576

E graeme.slattery@squirepb.com



Rebecca Heath

Of Counsel

T +61 8 9429 7476

E rebecca.heath@squirepb.com

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