Beware the Long Arm of the Australian Consumer Law: *Karpik v Carnival Plc* (2023) 98 ALJR 45; [2023] HCA 39

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The High Court's recent unanimous judgment in *Karpik v Carnival Plc* ('*Karpik*')[1] is a reminder to Australian maritime lawyers of the reach of the *Australian Consumer Law* ('*ACL*').[2] The appeal concerned a Canadian man who had entered a contract outside of Australia that was subject to United States ('US') terms and conditions. The contract also contained a US exclusive jurisdiction clause and a class action waiver clause. Nevertheless, because the contract was for a ticket on an ocean cruise, departing from and arriving in Sydney, this was sufficient for the *ACL* to apply in part. The effect of this application was to invalidate the class action waiver clause as unfair and to tip the balance against the exclusive jurisdiction clause such that Australian courts would not issue a stay of proceedings in favour of US litigation. The long arm of the *ACL* may be seen as the price of carrying on business in Australia. In this case note, I discuss the reasoning of the case, its implications and offer suggestions about how contracts might be altered to avoid similar outcomes.

Facts

The case involved the cruise ship *Ruby Princess*, a name that may be familiar to many Australians through its role in the unfolding of the COVID-19 pandemic in early 2020.[3] The ship departed Sydney on 8 March 2020 with a relatively full load of 2,600 passengers and 1,100 crew for a 13-day return cruise to New Zealand.[4] The cruise was cut short when several passengers became ill, and the *Ruby Princess* returned to Sydney on 19 March. Ms Karpik[5] and her husband were among those passengers who contracted COVID-19 and became ill. Subsequently, Ms Karpik began representative proceedings in the Federal Court in tort and under the *ACL*.

The appeal before the High Court was limited in scope, and for those casually following this litigation in the Federal Courts there might be some disappointment as to the issues covered. Notably, this was not an appeal from Justice Stewart's lengthy 1059-paragraph judgment handed down on 25 October 2023.[6] Instead, it arose from the relatively terse 397-paragraph judgment of the Full Court of the Federal Court regarding an interlocutory application.[7] Different passengers had purchased their tickets in different fora. Mr Ho, a Canadian, was one of the 700-odd passengers whose contract included the US terms (the 'US subgroup') and who was taking part in the Australian representative proceedings. Carnival's subsidiary, Princess Cruise Lines Ltd ('Princess'), sought a stay against the US subgroup in the Federal Court. By the time the case had worked its way to the High Court the parties had accepted that Mr Ho's contract had incorporated US terms and conditions.[8]

There were four issues being considered by the High Court.[9] First, what was the extraterritorial application of *ACL* pt 2-3 in relation to Mr Ho's contract. Secondly, assuming that the *ACL* applied, whether the class action waiver clause was unfair under pt 2-3 and thus void. Thirdly, and alternatively, whether the class action waiver clause was unenforceable under the pt IVA of the *Federal Court of Australia Act 1976* (Cth), dealing with representative proceedings. Fourthly, whether there were strong reasons for not enforcing the exclusive jurisdiction clause. This case note touches on the first, second and fourth issues.

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[1] (2023) 98 ALJR 45; [2023] HCA 39 ('*Karpik*').
[2] *Competition and Consumer Act 2010* (Cth) sch 2 ('*ACL*').
[3] See, eg, Eleanore Ainge Roy and Ben Doherty, 'Have Australia and New Zealand Stopped Covid-19 in its Tracks?', *The Guardian* (online, 9 April 2020) <https://www.theguardian.com/world/2020/apr/09/have-australia-new-zealand-stopped-covid-19-in-its-tracks-coronavirus>.
[4] *Karpik v Carnival Plc* [2023] FCA 1280, [1].
[5] Referred to as 'Mrs Karpik' in the trial judgment, but as 'Ms Karpik' by the High Court.
[6] *Karpik v Carnival Plc* [2023] FCA 1280.
[7] *Carnival Plc v Karpik* (2022) 294 FCR 524.
[8] *Karpik* (n 1) [4].
[9] Ibid [6].

Legal Issues

Extra-Territorial Application of Pt 2-3 on Unfair Contract Terms

As a preliminary matter, the High Court's analysis began by addressing the '"presumption" against extraterritoriality'.[10] Such a presumption might be described as a rule

> that an enactment describing acts, matters or things in general words, so that, if restrained by no consideration lying outside its expressed meaning, its intended application would be universal, is to be read as confined to what, according to the rules of international law administered or recognized in our Courts, it is within the province of our law to affect or control.[11]

The presumption against extraterritoriality was reduced by the High Court to 'an interpretive principle only.[12] Such a principle has 'little or no role to play' where a 'statute expressly departs' from 'common expectations that Parliament's concern with the subject matter is limited to matters within its territory'.[13] In this instance, there was such an express departure, not within the text of part 2-3, but elsewhere in the enactment.

The trial judge had held that *ACL* pt 2-3 (including s 23 which voids unfair contract terms) applied to Mr Ho's contract by reasons of s 5(1) of the *Competition and Consumer Act 2010* (Cth) ('*CCA*').[14] The Full Court did not decide this issue. The High Court largely agreed with the trial judge, their analysis of extraterritoriality taking up the largest part of the unanimous judgment.[15] Here are the relevant parts of s 5(1):

> **5 Extended application of this Act to conduct outside Australia**
>
> (1) Each of the following provisions:
> …
> (c) the Australian Consumer Law (other than Part 5-3);
> …
> extends to the engaging in conduct outside Australia by:
> (g) bodies corporate incorporated or carrying on business within Australia …

The *ACL* is contained as a schedule (sch 2) within the *CCA*. *CCA* Section 131(1) also makes clear that the *ACL* 'applies as a law of the Commonwealth to the *conduct* of corporations' (emphasis added). 'Engaging in conduct' is defined in *CCA* s 4(2)(a) as 'including the making of … a contract'.

In the High Court, there was no dispute regarding Princess 'carrying on business within Australia' (recall the cruise in question departed from and arrived at Sydney).[16] Nor was there any question that Mr Ho's contract (the 'conduct') was made outside Australia. Therefore, on the plain wording of s 5(1), this contract was 'conduct' to which the *ACL* extended. Furthermore, the High Court supported this conclusion with purposive—the *ACL* is consumer protection legislation—and consequentialist analyses—pt 2-3 will only apply to consumer (and small business) standard form contracts, which often involve an imbalance of bargaining power. There was 'nothing irrational' in extending its operations to foreign corporations that choose to carry on business in Australia.[17]

Princess argued that applying s 5(1) to *ACL* s 23 would lead 'to absurd and capricious results, capturing all relevant contracts with foreign corporations, even if they have no connection with Australia, on the happenstance that the corporation does some other business in Australia'.[18] A hypothetical was given in oral arguments: would a European car manufacturer that sells cars in Australia be subject to pt 2-3 in relation to its sales to *other* European countries?[19] The High Court rejected the concern raised by this hypothetical, reasoning that 'the absence of a

[10] Ibid [19].
[11] Ibid [22], quoting *Wanganui-Rangitikei Electric Power Board v Australian Mutual Provident Society* (1934) 50 CLR 581, 601.
[12] *Karpik* (n 1) [19].
[13] Ibid.
[14] This was obiter dictum, as the trial judge also held that the US terms and conditions were not properly incorporated in the first place: *Karpik* (n 1) [7].
[15] Ibid [18]–[50].
[16] Ibid [42].
[17] Ibid [39]–[41].
[18] Carnival Plc, 'Respondent's Outline of Oral Submissions', Submission in *Karpik v Carnival Plc*, S25/2023, 3 August 2023, [2].
[19] *Karpik* (n 1) [50].

connection beyond the extraterritorial operation' of pt 2-3 would leave open for a respondent to request a stay of proceedings on the grounds of an inappropriate forum.[20]

Unfairness of the Class Action Clause

Mr Ho's contract contained a class action waiver clause, cl 15(C):

> **Waiver of Class Action:**
> This passage contract provides for the exclusive resolution of disputes through individual legal action on your own behalf instead of through any class or representative action. Even if the applicable law provides otherwise, 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 part of a class or representative action, and you expressly agree to waive any law entitling you to participate in a class action.[21]

For *ACL* pt 2-3 to apply requires a *consumer contract* that is a *standard form contract* and a term that is *unfair*.[22] Only the final point, whether the term was unfair, was examined in any detail in the judgment. Clause 15(C) was unfair because: it caused a *significant imbalance* in the parties' rights; it was not reasonably necessary to protect the *legitimate interests* of Princess; it would cause *detriment* to Mr Ho is applied or relied on; and it was not *transparent*.

The significant imbalance existed as the clause was 'one-way'. It only prevented Mr Ho from class actions, not Princess.[23] The High Court acknowledged that such clauses do not 'impede or affect the *existence*' of an individual right to sue, but had the *effect* of 'preventing or discouraging passengers from vindicating their legal rights', particularly given that the ticket price ($1,796.17 Canadian Dollars) made it not 'economically viable' to do so.[24]

The legitimate interest analysis was aided by the statutory presumption that a term is not reasonably necessary unless proven otherwise by the party seeking to rely on the term.[25] The Court rejected the argument that Princess might be pressured into 'settling questionable claims' that, because these claims could be aggregated as a class action, might create 'even a small chance of devastating loss'.[26]

The detriment in question was being 'denied the benefits' of the Australian class action provisions.[27] Detriment was not limited to 'financial detriment'. There was no requirement for 'significant detriment'.

Finally, cl 15(C) was not transparent, not because it was not legible, but because it was not presented clearly and made readily available.[28] Instead, the clause could only be viewed *after* the contract was entered into, by clicking on a booking confirmation email, signing into a webpage and then being pointed towards one of three different contracts. The Court did not address whether it was 'expressed in reasonably plain language'.[29]

Test for Exercising a Stay

Perhaps most relevant to the field of maritime law was the discussion of whether to exercise the discretion to stay the Australian proceedings in the face of an exclusive jurisdiction clause. The High Court did little to expound the legal test of when to stay proceedings. There merely cited *Akai Pty Ltd v People's Insurance Co Ltd* ('*Akai*'),[30] stating '[i]n the absence of strong countervailing reasons, proceedings will be stayed in the face of' a foreign exclusive jurisdiction clause.[31] This exclusive jurisdiction clause, cl 15(B), stated:

> **Claims for Injury, Illness or Death:**
> All claims or disputes involving Emotional Harm, bodily injury, illness to or death of any Guest whatsoever, including without limitation those arising out of or relating to this Passage Contract or Your

[20] Ibid.
[21] Ibid [16] .This specific clause was in all capital letters in the contract.
[22] *ACL* (n 2) s 23(1); *Karpik* (n 1) [26].
[23] *Karpik* (n 1) [53].
[24] Ibid [54].
[25] *ACL* (n 2) s 24(4).
[26] *Karpik* (n 1) [56].
[27] Ibid [57]. Such Australian provisions provided a benefit notwithstanding the choice of US law.
[28] Ibid [58].
[29] *ACL* (n 2) s 24(3)(a).
[30] (1996) 188 CLR 418, 428–9 (Dawson and McHugh JJ), 445 (Toohey, Gaudron and Gummow JJ) ('*Akai*').
[31] *Karpik* (n 1) [66].

> Cruise, shall be litigated in and before the United States District Courts for the Central District of California in Los Angeles … to the exclusion of the courts of any other country, state, city, municipality, county or locale. You consent to jurisdiction and waive any objection that may be available to any such action being brought in such courts.[32]

At this point, the Court had already concluded that the class action clause was unfair, and thus was not available for Princess to rely on to support a stay.[33] In fact, that the class action clause might be upheld in US litigation acted as a 'strong countervailing reason not to enforce the exclusive jurisdiction clause', as Mr Ho would be deprived of a juridical advantage (being party to the class action) by US litigation.

A second reason to exercise the discretion to stay proceedings was to avoid fracturing the litigation. Staying the litigation would force the US subgroup to 'commence individual proceedings in the United States when essentially identical claims' would be heard in Australian courts. This would 'run the risk of producing conflicting outcomes in different courts with the attendant risk of bringing the administration of justice into disrepute'.[34]

Comments

Before going any further, although it was not discussed in the judgment, maritime lawyers should be reminded of *ACL* s 28 (also contained within pt 2-3 on unfair terms).

> **28 Contracts to which this Part does not apply**
>
> (1) This Part does not apply to:
> (a) a contract of marine salvage or towage; or
> (b) a charterparty of a ship; or
> (c) a contract for the carriage of goods by ship.

This provision, along with the s 23 requirement of a consumer contract, cabins the relevance of the unfairness analysis in this judgment to a small portion of maritime law. That said, these limitations only apply to pt 2-3, and provide no protection from the other parts of the *ACL*. Part 3-2 which relates to consumer guarantees, for example, is not affected by s 28.

Unfair Contract Terms

Although an extended reach of pt 2-3, even to contracts that apply foreign law, may seem unreasonable, the High Court saw it as matching Parliament's intention. 'Parliament is prescribing that a corporation that does business in Australia should be required, if it uses standard terms in a consumer or small business contract, to meet Australian norms of fairness, irrespective of whether the standard terms are in a contract made in Australia or one made overseas.'[35] The long arm of the *ACL* may be seen as the price of carrying on business in Australia.

Of course, to be made void by pt 2-3 a term must still be unfair. The High Court's analysis left open the possibility that different facts might lead to different conclusions regarding the *significant imbalance* and *transparency* elements of the unfairness test. In this sense, *Karpik* should not be seen as authority that all class action waiver clauses will be held unfair. The Court made express reference to how cl 15(C) was stated to be '"for the benefit of the Carrier and certain third party beneficiaries"'.[36] The clause only put restrictions on passengers and 'in no way restrict[ed] the options of the carrier'. One wonders how the court would interpret a class action waiver clause that applied to *both* parties. Such a clause would legally restrict a carrier and would not be 'one-way'. Giving up the benefit of class action might do little to alter a carrier's litigation strategy and as such could be an easy concession. A second suggestion would be to improve the transparency of the term and to have it be more readily available before contract entry.[37] An improvement in transparency, however, is less assured of success than addressing the imbalance in rights. This is because the wording of *ACL* s 24 appears to make *significant imbalance* an independent and necessary criterion, whereas *transparency*—despite being mandatory to consider—is not a discrete criterion.

[32] Ibid [15]. Curiously, unlike cl 15(C), this was not in all capital letters.
[33] Ibid [68].
[34] Ibid [69].
[35] Ibid [41].
[36] Ibid [53], quoting cl 15 of the contract
[37] The clause being in all capital letters apparently did nothing to improve its transparency.

Stays for Exclusive Jurisdiction Clause

The High Court refused the stay the Australian proceedings because of two 'strong countervailing reasons' argued by Karpik. First, the 'strong juridical advantage' of remaining in the class action in Australia as opposed to going it alone in the US. Secondly, the fracturing of the litigation. Regarding the first reason, *ACL* s 23 results in an unfair clause being 'void'. It is notable that this voidness did not prevent the clause from still being considered in the arguments against a stay. This is, perhaps, the kind of ambiguity Justice Windeyer had in mind when he wrote, '[t]he word "void" has never been an easy word'.[38] Section 23 does not render a clause so void as to be a nullity, such that it cannot be subsequently considered at all. Regarding the second reason, I question how 'strong' the disincentive was of potentially fracturing the litigation, particularly where that litigation involves different contracts subjected to different laws by the agreement of the parties.[39] The 'risk of producing conflicting outcomes in different courts' appears far less problematic if those courts are applying different laws. As such, this reason struggles to satisfy the test from *Akai*, which puts the burden on the party requesting the stay to prove 'strong cause'[40] or 'strong reasons'[41] against it. 'The policy of the law' is 'that the parties who have made a contract should be kept to it'.[42] That is, unless Australian law deems it unfair.

[38] *Brooks v Burns Philp Trustee Co Ltd* (1969) 121 CLR 432, 459.
[39] *Karpik* (n 1) [69].
[40] *Akai* (n 30) 428–9 (Dawson and McHugh JJ).
[41] Ibid 445 (Toohey, Gaudron and Gummow JJ).
[42] Ibid.