Article Information

Author: Anne Freeman
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Disputing the dispute resolution clause: when an arbitration clause may be unfair

The Federal Court's recent decision in AghaeiRad v Plus500 Pty Ltd [i] serves as a warning to companies using arbitration clauses in standard form contracts: unless you ensure the clause does not offend the unfair contracts regime, you might be on the road to litigation, rather than arbitration.

Background

The case was commenced as a representative proceeding (class action) by Mr AghaeiRad against Plus500AU and its parent company, which are part of a global fintech group operating technology-based trading platforms, including a platform for trading in over-the-counter Contracts for Difference or CFDs. Mr AghaeiRad alleges breach of contract and that the respondents engaged in misleading or deceptive conduct and unconscionable conduct in breach of the *Corporations Act, 2001* (Cth) and the *Australian Securities and Investments Commission Act, 2001* (Cth) (**ASIC Act**).

The respondents sought a stay of the proceeding and an order that the dispute be referred to arbitration in reliance on section 8(1) of the *Commercial Arbitration Act, 2010* (NSW)(**Act**) and a dispute resolution clause in the "User Agreement" which was one of the documents hyperlinked in the online registration process to trade on the online platform, and which Mr AghaeiRad had confirmed, by way of checking an online box, he had read and agreed to be bound by.

Mr AghaeiRad resisted the stay and referral on a number of bases, including that:

1. The Act didn't apply to the proceeding because the claim was a "consumer" claim, not a "commercial" claim;
2. Mr AghaeiRad had not agreed to the dispute resolution clause; and
3. The Act did not apply because the dispute resolution clause was void as an unfair contract term.

The dispute resolution clause provided as follows:

> ***23. DISPUTE RESOLUTION***
>
> *23.1 Except to the extent that this section 23 is inconsistent with the requirements of any legislative or regulatory regime, the dispute resolution process set out in this section shall apply. The parties must use all their reasonable endeavours to resolve any dispute arising in connection with the Client Agreements or any Transactions there under.*
>
> *23.2 If the parties fail to resolve a dispute within 5 business days of one party giving notice to the other of the dispute, either party may, by giving notice to the other, refer the dispute to the parties' Senior Officers (where you are an individual no such referral is applicable) who, each party must ensure, must co-operate in good faith to resolve the dispute as amicably as possible within 10 days of the dispute being referred to them.*
>
> *23.3 If the Senior Officers (or an individual and our Senior Officer) fail to resolve the dispute within 10 days of the dispute being referred to them, the parties must, at the written request of either party and within 10 days of receipt of the request, refer the dispute to mediation in accordance with, and subject to, the Resolution Institute's Mediation Rules. The costs of the mediator shall be met equally by the parties. If the dispute or difference is not settled within 30 days of referral to mediation (unless such period is extended by agreement of the parties), it shall be and is hereby submitted to arbitration in accordance with, and subject to, the Resolution Institute Arbitration Rules. Unless the parties agree upon an arbitrator, either party may request a nomination from the Chair of*

Resolution Institute.

23.4 This section does not limit your rights (if applicable) to take a dispute to external dispute resolution scheme of which we are a member.

Section 8(1) of the Act provides that a "court before which an action is brought which is the subject of an arbitration agreement must…refer the parties to arbitration unless it finds that the agreement is null and void, inoperative or incapable of being performed".

Can a "consumer" claim be arbitrated under the Act?

While noting that Mr AghaeiRad was a "consumer" for the purposes of consumer protection laws like the ASIC Act, Justice Thawley noted that a person's status as a consumer "does not insulate a dispute or arbitration involving that person or consumer from being characterised as commercial"[ii]. His Honour also noted that just because he was a consumer, it did not follow that the transactions entered into by Mr AghaeiRad were not commercial transactions or were not entered into in the context of a commercial relationship[iii]

His Honour concluded that Mr AghaeiRad was engaged in investment activities to make money and that is distinguishable from ordinary consumer purchases that have no real commercial consequences, and as such, if the dispute were referred to arbitration, it would be a commercial arbitration[iv].

Had Mr AghaeiRad agreed to arbitrate?

Although Mr AghaeiRad had checked the box indicating he had read, understood and agreed to be bound by hyperlinked documents, including the User Agreement, his evidence was that he had not read those documents. This type of agreement to terms is known as a "clickwrap contract"[v].

His Honour relied on the decision of Justice Beach in *Dialogue Consulting Pty Ltd v Instagram, Inc* in relation to the question of whether there was reasonable notice of the terms and a manifestation of assent to them[vi] where his Honour found that if "reasonable notice has been given to an offeree that a particular act signifies acceptance of the offer, and the offeree knowingly performs that act, then the offeree has accepted all of the terms of the offer, even if he does not know them all".

Here, the Court found that Mr AghaeiRad's checking of the online box did amount to an objective manifestation of his assent to the terms and despite his ignorance of the dispute resolution clause, it was a term of an agreed contract between the parties.

Was the dispute resolution clause void?

Mr AghaeiRad argued that the dispute resolution clause was an unfair contract term according to section 12BF of the ASIC Act. That provides that a term of a consumer contract or a small business contract is void if the term is unfair, the contract is a standard form contract and the contract is a financial product or a contract for the supply or possible supply of financial services. It was not in dispute that the contract was a consumer one, in standard form and for the supply or possible supply of financial services. That left the question of whether the term was unfair.

Section 12BG of the ASIC Act sets out the meaning of "unfair" as follows:

(1) A term of a contract referred to in section 12BF is ***unfair*** if:

(a) it would cause a significant imbalance in the parties' rights and obligations arising under the contract; and

(b) it is not reasonably necessary in order to protect the legitimate interests of the party who would be advantaged by the term; and

(c) it would cause detriment (whether financial or otherwise) to a party if it were to be applied or relied on.

(2) In determining whether a term of a contract is unfair under subsection (1), a court may take into account such matters as it thinks relevant, but must take into account the following:

(b) the extent to which the term is transparent;

(c) the contract as a whole.

(3) A term is ***transparent*** if the term is:

(a) expressed in reasonably plain language; and

(b) legible; and

(c) presented clearly; and

(d) readily available to any party affected by the term.

(4) For the purposes of paragraph (1)(b), a term of a contract is presumed not to be reasonably necessary in order to protect the legitimate interests of the party who would be advantaged by the term, unless that party proves otherwise.

Transparency

Although the dispute resolution clause was legible and readily available, the Court found that it lacked transparency because it failed to convey its effect to customers in reasonably plain language or by clear presentation[vii]. His Honour noted that although the second part of clause 23.3 made it plain that a matter is referred to arbitration in the circumstances set out in that sub-clause, what was not clear were the practical effects of this. For example, it did not explain that there will be an impact on the customer's right to access a court or participate in a class action[viii].

Significant imbalance

Plus500 argued that there was no significant imbalance because clause 23.3 was symmetrical, that is, it applied equally to both parties. That raised the issue of whether a symmetrical term could ever cause a significant imbalance in the parties' rights and obligations arising under the contract. Justice Thawley answered that question in the affirmative, and in doing so, analysed the High Court's reasoning in *Kaprik v Carnival plc**[ix]*.

That case related to the ill-fated *Ruby Princess* cruise, which involved an outbreak of COVID-19 and the illness and death of a number of passengers. A class action has been commenced by passengers or their relatives against the cruise operator. An issue arose as to whether certain terms in a contract relating passengers whose contracts were made outside Australia, which included an exclusive jurisdiction clause in favour of a US court and a class actions waiver, applied such that the claim of a Canadian class member should be stayed. Mrs Kaprik argued, amongst other things, that the waiver clause was an unfair contract term and therefore void.

The High Court unanimously considered that the class action waiver clause caused a significant imbalance in the rights of the parties under the contract. The clause itself was stated to be asymmetrical, as it was noted that the clause was specifically for the benefit of the operator. That made it, on its face, significantly unbalanced. The Court also found that the clause was "particularly one-way" because it imposed limitations on passengers but didn't restrict the operator. Of particular relevance, in light of the ticket price, was that bringing an individual claim, rather than proceeding as part of a class action, might well be economically unviable[x].

Justice Thawley in *Plus500* noted that a symmetrical term may have an asymmetric *effect* and that it cannot have been the intention of Parliament that the provision would not apply to contract terms that apply to both parties[xi]. His Honour used the example of a clause requiring the parties to arbitrate in a foreign jurisdiction and noted that a consumer of low value goods would never likely arbitrate and the seller would never be held to account[xii].

Ultimately, the Court found that the arbitration component of the dispute resolution clause would cause a significant imbalance because it would prevent Mr AghaeiRad from having recourse to a court, the availability of arbitration was theoretical given the cost compared to the likely value of the claim and the clause would prevent Mr AghaeiRad from being part of a class action[xiii]. In so finding, his Honour noted that it was unlikely that Plus500 would ever make a claim against a user of its trading platform, given there was a requirement for consumers to ensure a positive cash position in their accounts and that there were other powers, including making margin calls, which were available to it[xiv].

Not reasonably necessary to protect legitimate interests

Noting that Plus500 bore the onus of displacing the presumption that the dispute resolution clause was not reasonably necessary to protect its legitimate interests, it submitted that the clause:

- Enabled it to comply with its obligations as an AFSL holder;
- Facilitated the final, fair, efficient and cost-effective resolution of the types of complaints it typically received; and
- Provided for a common procedure and a common forum for the resolution of disputes[xv].

Although the Court accepted that the dispute resolution clause complied with the requirement for an AFSL holder to have a compliant dispute resolution system, the Court found that the requirement for an arbitration was not reasonably necessary to protect Plus 500's legitimate interests. His Honour noted that "the real vice is that the arbitration term did

not provide for the fair resolution of a typical complaint because no consumer would avail themselves of an arbitration[xvi]. The evidence showed that there had never been an arbitration of a dispute[xvii], and his Honour found that "[a] legitimate interest in having disputes resolved in a common forum is not *reasonably* protected by choosing a forum which is so unattractive in the context of the likely monetary value of the dispute that a customer would not take the dispute to the forum"[xviii].

Causes detriment

This element was disposed of quickly by the judge who noted that if the arbitration part of the dispute resolution clause were relied upon, Mr AghaeiRad would be deprived of the ability to prosecute his claim in an appropriate court and of the advantage of class action procedures[xix].

Unconscionable conduct?

Although not the subject of detailed consideration in this article, it should be noted that Justice Thawley also found that enforcement of the arbitration component of the dispute resolution clause is outside the norms of acceptable commercial behaviour and against the statutory conception of conscience[xx].

Takeaways

An explanation of the effect of the dispute resolution clause might have gone a considerable way in addressing whether the clause was unfair, though it must be remembered that even if transparent, the clause may still have been found unfair. In *Kaprik*, the High Court noted that the inquiry as to transparency is not an independent and separate inquiry as to whether the term is unfair and that "[t]he greater the imbalance or detriment inherent in the term, the greater the need for the term to be expressed and presented clearly; and conversely, where a term has been readily available to an affected party, and is clearly presented and plainly expressed, the imbalance and detriment it creates may need to be of a greater magnitude"[xxi].

The relevant clause in *Kaprik* was much clearer in explaining its consequences than that in Plus500, noting in particular that the contract provided for "the exclusive resolution of disputes through individual legal action on your own behalf instead of through any class or representative action" and that "you agree that any arbitration or lawsuit against carrier whatsoever shall be litigated by you individually and not as a member of any class or as part of a class or representative action, and you expressly agree to waive any law entitling you to participate in a class action"[xxii]. There was also a note which appeared before the terms of the contract were set which set out, in bold text, the need to read the terms carefully as they affected legal rights and were binding, and drew particular attention to the clause restricting the passengers' rights when suing[xxiii].

All of this may have helped significantly had it not been the case that the relevant clause could only been seen *after* the passenger had received a confirmation of his booking[xxiv]. That led to the Court concluding that "[g]iven the imbalance and detriment inherent in the term, there should have been a greater degree of transparency"[xxv].

Although this is an area where the law is developing, it is apparent from these decisions that without a very clear explanation, in plain language, of how a dispute resolution clause impacts on a party's rights, there is a real danger that they will be found unfair where they are contained in standard form consumer or small business contracts.

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[i] *AghaeiRad v Plus500 Pty Ltd* [2025] FCA 1602

[ii] Ibid at [56]

[iii] Ibid at [57]

[iv] Ibid at [65] and [66]

[v] Ibid at [70] referring to *Dialogue Consulting Pty Ltd v Instagram, Inc* [2020] FCA 1846

[vi] Ibid at [69]

[vii] Ibid at [113]

[viii] Ibid at [120]

[ix] [2023] HCA 39

[x] Ibid at [54]

[xi] At [138-139]

[xii] At [139]

[xiii] At [146]

[xiv] At [148]

[xv] At [164]

[xvi] At [172]

[xvii] At [173]

[xviii] At [175]

[xix] At [181]

[xx] At [232]

[xxi] At [32]

[xxii] At [16]

[xxiii] At [12]

[xxiv] At [11]

[xxv] At [58]