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Restrictions on enforcing an Arbitration Agreement – Recent decisions

Luke Preston, Partner

Kyle Trattler, Senior Associate

Two recent decisions have clarified the circumstances in which a court will be bound to refer to arbitration a dispute pending before it, pursuant to s 8 of the *Commercial Arbitration Act 2013* (Qld) and its interstate counterparts.[1]

Section 8(1) provides as follows:

> *8(1) A court before which an action is brought in a matter which is the subject of an arbitration agreement must, if a party so requests not later than when submitting the party's first statement on the substance of the dispute, refer the parties to arbitration unless it finds that the agreement is null and void, inoperative or incapable of being performed.*

In *Novawest Contracting Pty Ltd (Receiver and Manager Appointed) v Brimbank City Council and Anor*,[2] Vickery J of the Victorian Supreme Court considered the scope of s 8 of the Victorian *Commercial Arbitration Act 2011* (**VIC Act**). His Honour addressed in particular, the circumstances in which an arbitration agreement will be '*incapable of being performed*' and where, accordingly, the court retains its jurisdiction to hear the matter.

Subsequently, in *Rinehart v Rinehart (No 3)*,[3] the Federal Court of Australia considered the meaning of the term *'commercial dispute'* and whether a commercial relationship between the parties is a necessary pre-requisite to an *'arbitration agreement'* to be enforced under s 8 of the New South Wales *Commercial Arbitration Act 2010* (**NSW Act**).[4]

The decisions are of broad interest given the substantial uniformity in domestic commercial arbitration legislation enacted by the Australian states since 2010, based on the *2006 United Nations Commission on International Trade Law* (**UNCITRAL**) *Model Law*.

Novawest Contracting v Brimbank City Council and Anor

Facts

The proceedings comprised a claim by Novawest Contracting (**Novawest**) against Brimbank City Council (**BCC**) arising from a contract for the construction of road, drainage and other services for an urban renewal project in the North Sunshine Industrial Area. Novawest claimed delay costs, variation payments and the return of security held by BCC.

Arcadis Australia Pacific Pty Ltd (formerly Hyder Consulting Pty Ltd) (**Hyder**) had been engaged by BCC to provide consultant design, tender documentation and contract administration services for the project. BCC joined Hyder to the action as a second defendant by way of counterclaim, alleging that Hyder's design work was deficient.

The contract between BCC and Hyder (**Hyder Contract**) was in the AS 4122-2000 form, and contained dispute resolution provisions including an arbitration agreement in the following terms:

> 15.2 *If the dispute has not been resolved within 28 days of service of the notice of dispute, then unless clause 15.4 applies,*[5] *that dispute shall be and is hereby referred to arbitration.*

Hyder argued that cl 15.2 accordingly provided for compulsory arbitration, and sought an order pursuant to s 8(1) of the VIC Act for the stay of the litigation and the referral to arbitration of those parts of BCC's counterclaim which comprised disputes under the Hyder Contract.

Argument

BCC opposed referral to arbitration on the basis that BCC would not, until Novawest's claims against it for delay costs and variations were determined in the current court proceedings, be in a position to identify what (if any) loss or damage BCC had suffered as a result of Hyder's alleged breach. In those circumstances, BCC argued that its claim against Hyder was likely to be struck out by an arbitrator for failure to identify and plead (let alone prove) any loss or damage until the Novawest litigation was concluded.

The court had to consider whether that prospect meant that the Hyder Contract's arbitration agreement was *'null and void, inoperative or incapable of being performed'* within the terms of s 8 of the VIC Act.

Decision

The court observed the mandatory language of s 8 and endorsed reasoning set out in *Lysaght Building Solutions Pty Ltd (t/as Highline Commercial Construction) v Blanalko Pty Ltd (No 3)*:[6]

> *The use of the imperative word 'must' in s 8(1), rather than the permissive 'may', which was employed in the superseded Commercial Arbitration Act 1984, removes the court's discretion to refuse to grant a stay, and renders the provision mandatory. The only reason a court can refuse to grant a stay is if the arbitration agreement is found to be 'null, void, inoperative or incapable of being performed'. This means*

that if the requirements of the section are met the court has no choice but to grant a stay of the proceeding before it and refer the matter to arbitration.

This may result in some inefficiencies in case management in some cases, arising from the potential for litigation on the same project being conducted before different tribunals. Nevertheless the statutory meaning is clear.

In the absence of any evidence that the Hyder Contract arbitration agreement was null and void, or inoperative, Vickery J then considered the meaning of the term *'incapable of being performed'*. His Honour drew a clear distinction between hurdles in the administration of the arbitration itself on the one hand, and issues going to the merits of the dispute on the other. He adopted the rationale of the High Court of Singapore in *Sewbawang Engineers and Constructors Pte Ltd v Covec (Singapore) Pte Ltd*,[7]

[T]his term would relate to the capability or incapability of parties to perform an arbitration agreement. In Mustill & Boyd, Commercial Arbitration, it is stated the expression would suggest "something more than mere difficulty or inconvenience or delay in performing arbitration". There has to be "some obstacle which cannot be overcome even if the parties are ready, able and willing to perform the agreement". (...)

An arbitration agreement could be incapable of being performed, if, for example, there was contradictory language in the main contract indicating the parties intended to litigate. Moreover, if the parties had chosen a specific arbitrator in the agreement, who was, at the time of the dispute, deceased or unavailable, the arbitration agreement could not be effectuated. In addition, if the place of arbitration was no longer available because of political upheaval, this could render the arbitration agreement incapable of being performed.

If the arbitration agreement was itself too vague, confusing or contradictory, it could prevent the arbitration from taking place.

His Honour accordingly took the view that he was not entitled to delve into the merits of the dispute between BCC and Hyder in the context of the current application and that the purported difficulty which BCC might face in presently addressing an arbitration was not a relevant consideration. Any such difficulty did not, in the court's opinion, amount to the arbitration agreement being *'incapable of being performed'* within the terms of s 8.

The court accordingly granted Hyder's application and ordered the referral to arbitration of the disputes arising under the Hyder Contract. Whilst His Honour was mindful of the inefficiency and inconvenience of hearing different elements of the dispute in different tribunals, the mandatory terms of the VIC Act made the making of such an order obligatory.

Summary

The use of the imperative word *'must'* in s 8 represents a substantial change to the previous practice prior to the enactment of the current Australian Commercial Arbitration Acts. The court must now refer to arbitration any dispute falling within s 8's ambit, unless the subject arbitration agreement is found to be *'null, void, inoperative or incapable of being performed'*.

The decision in *Novawest Contracting* shows that overlapping disputes will be referred for determination before different tribunals where an arbitration agreement so requires, even if that course will lead to an inefficient, inconvenient and more expensive resolution of the real issues in dispute.

Only obstacles which cannot be overcome even if the parties are ready, able and willing to proceed with arbitration are likely to fall within the *'incapable of being performed'* exception in s 8.

Rinehart v Rinehart (No 3)

Facts

In *Rinehart (No 3),* Bianca Rinehart and John Hancock (**applicants**) are pursuing relief against their mother Gina Rinehart (**Mrs Rinehart**) and associated entities (**other respondents**) based upon allegations of misconduct in the administration of trusts associated with Mrs Rinehart's late father Lang Hancock.

Mrs Rinehart and the other respondents sought, pursuant to s 8(1) of the NSW Act,[8] interlocutory orders for referral of the dispute to arbitration and the dismissal or permanent stay of the court proceedings.

The parties identified 17 specific questions for determination by the court. In a comprehensive judgment also addressing a number of broader interlocutory issues, Gleeson J. examined the operation of commercial arbitration legislation in Australia and its meaning in the context of the historical development of the UNICITRAL Model Law.

The applicants opposed Mrs Rinehart's application for referral to arbitration on the following primary grounds:

- S 8(1) was not available to the Federal Court exercising federal jurisdiction, as it was not *'picked up'* by s 79 of the *Judiciary Act 1903* (Cth) (**Judiciary Act**);
- The relationship between the parties is not a commercial one, and that the Commercial Arbitration legislation accordingly has no application; and
- In any event, the deeds containing the arbitration clauses were procured by misconduct and should be declared void.

Judiciary Act, s 79

The Judiciary Act s 79(1) provides:

> *The laws of each State or Territory, including the laws relating to procedure, evidence, and the competency of witnesses, shall, except as otherwise provided by the Constitution or the laws of the Commonwealth, be binding on all Courts exercising federal jurisdiction in that State or Territory in all cases to which they are applicable.*

The applicants argued that s 53A of the *Federal Court of Australia Act 1976* (Cth) is inconsistent with s 8(1) and therefore does *'otherwise provide'* within the meaning of s 79(1), such that s 8(1) is not *'picked up'* by s 79(1).

S 53A is in the following terms:

> ***Arbitration, mediation and alternative dispute resolution processes***
>
> *1. The court may, by order, refer proceedings in the court, or any part of them or any matter arising out of them:*
>
> *a. to an arbitrator for arbitration; or*
>
> *b. to a mediator for mediation; or*
>
> *c. to a suitable person for resolution by an alternative dispute resolution process;*
>
> *in accordance with the Rules of Court.*
>
> *(1AA) Sub-s (1) is subject to the Rules of Court.*
>
> *(1A) Referrals under sub-s (1) (other than to an arbitrator) may be made with or without the consent of the parties to the proceedings. Referrals to an arbitrator may be made only with the consent of the parties.*
>
> *(2) The Rules of Court may make provision for the registration of awards made in an arbitration carried out under an order made under sub-s (1).*
>
> *(3) This section does not apply to criminal proceedings.*

Her Honour noted the distinction between the scope of operation of the two provisions, stating:[9]

's 53A concerns, relevantly, the court's power to refer proceedings in the court, or any part of them or any matter arising out of them to an arbitrator for arbitration. It does not provide for the compulsory referral of parties to arbitration, which is the subject matter of s 8'.

Gleeson J. endorsed the approach to determining whether a federal law *'otherwise provides'* for the purposes of s 79(1) as set out in *Latteria Holdings Pty Ltd v Corcoran Parker Pty Ltd*[10]

"… a court is to ask whether the federal law would so reduce the ambit of the State law that the provisions of the federal law are irreconcilable with the provisions of the State law. The "covering the field" approach, drawn from decisions concerning s 109 of the Constitution of the Commonwealth, is not to be taken …"

Applying those principles, the court rejected the applicants' argument that s 53A preserves the court's discretion whether to refer the parties to arbitration, in contrast to s 8(1) which purports to make referral mandatory in certain circumstances. Her Honour took the view that s 53A does not affect the ambit of s 8(1), as although the former confers a power on the court to refer parties to arbitration with their consent, it is silent as to proceedings the subject of (and any enforcement of rights arising from) an arbitration agreement.

Her Honour accordingly held that s 8(1) of the NSW Act was part of the law to be applied by the Federal Court pursuant to s 79 of the Judiciary Act.

Need for a commercial relationship between the parties

The agreed questions posed by the parties for the court's determination included relevantly the following:

1. What factors are relevant to determining whether the commercial arbitration legislation applies?

2. Does there need to be a commercial relationship between the parties in order for arbitration to be a domestic commercial arbitration?

Section 1(1) of the NSW Act clearly states that *'This Act applies to domestic commercial arbitrations'*, and the parties explicitly accepted that s 8(1) would have no application unless the proposed arbitration fell within that definition.

Whilst *'domestic'* is clearly defined in s 1(3) of the legislation,[11] no such specific treatment is afforded the term *'commercial'*.

The applicants argued[12] that the legislation is concerned with commercial disputes between business people, based on the requirement in s 1(3)(a) that the parties to an arbitration agreement have their *'places of business'* in Australia. The applicants' case was that neither of them conducted any business relevant to the subject matter of the dispute.

Gleeson J. rejected[13] that argument because s 1(4)[14] of the legislation expressly contemplates that a party to an arbitration agreement may not have a place of business.

Her Honour took the view that the Commercial Arbitration legislation is concerned with the resolution of *'commercial disputes'*, and went on to consider the proper construction of the term *'commercial'* in that context:[15]

A natural interpretation of the word 'commercial' when qualifying the word 'arbitration' is that it refers to

arbitration of commercial disputes. The note to s 1 indicates that the term 'commercial' should be given a wide interpretation, and that commercial disputes generally arise from a transaction between parties who have a relationship of a commercial nature. However, the legislation does not expressly require the identification of a commercial relationship between the parties to an arbitration agreement.

The parties expressly agreed[16] that the concept of *'commercial'* in the legislation is not confined by domestic law principles, given its origins in the UNCITRAL Model Law and having regard to s 2A[17] of the NSW Act.

The applicants emphasised the familial relationship between them and Mrs Rinehart and argued that the dispute is substantially concerned with the affairs of a family trust. Her Honour acknowledged[18] that certain features of the case are unusual in commercial contexts:

- The alleged arbitration agreements are all contained in agreements for the resolution of disputes about entitlements following the death of Mr Hancock, as distinct from agreements to engage in commercial activity; and
- The claims made by the applicants concern their disputed entitlements which ultimately arise from their status as grandchildren of Mr Hancock, rather than from any commercial activity.

Decision

After considering a range of domestic and international authority,[19] Her Honour formulated the following conclusions:

- An arbitration is not a *'commercial'* arbitration merely because it involves a corporation, association or individual which carries on business;
- The inclusion of commercial provisions in a contract will not necessarily render a dispute arising out of that contract a *'commercial'* dispute;
- An arbitration will be a *'commercial'* arbitration if it involves the resolution of a commercial dispute;
- A *'commercial dispute'* will typically, although not invariably, arise from a commercial relationship, at arms' length;
- A *'commercial dispute'* will typically not be of a type governed by any specific regime for dispute resolution, in contrast to the position for employment, family law and consumer disputes in most jurisdictions;
- A dispute will aptly be described as a *'commercial dispute'* where it concerns ownership of commercially valuable assets and entitlements to profits generated by those assets, and where the dispute is conducted in the nature of commercial litigation (for example, where the parties retain commercial legal advisers to conduct the dispute).

Her Honour determined[20] that:

- There does not need to be a *'commercial relationship'* between the parties in order for an arbitration to be a domestic commercial arbitration within the ambit of s 8; and
- Rather, there must be a *'commercial dispute'*, which may arise *'from issues about ownership of commercial assets, or entitlements to profits, or other features of the context of the dispute which reveal an underlying concern with the making of profits or commercial gains'*.

On the facts of the present case, Her Honour held[21] that:

- The claims made in the proceedings do comprise commercial disputes, to the extent that they concern ownership of valuable commercial assets and entitlements to profits generated by those assets and derived from commercial activities; and

- Neither the familial relationships between the parties, nor any lack of commercial sophistication on the part of either of the applicants would deprive the claims of their commercial character.

The court determined,[22] on the facts, that five of the deeds the subject of the proceedings contained apparently valid arbitration agreements within the meaning of s 8 of the NSW Act or alternatively the *Commercial Arbitration Act 2012* (WA). Before making an order for referral to arbitration under s 8 of claims arising under those deeds, Her Honour was however required to consider the applicants' claim that the deeds containing the arbitration clauses were procured by misconduct and should be declared void.

In a complex and considered judgment on the point,[23] Gleeson J.:

- Held[24] that the court has a discretion whether to make a determination that an arbitration agreement is *'null and void, inoperative or incapable of being performed'* within the terms of s 8(1) of the legislation;
- Took the view[25] that the matters asserted by the applicants could, if successful, lead to a finding that each arbitration agreement is void or inoperative for the purposes of s 8(1);
- Considered[26] that the circumstances favoured a trial of the applicants' assertions, notwithstanding that Mrs Rinehart and the other respondents had raised matters which *'at face value … raise serious challenges to the claims of undue influence, duress and other species of misconduct'*;[27]
- Found,[28] in balancing the potential inconvenience to the parties, that the inherent prejudice to the applicants in submitting to an inevitably lengthy non-consensual arbitration could not satisfactorily be addressed; and
- Ordered that the court's discretion should be exercised to direct a trial on the applicants' assertions and, as a result, to determine whether the relevant arbitration agreements are void or inoperative and so beyond the scope of s 8(1).

Summary

The decision in *Novawest Contracting*[29] mandates that a court refer to arbitration any dispute falling within the ambit of s 8 of the Commercial Arbitration legislation, unless the subject arbitration agreement is found to be *'null, void, inoperative or incapable of being performed'*. That section binds courts exercising Federal jurisdiction, just as it binds State Courts, by operation of s 79 of the Judiciary Act.

Section 8 applies to domestic commercial disputes, with the term *'commercial'* to be given a broad interpretation. There is no requirement that the parties to the dispute have a commercial relationship. The commercial nature of the dispute may instead arise from its subject matter, such as commercial assets or entitlements to profits, or other features which reveal an underlying concern with earnings or commercial gain.[30]

Where there is an assertion before the court that the subject arbitration agreement is *'null, void, inoperative or incapable of being performed'*, the court has a discretion to determine whether the application of s 8 is thereby ousted. Based on the approach adopted in *Rinehart (No 3),* courts will be expected to exercise that discretion in respect of any arguable case and will be reluctant to force a party to arbitration where its consent to that process is in any serious doubt.

In such circumstances, the party seeking to enforce the arbitration agreement should consider seeking confidentiality orders from the court, so as to maintain so far as possible the privacy which a valid arbitration agreement would otherwise confer on the dispute.

.....

[1] Section 8 has been enacted by each of the other Australian States in identical terms.
[2] [2015] VSC 679.
[3] [2016] FCA 539.
[4] Or, alternatively, under the identical provisions of the *Commercial Arbitration Act 2012* (WA).
[5] Clause 15.4 related to expert determination with the parties' agreement, and was not relevant in the circumstances.
[6] [2013] VSC 435, [125] - [126].
[7] [2008] SGHC 229.
[8] Or, alternatively, under the identical provisions of the *Commercial Arbitration Act 2012* (WA).
[9] *Rinehart v Rinehart (No 3)* [2016] FCA 539, [152].
[10] [2014] FCA 880; (2014) 224 FCR 519, [47].
[11] *An arbitration is domestic if:*
   a. *the parties to an arbitration agreement have, at the time of the conclusion of that agreement, their places of business in Australia, and*
   b. *the parties have (whether in the arbitration agreement or in any other document in writing) agreed that any dispute that has arisen or may arise between them is to be settled by arbitration, and*
   c. *it is not an arbitration to which the Model Law (as given effect by the International Arbitration Act 1974 of the Commonwealth) applies.*
[12] *Rinehart v Rinehart (No 3)* [2016] FCA 539, [46] - [47].
[13] Ibid, [46] and [48].
[14] *If a party does not have a place of business, reference is to be made to the party's habitual residence.*
[15] *Rinehart v Rinehart (No 3)* [2016] FCA 539, [51].
[16] Ibid, [54].
[17] Which deals with *'International origin and general principles'*; cf Model Law Art 2A.
[18] *Rinehart v Rinehart (No 3)* [2016] FCA 539, [71].
[19] Including primarily: *Report of the Secretary-General: possible features of a model law on international commercial arbitration (1981) UN Doc A/CN.9/207; Chief Executive Officer of the Australian Sports Anti-Doping Authority v 34 Players [2014] VSC 635; Report of the Secretary General to the Eighteenth Session of UNCITRAL (1984) UN Doc A/CN.9/264; Carter v McLaughlin (1996) 27 OR (3d) 792; and Re Ku-ring-gai Co-operative Building Society (No 12) Ltd [1978] FCA 50; (1978) 36 FLR 134.*
[20] *Rinehart v Rinehart (No 3)* [2016] FCA 539, [72].
[21] Ibid, [560] - [561].
[22] Ibid, [21(3)].
[23] Detailed consideration of the judgment on this point is beyond the scope of this article.
[24] *Rinehart v Rinehart (No 3)* [2016] FCA 539, [119].
[25] Ibid, [663].
[26] Ibid, [666].
[27] Ibid, [665].
[28] Ibid, [667(5)].
[29] [2015] VSC 679.
[30] *Rinehart v Rinehart (No 3)* [2016] FCA 539, [72].

Authors

Luke Preston
Partner

P: (07) 3000 8384
E: lpreston@carternewell.com

Kyle Trattler
Senior Associate

P: (07) 3000 8385
E: ktrattler@carternewell.com