Case note: *In the matter of Infinite Plus Pty Ltd* [2017] NSWSC 470

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In a recent decision,[1] the Supreme Court of New South Wales ordered that court proceedings between shareholders in a Taiwanese bubble tea company be stayed in favour of UNCITRAL Rules arbitration at the Hong Kong International Arbitration Centre.

The dispute arose between two shareholders of Infinite Plus, an Australian company that acts as franchisor for the publicly-listed Taiwanese bubble tea company, La Kaffa International Co Ltd (**La Kaffa Taiwan**), operating under the brand "*ChaTime*". One of the shareholders, Yang Yang Qian, issued the other, Chen Zhao, with an Expulsion Notice under a shareholders agreement. The Expulsion Notice set out alleged breaches by Mr Zhao of the shareholders agreement between him, Ms Qian, Infinite Plus Pty Ltd and La Kaffa International Co Ltd, a company incorporated in the Cayman Islands (**La Kaffa Cayman**) and triggered a buy-out procedure, estimating the value of Mr Zhao's interest in Infinite Plus at $1,500,000.

Following the issuance of the Expulsion Notice, Mr Zhao commenced proceedings in the New South Wales Supreme Court against Ms Qian pursuant to the statutory oppression provisions in sections 232 and 233 of the *Corporations Act 2001* (Cth). Ms Qian then issued a notice of arbitration to invoke the arbitration agreement in clause 13 of the shareholders agreement:

> *Any dispute, controversy or claim arising out of or relating to this Agreement, or the breach, termination or invalidity thereof, shall be settled by arbitration in accordance with the arbitration rules of the United Nations Commission on International Trade law then in force. The appointing authority shall be Hong Kong International Arbitration Centre (HKIAC). There shall be one arbitrator appointed by the HKIAC. The language of the arbitration shall be English. The award of such arbitrator shall be delivered to the parties herein in writing and shall be final and binding on the parties. Each of the parties to this Agreement hereby waives any right of appeal against the arbitration award.*

Following the notice of arbitration, Mr Zhao applied to the Supreme Court to have the arbitration stayed pending the outcome of the court proceedings. Mr Zhao also applied to join La Kaffa Taiwan, and amended the pleadings to claim that the Expulsion Notice was invalid.

Ms Qian sought a stay of the court proceedings under section 7 of the *International Arbitration Act 1974* (Cth) (the **IAA**) and an order pursuant to Article 8 of the *UNCITRAL Model Law on International Commercial Arbitration* (the **Model Law**) referring the dispute to arbitration in accordance with clause 13 of the shareholders agreement.

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1 *In the matter of Infinite Plus Pty Ltd* [2017] NSWSC 470 (***Infinite Plus***).

In opposing Ms Qian's application for a stay, Mr Zhao and La Kaffa Taiwan argued that the claim the subject of the oppression proceeding is not a dispute or claim "*arising out of or relating to this Agreement, or the breach* […] *thereof*".[2]

The stay application was heard by Gleeson JA. His Honour was required to determine three main issues:

(i) the scope of the arbitration agreement;

(ii) whether the claims the subject of the court proceedings fell within the scope of the arbitration clause of the shareholders agreement; and

(iii) whether the statutory oppression claims made by Mr Zhao were capable of settlement by arbitration (i.e. arbitrable).

In deciding the first issue, the Court relied on various authorities in support of a broad construction of the scope of arbitration agreements.[3] With respect to the second issue, the Court relied on *Robotunits Pty Ltd v Mennel* (2015) 297 FLR 300 as authority for the proposition that "*the nature and extent of the matters involved in a court proceeding are to be ascertained from the pleadings and from the underlying subject matter upon which the pleadings, including any defence, are based*".[4] On this basis, considering Mr Zhao's pleadings and evidence, the Court determined the matters in issue to be:

(i) Ms Qian's alleged oppressive conduct within the meaning of s 232 of the *Corporations Act* by purporting to exercise her rights to buy-out the shares in the company held by Mr Zhao;

(ii) the validity of the Expulsion Notice;

(iii) Mr Zhao's alleged breaches of the shareholders agreement; and

(iv) Mr Zhao's alleged failure to remedy such breaches.

The Court found that these matters constituted "*a dispute arising out of or relating to the shareholders agreement and alleged breaches of such agreement*."[5]

The Court then turned to the third issue: whether parties can submit to arbitration issues involving statutory rights and claims where, under the statute in question, the power to grant the relevant statutory remedies is conferred on the court. That is, in this case, whether Mr Zhao's claims for relief from oppression under section 232 of the *Corporations Act* could be

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2 Clause 13 of the shareholders agreement, as extracted at [15] of *Infinite Plus.*

3 These authorities included *Rinehart v Welker* [2012] NSWCA 95 at [117] and [120], where it was held that arbitration agreements "*should not be construed narrowly*" rather they should be "*liberally construed*". Such language is also found in *Francis Travel Marketing Pty Ltd v Virgin Atlantic Airways Ltd* (1996) 39 NSWLR 160 at 165, and in *Comandate Marine Corp v Pan Australia Shipping Pty Ltd* (2006) 238 ALR 457 at [164]. In its observation that the expression "*arising out of*" as found in clause 13 of the shareholders agreement "*has usually been given a wide meaning*", the Court referred to *Francis Travel Marketing Pty Ltd v Virgin Atlantic Airways Ltd* (1996) 39 NSWLR 160 at 165 and *John Holland Pty Ltd v Kellogg Brown & Root Pty Ltd* [2015] NSWSC 451 at [69].

4 *Infinite Plus* at [60].

5 *Infinite Plus* at [62].

determined by arbitration.[6] In considering the issue, Gleeson JA cited *Rinehart v Welker* [2012] NSWCA 95, in which Bathurst CJ considered authorities which held that parties can submit to arbitration issues involving rights conferred under statute and claims where the power to grant statutory remedies has been conferred on the court.

In *Rinehart v Welker*, Bathurst CJ cited with approval the approach taken by the Court of Appeal of England and Wales in *Fulham Football Club (1987) Ltd v Richards* [2012] 1 All ER 414 where Longmore LJ commented (at [103]): "*the fact that an arbitrator cannot give all the remedies which a court could does not afford any reason for treating an arbitration agreement as of no effect*". The Chief Justice continued (at [172]) citing *ACD Tridon v Tridon Australia* [2002] NSWSC 896 and *Fulham Football Club*: "*although an arbitrator would not have power to order the winding-up of a company* [...] *claims for relief under s 232 of the Corporations Act and its United Kingdom equivalent s 994 of the Companies Act have been held to be capable of being resolved by arbitration*".

Gleeson JA also cited the recent case of *WDR Delaware Corporation v Hydrox Holdings Pty Ltd* [2016] FCA 1164, where Foster J of the Federal Court stayed the oppression proceedings and referred the dispute to arbitration, save for the ultimate question of whether a winding-up order should be made.

The Court ultimately concluded that Mr Zhao's claims for relief under s 232 of the *Corporations Act* were arbitrable.

Having determined these three central issues, it fell to the Court to determine whether the oppression claim by La Kaffa Taiwan could be stayed, given that La Kaffa Taiwan is not privy to the arbitration agreement in clause 13 of the shareholders agreement. Here the Court exercised its discretion under section 67 of the *Civil Procedure Act 2005* (NSW), ruling that the oppression claim by La Kaffa Taiwan should be stayed pending the outcome of the arbitration on the basis that the claims by Mr Zhao against Ms Qian are the principal claims in the oppression proceeding.

Further, the Court found that La Kaffa Taiwan's oppression claim relied on no separate or additional conduct of Ms Qian. Rather, La Kaffa Taiwan's claim was dependent upon Mr Zhao's oppression claim. Consequently, the Court considered it would be "*inappropriate*" for La Kaffa Taiwan's oppression claim to proceed whilst the arbitration between Ms Qian and Mr Zhao (including Mr Zhao's oppression claim) is pending.[7] In this regard, the Court sought to "*avoid a multiplicity of proceedings*" and concluded that it would be "*contrary to the just, quick and cheap resolution of the real issues in the proceeding*" to permit Mr Zhao to pursue his claim for relief whilst the other matters in the proceeding are stayed.[8]

The effect of this is that once the arbitral tribunal has issued an award on Mr Zhao's oppression claim granting such relief as it has power to grant, the court may then determine La Kaffa Taiwan's oppression claim, granting such relief as is within its power to grant.

Accordingly, Gleeson JA stayed both oppression actions and referred Mr Zhao's oppression claim to arbitration in accordance with clause 13 of the shareholders agreement.

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6 *Infinite Plus* at [63].

7 *Infinite Plus* at [75].

8 *Infinite Plus* at [68].

The *Infinite Plus* decision provides further confirmation of the pro-arbitration disposition of Australian courts. It shows that Australian courts will stay court proceedings provided that there is a valid arbitration agreement that is broad enough to cover the dispute and the subject matter of the dispute is arbitrable.

While the construction of the arbitration agreement (specifically, the determination of its scope) is often a relatively simple exercise, the question of arbitrability tends to be more complicated – especially in the context of statutory causes of action. Unlike the question of scope, which is often concerned with standard wording (such as "*disputes arising out of* […]") and therefore easier to answer by reference to precedent, the question of arbitrability will usually require an analysis of a specific statute and the policy considerations that inform it. Much of Australia's arbitrability jurisprudence has been generated in the context of trade practices legislation. For example, Australian courts have long held that disputes based on misleading or deceptive conduct under section 52 of the *Trade Practices Act 1974* (Cth) (now section 18 of *The Australian Consumer Law*, Schedule 2 of the *Competition and Consumer Act 2010* (Cth)) are arbitrable.[9] But, as the use of arbitration increases, we are seeing other legislation come into play in cross-border disputes. This is advancing the development of arbitrability jurisprudence specific to other statutes, particularly the *Corporations Act*.

Cases such as *Infinite Plus* show that Australian courts will enforce arbitration agreements, even where the dispute includes elements of company law and the remedies sought by the parties may not be within the power of the arbitrator to grant. It remains to be seen, however, whether this approach serves the objective of efficiency – one of arbitration's key promises.

[9] However, Australian courts have found that disputes based on anti-competitive behaviour under Part IV of the TPA are not arbitrable, regardless of the scope of the arbitration agreement; see for example, the Federal Court in *Alstom Power v Eraring Energy* (2004) ATPR 42-009.