Inghams v Hannigan

When chickens come home to roost: is old authority holding back contemporary arbitration?

Jesse Kennedy, New Chambers

Fiona Trust v Privalov

- [2008] 1 Lloyd's Rep 254; [2007] UKHL 40
- Eschewed earlier English cases parsing over various linguistic nuances
- Time to "*draw a line under the authorities to date and make a fresh start*"
- Lord Hoffmann at [13]:

  "*In my opinion the construction of an arbitration clause should start from the assumption that the parties, as rational businessmen, are likely to have intended any dispute arising out of the relationship into which they have entered or purported to enter to be decided by the same tribunal. The clause should be construed in accordance with this presumption unless the language makes it clear that certain questions were intended to be excluded from the arbitrator's jurisdiction.*"

The status of the presumption in Australia

Francis Travel Marketing v Virgin Atlantic Airways (1996) 39 NSWLR 160 at 165 (Gleeson CJ):

- Commercial parties are "*unlikely to have intended that different disputes should be resolved before different tribunals, or that the appropriate tribunal should be determined by fine shades of difference in the legal character of individual issues, or by the ingenuity of lawyers in developing points of argument*"

Rinehart v Welker (2012) 95 NSWLR 221 at [121]

- No presumption applies, simply an exercise in contractual construction

Hancock Prospecting v Rinehart (2017) 257 FCR 442 at [182] and [193]

- It applies as an assumption of contractual intent, consistent with orthodox principles of construction

Rinehart v Hancock Prospecting Pty Ltd [2019] HCA 13

- Did not need to resolve the issue

Inghams Enterprises Pty Ltd v Hannigan

- (2020) 379 ALR 196; [2020] NSWCA 82

- Clause 23.1:

  *A party must not commence court proceedings in respect of a dispute arising out of this Agreement ("**Dispute**") (including without limitation any Dispute regarding any breach or purported breach of this Agreement, the interpretation of any of its provisions, any matters concerning a party's performance or observance of its obligations under this Agreement, or the termination or the right of a party to terminate this Agreement) until it has complied with this clause 23.*

- Clause 23.6 (emphases added):

  If … the Dispute concerns <u>any</u> monetary amount <u>payable</u> and/or owed by either party to the other <u>under this Agreement</u>, including without limitation matters relating to determination, adjustment or renegotiation of the Fee … then the parties must (unless otherwise agreed) submit the Dispute to arbitration [in accordance with the IAMA Arbitration Rules].

The Majority

- The "*question is 'purely one of construction' and accordingly to be determined by the application of orthodox principles of construction*" (at [119])
- Payable and/or owed "under this agreement" means arising from an obligation sourced in the agreement (at [140]-[143])
- Covers disputes about payment obligations under the agreement (e.g. liquidated damages), or issues concerning the negotiation, adjustment or determination of any fee to be paid (at [143])
- Damages for breach of other obligations, or for a wrongful purported termination, arise by operation of law, not the agreement ([148]-[150])
- Dispute not within the scope of the arbitration agreement

The Minority President

- Equally considered the question was purely one of construction (at [52])
- However, in the context of a DR clause, a "*broad and liberal construction*" is favoured (at [59]-[63])
- Adopted approach of FCAFC in *Hancock Prospecting:*

  "*where one has relational phrases capable of liberal width, it is a mistake to ascribe to such words a narrow meaning, unless some aspect of the constructional process, such as context, requires it*"

- The significance of the broad definition of "Dispute" and the use of the word "any" (at [77]-[85])
- Damages are "governed or controlled" by the agreement and are therefore amounts payable "under the agreement". The *source* of the obligation to pay damages is ultimately the agreement (at [86]-[96])

Implications

- Position of *Fiona Trust* and the application of any assumptions or presumptions remains unsettled
- The resurrection of the narrow "arising under" constructions?
- Uncertainty of construction and its consequences
- Does a statutory presumption apply to international arbitration agreements?
  - *International Arbitration Act 1974* (Cth), s 39:

    "(1) This section applies where … (c) a court is interpreting an agreement … to which this Act applies [i.e., an international commercial arbitration agreement].

    (2) The Court … must, in doing so, have regard to: (a) the objects of the Act; and (b) the fact that: (i) arbitration is an efficient, impartial, enforceable and timely method by which to resolve commercial disputes …"

Questions