Chartered Institute of Arbitrators

CIArb

Australia

The CIArb Australia News

December 2017

www.ciarb.net.au

RUSSELL THIRGOOD
PARTNER
MCCULLOUGH ROBERTSON
View Profile

ERIKA WILLIAMS
SENIOR ASSOCIATE
MCCULLOUGH ROBERTSON
View Profile

Casenote: The Rinehart Saga Continues... in private

Case: Hancock Prospecting Pty Ltd v Rinehart [2017] FCAFC 170

The latest decision in the Rinehart family saga was handed down on 27 October 2017 and canvassed a number of crucial legal principles relating to arbitration.[1] Although lengthy, the judgment gives close consideration to the history of arbitration in Australia and abroad and provides clear enunciation of certain arbitration related legal principles.

The underlying dispute involves allegations by the children of mining magnate, **Gina Rinehart**, that Mrs Rinehart breached her duties as a fiduciary and as a trustee of trusts in which her four children had beneficial interests by manipulating the financial position of Hancock mining assets in her own favour and other misconduct. Daughter **Bianca Rinehart** and son **John Hancock** (together, the **Applicants**) also claim that various deeds they signed which included arbitration agreements are void as Mrs Rinehart induced them to sign the deeds by misleading and deceptive and unconscionable conduct, undue influence, breach of trust and fraud on a power.

This article focusses on the Court's discussion of the applicability of the Commercial Arbitration Act, construing the scope of an arbitration agreement and whether third party companies involved in the legal battle could also have their disputes referred to arbitration.

When does the Commercial Arbitration Act apply?

If should first be said that each state and territory in Australia has now enacted uniform domestic commercial arbitration acts so the principles espoused by the court in relation to the Commercial Arbitration Act 2010 (NSW) (the **Act**) (which the parties agreed the Court should apply in the present case) are equally applicable to the domestic commercial arbitration acts throughout Australia.

For a domestic commercial arbitration act to apply, the dispute must be 'domestic' and 'commercial'. There was no argument that the present dispute was domestic. However, two arguments were presented by the Applicants to suggest that the dispute was not commercial.

Firstly, the Applicants submitted that it was necessary to demonstrate that the dispute arose from a 'commercial relationship'. The Court was able to dismiss this submission swiftly, stating that as the Commercial Arbitration Act refers to 'commercial arbitration', the word 'commercial' applies to the word arbitration and not to the relationship of the parties in the dispute. The Court also identified a number of examples of commercial disputes that could properly be referred to arbitration where no commercial relationship existed, including rival businesses or neighbouring property owners in dispute.

Secondly, the Applicants argued that the present dispute was a 'family' or 'trust' dispute whereas Mrs Rinehart submitted that the dispute is properly characterised as 'commercial'. The first point the Court made was that the enquiry was not binary and questions of characterisation rarely involve the existence of mutually exclusive categories.

Although the Court acknowledged that:

> *'in one sense the dispute is capable of being described as one between a mother and her children, about the destruction of a family relationship under the crushing weight of wealth, about the alleged maladministration of family trusts, and about the asserted loss of a large part of an inheritance that the childrens' [sic] grandfather (Mr Lang Hancock) had intended them to have.'*

The court did not consider further whether a 'trust' dispute was also a commercial dispute for the purpose of arbitration. However, it has been held in other decisions that a dispute relating to a trust is arbitrable.[2]

It agreed with Mrs Rinehart's submissions that the disputes were 'quintessentially commercial'. The Court noted that the Applicants failed 'to deal with the inconvenient fact that their pleading ... is founded on express allegations that the pleaded misrepresentations and conduct were and was made "in trade or commerce"'. In stating that characterising this dispute as only a family dispute would ignore the 'overwhelming commercial nature' of the dispute, the Court concluded that the dispute was necessarily commercial. Accordingly, the arbitration would be a domestic commercial arbitration for the purpose of the Commercial Arbitration Act.

Construing the scope of an arbitration clause

The Court gave detailed consideration to the approach taken in the English courts on one hand, and the approach taken in other Model Law jurisdictions such as Singapore, Hong Kong, Canada, New Zealand and Ireland on the other.

The English courts adopt a 'merits' or 'balance of probability' approach whereby the court conducts a full merits hearing regarding the existence and scope of the arbitration agreement. The approach taken in other Model Law jurisdictions is a 'prima facie' approach where, if there appears to be a valid arbitration agreement which prima facie covers the matters in dispute, the court's enquiry stops there and the matter is referred to arbitration. Then it is for the arbitrator to determine jurisdiction and scope of the arbitration agreement.

The court commended the prima facie approach noting that this approach recognised the arbitral tribunal's competence to rule on its own jurisdiction as provided for in the Act. The appropriate role for the court is to satisfy itself that there is an apparently valid arbitration agreement and then to take a broad view when characterising the disputes to determine whether they fall within the scope of the arbitration agreement, without delving into the merits of the case.

When ascertaining what matters fall within the scope of the arbitration agreement, it is the width or narrowness of the terms of the arbitration agreement which need to be considered. In this particular dispute, the relevant phrase of the arbitration clauses were 'any dispute under this deed' and 'all disputes hereunder'. The question was whether the argument over the validity of the deeds themselves was encompassed by the

GINA RINEHART WINS BID TO PUSH BATTLE WITH KIDS BEHIND CLOSED DOORS

Katie Walsh
The Australian Financial Review
27 October 2017

The epic dispute between Gina Rinehart and her two eldest children will be pushed behind closed doors and out of the public eye after the billionaire miner won an appeal to force the warring family members to arbitrate outside of court.

In a 138-page judgment handed down Friday morning, in which it described the dispute as being in one sense about the " destruction of a family relationship under the crushing weight of wealth", the Full Federal Court held the claims of Bianca Rinehart and her brother John Hancock that their mother moved valuable mining assets out of the family trust fell within valid arbitration clauses.

"The primary judge concluded that the so-called validity claims propounded by Ms Rinehart were not the subject of arbitration agreements... We disagree," said Federal Court chief justice Allsop and justices Anthony Besanko and David O'Callaghan in a joint judgment.

"We would stay the proceedings in court, permitting the arbitrator to deal with all issues including the attack on the arbitration agreements."

Bianca Rinehart at the Pink Hope Gala in Sydney back in 2015. Tony Aoun

The decision overturns the **May 2016 ruling of Federal Court Justice Jacqueline Gleeson to allow the dispute to continue before a court**, in the public eye.

Despite disagreeing with Justice Gleeson's finding that Ms Rinehart's claims fell outside the arbitration agreements and rubber-stamping the court battle, the Full Federal Court agreed with most of her preliminary findings on the validity of the agreements and the commercial nature of the dispute.

The bench noted that just because it "may be seen as a family dispute" did not mean it could not be "characterised as commercial".

"It is, of course, also true to say that in one sense the dispute is capable of being described as one between a mother and her children, about the destruction of a family relationship under the crushing weight of wealth, about the alleged maladministration of family trusts, and about the asserted loss of a large part of an inheritance that the childrens' grandfather (Mr Lang Hancock) had intended them to have," the court said.

"But, in our opinion, the choice between a dispute being 'commercial' on the one hand, or 'family' on the other, is not, as the applicants' submissions imply, a binary one.

"Such questions of characterisation rarely involve the existence of mutually exclusive categories."

Mrs Rinehart was **ranked third in the 2017 Rich List** compiled by The Australian Financial Review, with an estimated wealth of more than $10 billion.

The Federal Court battle dates back to October 2014, when Ms Rinehart and her older brother Mr Hancock filed a claim against Gina and 14 others related to the Hancock Prospecting group.

They claimed on the death of their grandfather Lang Hancock in 1992, Gina breached her duties as fiduciary of the family trust by removing the valuable mining assets and placing them into Hancock Prospecting — at the time, $77.8 million in net assets. She is then alleged to have given herself a 76.55 per cent shareholding of Hancock, instead of the 49 per cent allegedly agreed with her father. Mrs Rinehart is fiercely defending the claims.

wording in these arbitration clauses.

The Court noted that the construction of the arbitration agreement is based on an assumption that rational businessmen are likely to have intended any dispute that

may arise to be determined by the same tribunal. The Court's dismay at the semantic interpretation of the various phraseology used in arbitration clauses was evident when it stated:

> *... the assumption has a real role to play – not the subject of a nod, before fine textual analysis takes place using legal and linguistic ingenuity differentiating prepositional phrases using spatial and temporal metaphors derived from, or imposed on, the words. The assumption of an appropriate common sense contextual framework is not foreign to, but part of, an orthodox approach to construction.*

In rejecting the decision in Rinehart v Welker,[3] the Court found little difficulty in determining that a liberal reading of the clause 'any dispute under this deed' resulted in the conclusion that the substantive claims and validity claims were within the scope of the arbitration agreement.

It then remained to be determined whether the disputes concerning the rights of third parties which were companies with assets the subject of the deeds, including Hope Downs Iron Ore Pty Ltd and Roy Hill Iron Ore Pty Ltd, could be referred to arbitration. The Court held that, to the extent that the dispute concerning those third party interests were disputes between the parties to the deeds, then those aspects of the dispute could be referred to arbitration.

Third party companies' participation in the arbitration

Having determined that the disputes between the parties to the deeds could be referred to arbitration, the Court then had to consider whether the third party entities could also have their disputes (vis-a-vis the parties to the arbitration agreements) referred to arbitration.

The Court had to consider whether the third party companies were party to the arbitration clause in accordance with the extended definition of a party in the Act. In the Act, a party includes a person *'claiming through or under a party to the arbitration agreement'*.

The Court held that merely being in a close relationship with or having closely related rights did not equate to a party claiming 'through or under' another person. If, however, the third party companies had a cause of action or ground of defence that is derived from a party to the arbitration agreement, they may have been captured by the extended definition of party in the Act. In this case, the third party companies were not found to have a derivative defence and there was no legal relationship between the party to the arbitration agreement and the third party companies relevant to the defence.

As the third party companies were not claiming through or under a party to the arbitration agreement, the Court held that the claims against those companies would not be referred to arbitration and, in the interests of justice, stayed the claims against the third party companies to allow the remaining claims that were referred to arbitration to go through that process first.

Lessons

It is clear from this decision, and a number of other recent decisions, that Australian courts will take a broad, liberal approach to the construction of an arbitration agreement. Parties' attempts at arguing that a dispute is not commercial or relying on semantics to exclude a dispute from the operation of the Act will not be entertained by Australian courts. Australian courts will hold parties to their agreements to arbitration and conversely, a non-party to an arbitration agreement cannot (without all parties' consent) have its dispute referred to arbitration by the court.

1. Hancock Prospecting Pty Ltd v Rinehart [2017] FCAFC 170.
2. Fitzpatrick v Emerald Grain Pty Ltd [2017] WASC 206.
3. [2012] NSWCA 95.

Evidence before the court during its week-long hearing in February included a 2005 conversation between Bianca Rinehart and her brother, in which Mr Hancock told her "not to assume his attack" against their mother "was over".

"He said that Hope Downs 'belongs to the children' and that because he was aware [Mrs Rinehart] was under immense pressure to get the Hope Downs deal signed in time for government deadline of 30 June 2005, that is why he decided to 'hit her

up' for a 'few mill' then, but that his 'case' against [her] was by no means over," Bianca Rinehart recorded of the conversation.

"He stated that he would fight for ownership of our company's other assets (excluding Hope Downs) – ie Roy Hill, and that he would float these once he had control of them."

The court disagreed with the primary judge that a separate attack brought by the children that an arbitration clause was "null and void" should be heard by a court.

A short hearing between the parties on the issue was "unlikely" based on the "intensity of application to every matter in dispute" and it would be better to let the arbitrator decide, the court said.

"The separate attack is ill-formulated... As such it has an inherent lack of apparent strength given that the

two features are well-understood characteristics of commercial arbitration," it said.

A separate Supreme Court dispute is ongoing.