ARBITRATION UPDATE

AVOIDING THE VOID: ARBITRATION CLAUSES IN AUSTRALIAN STANDARD FORM CONSUMER CONTRACTS

Consumer contracts in the 21st century frequently contain arbitration clauses. Online sellers, transport service providers, telephone companies, social media websites and even dating apps are all requiring consumers to sign up to arbitration for resolution of disputes as part of their service contract. While such clauses provide legal stability and certainty for businesses, consumers can face a significant hurdle in accessing legal recourse. This is particularly the case where foreign entities bind Australian consumers through terms of service that require arbitration overseas. There is potential for such arbitration agreements to be considered void under the Australian Consumer Law’s unfair contract provisions and therefore unenforceable, which can leave entities exposed to the legal action they originally sought protection from.

INTRODUCTION

The widespread use of arbitration clauses in standard form consumer contracts emerged predominantly out of the United States, as a mechanism to avoid or delay exposure to US class or court action and significant damages awards. In the United States, courts have enforced arbitration clauses in contracts with consumers, effectively preventing consumers from commencing class action suits. For more information see most recently DirecTV Inc. v Imburgia, 577 U.S. (2015) and AT&T Mobility v. Concepcion, 563 U.S. 333 (2011). In the UK however, the High Court has held that clauses attempting to mandate arbitration upon a consumer may amount to unfair terms, especially where they limit a consumer’s access to the courts (see Mylerist Builders Ltd v Mrs G Buck [2008] EWHC 2172).

In Australia, the operation of the unfair contract provisions of the Australian Consumer Law (ACL)
may render similar clauses void. If your business engages with Australian consumers, your contract will be subject to the ACL and the unfair terms regime. It is important to be conscious of this when drafting arbitration clauses in standard form contracts, and to consider the way a clause can be drafted to reduce the likelihood of it being void for unfairness.

**HOW DO COURTS APPROACH ARBITRATION AGREEMENTS IN AUSTRALIA?**

Australian courts embrace valid arbitration agreements and enforce them in anti-suit injunctions. This is a drastic change from the approach adopted by the courts over the past 30 years, where such agreements were often considered void for public policy on the basis that they usurped the role of sovereign courts. One of the principal reasons for this change of approach is the view from the courts that, where foreign corporations are involved, it is better to deal with the dispute via arbitration than have the burden and cost of court proceedings borne by Australian taxpayers in Australian courts. The application of unfair provisions terms to such clauses may however give courts reason to reconsider the warmth with which certain arbitration agreements are received.

**WHAT DOES THE ACL SAY ABOUT UNFAIR TERMS?**

Unfair terms are not permitted in standard form contracts and will be made void by section 24 of the ACL.

The ACL protection extends to contracts where the consumer or business is in Australia, regardless of the location of the other party to the contract.

A term will be void for unfairness if it:

- causes a significant imbalance in the rights and obligations of the parties; and
- is not reasonably necessary to protect the legitimate interests of the party advantaged by the term; and
- causes financial or other detriment to a party if it were applied or relied on.

Since 2013, the Australian Competition and Consumer Commission (ACCC) has actively pursued consumer complaints about unfair terms, and from 2016 the unfair terms provisions in the ACL will extend to contracts with small businesses.

**WHY WOULD AN INTERNATIONAL ARBITRATION CLAUSE BE VOID?**

Section 25(1) of the ACL offers examples of what can constitute an unfair term, and includes terms that limit, or have the effect of limiting, the right of one party to sue the other. While the examples in the ACL are not determinative of unfairness, the court will assess unfairness in light of the examples. Courts are arguably more likely to render arbitration clauses void for unfairness where applicant consumers can demonstrate the clause causes detriment, financial or otherwise, by preventing the consumer from bringing action in a domestic court or by requiring the consumer to proceed with arbitration in a foreign jurisdiction.

Arbitration clauses requiring a consumer to arbitrate in a foreign jurisdiction will effectively prohibit the right of that party to initiate court proceedings and will also likely require the consumer to incur a substantial expense. It follows that Australian claimant consumers required to participate in foreign arbitration will be at a disadvantage, or at least in a materially weaker position than respondent businesses.

Examples of clauses that may be considered unfair and therefore void include:

- an arbitration clause in a car sharing service consumer contract requiring Australian consumers to resolve disputes through international arbitration in The Netherlands under International Chamber of Commerce's (ICC) rules and the laws of The Netherlands;
- an arbitration clause in an online music streaming, podcast and video service consumer contract requiring Australian consumers to participate in an international arbitration under ICC rules, applying the law of the State of California, United States, without regard to choice or conflicts of law principles, and administered by the International Court of Arbitration in France;
- an arbitration clause in the terms of use for an online mobile photo-sharing, video-sharing, and social networking service providing for consumer-related disputes to be resolved
under the American Arbitration Association's rules and administered instead by the Judicial Arbitration and Mediation Services in one of 27 States of the United States.

In the UK, the High Court in *Mylcrist Builders Ltd v Mrs G Buck* found that terms attempting to mandate arbitration upon a consumer are unfair terms because they limit access to the courts. The decision enforces a general rule in the UK that dispute resolution provisions in consumer contracts should preserve the right to bring proceedings before a court. While there are differences between the UK and Australian unfair terms regimes, namely an express "good faith" requirement in the UK, the notion of some "imbalance" between the parties remains common and an onerous international arbitration clause could likely be the factor that tips the scale. An Australian court may look to the decision in *Mylcrist Builders Ltd v Mrs G Buck* for guidance on the issue.

There is also a further argument that, to the extent an international arbitration clause has the effect of excluding, restricting or modifying the statutory guarantees in Division 1 of the ACL, it will be void under section 64(1). The guarantees include quality and fitness for purpose of goods, and the rendering of services with due care and skill and in a reasonable time. These apply to all goods and services with some minor exceptions, for example contracts for the transportation and storage of goods.

The court may find that requiring arbitration to take place in a foreign jurisdiction and under foreign laws may prohibit the application of one or more of the statutory guarantees prescribed in the ACL, rendering the clause void.

**CONCLUSION**

When drafting contracts for Australian consumers, it is important to consider the ACL's consumer protections. If an international arbitration clause were challenged in an Australian court, there is some scope for it to be void on the basis that it is unfair. Drafting arbitration clauses with the ACL in mind will reduce the potential for a term to be declared void by the court. This may involve drafting clauses that:

- allow for domestic arbitration.
- provide an "opt-in" mechanism.

- incorporate a carve-out for claims of a certain value to be commenced in local, small claims courts such as a cap or threshold on the value of claims that require international arbitration.
- incorporate other carve-outs in the dispute resolution clause to ensure consumers have other dispute resolution options available to them prior to engaging in arbitration, such as negotiation or mediation.
More information

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