FEDERAL COURT OF AUSTRALIA

Comandate Marine Corp v Pan Australia Shipping Pty Ltd [2006] FCAFC 192

CORRIGENDUM

COMANDATE MARINE CORP v PAN AUSTRALIA SHIPPING PTY LTD
NSD 1613 OF 2006

FINN, FINKELSTEIN AND ALLSOP JJ
20 DECEMBER 2006 (CORRIGENDUM 15 MARCH 2007)
SYDNEY

IN THE FEDERAL COURT OF AUSTRALIA

NEW SOUTH WALES DISTRICT REGISTRY **NSD 1613 OF 2006**

ON APPEAL FROM A SINGLE JUDGE OF THE FEDERAL COURT OF AUSTRALIA

BETWEEN:	**COMANDATE MARINE CORP.** **Appellant**
AND:	**PAN AUSTRALIA SHIPPING PTY LTD** **Respondent**
JUDGES:	**FINN, FINKELSTEIN AND ALLSOP JJ**
DATE:	**20 DECEMBER 2006 (CORRIGENDUM 15 MARCH 2007)**
PLACE:	**SYDNEY**

CORRIGENDUM

1. On page 44 of the Reasons for Judgment in the last line of paragraph 139, "[x]" be replaced with "[138]".

I certify that the preceding one (1) numbered paragraph is a true copy of the Corrigendum to the Reasons for Judgment of the Honourable Justices Finn, Finkelstein and Allsop.

Associate:

Dated: 15 March 2007

Counsel for the Appellant:	Mr A J Sullivan QC and Mr D A McLure
Solicitor for the Appellant:	Norton White
Counsel for the Respondent:	Dr A S Bell SC and Mr C Carter
Solicitor for the Respondent:	Ebsworth & Ebsworth
Dates of Hearing:	25 and 26 October 2006
Last Submission filed:	2 November 2006
Date of Judgment:	20 December 2006

FEDERAL COURT OF AUSTRALIA

Comandate Marine Corp v Pan Australia Shipping Pty Ltd [2006] FCAFC 192

CORRIGENDUM

COMANDATE MARINE CORP v PAN AUSTRALIA SHIPPING PTY LTD
NSD 1613 OF 2006

FINN, FINKELSTEIN AND ALLSOP JJ
20 DECEMBER 2006 (CORRIGENDUM 6 FEBRUARY 2007)
SYDNEY

IN THE FEDERAL COURT OF AUSTRALIA

NEW SOUTH WALES DISTRICT REGISTRY **NSD 1613 OF 2006**

ON APPEAL FROM A SINGLE JUDGE OF THE FEDERAL COURT OF AUSTRALIA

BETWEEN:	**COMANDATE MARINE CORP.** **Appellant**
AND:	**PAN AUSTRALIA SHIPPING PTY LTD** **Respondent**
JUDGES:	**FINN, FINKELSTEIN AND ALLSOP JJ**
DATE:	**20 DECEMBER 2006 (CORRIGENDUM 6 FEBRUARY 2007)**
PLACE:	**SYDNEY**

CORRIGENDUM

1. The number '1330' in order 2(a) on the Orders page and on page 84 at paragraph 255 should be replaced by the number '1130' so that it reads as follows:

> "Subject to the retention of the security provided for the release of *Comandate* remaining as security for Pan's claims against Comandate Marine in the arbitration, proceeding NSD 1130 of 2006 be stayed."

I certify that the preceding one (1) numbered paragraph is a true copy of the Corrigendum to the Reasons for Judgment of the Honourable Justices Finn, Finkelstein and Allsop.

Associate:

Dated: 6 February 2007

Counsel for the Appellant:	Mr A J Sullivan QC and Mr D A McLure
Solicitor for the Appellant:	Norton White
Counsel for the Respondent:	Dr A S Bell SC and Mr C Carter
Solicitor for the Respondent:	Ebsworth & Ebsworth
Dates of Hearing:	25 and 26 October 2006
Last Submission filed:	2 November 2006
Date of Judgment:	20 December 2006

FEDERAL COURT OF AUSTRALIA

Comandate Marine Corp v Pan Australia Shipping Pty Ltd [2006] FCAFC 192

ADMIRALTY AND MARITIME JURISDICTION – action *in rem* in Australia commenced by foreign party who had commenced London arbitration against Australian party – no statutory basis for commencing the *in rem* action – no election or waiver or abandonment of arbitration – nature of action *in rem* discussed

INTERNATIONAL ARBITRATION – proceedings begun in this Court by Australian party – stay sought by foreign party under *International Arbitration Act 1974* (Cth) – stay granted

International Arbitration Act 1974 (Cth) ss 3, 7, 16
Trade Practices Act 1974 (Cth) ss 52, 82, 87

ACD Tridon Inc v Tridon Australia Pty Ltd [2002] NSWSC 896 approved
Aichhorn & Co KG v The Ship MV 'Talabot' (1974) 132 CLR 449 applied
Allergan Pharmaceuticals Inc v Bausch & Lomb Inc (1985) 7 ATPR 40-636 discussed and distinguished
Branir Pty Ltd v Owston Nominees (No 2) Pty Ltd (2001) 117 FCR 424 applied
Caltex Oil (Australia) Pty Ltd v The Dredge 'Willemstad' (1976) 136 CLR 529 applied
Codelfa Constructions Pty Ltd v State Rail Authority of New South Wales (1982) 149 CLR 337 discussed and distinguished
Craine v Colonial Mutual Fire Insurance Co Ltd (1920) 28 CLR 305 applied
Ethiopian Oilseeds and Pulses Export Corporation v Rio del Mar Foods Inc [1990] 1 Lloyd's Rep 86 discussed and approved
Ferris v Plaister (1994) 34 NSWLR 474 discussed and approved
Flakt Australia Ltd v Wilkins & Davies Construction Co Ltd [1979] 2 NSWLR 243 referred to
Francis Travel Marketing Pty Ltd v Virgin Atlantic Airways Ltd (1996) 39 NSWLR 160 discussed and approved
Government of Gibraltar v Kenney [1956] 2 QB 410 discussed
Harbour Assurance Co (UK) Ltd v Kansa General International Insurance Co Ltd [1992] 1 Lloyd's Rep 81 discussed
Harbour Assurance Co (UK) Ltd v Kansa General International Insurance Co Ltd [1993] QB 701 referred to
Heyman v Darwins Ltd [1942] AC 356 referred to
Hi-Fert Pty Ltd v Kiukiang Maritime Carriers Inc (No 5) (1998) 90 FCR 1 discussed and not followed
Immer (No 145) Pty Ltd v Uniting Church in Australia Property Trust (NSW) (1993) 182 CLR 26 applied
Kuo Fen Ching v Dauphin Offshore Engineering & Trading Pte Ltd [1999] 3 SLR 721 referred to
La Donna Pty Ltd v Wolford AG (2005) 194 FLR 26 discussed and distinguished
Perri v Coolangatta Investments Pty Ltd (1982) 149 CLR 537 applied
Recyclers of Australia Pty Ltd v Hettinga Equipment Inc (2000) 100 FCR 420 referred to
Republic of India v India Steamship Co Ltd (No 2) (The 'Indian Grace') [1998] AC 878 discussed and disapproved
Samick Lines Co Ltd v Owners of The 'Antonis P Lemos' [1985] AC 711 discussed

Sargent v ASL Developments Ltd (1974) 131 CLR 656 applied
SZEEU v Minister for Immigration and Multicultural and Indigenous Affairs (2006) 150 FCR 214 applied
Tanning Research Laboratories Inc v O'Brien (1990) 169 CLR 332 discussed
The 'August 8' [1983] 2 AC 450 discussed
The 'Bold Buccleugh' (1851) 7 Moo PC 267, 13 ER 884 discussed
The 'Broadmayne' [1916] P 64 applied
The 'Deichland' [1990] 1 QB 361 discussed
The 'Dictator' [1892] P 304 applied
The 'Dupleix' [1912] P 8 applied
The 'Gemma' [1899] P 285 applied
The 'Indian Grace' (No 2) [1994] 2 Lloyd's Rep 331 discussed and approved
The 'Irina Zharkikh and Ksenia Zharkikh' [2001] 2 NZLR 801 discussed
The 'Maciej Rataj' [1995] 1 Lloyd's Rep 302 discussed
The 'Parlement Belge' (1880) 5 PD 197 discussed
The 'Rena K' [1979] QB 377 discussed
The 'Tervaete' [1922] P 259 discussed
Tisand Pty Ltd v The Owners of the Ship MV 'Cape Moreton' (Ex Freya) (2005) 143 FCR 43 referred to
Wealands v CLC Contractors and Key Scaffolding Ltd [1999] 2 Lloyd's Rep 739 referred to
Zambia Steel & Building Supplies Ltd v James Clark & Eaton Ltd [1986] 2 Lloyd's Rep 225 discussed

Commonwealth of Australia Parliamentary Debates Senate, 2 and 24 October 1974 and 1973-76, 24 November 1988 and 12 April 1989 and House of Representatives, 2 December 1974, 3 and 22 November 1988
Australian Law Reform Commission (Report No 33)
Handley, K *Estoppel by Conduct and Election* (Thomson/Sweet and Maxwell 2006)
Holtzmann, HM and Neuhaus, JE *A Guide to the UNCITRAL Model Law on International Commercial Arbitration: Legislative History and Commentary* (Kluwer, the TMC Asser Institute 1989)
Jacobs, M *Commercial Arbitration law and Practice* (Lawbook Co)
Merkin, R *Arbitration Law* (LLP 2004)
Mustill, M and Boyd, S Commercial Arbitration (Butterworths 1989 and 2001 Companion)
Redfern, A and Hunter, M *Law and Practice of Commercial Arbitration* (Thomson/Sweet and Maxwell 2004)
Sanders, P (Ed) *International Handbook on Commercial Arbitration* Vol 1 (Kluwer)
Sutton, D and Gill, J *Russell on Arbitration* (22nd Ed 2003 Sweet and Maxwell)
Thomas, DR *Maritime Liens* (Stevens 1980)
van den Berg, AJ *The New York Arbitration Convention of 1958* (Kluwer 1981)
Wiswall, F *The Development of Admiralty Jurisdiction and Practice Since 1800* (Cambridge University Press 1970)

COMANDATE MARINE CORP. v PAN AUSTRALIA SHIPPING PTY LTD
NSD 1613 OF 2006

FINN, FINKELSTEIN AND ALLSOP JJ
20 DECEMBER 2006
SYDNEY

GENERAL DISTRIBUTION

IN THE FEDERAL COURT OF AUSTRALIA

NEW SOUTH WALES DISTRICT REGISTRY **NSD 1613 OF 2006**

ON APPEAL FROM A SINGLE JUDGE OF THE FEDERAL COURT OF AUSTRALIA

BETWEEN: **COMANDATE MARINE CORP.**
Appellant

AND: **PAN AUSTRALIA SHIPPING PTY LTD**
Respondent

JUDGES: **FINN, FINKELSTEIN AND ALLSOP JJ**

DATE OF ORDER: **20 DECEMBER 2006**

WHERE MADE: **SYDNEY**

THE COURT ORDERS THAT:

1. The appeal be allowed.
2. Order 5 made by the Court on 13 July 2006 and the order made by the Court on 22 August 2006 be dissolved and set aside, respectively and in lieu of the order made on 22 August 2006:
    (a) Subject to the retention of the security provided for the release of *Comandate* remaining as security for Pan's claims against Comandate Marine in the arbitration, proceeding NSD 1330 of 2006 be stayed.
    (b) Pan pay the costs of Comandate Marine of the motion for a stay of proceedings served on 23 June 2006 and filed 4 July 2006.
3. Pan pay Comandate Marine's costs of the appeal.
4. The question of the costs of the anti-anti suit injunction and of the balance of the proceedings at first instance be stood over for argument to a date to be fixed.

THE COURT NOTES:

5. The undertaking to the Court of Comandate Marine Corp that it will allow the arbitration to determine all issues between the parties arising under the *Trade Practices Act 1974* (Cth).

Note: Settlement and entry of orders is dealt with in Order 36 of the Federal Court Rules.

GENERAL DISTRIBUTION

IN THE FEDERAL COURT OF AUSTRALIA
NEW SOUTH WALES DISTRICT REGISTRY **NSD 1613 OF 2006**

ON APPEAL FROM A SINGLE JUDGE OF THE FEDERAL COURT OF AUSTRALIA

BETWEEN:	**COMANDATE MARINE CORP.** **Appellant**
AND:	**PAN AUSTRALIA SHIPPING PTY LTD** **Respondent**
JUDGES:	**FINN, FINKELSTEIN AND ALLSOP JJ**
DATE:	**20 DECEMBER 2006**
PLACE:	**SYDNEY**

REASONS FOR JUDGMENT

FINN J

1 I have had the advantage of considering the reasons of, and the orders proposed by, Allsop J. I agree with the orders proposed. Subject to what I say below, I agree with his Honour's reasons.

2 My unpreparedness to agree generally with Allsop J's reasons does not reflect unarticulated differences I have with what his Honour has said. Rather, because I am of the view that the appeal can properly be disposed of on bases that are somewhat more narrow than those canvassed by his Honour, I do not consider it necessary to express a view on a number of matters dealt with by Allsop J.

3 I am satisfied that Comandate Marine did not make an election between inconsistent rights; and it did not expressly or impliedly abandon the London arbitration. I likewise am of the view that Pan ought not be permitted to rely upon the two grounds advanced in its notice of contention although I do not consider that either ground has been made out in any event on the material before the Court. I agree with Allsop J's reasons in relation to all of these matters save that I do not consider it necessary to express any view on the correctness or otherwise of Lord Steyn's speech in *Republic of India v India Steamship Co Ltd (No 2)*

[1998] AC 878. In my view there was no election or abandonment by Comandate Marine, irrespective how Comandate Marine's commencement of the action *in rem* against *Boomerang 1* is formally to be characterised.

4 The central question in the appeal is whether, in the circumstances, the primary judge was obliged by s 7(2) of the *International Arbitration Act* to stay Pan's Federal Court proceeding, Comandate Marine having applied under that Act for such an order. I am satisfied that the parties' arbitration agreement satisfied the requirements of Article II of what, for convenience, I will call the New York Convention; see *International Arbitration Act*, Sched I, Art II. In particular *it* was contained in the exchange of letters and telegrams which acquired contractual force when, as is acknowledged by Pan, a binding contract later came into existence. I equally am satisfied that that contract, though subject to a condition precedent to performance (i.e. the prior provision of a bank guarantee by Pan) was itself brought into existence through a process of documentary exchanges. I agree with Allsop J's reasons for these conclusions. I do not, though, consider it necessary to express a view on whether Article 8 of what I will call the Model Law: see s 15 of the *International Arbitration Act 1974*; could be relied upon by Comandate Marine if it could not bring itself within Article II of the New York Convention.

5 Having fulfilled the requirements of Article II, the arbitration agreement was one to which s 7(1) of the *International Arbitration Act* applied. For the purposes of s 7(1)(d), Pan was at the time of the agreement "ordinarily resident in a Convention country", i.e. Australia: see s 3(3) of the *International Arbitration Act*. For the reasons given by Allsop J, I am satisfied that the arbitration agreement is not null and void, inoperative or incapable of being performed: cf s 7(5) of the *International Arbitration Act*. I would emphasise, in particular, my concurrence in his Honour's views on why we should follow *Ferris v Plaister* (1994) 34 NSWLR 474.

6 I likewise agree with Allsop J's construction of the scope of the arbitration agreement. I would emphasise in particular my concurrence in his Honour's views on the reasoning of Emmett J in *Hi-Fert Pty Ltd v Kiuking Maritime Carriers Inc (No 5)* (1998) 90 FCR 1 in construing the scope of the arbitration clause in that case. I also do not consider we are bound by that decision.

7 Given the scope of the arbitration clause and given that the *Trade Practices Act*

claims (including Pan's s 87 claim) are arbitrable in the sense of "capable of settlement by arbitration" in the London arbitration: cf *Francis Travel Marketing Pty Ltd v Virgin Atlantic Airways Ltd* (1996) 39 NSWLR 160 at 166-167; I am satisfied for the reasons given by Allsop J that the requirements of s 7(2) of the *International Arbitration Act* have been satisfied in this matter and that a stay ought to have been ordered.

8 I would merely add that, whatever advantage or disadvantage accrued to Pan from having both the relevant legal effects of its pre-contractual conduct and its *Trade Practices Act* claims determined in London according to English law (including relevant principles of conflict of laws), this is what has been agreed to by the parties as international commercial contractors. There is no legal principle of, nor is there any policy immanent in, Australian law that denies them what they have agreed. On the contrary, s 7 of the *International Arbitration Act* upholds it.

I certify that the preceding eight (8) numbered paragraphs are a true copy of the Reasons for Judgment herein of the Honourable Justice Finn.

Associate:

Dated: 20 December 2006

GENERAL DISTRIBUTION

IN THE FEDERAL COURT OF AUSTRALIA

NEW SOUTH WALES DISTRICT REGISTRY **NSD 1613 OF 2006**

ON APPEAL FROM A SINGLE JUDGE OF THE FEDERAL COURT OF AUSTRALIA

BETWEEN:	**COMANDATE MARINE CORP.** **Appellant**
AND:	**PAN AUSTRALIA SHIPPING PTY LTD** **Respondent**
JUDGES:	**FINN, FINKELSTEIN AND ALLSOP JJ**
DATE:	**20 DECEMBER 2006**
PLACE:	**SYDNEY**

REASONS FOR JUDGMENT

FINKELSTEIN J

9 I agree in the reasons of Allsop J.

I certify that the preceding one (1) numbered paragraph is a true copy of the Reasons for Judgment herein of the Honourable Justice Finkelstein.

Associate:

Dated: 20 December 2006

GENERAL DISTRIBUTION

IN THE FEDERAL COURT OF AUSTRALIA
NEW SOUTH WALES DISTRICT REGISTRY **NSD 1613 OF 2006**

ON APPEAL FROM A SINGLE JUDGE OF THE FEDERAL COURT OF AUSTRALIA

BETWEEN:	**COMANDATE MARINE CORP.** **Appellant**
AND:	**PAN AUSTRALIA SHIPPING PTY LTD** **Respondent**
JUDGES:	**FINN, FINKELSTEIN AND ALLSOP JJ**
DATE:	**20 DECEMBER 2006**
PLACE:	**SYDNEY**

REASONS FOR JUDGMENT

ALLSOP J

10 This is an appeal from orders made by a Judge of the Court in a matter between a Liberian company, Comandate Marine Corp (Comandate Marine) and an Australian company, Pan Australia Shipping Pty Ltd (Pan), concerning the time charter of the ship *Comandate*, a general cargo vessel of 25,855 dwt in metric tons and 18,775 Gross Tonnage, built in 1983, registered in Liberia, managed and owned by Greek interests and with a container capacity of 1,358 twenty foot equivalent units (TEUs). I would allow the appeal, set aside the orders made by the primary judge, stay proceedings in this Court and discharge the anti-anti-suit injunction that is in place.

11 I set out a table of contents of these reasons:

- Background to the litigation [12] - [20]
- Pan's Amended statement of claim [21] - [33]
- The provisions of the *International Arbitration Act 1974* (Cth) and Comandate Marine's notice of motion [34] - [45]
- The issues on appeal and my conclusions in summary form [46] - [52]
- The first group of issues: waiver, election and abandonment [53] - [132]

- The second group of issues: whether there was an agreement in writing for the purposes of the *International Arbitration Act 1974* (Cth) [133] - [161]
- The third group of issues: the scope of the arbitration clause [162] - [187]
- The fourth group of issues: the operation of the *International Arbitration Act 1974* (Cth) in the light of the proper construction of the arbitration clause [188] - [245]
- The fifth group of issues: other bases for a stay by reason of the arbitration clause, assuming the inapplicability of the *International Arbitration Act 1974* (Cth) [246] - [250]
- The sixth group of issues: the anti-anti-suit injunction [251] - [253]
- The appropriate orders [254] - [256]

Background to the litigation

12 An understanding of the orders made by the primary judge and the issues on appeal require an appreciation of the background facts of the dispute.

13 At all relevant times, Pan carried on a coastal liner shipping service from and to Australian ports. It was engaged in the coasting trade as that term is understood in s 7 of the *Navigation Act 1912* (Cth). Pan is now in voluntary administration. There was no asserted present relevance of that fact to the disposition of the appeal.

14 The service run by Pan was undertaken initially by one ship, *Boomerang I*, and was to be undertaken also by a second ship, *Comandate*, which was known, for a short time, as *Boomerang II*. For clarity, I will refer to the second ship as *Comandate*. *Boomerang I* was demise chartered by Pan from Jaymont Shipping Company Limited, a company wholly unrelated to Comandate Marine. *Comandate* was time chartered to Pan under terms which included those contained in New York Produce Exchange Form 1993 Revision (NYPE 93).

15 The time charter indicated that it was made for a duration of 24 months with a further 12 months at charterer's option from 19 April 2006. It will be necessary to examine the assertions of the parties in relation to the formation of the time charter in a little detail. For the moment, it is only necessary to understand the relevant terms of the arbitration clause (which both parties accept formed part of the time charter) being, clause 45(b) of the NYPE

93 (clause 45(a), providing for New York arbitration, had been excised and the final paragraph of clause 45(b) dealing with small claims is not relevant):

> *"(b) LONDON*
> ***All disputes arising out of this contract shall be arbitrated at London** and, unless the parties agree forthwith on a single Arbitrator, be referred to the final arbitrament of two Arbitrators carrying on business in London who shall be members of the Baltic Mercantile & Shipping Exchange and engaged in Shipping one to be appointed by each of the parties, with the power to such Arbitrators to appoint an Umpire. No award shall be questioned or invalidated on the ground that any of the Arbitrators is not qualified as above, unless objection to his action be taken before the award is made. **Any dispute arising hereunder shall be governed by English Law**.*
> *…"*
> [emphasis added]

16 Disputes arose under the time charter. Pan alleged various breaches of the time charter and claimed damages in the order of USD 2.5m. Pan commenced *in rem* proceedings against *Comandate* in the Court under the *Admiralty Act 1988* (Cth) and obtained the arrest of *Comandate* in Fremantle pursuant to a warrant issued on 9 June 2006. Security was put up by or on behalf of Comandate Marine and *Comandate* was released from arrest on 14 June 2006.

17 After some communications between the solicitors for the parties, the London solicitors for Comandate Marine sought an assurance that Pan would submit all disputes exclusively to arbitration under clause 45(b) of the time charter. Comandate Marine's London solicitors indicated that failing the provision of such assurance, they were instructed to seek an anti-suit injunction in the High Court of Justice in London to restrain Pan taking any steps to prosecute its claims, or any of them, otherwise than in London arbitration. Pan was given until the morning (London time) of 22 June 2006 to respond. In this body of communication, Comandate Marine asserted a claim for over USD 4m for what it said were Pan's breaches of the time charter.

18 On 20 June 2006, Emmett J made ex parte orders which, amongst other things, restrained Comandate Marine, until further order, from taking any step in the High Court of Justice or in any other court to restrain the continuation of the proceeding in the Court brought under the *Admiralty Act*. (This is the anti-anti-suit injunction to which I have referred. I will continue to use this expression in relation to this order as made and extended.) The notice of motion pursuant to which Emmett J made those orders came before

the primary judge on 22 June 2006. On that day, for reasons which his Honour gave extempore, the primary judge made orders extending the anti-anti-suit injunction up to and including 13 July 2006. This was done principally to permit Pan to file its statement of claim under Rule 22 of the Admiralty Rules against Comandate Marine, and in this regard to protect the integrity of the Court's processes. At the time the matter was before the primary judge on 22 June 2006, there was no notice of motion filed on behalf of Comandate Marine seeking a stay under the *International Arbitration Act 1974* (Cth). The orders made by his Honour provided for the filing of such a motion by Comandate Marine. The following day, 23 June 2006, such a motion was served. It was filed on 4 July 2006. On 6 July 2006, a statement of claim was filed by Pan. On 11 July 2006, an amended statement of claim was filed by Pan.

19 The matter came before the primary judge again on 13 and 14 July 2006. The questions before his Honour were whether the anti-anti-suit injunction should be extended and whether a stay of the proceedings of this Court should be given under the *International Arbitration Act*, or otherwise. On 13 July 2006, after taking evidence and hearing argument over two days, his Honour reserved his decision on the stay application and extended the anti-anti-suit injunction until further order. On 22 August 2006, the primary judge made an order dismissing the motion for a stay of the proceedings of the Court and left undisturbed the anti-anti-suit injunction: see *Pan Australian Shipping Pty Ltd v The Ship 'Comandate' (No 2)* [2006] FCA 1112.

20 It is necessary to describe other events of June and July. On 14 June 2006, Comandate Marine's London solicitors notified Pan of the commencement of the arbitration in London. On 23 June 2006, that is on the day it served its notice of motion under the *International Arbitration Act* for a stay of the proceedings in this Court, Comandate Marine, as plaintiff, commenced *in rem* proceedings against *Boomerang I*. In the early hours of Saturday 24 June 2006, *Boomerang I* was arrested in Fremantle. There was an urgent application before me on the evening of Saturday 24 June for the setting aside of the writ and the arrest. I did not deal with the substance of the arguments that evening, but I permitted *Boomerang I* to load and sail for the east coast: see *Comandate Marine Corp v The Ship 'Boomerang I'* [2006] FCA 859. Before she arrived in Sydney, a Full Court sat on Tuesday 27 June 2006 exercising the original jurisdiction of the Court pursuant to a direction of the Chief Justice under s 20(1A) of the *Federal Court of Australia Act 1976* (Cth), and set aside

the writ and the arrest. The Court refused to accept the argument put on behalf of Comandate Marine that the surrogate ship arrest provided for by s 19 of the *Admiralty Act* could be availed of in circumstances where the relevant person (Pan) was the demise charterer of the ship: see *Comandate Marine Corp v The Ship 'Boomerang I'* (2006) 151 FCR 403.

Pan's Amended Statement of Claim

21 Before dealing with the orders and reasons of the primary judge, it is necessary to appreciate the terms of Pan's claims against Comandate Marine. They have a direct bearing on the claim by Comandate Marine for a stay.

22 The early paragraphs of the amended statement of claim plead the negotiations said to have been undertaken by the parties' shipbrokers. Pan's broker was in Australia. Comandate Marine's broker was outside Australia. It was alleged that in these negotiations Comandate Marine's broker made six representations on behalf of Comandate Marine by the sending of various communications to Pan's broker in Australia, as follows:

- that Comandate Marine would provide a master and crew who were capable of performing their respective obligations under the contemplated charter in the Australian coastal trade;
- that the master, officers and crew were and would be lawfully able to enter and work in Australia and Australian waters, and to discharge their respective obligations under the contemplated charter;
- that the vessel was and would be kept in a thoroughly efficient state in hull, machinery and equipment for and during the proposed service in the coastal trade;
- that the vessel would have a full complement of officers and crew for that purpose;
- that the vessel was and would be seaworthy in all respects; and
- that the vessel, its master and crew were and would be fit for service in the Australian coastal trade.

23 It was said that the making of these representations amounted to conduct in trade and commerce within the meaning of the *Trade Practices Act 1974* (Cth). Importantly, it is to be noted that these representations arose wholly from the negotiations leading up to the fixing of the vessel. The conduct included the sending of a telex on 7 April 2006 confirming discussions on terms and the sending of a pro forma charterparty relating to an earlier and unrelated fixture between the disponent owners of *Comandate* and an entity called Asiatic Shipping Services dated 1 February 2005 that was used as a basis for discussion and the making of a counter offer on 14 April 2006. Thus, the conduct said to give rise to the claims

under the *Trade Practices Act* was within the confines of the body of negotiations which culminated in the time charter and concerned the subject and operation of that anticipated contract. It is also worthy of note that each of the representations can be seen to be reflected in the language of the terms (express and implied) of the time charter that were pleaded and that are referred to below.

24 To the extent that the above representations were in respect of future matters, it was said that Comandate Marine did not have reasonable grounds for making them. Reliance was placed on s 51A(2) of the *Trade Practices Act*; but the absence of reasonable grounds was also said to be inferred from facts otherwise pleaded: the detention of the vessel by the Australian Maritime Safety Authority (AMSA) for various deficiencies in *Comandate* identified by it in the exercise of its inspection functions; deficiencies identified by a surveyor on 7 May 2006; a hull fracture identified by those on board tugs assisting *Comandate* on 22 May 2006; and the absence of appropriate visas for, and immigration documentation of, the master and crew.

25 The pleading asserted that on 19 and 20 April 2006 Comandate Marine accepted by email a counter offer made by Pan on 19 April 2006, for the time charter of the ship, subject to Pan providing a bank guarantee. In the alternative, it was also pleaded that on 20 August 2006 Comandate offered to have the vessel with master and crew for service in the Australian coastal trade, which was accepted by accepting delivery of the vessel in Singapore on 22 April 2006. The assertions as to the formation of the contract of time charter became more precise at the hearing on 13 and 14 July 2006. I deal with them in some more detail below. They are of importance to the application and operation of the *International Arbitration Act* and to the application for a stay sought by Comandate Marine thereunder.

26 The pleading then asserted various express terms from clauses 2, 5, 6, 8, 28, 88 and 92 of the pro forma charterparty. It also pleaded various implied terms as follows:

- that the vessel was seaworthy;
- that the vessel was in all respects fit for service in the Australian coastal trade;
- that the vessel complied with flag and class requirements;
- that the master, officers and crew were lawfully able to enter Australia so as to command and crew the vessel in accordance with the express terms of the charter; and
- that the master, officers and crew were capable of performing their respective

obligations under the charter.

27 The entry into the charterparty was said to have been in reliance on the representations being the conduct for the purposes of the *Trade Practice Act*.

28 The upshot of the master and crew not possessing appropriate visa and other immigration documentation was that on completion of necessary repairs to permit the lifting of the detention of *Comandate* by AMSA, she was only permitted to sail for a foreign port with that crew. The master and crew were not to be granted bridging visas to allow them to remain in Australia and were to be required to apply for any appropriate visas from outside Australia. Comandate Marine therefore made arrangements for *Comandate* to proceed to Singapore. The pleading then asserted that an offer was made by Pan, without prejudice and without admissions, to repatriate the existing crew and replace them with a crew arranged by Pan through an Australian company. This offer was said to have been refused by Comandate Marine.

29 The pleading asserted that the conduct comprising the pleaded representations was misleading or deceptive or likely to mislead or deceive. The particulars to this allegation were as follows:

- Comandate Marine did not provide a master and crew who were capable of performing their respective obligations under the contemplated charter in the Australian coastal trade;
- Comandate Marine failed to ensure the master, officers and crew were lawfully able to enter and work in Australia and Australian waters, and to discharge their respective obligations under the contemplated charter;
- the vessel was not kept in a thoroughly efficient state in hull, machinery and equipment for and during the proposed service in the coastal trade;
- the vessel did not have a full complement of officers and crew for that purpose;
- the vessel was not seaworthy in all respects;
- the vessel, its master and crew were unfit for service in the Australian coastal trade;
- Comandate Marine did not have a reasonable basis for the representations in respect of future matters at the time they were made;

Pan also referred to matters referred to earlier in the pleading, relied upon s 51A of the *Trade Practice Act* and reserved the right to provide further particulars following discovery and interrogatories.

30 An alternative count based on s 55A of the *Trade Practice Act* was pleaded stating that Comandate Marine had engaged in conduct liable to mislead as to the characteristics and suitability for purpose of services.

31 The pleading asserted that by refusing to sail to Sydney pursuant to instructions and stating an intention to sail for Singapore, and by its conduct otherwise, including the breaches pleaded, Comandate Marine evinced an intention not to be bound by the time charter. The pleading also asserted that the various deficiencies of ship and crew were also fundamental breaches of the pleaded express and implied terms of the time charter amounting to repudiation. It was asserted that Comandate Marine's repudiation was accepted on 10 June 2006.

32 These assertions were followed by a final section of the pleading which sought to take advantage of the conduct of Comandate Marine in commencing *in rem* proceedings against, and arresting, *Boomerang I*. It was said that by the commencement and pursuit of those proceedings in the Court and the taking of steps and the seeking of special leave in the High Court of Australia Comandate Marine had elected to submit the resolution of all disputes arising out of or in relation to the time charter to the Federal Court of Australia or that it had waived its right to have any disputes arising out of the time charter referred to arbitration.

33 As to relief, Pan claimed damages under s 82 of the *Trade Practices Act* caused by the pleaded conduct and also for the contractual breaches of the time charter. The same particulars of damage were given to these two claims for damages. The pleading also claimed an order under s 87 of the *Trade Practices Act* setting aside *ab initio* the time charter. Various other orders were sought.

The provisions of the *International Arbitration Act* and Comandate Marine's notice of motion

34 The notice of motion of Comandate Marine before the primary judge sought a stay on a number of bases. Most importantly, a stay was sought by reason of the *International Arbitration Act.* In this respect the motion raised, and this appeal raises, important issues as to the operation of that Act.

35 Section 7(2) of the *International Arbitration Act* provides for a mandatory stay of legal proceedings where there is an arbitration clause applicable to the resolution of the dispute when s 7(1) makes the section applicable. The terms of s 7 are as follows:

"(1) Where:

(a) the procedure in relation to arbitration under an arbitration agreement is governed, whether by virtue of the express terms of the agreement or otherwise, by the law of a Convention country;

(b) the procedure in relation to arbitration under an arbitration agreement is governed, whether by virtue of the express terms of the agreement or otherwise, by the law of a country not being Australia or a Convention country, and a party to the agreement is Australia or a State or a person who was, at the time when the agreement was made, domiciled or ordinarily resident in Australia;

(c) a party to an arbitration agreement is the Government of a Convention country or of part of a Convention country or the Government of a territory of a Convention country, being a territory to which the Convention extends; or

(d) a party to an arbitration agreement is a person who was, at the time when the agreement was made, domiciled or ordinarily resident in a country that is a Convention country;

this section applies to the agreement.

(2) Subject to this Part, where:

(a) proceedings instituted by a party to an arbitration agreement to which this section applies against another party to the agreement are pending in a court; and

(b) the proceedings involve the determination of a matter that, in pursuance of the agreement, is capable of settlement by arbitration;

on the application of a party to the agreement, the court shall, by order, upon such conditions (if any) as it thinks fit, stay the proceedings or so much of the proceedings as involves the determination of that matter, as the case may be, and refer the parties to arbitration in respect of that matter.

(3) Where a court makes an order under subsection (2), it may, for the purpose of preserving the rights of the parties, make such interim or supplementary orders as it thinks fit in relation to any property that is the subject of the matter to which the first-mentioned order relates.

(4) For the purposes of subsections (2) and (3), a reference to a party includes a reference to a person claiming through or under a party.

(5) A court shall not make an order under subsection (2) if the court finds that the arbitration agreement is null and void, inoperative or incapable of being performed."

There was no dispute but that s 7(1) made the *International Arbitration Act* relevant.

36 The phrase "arbitration agreement" is defined in s 3(1) of the *International*

Arbitration Act as follows:

> "arbitration agreement *means an agreement in writing of the kind referred to in sub-article 1 of Article II of the Convention."*

37 The "Convention" there mentioned is defined in s 3(1) of the *International Arbitration Act* as "the Convention on the Recognition and Enforcement of Foreign Arbitral Awards adopted in 1958 by the United Nations Conference on International Commercial Arbitration at its 24th meeting, a copy of the English text of which is set out in Schedule 1", well known, of course, as the New York Convention.

38 Article II of the Convention is in the following terms:

> *"1. Each Contracting State shall recognize an agreement in writing under which the parties undertake to submit to arbitration all or any differences which have arisen on which may arise between them in respect of a defined legal relationship, whether contractual or not, concerning a subject matter capable of settlement by arbitration.*
>
> *2. The term 'agreement in writing' shall include an arbitral clause in a contract or an arbitration agreement, signed by the parties or contained in an exchange of letters or telegrams.*
>
> *3. The court of a Contracting State, when seized of an action in a matter in respect of which the parties have made an agreement within the meaning of this article, shall, at the request of one of the parties, refer the parties to arbitration, unless it finds that the said agreement is null and void, inoperative or incapable of being performed."*

39 The *International Arbitration Act* was the fulfilment of Australia's international obligations arising from its accession to the Convention. Section 7 was the placement into Australian domestic law of the elements of the Convention reflected in Article II and elsewhere in the Convention that Contracting States should take steps to recognise and enforce the contractual will of parties to submit their disputes to international arbitration.

40 In 1989, amendments were made to the *International Arbitration Act* by the *International Arbitration Amendment Act 1989* (Act No 25 of 1989) to implement the Model Law on International Commercial Arbitration adopted by the United Nations Commission on International Trade Law ("UNCITRAL") on 21 June 1985, the English text of which is set out in Schedule 2 of the *International Arbitration Act* (the "Model Law"). Section 16(1) of the *International Arbitration Act* provides that, subject to Part III, the Model Law has the force of law in Australia.

41 Section 17 of the *International Arbitration Act* is in the following terms:

> *(1) For the purposes of interpreting the Model Law, reference may be made to the documents of:*
> *(a) the United Nations Commission on International Trade Law; and*
> *(b) its working group for the preparation of the Model Law;*
> *relating to the Model Law.*
>
> *(2) Subsection (1) does not affect the application of section 15AB of the* Acts Interpretation Act 1901 *for the purposes of interpreting this Part."*

42 Article 1 deals with scope of application of the Model Law and relevantly is in the following terms:

> *"Article 1. Scope of application* *
> *(1) This Law applies to international commercial* ** *arbitration, subject to any agreement in force between this State and any other State or States.*
>
> *(2) The provisions of this Law, except articles 8, 9, 35 and 36, apply only if the place of arbitration is in the territory of this State.*
>
> …
>
> *(5) This Law shall not affect any other law of this State by virtue of which certain disputes may not be submitted to arbitration or may be submitted to arbitration only according to provisions other than those of this Law.*
>
> * *Article headings are for reference purposes only and are not to be used for purposes of interpretation.*
> ** *The term 'commercial' should be given a wide interpretation so as to cover matters arising from all relationships of a commercial nature, whether contractual or not. Relationships of a commercial nature include, but are not limited to, the following transactions: any trade transaction for the supply or exchange of goods or services; distribution agreement; commercial representation or agency; factoring; leasing; construction of works; consulting; engineering; licensing; investment; financing; banking; insurance; exploitation agreement or concession; joint venture and other forms of industrial or business co-operation; carriage of goods or passengers by air, sea, rail or road."*

There was no dispute that the time charter here and the location and characteristics of the parties made any arbitration under clause 45(b) of NYPE 93 an international commercial arbitration for the purpose of the Model Law.

43 Given that the place of the arbitration pursuant to clause 45(b) of the time charter was not Australia ("this State" in Article 1(2) meaning Australia: s 16(2) of the *International*

Arbitration Act) only articles 8, 9, 35 and 36 of the Model Law expressly apply here. Articles 35 and 36 deal with recognition and enforcement of foreign awards and are irrelevant to the resolution of this dispute in their operation. Though Article 7 is not expressly picked up by Article 1(2), the terms of Article 8 include the phrase "arbitration agreement" which is defined in Article 7. It is therefore convenient to set out the terms of Articles 7, 8 and 9 of the Model Law:

> *"Article 7.* Definition and form of arbitration agreement
> *(1) 'Arbitration agreement' is an agreement by the parties to submit to arbitration all or certain disputes which have arisen or which may arise between them in respect of a defined legal relationship, whether contractual or not. An arbitration agreement may be in the form of an arbitration clause in a contract or in the form of a separate agreement.*
>
> *(2) The arbitration agreement shall be in writing. An agreement is in writing if it is contained in a document signed by the parties or in an exchange of letters, telex, telegrams or other means of telecommunication which provide a record of the agreement, or in an exchange of statements of claim and defence in which the existence of an agreement is alleged by one party and not denied by another. The reference in a contract to a document containing an arbitration clause constitutes an arbitration agreement provided that the contract is in writing and the reference is such as to make that clause part of the contract.*
>
> *Article 8.* Arbitration agreement and substantive claim before court
> *(1) A court before which an action is brought in a matter which is the subject of an arbitration agreement shall, if a party so requests not later than when submitting his first statement on the substance of the dispute, refer the parties to arbitration unless it finds that the agreement is null and void, inoperative or incapable of being performed.*
>
> *(2) Where an action referred to in paragraph (1) of this article has been brought, arbitral proceedings may nevertheless be commenced or continued, and an award may be made, while the issue is pending before the court.*
>
> *Article 9.* Arbitration agreement and interim measures by court
> *It is not incompatible with an arbitration agreement for a party to request, before or during arbitral proceedings, from a court an interim measure of protection and for a court to grant such measure."*

44 Reading s 16(1) of the *International Arbitration Act* and the Model Law together, Article 1 would appear to be given the force of law in Australia even where, as here, the arbitration is foreign. Other provisions relevant to the operation of Article 8 are not expressly

made applicable by Article 1(2): Article 2 contains definitions and rules of interpretation; and Article 3 deals with receipt of written communications (relevant to the formation of the relevant arbitration agreement). There is no explanation for these omissions in the comprehensive work by Holtzmann, HM and Neuhaus, JE on the *travaux préparatoires* to the Model Law: *A Guide to the UNCITRAL Model Law on International Commercial Arbitration: Legislative History and Commentary* (Kluwer, the TMC Asser Institute 1989).

45 It will be necessary to refer to other provisions of the *International Arbitration Act*, the Convention and the Model Law and to the content of those various provisions later in these reasons.

The issues on appeal and my conclusions in summary form

46 There were numerous issues argued on the appeal. To assist in the understanding of these reasons I set out the issues in six groups in the order in which they fall for consideration and my views in summary on them.

47 The first group of issues concerns the assertions by Pan that Comandate Marine waived or elected to abandon the London arbitration by its conduct. If Pan is correct in this respect, the later questions as to the extent of the arbitration agreement, the meaning and operation of the *International Arbitration Act*, and other discretionary considerations do not arise. For the purpose of these issues an arbitration agreement with ample relevant scope can be assumed. My views are that the primary judge erred in his conclusion that there had been waiver and election and that Pan fails on all these arguments. It is therefore necessary to move to the next group of issues.

48 The second group of issues is whether there was an agreement in writing so that there can be an agreement for the purposes of the operation of the *International Arbitration Act.* My views are that the primary judge erred in concluding that there was no agreement in writing for the purposes of the *International Arbitration Act*.

49 The third group of issues concerns the proper scope of the arbitration clause here, and, in particular, whether it is wide enough to encompass the *Trade Practices Act* claims. My views are that the primary judge erred in construing clause 45(b) too narrowly and that the clause is sufficiently wide to cover all the disputes between the parties.

50 The fourth group of issues concerns the operation of the *International Arbitration Act*.

My views are that Comandate Marine is entitled to an unconditional stay based on Article 8 of the Model Law and s 7 of the *International Arbitration Act*.

51 The fifth group of issues concerns other possible basis for a stay assuming no order under the *International Arbitration Act.* It is unnecessary to deal with these issues.

52 The sixth group of issues concerns the anti-anti-suit injunction. My view is that the anti-anti-suit injunction should be dissolved.

The first group of issues: whether Comandate Marine by its conduct elected to waive or abandon, waived, abandoned, or otherwise lost its right to insist on arbitration

53 The primary judge concluded that Comandate Marine had elected not to pursue its arbitration proceedings by beginning its *in rem* proceedings against *Boomerang I* without placing on the writ its intention to seek a stay under s 29 of the *Admiralty Act* or otherwise indicating on the writ that the proceeding was brought solely for the purpose of obtaining security for the London arbitration. Secondly, he concluded that by the conduct of both parties in electing to litigate in the Court the arbitration agreement had been, in substance, abandoned. So his Honour concluded that the arbitration agreement was either "incapable of being performed" or "inoperative" for the purposes of s 7(5) of the *International Arbitration Act.*

54 Pan sought in argument to bolster these conclusions by putting the matter in two other ways. First, it said that the filing of the *in rem* writ against *Boomerang I* was the acceptance by Comandate Marine of Pan's repudiation of the arbitration agreement; and, secondly, it said that there was an implied contractual abandonment of the arbitration agreement. These ways of putting the matter were formalised in a notice of contention filed after the hearing on 1 November 2006. (It was not submitted by Pan that Comandate Marine's conduct was itself a repudiation of the arbitration agreement. Though, in fairness, it was said to be an abandonment of the arbitration agreement.)

55 For the reasons that follow, in my view: the primary judge erred in reaching the conclusions that he did, Pan should not be permitted to raise the new ways of putting the matter on appeal and, even if Pan be permitted to do so, on the material before the Court, it should not be concluded that there was an acceptance by Comandate Marine of a repudiation by Pan or that the parties had impliedly agreed to abandon the arbitration.

56 Central to the reasoning of the primary judge was the form of relief in the writ *in rem* filed on 23 June 2006 and served on the ship, together with the arrest warrant, late on 23 June or in the early hours of 24 June 2006. The writ was, relevantly, in the following terms:

> *"BY THIS WRIT the Plaintiff commences action against the Ship specified below.*
>
> *DATE OF ISSUE: 23 June 2006*
>
> *PARTICULARS OF PROPERTY: The Ship "Boomerang 1" registered in Cyprus.*
>
> *AMOUNT CLAIMED OR OTHER RELIEF SOUGHT:*
>
> *1. arrest of the ship "Boomerang I";*
> *2. damages;*
> *3. interest;*
> *4. costs.*
>
> *PARTICULARS OF CLAIM:*
>
> *1. The Plaintiff's claim is for damages for breach of a time charter entered into between the Plaintiff and Pan Australia Shipping Pty Ltd on or about 19 April 2006 in respect of the ship "Comandate". In breach of the time charter, Pan Australia Shipping Pty Ltd has:*
> *(a) failed to obtain valid crew visas for the intended trade of the ship "Comandate";*
> *(b) wrongfully terminated the charter in respect of the ship "Comandate"; and*
> *(c) failed to make hire payments due under the time charter.*
>
> *The Court's jurisdiction in respect of this claim arises under sections 10, 17 and 4(3)(d), (f), (o) and (w) of the* Admiralty Act.
>
> *RELEVANT PERSON:*
>
> *Pan Australia Shipping Pty Ltd*
> *the demise or bareboat charterer of the vessel "Boomerang 1"*
>
> …
>
> *TO THE DEFENDANT*
>
> *If you wish to defend this claim, you must, within 21 days after this writ is served on you, file an appearance."*

57 The writ was based on Form 6 of the Admiralty Rules. In Form 6, adjacent to the

heading "relevant person" there is a footnote which states: "Refer to Rule 15 and specify the relevant person in relation to the claim, if known to the plaintiff." Rule 15 is in the following terms:

> *"(1) Initiating process in a proceeding commenced as an action* in rem *shall specify a relevant person in relation to the maritime claim concerned as a defendant.*
>
> *(2) A relevant person may be specified by reference to ownership of, or other relevant relationship with, the ship or other property concerned."*

58 The phrase "relevant person" is defined in s 3(1) of the *Admiralty Act* as meaning in relation to a maritime claim a person who would be liable on the claim in a proceeding commenced as an action *in personam*. As to its meaning, see *Owners of the Motor Vessel 'Iran Amanat' v KMP Coastal Oil Pte Ltd* (1999) 196 CLR 130.

59 Section 29 of the *Admiralty Act* provides for the staying of proceedings commenced under the *Admiralty Act* in favour of arbitration (in Australia or elsewhere) or litigation elsewhere on condition that the ship or other property be retained as security for the award or judgment in the arbitration or litigation. Thus, in practice, *in rem* proceedings can be commenced only as security for foreign arbitration or litigation. In the practice of Admiralty in Australia, a regular occurrence is the arrest of a ship under *in rem* proceedings without any further *in personam* proceeding occurring. That is, ships are regularly arrested for security for an arbitration award or foreign judgment.

60 In my respectful view, the first error committed by the primary judge was to posit the existence, at the point of the filing and serving of the writ *in rem*, of two mutually inconsistent rights, the exercise of one of which was inconsistent with the existence of the other. Comandate Marine was a party to a contract whereby it had agreed to submit disputes between it and Pan under the time charter exclusively to arbitration. It commenced that arbitration. It commenced *in rem* proceedings against the ship. This is an action against the ship itself: *Aichhorn & Co KG v The Ship MV 'Talabot'* (1974) 132 CLR 449 at 455-56. Upon the entry of appearance by the relevant person the action proceeds also as if it were an action *in personam*, though it does not cease to be an action *in rem*: *Caltex Oil (Australia) Pty Ltd v The Dredge 'Willemstad'* (1976) 136 CLR 529 at 538. For present purposes, however, in dealing with the question of an election between mutually inconsistent rights, it is unnecessary to stress the *in rem* character of the action, and the *in rem* action can be

assumed to be an action between Pan and Comandate Marine. I will deal with the correctness of this assumption in due course.

61 The commencement of the action *in rem* may have greater, or lesser, significance depending upon the circumstances. It is not necessary to conclude that such an act cannot, in any circumstances, amount to a repudiation of an agreement to resolve disputes in a particular way. All the relevant circumstances would need to be examined in order to assess that. The approach of the primary judge was to ascribe a significance to the writ, in the form it took, as inconsistent with the continued existence of the entitlement and obligation to take the dispute between Pan and Comandate Marine exclusively to arbitration. There are a number of difficulties with this conclusion.

62 The principal difficulty is the absence of two mutually inconsistent rights, in the sense that exercise of one presupposes the non-existence of the other. I agree with Austin J in *ACD Tridon Inc v Tridon Australia Pty Ltd* [2002] NSWSC 896 at [58] that the selection of the method of dispute resolution is not between inconsistent rights. See also *Yimin Zhang v Shanghai Wool and Jute Textile Co Ltd* [2006] VSCA 133 at [15] per Chernov JA, with whom Ashley JA and Bongiorno AJA agreed at [28] and [29], respectively. The notion of inconsistent rights was explained by Stephen J in *Sargent v ASL Developments Ltd* (1974) 131 CLR 634 at 641-2: the rights are inconsistent if neither may be enjoyed without the extinction of the other. For instance, when a contract is repudiated the innocent party either accepts the repudiation and ends the contract or chooses not to end the contract. Both cannot be done – the contract is either ended or on foot. A litigant who has bound itself to arbitrate and commences so to do and who files court proceedings as well may be acting oppressively or abusively and may be in breach of contract, but has not elected between inconsistent rights. Here, the filing of the writ did not extinguish the rights under the arbitration agreement; it may or may not have constituted, or formed part of, an inconsistent course of conduct; it may or may not have amounted to a breach of contract; but it did not cause or presuppose the extinction of the rights under the arbitration agreement. To express the matter in the terms of Professor Hohfeld used by Mr Justice Handley in *Estoppel by Conduct and Election* (Thomson/Sweet and Maxwell 2006) at 230-231:

> *"The elector has a power to change the legal rights and duties of himself and another with a corresponding liability in that other to submit to the change."*

63 Undoubtedly, the institution of some legal proceedings can work an election in some circumstances: the commencement of ejectment proceedings effects a forfeiture: *Scarf v Jardine* (1882) LR 7 App Cas 345 at 361; commencement of proceedings to enforce a contract which could be rescinded for fraud or other cause is an election to affirm; many other examples could be given. No such inconsistency arises here.

64 It was likely, and no doubt assumed by those advising Comandate Marine, that Pan would, in some fashion, move to protect the ship of which it was demise charterer. Indeed, Pan's first (and only) substantive step in the proceeding after filing an appearance was to challenge (successfully) the authority of the Court to hear the *in rem* action. There can have been little doubt in those who advised Comandate Marine that there would be a debate about the validity of the invocation of the authority of the Court given the terms of s 19 of the *Admiralty Act* and the well-known jurisprudence discussed in the reasons of the Full Court: see *Comandate Marine Corp v The Ship 'Boomerang I'* (2006) 151 FCR 403 at 407-409 [18]-[26]. If s 19 were validly invoked, Comandate Marine could use s 29 to stay the action once security had been put up. If Pan did not appear (an unlikely, but theoretical, scenario) Comandate Marine would have had to decide whether to press on or otherwise make an application under s 29. I do not see how the form of the writ, without an endorsement as to an intention to use s 29 of the *Admiralty Act* was decisive. Ordinarily, there is nothing conclusive about the form in which a writ is issued or about the claims made in a writ: see *United Australia Limited v Barclays Bank Limited* [1941] AC 1 at 18-19. Taken alone, the commencement of the *in rem* action did not work an election or waiver of any right to arbitrate. There was no step by Comandate Marine unequivocably inconsistent with the existence of the right and obligation to arbitrate.

65 This is not to say that legal proceedings may not be conducted to such a point that the only conclusion is that the party can be taken to have waived or abandoned the right to arbitrate: cf *The Commonwealth of Australia v Verwayen* (1990) 170 CLR 394 at 472 per Toohey J. Thus, at this point it is necessary to appreciate the balance of the evidence insofar as it bears on the conduct of the parties, in particular the whole context of the commencement of, and abortive attempt to prosecute, the *Boomerang I* proceedings in order to see whether Comandate Marine waived (in the sense of abandoning) the right to arbitrate and to assess the two new ways the matter was put on appeal: implied contractual abandonment and acceptance by Comandate Marine of the asserted repudiation by Pan.

66 The facts earlier set out provide the background to the commencement of the *in rem* action against *Boomerang I* and her arrest. The following further facts are also relevant. I have ignored the time differences between Sydney, London and New York in discussing these events.

67 After the arrest of *Comandate* on 9 June 2006, a letter of guarantee was provided on behalf of Comandate Marine on 13 June 2006. On 14 June 2006, a number of things occurred: a conditional appearance was filed by Comandate Marine; *Comandate* was released; and Comandate Marine in a letter to Pan articulated, and gave particulars of, its claim against Pan in excess of USD 4m, gave formal notice of the commencement of the arbitration and appointed an arbitrator on its behalf.

68 On 15 June 2006, Mr O'Neil of Stephenson Harwood (Comandate Marine's London solicitors) sent an email to Ms Wilmshurst of Ebsworth & Ebsworth (Pan's Sydney solicitors). This email was sent in the context of some telephone discussions of which there was no direct evidence. It is unnecessary to deal with most of the email that was concerned largely with the perceived relative merits, or lack thereof, of the parties' respective claims. Importantly, however, Mr O'Neil made an unequivocal request for a statement from Pan as to the arbitration clause. He said:

> *"Finally, please confirm by tomorrow morning that your clients accept and will abide by the exclusive English law and arbitration provisions provided under the governing Charter, or whether they will seek to have this dispute resolved and or litigated in Australia. Unless we have your unequivocal confirmation by tomorrow morning our time, we hereby place you on formal notice that we will have no choice but to apply for an anti-suit injunction in the English High Court on Monday to restrain any substantive proceedings in Australia. Please be guided accordingly and we reserve all of our clients rights on costs in the event that such an application is necessary."*

69 On the following day, 16 June 2006, Ms Wilmshurst respondent to this part of Mr O'Neil's email as follows:

> *"The threatened anti-suit injunction is, in our view, misconceived. If your client is minded to seek a stay of the in rem action, we will obtain instructions in relation to our client's attitude to such an application including the costs of the proceeding to date."*

70 Mr O'Neil respondent to this part of Ms Wilmshurst's email was as follows:

> *"Unless you revert now as requested yesterday with your clients' unequivocal agreement and affirmation that any and all disputes between them and owners will be resolved in accordance with English Law and arbitration as provided by Clause 45 of the governing CP, we will proceed as previously notified and will recover the costs of doing so against your clients. You have formal notice of our intentions."*

The parties had also been discussing the provision of security by Pan for Comandate Marine's claim. As to this, in this same email, Mr O'Neil stated:

> *"Absent the voluntary provision of security, our clients will now take whatever steps are necessary to properly secure their claim."*

71 Twenty minutes later (it is not clear whether there had been an intervening telephone discussion), Mr O'Neil once again taxed Ms Wilmshurst for her instructions about the arbitration, saying:

> *"I repeat that I now want your clients' categoric and unequivocal agreement, confirmation and affirmation that all disputes between our clients will be resolved exclusively in accordance with the dispute resolution clause of the CP, i.e. English law and arbitration. Nothing less will do. You are on Notice."*

72 A conversation between Mr O'Neil and Ms Wilmshurst then took place (still on 16 June), following which Ms Wilmshurst sent an email stating:

> *"Further to our conversation of a moment ago, I do not have Charterers' instructions on the matter you have sought an unequivocal response upon through the course of your day today. Should you wish to attempt to construe my comments as being confirmation of our client's position then you will be deliberately misconstruing the position.*
>
> *Personally I had thought that we have had a professional and constructive dialogue to date and hope this can continue."*

73 Later still on 16 June, Mr O'Neil responded in a short email, the totality of which was as follows:

> *"You know what we want and you are deliberately equivocating. You have until our Monday morning to respond as requested."*

74 The strength of the correspondence from Mr O'Neil caused Ms Wilmshurst to express her views more than once (by way of suggestion) that Mr O'Neil "tone down" his

correspondence. Whether or not the tone of Mr O'Neil's communications was appropriate need not be debated. What was clear, however, was the blunt and forceful proposition put forward by him that his client wished to arbitrate and that his client demanded an unequivocal acceptance by Pan that it would submit all disputes to arbitration in accordance with the disputes.

75 Also on 16 June, Comandate Marine commenced proceedings in the United States District Court, Southern District of New York claiming maritime attachment under Rule B of the Supplemental Rules for Certain Admiralty and Maritime Claims. The Verified Complaint filed stated that Comandate Marine sought the "issuance of process of maritime attachment so that it may obtain security for its claims against [Pan]." The complaint made clear the existence of the arbitration. On the same day, an order for maritime attachment was made by Judge Crotty of the United States District Court.

76 On 17 June 2006, Ebsworth & Ebsworth sent by facsimile a letter to Stephenson Harwood. In the light of Pan's submissions on appeal that it (Pan) had repudiated its own obligations under the arbitration agreement by 23 June 2006, it is necessary to set the letter out in full:

> *"We refer to our emails dated 15 and 16 June 2006.*
>
> *We note that your client will apply for an anti-suit injunction on Monday morning unless our client provides by then its "categoric and unequivocal agreement, confirmation and affirmation that all disputes between our clients will be resolved exclusively in accordance with the dispute resolution clause".*
>
> *As you know, we have indicated that it is our view the application you intend to bring is misconceived and entirely inappropriate at this stage. The reasons for this view on our part include the following:*
>
> *1. Our clients commenced in rem proceedings in the Australian Courts to obtain security for the claim against your client and the Australian Courts clearly have jurisdiction in relation to such arrest proceedings.*
>
> *2. It is not a breach of the arbitration clause to have brought such proceedings in the Australian Court.*
>
> *3. Owners only appointed their arbitrator on 14 June.*
>
> *4. Charterers are considering their position and will respond to Owners' appointment of an arbitrator at an appropriate time which will be within a matter of days.*

> *5. Charterers have not commenced in personam proceedings in Australia, nor have they threatened to do so at any stage.*
>
> *6. You have provided nothing to suggest that there is such urgency that our client should not be entitled to provide instructions on the confirmation you have sought within a reasonable time frame rather than within the 24 hour period prescribed in your initial demand.*
>
> *We understand that pursuant to the Protocol Practice Direction, litigation should be viewed as the last resort, not the first resort. The heavy-handed approach adopted by your client in respect of the foreshadowed application is inconsistent with the obligations under this document.*
>
> *Any application for an anti-suit injunction should be made on notice by summons, and our client is able to make appropriate arrangements for service. There is no justification whatsoever for an urgent ex-parte application. If, regardless of this, your client proceeds with an ex-parte application then we ask that a copy of this letter and our emails dated 16 June 2006 are shown to the Court."*

77 The letter was astute (as Ms Wilmshurst had been in her prior emails and, to the extent one can infer from them, in conversation) not to deny the binding nature of the arbitration agreement.

78 Mr O'Neil's response was by email on 17 June and conformed with the direct and uncompromising tone and content of earlier correspondence from him. It stated:

> *"Thank you for your fax which will of course be brought to the Court's attention.*
>
> *Once again, you have sought to avoid directly answering my very simple request, attempting to justify you avoidance and delay on the basis that you have had insufficient time to take instructions. Your points 4, 5 and 6 equivocate further.*
>
> *We will be applying to Court on Monday or Tuesday of next week and you are on notice of this fact. You have had more than sufficient time to seek instructions from your clients as to whether they agree that all disputes between them arising under and/or in connection with the CP will and should be exclusively resolved in accordance with the English law and arbitration provision of the CP. The fact that they (and you) have not confirmed and affirmed this immediately is very telling.*
>
> *The issue is very simple. Are your clients intending to bring in personam proceedings in Australia, yes or no?*

I look forward to hearing from you."

79 Ms Wilmshurst's response, again on 17 June, was as follows:

"Again you are speculating without any basis. As you know I intend to take instructions and revert but do not consider your heavy-handed approach means that it must be within the unreasonable time frames that you are seeking to dictate."

80 On 19 June 2006, Mr O'Neil sent a two page facsimile to Ms Wilmshurst. Again because of Pan's submission as to its own repudiation and the acceptance of it by Comandate Marine it is necessary to set out this letter in full:

"We refer to your fax of 17 June 2006. Obviously there are a number of matters contained within your fax about which we do not agree, some of which need to be addressed. On behalf of our client we have since Thursday 15 June 2006 been asking you to answer what is, with respect, a very straight forward question. Despite repeated opportunities to do so you have failed completely to answer the pertinent question, namely, does your client intend to honour its contractual agreement as evidenced in the arbitration clause of the Charter?

Because you have deliberately refused to answer this simple question we have taken steps to prepare for an urgent ex parte application for the issue of an anti-suit injunction to restrain your client from continuing or prosecuting any proceedings against our client otherwise than via the mechanism contemplated in the Charter. You have been no [sic] *notice of our client's intended course of action for adequate time. Contrary to your self-serving protestation your client has been allowed more than sufficient time to consider its position (especially when contrasted with the notice our client received prior to the arrest of the vessel).*

On 14 June 2006 your Partner Mr Drew James inquired whether our client would be agreeable to all disputes being determined in the Federal Court of Australia or whether they press for those matters to be determined by way of London arbitration. It is clear from service of the Notice of Commencement later that same day that Owners want to give effect to the contractual bargain and do not consent to a non-contractual jurisdiction.

On 16 June 2006 you asked whether it was my client's intention to seek a stay of the in rem proceedings. The critical question in that regard is whether your client would agree to a stay of those proceedings in favour of having the dispute resolved by way of London arbitration in accordance with the arbitration clause in the Charter? Clearly this is an issue that you have turned your mind to and one about which from your correspondence it is reasonable to assume that you have discussed with your client. As mentioned above we are instructed to (and are ready to execute) apply for an anti-suit

> *injunction against your client to give effect to the parties agreement. We intend to appear before the Court on that application on* ***Thursday 22 June 2006****. By that date you will have been on notice of the application for 7 days, which on any view is a reasonable period of time.*
>
> *We therefore request your clear and unequivocal answer to the question of whether your client would agree to a stay of the Australia in rem proceedings? Please answer this question on or before our opening Thursday morning,* ***0800 hours local time or 1700 hours AEST****.*
>
> *Please note, if you fail to answer the question whether our client will agree to a stay of the in rem proceedings in favour of London arbitration , or give a qualified/equivocal answer to same, we shall assume that to be conduct on instruction from your client evidencing an intention to refuse to abide by the terms of the Charter and will ask the Court to draw that inference when we appear for the anti-suit injunction.*
>
> *Finally, if your client is not prepared to unequivocally confirm that it will abide by its contractual bargain and agree to submit to the arbitration mechanism contained in the Charter (or fails to answer within time) it would be useful if you could nominate a firm of London solicitors who will be instructed on behalf of your client.*
>
> *We look forward to hearing from you."*
> [emphasis in original]

81 On the following day, 20 June 2006, Pan sought and was granted the anti-anti-suit injunction by Emmett J. The matter came before Rares J at 11.10 am on 22 June 2006. His Honour delivered extempore reasons between 4.34 pm and 5.17 pm. The conduct of the motion that day occupies 73 pages of transcript. In the light of Pan's submission that its conduct leading up to 23 June was a repudiation of the arbitration agreement, it is necessary to refer to aspects of the transcript. Pan was represented by Dr Bell who appeared with Mr Gray, Comandate Marine by Mr Street SC who appeared with Mr McLure.

82 The first matter discussed was the conditionality of the appearance of Comandate Marine. It is unnecessary to deal with the discussion at length, but a concern was expressed by Mr Street about the creation of an *in personam* proceeding by the filing of an unconditional appearance.

83 In describing the purpose of the application for the anti-anti-suit injunction, Dr Bell said at pp 5, 6 and 8 of the transcript:

> *"…What we seek to achieve, your Honour, by the relief we seek is to preserve*

the status quo in the classical sense. The status quo would allow, an appearance having been entered, these proceedings to run along to the stage that an in personam claim is filed setting out the causes of action sought to be pursued on behalf of the plaintiff and when and if that claim is filed it will be open to the defendant to move, if so advised, for any form of interlocutory relief in this court including a stay of the proceedings pursuant to the provisions of the International Arbitration Act.

…

…[T]*he serious question to be tried relevantly is whether there is an arguable case that this court should move now in light of the evidence which I will identify shortly to preserve its own ability to control these proceedings including its ability under the International Arbitration Act to impose conditions which may or may not be considered appropriate by the court in relation to the future conduct both of these proceedings and if the court finds there is a binding arbitration agreement and the dispute is sought to be agitated by my client is otherwise within the scope of that arbitration agreement if the proceedings were otherwise to be stayed including the question of whether any such dispute is capable of settlement by arbitration.*

…

The serious question to be tried is whether or not this court should on the basis of the material before the court, namely a claim at a very early stage where there has been a defective appearance up to now and where factual inquiries are still being undertaken, whether this court should act to preserve its ability under the International Arbitration Act, if that Act applies, to impose conditions to ensure that potential statutory claims aren't able to be shut out on the merits through the combined operation of an arbitration clause and a foreign government law clause as has happened to Australian statutory claims in the past as a result of the very kind of application which has been threatened by my learned friend's clients in England.

In my submission, and this is why we put it on an interlocutory basis, what we wish is a time within the time contemplated by the rules of court, that is to say the time within which an in personam claim is to be filed to formulate fully the claim my clients seeks to make including formulation of potential Trade Practices Act claims and to hold the status quo until that time,

…

…obviously one of the reasons of relevance of the TPA claim is that there is a live issue as to whether or not such claims are capable of settlement by arbitration or the parties should be intended to have referred as Emmett J said in the Full Court in Kiukiang Korea [sic] *whether you would attribute to the parties an intention to refer an Australian statutory claim to commercial men in London, etcetera, those sort of considerations*

…

> *But also even if it is within the scope of this agreement, and we simply wish to, the reason this relief is being sought now, we wish to preserve the possibility of an argument that even if our friends establish that there is an arbitration agreement and even if they establish that some or all of an in personam claim falls within the scope of the arbitration agreement on its proper construction the court should still, we wish to preserve the ability ask the court to impose conditions of the kind Allsop J indicated which are designed to ensure that that claim is not defeated without ever being heard on its merits. And the rationale of that, as I say, is the approach English courts take to picking up or not picking up relevantly strange statutory claims."*

84 It is unnecessary to set out further parts of the transcript. It was plain that Dr Bell was putting Pan's submission that there was a fear that an English Court would issue an anti-suit injunction thereby depriving Pan of the available arguments relevant to the operation of the *International Arbitration Act*, including the proper scope of the arbitration clause and the possibility of conditions on any stay. It was made clear that Pan would rely heavily on the approach of the Full Court in *Hi-Fert Pty Ltd v Kiukiang Maritime Carriers Inc (No 5)* (1998) 90 FCR 1 (*The 'Kiukiang Career'*).

85 During the hearing Mr Street made it clear that Comandate Marine would move the Court for a stay under the *International Arbitration Act*.

86 Stopping at this point, if Pan is to show that the filing and serving of the writ on 23 June 2006 was an acceptance by Comandate Marine of a repudiation by Pan, it must be recognised that on 14 June 2006, Comandate Marine commenced the arbitration, thus waiving any right to accept any repudiation by Pan in commencing the *in rem* proceedings on 9 June 2006. In any event, taking the whole of Pan's conduct up to and including 22 June 2006, it is not clear to me that Pan evinced an intention not to be bound by the arbitration agreement. Both Ms Wilmshurst and Dr Bell were carefully stating Pan's position, and stopping short of repudiating any obligation under the arbitration clause. They wanted issues concerning the arbitration clause addressed in Australia, in the first instance, under the *International Arbitration Act*. That Ms Wilmshurst did not accede to Mr O'Neil's demands does not necessarily amount to a repudiation. Mr O'Neil's views as to what his client was entitled and his demands therefor did not unilaterally set the boundary of conduct conforming to the contract. Dr Bell relied on an English case in the Court of Appeal (*Downing v Al Tameer Establishment* [2002] EWCA Civ 721) in support of the propositions that his client

had repudiated the arbitration agreement and that Comandate Marine had accepted that repudiation. I find no assistance in the case in this respect. The questions whether a party's conduct evinces an intention not to be bound by a contract or whether another party has accepted such is not to be answered by examining the different facts of another entirely unrelated case or even one with some similarities. To the extent that the case was cited for the proposition that a refusal to answer questions such as those posed by Mr O'Neil of Mr Wilmshurst was repudiatory conduct, it only needs to be said that no such legal principle exists. (The existence of the case may, however, in fairness to Mr O'Neil, explain why he thought it necessary or appropriate to engage in the correspondence that he did.)

87 The orders made on 22 June 2006 continued the anti-anti-suit injunction up to 13 July. Orders 7, 8 and 10 dealt with the filing by Comandate Marine of its motion for a stay and by Pan of its statement of claim and provided for the hearing of the notice of motion, as follows:

> *"7. Leave be granted to the defendant to file and serve on or before 5 pm 23 June 2006 an amended notice of motion seeking, as it may be advised, a stay under s 7 of the* International Arbitration Act 1974 *(Cth).*
>
> *8. The time for filing of any statement of claim under Order 22 of the* Admiralty Rules 1988 *(Cth) be extended to 12 noon on 5 July 2006.*
>
> …
>
> *10. The hearing of the amended notice of motion of the defendant to be filed pursuant to Order 2* [sic: 7] *be provisionally fixed before Rares J at 10.15 am on 13 July 2006."*

88 Much was made in argument by Dr Bell that Comandate Marine did not comply with order 7. The notice of motion was not filed and served on 23 June 2006, rather the *in rem* writ against *Boomerang I* was. It was not filed until 4 July 2006. This demonstrated, it was submitted, a clear change of approach which could be taken as reflective of a decision by Comandate Marine to litigate in Australia and not arbitrate in London. One difficulty with this submission (indeed an obstacle of some size) was that though the notice of motion was not filed on 23 June 2006, it was served on Ebsworth & Ebsworth on that day. Indeed at a subsequent directions hearing (on 7 July 2006) Dr Bell himself suggested to the primary judge that an order regularising the matter should be made, *nunc pro tunc*. The judge did so. Thus, the filing of the writ *in rem* against *Boomerang I* was in the context of Comandate Marine continuing to assert its wish for the dispute to be arbitrated. I reject the submission of

Dr Bell that the timing of this filing reflected a reversion to the previous course of action, after a failed attempt to litigate in court. There is nothing to suggest that Comandate Marine ever evinced an intention to abandon the arbitration or that the filing of the notice of motion was not simply the completion of the steps taken on 23 June 2006 to comply with the primary judge's order.

89 On the first day (Saturday) after the filing of the writ against *Boomerang I*, Pan filed an appearance as bareboat charterer and moved to set aside the writ. The filing of an appearance by Pan marked the commencement of the time from which the action, if validly commenced, could be said to proceed as if it were an action *in personam*. Comandate Marine did not file a statement of claim. The order of the Full Court setting aside the writ made on Tuesday 27 June 2006 was stayed until 29 June 2006 to allow an application to the High Court of Australia. On 28 June 2006, Comandate Marine filed a summons in the High Court of Australia seeking a stay of the orders of the Full Court and seeking the issue of a warrant for the re-arrest of *Boomerang I.* Heydon J heard the motion on the following day and dismissed the summons. Special leave, which was also sought, was later dismissed.

90 For the short life of the litigation represented by the *in rem* action against *Boomerang I*, the parties were focussed on the question of the statutory authority, or lack of it, for the invocation of the authority of the Court under Part III of the *Admiralty Act*. No occasion for Comandate Marine arose to press an articulated claim in a statement of claim or otherwise. No occasion arose for Comandate Marine to be taxed with the issue as to whether it was oppressive or abusive to be proceeding with an *in personam* claim and the arbitration. No occasion arose for Comandate Marine to apply for a stay under s 29 of the *Admiralty Act.*

91 The action against *Boomerang I* was capable of being prosecuted as a means of obtaining security for the arbitration. The parties had discussed Pan's provision of security and Comandate Marine had obtained orders for maritime attachment in New York plainly for that purpose. A strong, indeed strident, body of communication made plain Comandate Marine's insistence on arbitration. The filing of a writ which could be used to found an *in personam* claim against Pan prosecuted in this Court or which could be used for a more limited purpose contemplated by s 29 of the *Admiralty Act* did not unequivocably bespeak an abandonment of, or change to, that position. At most, it can be seen as the making of a tactical move to obtain an advantage in a litigation landscape which was unfolding and which was uncertain.

92 I do not see how the failure to inscribe in the writ an intention to apply for a stay under s 29 of the *Admiralty Act* converts what was done into an abandonment of a position consistently maintained. For the reasons that I expressed earlier, it was not a choice between inconsistent rights. When one examines fully the context, it was not an unequivocal statement either that Comandate Marine wished to abandon the arbitration or accept any repudiation by Pan (even assuming that such occurred) of the arbitration agreement.

93 If, as in fact occurred, the Court refused to stay the proceedings that had been brought by Pan and continued the anti-anti-suit injunction, the arbitration would be effectively stopped. That was a possibility that was plain to any experienced litigator faced with the facts that I have outlined. In those circumstances, the commencement of the *in rem* proceedings against *Boomerang I* may have had (and could be seen at the time to have had) a significance beyond obtaining security for the arbitration. The litigation landscape was less than clear. The step taken by Comandate Marine can be seen as one designed to advance its position whatever the outcome of the interlocutory debate in this Court. As such, it was plainly not an unequivocal statement of abandonment of the arbitration or of any right to seek a stay of the court proceedings or that Comandate Marine had decided to prosecute the proceedings *in personam* to the exclusion of proceeding with the arbitration.

94 Significant reliance was placed by Pan on the decision of Whelan J in *La Donna Pty Ltd v Wolford AG* (2005) 194 FLR 26. The defendant, an Austrian company, had appointed the plaintiff, an Australian company, as its Australian distributor. The distributorship agreement had a clause providing for arbitration in Austria. The plaintiff brought proceedings in the Supreme Court of Victoria. The defendant sought a stay. One of the contentions of the plaintiff was that the defendant's conduct in the legal proceedings was such as to have waived the right to arbitrate and so the arbitration agreement was inoperative for the purposes of s 7(5) of the *International Arbitration Act.* The proceedings were begun in April 2005. Ex parte orders had been made. A contested interlocutory hearing followed. In May 2005, the defendant applied for security for costs. The affidavits in support detailed the work to be done in the hearing. A mediation occurred. (The report is not clear whether this was a mediation of the application for security or of the whole dispute.) The application for security came on before a Master. It was dismissed on the basis that the defendant had failed to demonstrate a sufficiently weak financial position of the plaintiff. In August 2005, without any prior intimation, the defendant sought a stay under s 7(2) of the *International*

Arbitration Act. Whelan J dealt with the argument of waiver in the sense of abandonment by placing particular reliance on the application for security for costs. The other steps he thought to be insufficient to amount to a waiver. As to the application for security, Whelan J said the following at [25]-[27]:

> *"The application for security for costs falls into an entirely different category, however. That application was based on the explicit premise that the litigation would proceed to trial in the absence of a settlement, and that the matters the subject of the proceeding would be determined by the Court.*
>
> *Wolford sought an advantage, or at least sought to impose upon La Donna a burden, which was based upon the proposition that the litigation would proceed in this Court, that the defendant would take steps, and that the defendant would incur costs in taking those steps, in that litigation in this Court. This step was an unequivocal abandonment of the alternative course, being an application for a stay and a consequent arbitration.*
>
> *To allow Wolford to rely on the arbitration provision now would be to permit it to approbate and reprobate. In my view, it has waived the provisions and thereby rendered them inoperative."*

95 The essence of Whelan J's views was that the foreign party had sought an advantage in the litigation upon the explicit premise that the litigation would proceed to trial in the absence of a settlement. Accepting (without deciding) that that was a sufficient and relevant statement of principle, the conduct of Comandate Marine here does not amount to this. Taken together, and in particular in the context of the conduct of Comandate Marine's London solicitors, it cannot be said that Comandate Marine had acted on the explicit and unequivocal premise that the *in rem* claim would proceed to trial in this Court in the absence of settlement.

96 In the same way and for the same reasons, the conduct of Comandate Marine as a whole could not be said to have reflected an election or choice to get some advantage to which it would not otherwise be entitled without proceeding against Pan on the *in personam* claim and abandoning the arbitration: *Craine v Colonial Mutual Fire Insurance Co Ltd* (1920) 28 CLR 305 at 326. Nor could that conduct as a whole be seen to have evinced an abandonment of the right to insist on arbitration in circumstances where the occasion for that choice to be made once and for all had not arisen: *Immer (No 145) Pty Ltd v Uniting Church in Australia Property Trust (NSW)* (1993) 182 CLR 26 at 41-42.

97 Pan argued that there was no reservation revealed about the nature of the act by

Comandate Marine. No one said that a mistake was made in failing to endorse the writ with the claim for a stay under s 29 of the *Admiralty Act.* I do not think that that is the correct perspective. A step was taken which, in the context of s 29 and of the clearly stated position of Comandate Marine, was equivocal. It was challenged. It was found to be misconceived. No course of conduct inconsistent with one which insisted on arbitration had yet been evinced.

98 Cases to the effect that a claimant by bringing proceedings submits to the jurisdiction of the court including to any cross-claim do not advance the position of Pan. If, in all the circumstances, the bringing of the abortive *in rem* claim was not a once and for all choice of inconsistent rights or was not the unequivocal embarking on a course inconsistent with ever insisting on arbitration, these cases of personal presence and amenability to the court's process do not take the matter any further.

99 All the above has proceeded on the basis put forward by Pan that the commencement of the action *in rem* against *Boomerang I* can be taken as the full equivalent of an action between Comandate Marine and Pan. That rests on the assumption that the action *in rem* when filed was an action between Comandate Marine and Pan. This is not correct, though at least since 1998 in England it has the support of the House of Lords in *Republic of India v India Steamship Co Ltd (No 2) (The 'Indian Grace')* [1998] AC 878, which was relied upon by Pan in this context.

100 In *The 'Indian Grace'* Lord Steyn (with whom Lord Browne-Wilkinson, Lord Hoffmann, Lord Cooke of Thorndon and Lord Hope of Craighead agreed) concluded that the notion of an action against an inanimate object was a fiction which had outlived its useful life. The action *in rem*, he said, should be recognised for what it is, an action between the plaintiff and, in the language of the *Admiralty Act*, the relevant person. It was said that this was the position prior to any appearance by the relevant person.

101 *The 'Indian Grace'* concerned a cargo of munitions from Sweden to India on board *Indian Grace.* A fire occurred on the voyage which was extinguished with water. Some of the cargo was jettisoned. The plaintiffs (the cargo interests) notified two claims to the defendant (carrier) – a large claim for total loss of cargo in no 3 hold due to damage to the cargo and a small short delivery claim for the jettisoned cargo. A small *in personam* claim was made in a court in Cochin for the jettisoned cargo. Judgment was entered. A writ *in rem*

was issued in London in respect of the total loss of cargo in no 3 hold, and served on a sister ship of the carrying vessel. The House of Lords held that the *in rem* proceedings were barred, falling within s 34 of the *Civil Jurisdiction and Judgments Act* 1982 (UK) which was in the following terms:

> *"No proceedings may be brought by a person in England and Wales or Northern Ireland on a cause of action in respect of which a judgment has been given in his favour in proceedings* ***between the same parties****, or their privies, in a court in another part of the United Kingdom or in a court of an overseas country, unless that judgment is not enforceable or entitled to recognition in England or, as the case may be, in Northern Ireland."*
> [emphasis added]

102 The question before the House of Lords was whether the English Admiralty action *in rem* was brought against the same parties as those to the action *in personam* in Cochin for the purposes s 34 of the above Act. The House of Lords answered the question in the affirmative. Lord Steyn concluded at 913 that an action *in rem* is an action against the owners of the ship from the moment the Court is seized with jurisdiction. (As to whether this time is the time of filing, or serving, the writ, see *The 'Monica S'* [1968] P 741 and *Tisand Pty Ltd v The Owners of the Ship MV 'Cape Moreton' (Ex Freya)* (2005) 143 FCR 43 at 71 [107].) In reaching that conclusion, Lord Steyn discussed the nature of the action *in rem* and rejected the view, which can be said to have been orthodoxy for over a century, that although the two actions may involve the same cause of action they are between different parties, at least until an appearance is filed by the equivalent of a relevant person.

103 The case was one capable of being disposed of by reference solely to the proper construction of the statutory provision in question. This is how the Court of Appeal approached the matter: see [1998] AC 878 at 893-96. This was how the Court of Appeal in Singapore in *Kuo Fen Ching v Dauphin Offshore Engineering & Trading Pte Ltd* [1999] 3 SLR 721 distinguished *The 'Indian Grace'*, saying the following at 728 [24]:

> *"The portions of the House of Lords judgment relied on by the appellants* [dealing with the nature of Admiralty *in rem* proceedings] *were theoretical expositions on the nature of in rem actions and did not constitute the ratio. Moreover, the comments were due to the specific context of the facts in the case."*

104 Lord Steyn came to the view that he did referred to above for three reasons: (1) the

dominance of the so-called procedural theory as an explanation for the action *in rem* over the so-called personification theory; (2) the effect of various sovereign immunity cases; and (3) what were said to be developments by the Privy Council in *The 'August 8'* [1983] 2 AC 450, the Court of Appeal in *The 'Deichland'* [1990] 1 QB 361 and the European Court of Justice in *The 'Maciej Rataj'* [1995] 1 Lloyd's Rep 302.

105 The utmost respect, of course, must be paid to the reasoning of such an eminent court; and the need for consistent doctrine in international shipping law so far as is possible must be recognised. Giving the fullest weight possible to those considerations, I do not think that it is correct to say that before an owner or demise charterer who is a relevant person files an appearance and submits personally to the jurisdiction of the court, the action *in rem* is other than against the ship. In my respectful view, the three reasons given by Lord Steyn do not warrant the conclusion which he drew. Ultimately, for Australia, the answer is to be given by an understanding of the *Admiralty Act* in the context in which it appears. In this task, the name of the theory explaining the action *in rem* is of little utility and a debate as to the ascendancy or vindication of one theory over another is likely to misdirect analysis. At the outset, I should acknowledge the assistance from the notes of Professor Rose and Mr Teare in [1998] *Lloyd's Maritime and Commercial Law Quarterly* 27 and 33 and from the reasons of Young J in *The 'Irina Zharkikh and Ksenia Zharkikh'* [2001] 2 NZLR 801. I would also preface the following remarks by stating that I agree with the reasons of Clarke J (as his Lordship then was) in *The 'Indian Grace'* [1994] 2 Lloyd's Rep 331 at 349-54. His Lordhip's reasons correctly, in my respectful view, set out the nature of the Admiralty action *in rem* and correctly state the legal context against which the *Admiralty Act* should be read.

106 The *Admiralty Act* was the product of a careful and scholarly report by the *Australian Law Reform Commission* (Report No 33) (the "ALRC Report"). The nature of the action *in rem* provided for in Part III of the *Admiralty Act* is to be viewed against the background of Admiralty jurisdiction up to 1988 and the terms of the *Admiralty Act* are to be construed in that context: see generally *The 'Cape Moreton'* at [59]-[65]. The ALRC Report at [14]-[17] deals briefly, but succinctly, with the nature of the action *in rem* and the respective competing theories underpinning it. I do not intend to set out this well-known background other than to say that the arrest of a ship, in particular when based on a statutory ground separate from a maritime lien, became seen as a device to compel appearance of the owner. The liability personally of the owner to the full extent of the claim and not limited to the value of the *res*,

if the owner did so appear, was laid down by Sir Francis Jeune in *The 'Dictator'* [1892] P 304 and developed in *The 'Gemma'* [1899] P 285, *The 'Dupleix'* [1912] P 8 and the later cases. This was a development not without controversy: see Wiswall, F *The Development of Admiralty Jurisdiction and Practice Since 1800* (Cambridge University Press 1970) at 131-32 and 168-84. Only 40 years earlier, the Privy Council had appeared to ground all Admiralty *in rem* actions in the maritime lien and the theory of the ship as the wrongdoing instrument: *The 'Bold Buccleugh'* (1851) 7 Moo PC 267, 13 ER 884 limiting, it was thought, liability on such actions to the *res* itself, and its value. This appeared to state English Admiralty law in a manner similar to the United States: *The 'Little Charles'* 26 F Cas 979 (1818), *The 'Palmiyra'* 25 US 1 (1827), *The 'Nestor'* 18 F Cas 9 (1831), *The Brig 'Malek Adhel'* 43 US 210 (1844) and *The 'Young Mechanic'* 30 F Cas 873 (1855) and to found it upon a theory of the personification of the ship.

107 As discussed in *The 'Cape Moreton'* at 68-73 [100]-[118] English and Australian Admiralty jurisdiction has been heavily influenced by the procedural theory, rather than by the personification theory. It is unnecessary to deal further with the two theories and the variations thereof. For present purposes, it can be accepted that, to a significant degree, the procedural theory underpins the *Admiralty Act*; but to say as much does not solve all issues in understanding the nature of the action *in rem.*

108 It is necessary to identify some fundamental issues about the action *in rem*, which before *The 'Indian Grace'* appeared to have been settled, although, in fairness, comments such as those by Brandon J in *The 'Conoco Britannia'* [1972] 2 QB 543 at 555 foreshadowed some re-evaluation of the nature of the action *in rem*. (I will limit myself to dealing with actions *in rem* against the ship and ignore questions of other property. Also, the authorities given are not exhaustive.) The claim is served upon the ship. The ship must be in the geographical jurisdiction of the court. Service *ex juris* is not permitted. Once the action is commenced a change in ownership will be ineffective to prevent the action proceeding against the ship: *The 'Monica S'* [1968] P 741 and *The 'Cape Moreton'*. This obtains whether the claim underlying the action is a maritime lien: s15 of the *Admiralty Act* or a maritime claim sufficient to ground an action *in rem*: ss 16, 17, 18 and 19 of the *Admiralty Act*. Subject to the extension of surrogate or sister ship arrest, the action *in rem* lies only against the ship in connection with which the claim arises: *The 'Beldis'* [1936] P 51, and see the word "concerning" in ss 16, 17, 18 and 19 and the words "in respect of" in s 15.

109 Once an *in rem* claim has been served on the ship, an appearance may be filed under Rule 23 by someone who has a relationship with the ship or property against which the action *in rem* has been commenced. Certainly if the party who files a notice of appearance is a relevant person, the consequence is that, as Gibbs J said in *Caltex Oil v The Dredge 'Willemstad'*, the action proceeds as if it were an action *in personam* (without ceasing to be an action *in rem*) against that person. Once a relevant person files an appearance, the plaintiff will file a statement of claim "on each party who has entered an appearance" and the relevant person becomes liable to have judgment entered against it personally and to the full extent of the claim, not limited by the value of the ship: *Caltex Oil v The Dredge 'Willemstad'; The 'Dictator'*; *The 'Gemma'*; *The 'Dupleix*'; and *The 'Banco'* [1971] P 137. If a person files a notice of appearance who is not a relevant person, eg a mortgagee, demise charterer (where the claim is against the owner) or an owner to whom the ship has been transferred after the commencement of the writ, there is no call to characterise the action as other than *in rem*. If the relevant person does not appear, the claimant is limited to the *res*, which is available to the claimant as one of all maritime claimants who may come in to assert their rights over the ship or the funds from the sale: *The 'Banco'; The 'Queen of the South'* [1968] P 449; *The 'Leoborg (No 2)'* [1963] 2 Lloyd's Rep 441; and *The 'Silia'* [1981] 2 Lloyd's Rep 534. In these circumstances, it can be taken that the relevant person has made a choice not to come in and defend any interest in the ship which would have come at the price of submitting itself to personal liability for the full amount of the claim. Indeed, there may be no other party who is interested in defending the claim, in which case the plaintiff will proceed against the ship, obtain judgment against the ship, have the ship sold under court process and, after payment of the costs and expenses of the arrest and sale, take its share of the proceeds in competition with other maritime claimants on the ship.

110 A cause of action *in rem* does not merge in a judgment *in personam*: *The 'Cella'* (1888) 13 PD 82 at 85; and *The 'Rena K'* [1979] QB 377 at 405-406.

111 These attributes of the action acting together lie at the heart of the operation of the procedural theory. The owner can be forced to the jurisdiction to protect its asset. Once there, it is liable in full to the claim, its liability not limited by the value of the ship. If it does not wish to face that prospect, its asset, the ship, faces condemnation for the claim and the claims of other maritime claimants. To the extent that the *in rem* claimant remains unsatisfied as to the full amount of the claim it is not debarred from proceeding *in personam*

against the owner personally. In this way, the procedural theory relies for its effective operation upon the reality of the claim against the ship being separate and distinct from the claim *in personam.*

112 Actions *in rem* under Part III can be based on maritime liens, proprietary maritime claims and general maritime claims. The phrases "proprietary maritime claim", "general maritime claim" and "maritime claim" are defined in s 4 of the *Admiralty Act.* There is no definition of a maritime lien in the *Admiralty Act.* It is a creature of maritime law and is generally described by reference to cases such as *The 'Bold Buccleugh'* (1851) 7 Moo PC 267 at 284-85, 13 ER 884 at 890-91 as a non-possessory claim or privilege upon a ship carried into effect by legal process by *in rem* action. It is inchoate from the time of the events giving rise to it, attaching to the ship, travelling with the ship into anyone's possession (even a bona fide purchaser for value without notice, except a purchaser at an Admiralty Court sale) and perfected by legal process relating back to first attachment. See also *The 'Two Ellens'* (1872) LR 4 PC 161 at 169; *The 'Ripon City'* [1897] P 226 at 242; *The 'Tolten'* [1946] P 135 at 150; and *The 'Tervaete'* [1922] P 259 at 273; and Thomas, DR *Maritime Liens* (Stevens 1980) at [10]-[13]. Under *The 'Halcyon Isle'* [1981] AC 221 maritime liens are characterised as procedural. Some legal systems view the matter differently.

113 As can be seen from comparing ss 15 and 16 of the *Admiralty Act* with ss 17 to 19 of the *Admiralty Act,* an action *in rem* on a maritime lien or a proprietary maritime does not depend on the claimant proving the requisite relationships between that relevant person and the ship at the respective times in paragraphs (a) and (b) of ss 17, 18 and 19.

114 The types of maritime lien are set out non-exhaustively in s 15, but see *The 'Acrux'* [1965] P 391, *The 'Halcyon Isle'* and *Fournier v The Ship 'Margaret Z'* [1999] 3 NZLR 111 at [22]-[23] as to the constraints on expansion of liens by judicial exposition.

115 Apart from how they arise, their relevance to priorities between claimants and the lack of a requirement to prove the connecting factors in paragraphs (a) and (b) in ss 17, 18 and 19, maritime liens do not give rise to a different kind of *in rem* action from one based on a maritime claim, whether proprietary or general. There is no suggestion in the *Admiralty Act* that the rights to proceed against a ship, provided for exclusively under statute: see s 14 of the *Admiralty Act,* are of a different kind or character, if based on a maritime lien rather than if based on a maritime claim.

116 The conclusion drawn by Lord Steyn in *The 'Indian Grace'* that the dominance of the procedural theory leads to the conclusion that the action *in rem* should be viewed from its commencement, prior to appearance, as always an action between the parties to the cause of action underlying it (the parties to the *in personam* claim) ignores critical aspects of the ship's responsibility for maritime liens and maritime claims in certain circumstances and the practical operation of the procedural theory itself. That the procedural theory can be seen as a dominant theory in English and Australian Admiralty law can be accepted for the purpose of debate (the correctness of that statement, any relevant qualifications to it and aspects of Lord Steyn's historical analysis need not be debated or analysed). But it is not an all-embracing theory explaining all aspects of the action *in rem*: see the ALRC Report at [17] and Thomas, DR *op cit* at [8a]. The place of the maritime lien and the access of the claimant to the ship to enforce it whoever owns the ship, the capacity of the action *in rem* to continue against the new owner if a sale occurred after commencement of the action, the historical separateness of the judgments on the action *in rem* and *in personam*, the restriction in the claimant's rights to the value of the *res*, the coming in by others to defend their interests in the ship and the coming in to share in the fund by other claimants interested in the ship all point to the reality of the claim against the ship.

117 Lord Steyn simply set maritime liens to one side. He did not deal with *The 'Monica S'* and the statutory action *in rem* continuing against the ship after a sale to a new owner. He denied, however, the legitimacy of treating judgments *in rem* and *in personam* as separate. So to find was contrary to established authority for over a century. Lord Steyn, wrongly, as Young J pointed out in *The 'Irina Zharkikh'*, said that all the cases about non-merger of *in personam* and *in rem* judgments were lien cases. They were not. *The 'Cella'* (1888) 13 PD 82 and *The 'Rena K'* [1979] QB 377 at 405-406 involved a statutory right of action *in rem.* With respect, the character of the statutory action cannot be assessed by putting the maritime lien to one side. The action *in rem* is the essential procedural perfection of the lien which attaches from the time of the very acts which give rise to it, in circumstances where the person liable on any claim, eg salvage or bottomry, might not be the current owner.

118 Further, to assimilate judgments resulting from the actions *in rem* and *in personam* is to debilitate the utility of the action *in rem.* The force of the procedural theory is to bring the owner liable on the action to court to appear and expose itself to the claim for its full amount. If the claimant has to bring the action *in rem* knowing that this is its one action against the

defendant owner, it may risk disaster in proceeding *in rem.* If the owner does not appear and if the claimant proceeds against the ship, it may gain little from the action (even if it has a strong case). Other claimants may come in – mortgagees, lienees, other statutory claimants. None of these, or at least the amount each is owed, would have been apparent to the claimant before judgment. Yet, having gone to judgment *in rem,* the claimant is precluded from proceeding again *in personam* because really it has, according to *The 'Indian Grace',* already had its opportunity against he defendant owner *in personam* by the *in rem* action. There has been no personal submission by the relevant person and so it is difficult to see how the plaintiff can somehow enforce the *in rem* judgment against other assets of the relevant person. If this is the position, there is a clear opportunity for a party liable for a maritime claim to collude with others to undermine entirely the worth of the underlying cause of action. The action *in rem* is a necessary tool of international maritime commerce for the recovery of just claims. To treat it as the equivalent of the *in personam* claim risks making it a dangerous lottery, thereby diminishing its practical value.

119 The differences between the *in rem* and *in personam* actions lay at the heart of Admiralty practice. They gave utility to the Admiralty procedure. They gave efficacy to the procedural theory itself. The action being against the ship inhered in the law up to 1988, and was recognised by the *Admiralty Act*. The action *in rem* when commenced is not against the relevant person. It is against the ship. The position after a notice of appearance is filed by a relevant person is as I have expressed it.

120 In my respectful view, the procedural theory is an inadequate foundation upon which to conclude that the *in rem* action is always an action to which the owner or demise charterer as relevant person is a party. To the contrary, it supports the conclusion that the action *in rem* is against the ship.

121 The sovereign immunity cases referred to by Lord Steyn (*The 'Tervaete'* [1922] P 259, *The 'Jupiter'* [1924] P 236, *The 'Cristina'* [1938] AC 485 and *The 'Parlement Belge'* (1880) 5 PD 197) do not, in my view, require a different conclusion. In none of these cases was there any challenge to the proposition that the owner did not become a party to the proceedings until it entered an appearance. Undoubtedly these cases prevented an *in rem* action proceeding against a ship owned by a foreign sovereign. The notion that the sovereign's interests were being sufficiently affected for the doctrine of sovereign immunity to apply can be readily accepted. Lord Wright's view in *The 'Cristina'* at 505 that the

sovereign was called upon to sacrifice either his property or his independence explains the notion of being "impleaded". It provides, however, no logical foundation to say that the sovereign is a party to the *in rem* action before an appearance. As Mr Teare points out in [1998] *Lloyd's Maritime and Commercial Law Quarterly* 33 at 39, in none of the sovereign immunity cases was there any criticism of *The 'Dictator', The 'Gemma'* and *The 'Dupleix'* in their stating that the owner became a party only after it entered an appearance. In my respectful view, the views of Clarke J at first instance in *The 'Indian Grace'* at 354 distinguishing between impleading and the parties to the *in rem* action before the appearance are correct. These were the views also of Lord Esher MR in *The 'Longford'* (1888) 14 PD 34 at 37 when he said in relation to *The 'Parlement Belge'*:

> *"…the most that can be collected from that decision… is that an action in rem is not the same as an action in personam, though it may indirectly affect the owners of or persons interested in the ship"*

122 The third reason given by Lord Steyn was what he saw as "further developments" in *The 'August 8', The 'Deichland'* and *The 'Maciej Rataj'*.

123 In *The 'August 8'* Lord Brandon of Oakbrook said at 456:

> *"...By the law of England, once a defendant in an admiralty action in rem has entered an appearance in such action, he has submitted himself personally to the jurisdiction of the English Admiralty Court, and the result of that is that , from then on, the action continues* ***against him*** *not only as an action in rem but also as an action in personam:* The Gemma *[1899] P. 285, 292 per A. L. Smith L.J."*
> [emphasis given by Lord Steyn]

This had been the case since *The 'Dictator'*. It accords with the proposition and, indeed embodies the proposition, that until the notice of appearance by the putatively liable defendant, the action *in rem* is only an action against the ship (which it continues to be thereafter, whilst also proceeding as if it were an action *in personam* also). No support is given by this case for Lord Steyn's view that before an appearance is filed the owner is a party to the action.

124 *The 'Deichland'* concerned Article 2 of the 1968 Convention on Jurisdiction and the Enforcement of Judgments in Civil and Commercial Matters. An action *in rem* was commenced and served on the ship. Sheen J rejected a motion challenging jurisdiction based on Article 2 (made part of English domestic law) which was in the following terms:

> *"Subject to the provisions of this Convention, persons domiciled in a contracting state shall, whatever their nationality, be sued in the courts of that state."*

Sheen J found the action was *in rem* and not against the party domiciled in Germany. The Court of Appeal allowed the appeal. It did so on the proper construction of the article. It did not do so on the basis of some change to the fundamental character of the *in rem* writ before appearance. See in particular the reasons of Neill LJ at 373-74 and Sir Denys Buckley at 389. Nowhere in *The 'Deichland'* was there any expression of views that the analysis of the action *in rem* expounded in *The 'Dictator'* should be departed from.

125 *The 'Maciej Rataj'* concerned the operation of Article 21 of the Brussels Convention and whether an action *in rem* and an action *in personam* are between the same person for that provision. The interpretation of Article 21 proceeded independently of the distinction drawn in English law between the two actions. The case did not deal with the true nature of the Admiralty *in rem* action. It is therefore no support for a proposition that there should be a change of the law as to that matter.

126 The ALRC Report and in particular chapters 8 and 9 worked on the basis of the separateness of the action *in rem* and the action *in personam* and of the former being an action against the ship.

127 The terms of Rule 15(1) referred to earlier requiring specification of a relevant person in the writ "as a defendant" do not bring about a change to the nature of the proceeding before appearance. Plainly this requirement is to identify who will be an *in personam* defendant if an appearance is filed.

128 Until the High Court of Australia says otherwise, the law of Australia is that the action *in rem*, at least prior to the unconditional appearance of a relevant person, is an action against the ship, not the owner or demise charterer of the ship: *Aichhorn & Co KG v The Ship MV ' Talabot'* at 454-56 (per Menzies, Gibbs and Mason JJ); and *Caltex Oil v The Dredge 'Willemstad'* at 538-39 (per Gibbs J) citing *The 'Dictator'*, *The 'Gemma'*, *The 'Dupleix'*, *The 'Banco'* at 151, *The 'Broadmayne'* [1916] P 64 at 77 and *The 'Conoco Britannia'* at 555. After the appearance, it continues as an action *in rem* and also as if it were an action *in personam* against the relevant person who appears.

129 The position is conveniently expressed by Bankes LJ in *The 'Broadmayne'* at 77, specifically cited by Gibbs J in *Caltex Oil v The Dredge 'Willemstad'* at 538, as follows:

> *"The position is, I think, quite clearly indicated in the passage from Clerke* [Praxis Curiae Admiralitatis], *cited with approval by Jeune J* (sic). *in* The Dictator … *where the writer says that after appearance the case proceeds 'ut in actione instituta contra personam debitoris' – that is to say, that the action is to proceed as if, but only as if, it was an action in personam. The advantage of the action being an action in rem still remains in the sense that, should the exceptional occasion arise, the Court in a proper case would no doubt still have jurisdiction to order the arrest of the vessel."*

130 Apart from any other reason why the filing of the writ was not an election or waiver or abandonment depriving Comandate Marine of the entitlement to continue with the arbitration, it was not the commencement of legal proceedings against Pan.

131 There was, in my view, no election between inconsistent rights, no abandonment (express or implied) of the arbitration and no unequivocal acceptance of any repudiation by Pan, assuming one to have been demonstrated.

132 Though the issues raised by grounds 1 and 2 of the notice of contention that Comandate Marine accepted a repudiatory conduct or anticipatory breach by Pan (ground 1) and that the parties reached an implied agreement to abandon the arbitration agreement (ground 2) can be understood in the context of the evidence that was led, the relevant parts of which I have set out, the hearing was not directed to these issues. Objection was taken to these issues being raised on the basis that the course of the hearing may have been different had these issues been raised. It cannot be concluded that there was a full examination of all the facts about the period from early June 2006 onwards with these two additional issues in mind. In that context, I am not prepared to conclude that the raising of these issues now would not work an injustice: *Branir Pty Ltd v Owston Nominees (No 2) Pty Ltd* (2001) 117 FCR 424, at [37] and [38]. Therefore, I would not permit Pan to rely on grounds 1 and 2 of the notice of contention. If that is not the correct approach, on the basis of the material before the Court, for the reasons that I have given, I would reject both grounds.

The second group of issues: whether there was an agreement in writing and the application of the *International Arbitration Act* thereby

133 As the primary judge noted, it was common ground before him that there was a contract between Pan and Comandate Marine amounting to the time charter of *Comandate*. It

was also common ground that cl 45(b) of NYPE 93 was an express term of the time charter. The primary judge found, however, that there was no agreement in writing for the purposes of Article II of the Convention and, so, no arbitration agreement for the purposes of the *International Arbitration Act.* To understand why the primary judge came to that conclusion one needs to appreciate how the time charter came to be formed.

134 Negotiations began on 7 April 2006. On 8 or 9 April, Mr Athanassiou of Prime Maritime Inc (Comandate Marine's broker) sent an email to Mr Colaco of Trans World Chartering Pty Ltd (Pan's broker) attaching an NYPE 93 precedent (the pleaded "pro forma charterparty" to which I have already referred). This contained clause 45(b) in the form it took in the time charter here.

135 On 13 April 2006, Pan's broker responded, accepting this form "except as follows logically amended and as per Main Terms agreed". There followed various changes that were required. No changes were required to clause 45(b), which was not thereafter the subject of any discussion, debate or reservation.

136 Later, on 13 April 2006, Comandate Marine's broker responded in abbreviated form stating in effect, though somewhat cryptically:

> *"Thanks charterers last counter offer on details which owners accept/except as follows."*

There were then set out a number of amendments.

137 By 19 April 2006, Pan and its brokers had not responded to this last email. Comandate Marine's broker sent the following email to Pan's broker:

> *"Meantime, We/Owners are still missing Chrtrs' clean confirmation to Owners last. Plse, do not fail to provide us tomorrow mrng with Chrtrs' Full Banking [Details] for [Bank Guarantee] purposes, as per clause 100. [Awaiting yours]"*

138 Later on 19 April, Pan's broker sent an email to Comandate Marine's broker, stating:

> *"Thanks for Owners last, however, as advised the wording needs to be amended as follows, if Owners accept same we are fixed. Charterers* [that is Pan] *have advised that the Bank Guarantee is in place and Owners should check with their Bank, if there are any problems, please let us know. Meantime, charterers have confirmed they are ready to accept the vessel on 22.04.2006 …"*

There then followed various required amendments.

139 Later still on 19 April, Comandate Marine's broker sent an email to Pan's broker in answer to this last email, as follows

> *"Owners accept fully yr below - subject to receive* (sic) *the relevant Bank Guarantee which upto now didn't received* (sic) *neither by* (sic: from) *Chrtrs nor by* (sic: from) *Chrtrs' Bank …"*

The phrase 'yr below' clearly was a reference to Pan's broker's last email (set out relevantly, at [x] above) which was below Comandate Marine's broker's email on replying to it.

140 About an hour later, still on 19 April, Comandate Marine's broker sent a further email to Pan's broker, as follows:

> *"Owners hereby are glad to confirm their aggrement* (sic) *to Charterers alternations* (sic) *as provided in their msg as mentioned herebelow. We therefore are fully fixed subject to Bank Guarantee.*
> *Kindly advise urgently within today Bank's full style … so that our Bankers can contact them tomorrow morning."*

141 On 20 April 2006, Comandate Marine's broker sent a telex/email to Pan's broker headed 'FINAL RECAP' which commenced:

> *"Confirm having fixed with all subs in order, 'SUBJECT Owners to Receive the BANK GUARANTEE from Chrtr's/Chrtrs' Bank' as follows: .."*

There is then a recitation of the ship's details and certain clauses and amendments. After the words 'END RECAP', the following was stated:

> *"Both Parties, are kindly requested to confirm abv recap is in line with negos agreed so far."*

142 Later on 20 April, Comandate Marine's broker sent an email to Pan's broker stating that the bank guarantee had been received and that the ship was to be delivered on the next day.

143 *Comandate* was delivered to and accepted by Pan on 21 April 2006 at Singapore.

144 The primary judge concluded that there was no agreement in writing for the purposes of Article II of the Convention and so no arbitration agreement for the purposes of s 7 of the *International Arbitration Act*. He did so accepting Pan's submission that if an act or if conduct (as opposed to the exchange of a letter or telegram – see Article II sub-article 2) brought the time charter into existence, in terms of contract formation, there was no "agreement in writing". His Honour concluded that there was no concluded agreement,

whether to fix the charter or to arbitrate, until the bank guarantee was provided. The provision of the guarantee acted, he said, as acceptance of the final offer of Comandate Marine's broker's offer of 20 April under the heading "FINAL RECAP". Thus, he said the contract was formed by "tacit acceptance" and not by the act of exchange of a relevant document.

145 Comandate Marine submitted that his Honour erred in the following respects in concluding as he did in this respect:

(a) First, it was a misreading of Article II of the Convention to require the time charter as a whole to come into existence as a contract by a signature or the sending or receipt of a letter or telegram for there to be an agreement in writing for Article II of the Convention. I will refer to this as the first asserted error.

(b) Secondly, and in any event, the time charter as a whole did come into existence as a contract by the sending or receipt of a letter or telegram being the two emails of Comandate Marine's broker late on 19 April 2006. The provision of the bank guarantee was a condition precedent to performance, not a condition precedent to a binding legal relationship coming into existence. I will refer to this as the second asserted error.

146 Comandate Marine also submitted that his Honour erred in failing to deal with the question of Article 8 rule 1 of the UNCITRAL Model Law on International Commercial Arbitration which has the force of law in Australia by s 16 of the *International Arbitration Act.* I will refer to this as the third asserted error.

The first asserted error

147 The first asserted error accepts for the purposes of argument the correctness of the primary judge's views that the time charter as a whole did not come into existence as a contract until the act of the provision of the bank guarantee.

148 It is clear from the terms of Article II that the agreement in question is the agreement to arbitrate: Article II sub-article 1 and see *International Arbitration Act*, s 3(1) "arbitration agreement". It is also clear that such an agreement may be a clause in a contract or an arbitration agreement: Article II sub-article 2 and see s 3(1) "agreement in writing". The

notion of "an arbitration agreement" for Article II sub-article 2 is given content by sub-article 1 – "under which the parties undertake to submit to arbitration all or any differences …" etc. Article II is clearly addressed to the agreement to arbitrate, not to the wider substantive legal relationship, which may or may not be contractual: Article II sub-article 1.

149 Article II does not say that the only agreement to which it refers is one which was formed or concluded by the act of signing or by the despatch or receipt of a letter or telegram. What is required is that there be more than a unilateral statement in writing of the arbitration clause or arbitration agreement. The bilateral recognition of the clause or arbitration agreement will be achieved if the arbitral clause is in a contract, or if the arbitration agreement is, signed by the parties or if the arbitral clause is in a contract, or if the arbitration agreement is, contained in an exchange of letters or telegrams. Here, there was no signing of any such document. Rather there was an exchange of letters or telegrams in which were contained the arbitral clause and the whole time charter. Even assuming that the contract did not spring into life with the act of despatch or receipt of a letter or telegram, but with some conduct of one of the parties, once the contract exists or once there is a binding arbitration agreement, the arbitral clause in the contract or the arbitration agreement can be said to be contained in the exchange of letters or telegrams.

150 Each of the cases relied on by the primary judge in dealing with this issue was directed to the circumstance where the arbitral clause in a contract or the arbitration agreement was only found in writing emanating from one side. That was inadequate. Nowhere in these cases was there an arbitral clause in a contract or an arbitration agreement in a signed document or contained in an exchange of letters or telegrams. The requirement that the arbitral clause in a contract or an arbitration agreement be contained in an exchange of letters or telegrams is not a requirement that the contract be formed by the act of signing or the exchange of letters or telegrams. The clause in a contract or the arbitration agreement can be contained in an exchange of letters and telegrams even if the act of formation was some conduct. The passage from the judgment of Ralph Gibson LJ in *Zambia Steel & Building Supplies Ltd v James Clark & Eaton Ltd* [1986] 2 Lloyd's Rep 225 at 234 cited by the primary judge is not (as the primary judge appeared to conclude) contrary to this. Ralph Gibson LJ Lordship referred to "assent to be bound by both parties is given in writing by such document". The meaning of this passage was illuminated by what he said earlier on the same page:

> *"The second possible meaning is that both the terms of the agreement to submit and the apparent assent to those terms are contained in a document or documents."*

151 This is not a requirement that the contract be formed by such a document being signed or sent or received but that the terms **and** the assent to such terms are in a signed document or in exchanged documents. Thus, as here, where one finds clear and unambiguous exchanges of letters or telegrams setting out the arbitral clause and indeed the whole of the agreement, and the assent thereto, the fact that the contract springs into life upon the provision of the bank guarantee (pursuant to the consensus to be found in the already exchanged letters or telegrams) does not gainsay the proposition that the arbitral clause in the contract or the arbitration agreement was contained in the exchange of relevant documents. Here, the terms of the arbitration clause and the whole contract and assent of both parties thereto were contained in such documents. There was no issue but that a contract did come into existence – the time charter, including the arbitration clause. Once that occurred the arbitration clause contained in the exchange of relevant documents was binding.

152 This approach is confirmed by the reading of the work of van den Berg, AJ *The New York Arbitration Convention of 1958* (Kluwer 1981) cited by the primary judge. As that learned author makes clear, the drafters of the Convention wished to exclude oral or tacit acceptance of the arbitration agreement thereby leaving its terms and the assent to it without written proof. Where there is clear mutual documentary exchange as to the terms of, and assent to, the arbitration agreement the purpose of Article II is fulfilled. If the agreement so reached is conditional, in the sense of being operative only upon an event occurring, the arbitration agreement can, nevertheless, be said to be contained in the exchange of relevant documents. van den Berg cited at 196 the rejection of the Dutch proposal:

> *"confirmation in writing by one of the parties [which is kept] without contestation by the other."*

As van den Berg then noted in relation to the rejection of this proposal:

> *"… the voting of the delegates indicates that they deemed only the written acceptance of a proposal to arbitrate sufficient for the written form of the arbitration agreement."*

153 There can be no doubt here that the arbitral clause in the time charter was contained in exchange of relevant documents. It was not left to tacit approval or acquiescence or silence. (The same can be said about the whole of the time charter.)

154 As the Manitoba Court of Appeal said in *Proctor v Schellenberg* [2003] 2 WWR 621 at 628 [18] the definition in Art II sub-art 2 is inclusive:

> *"**What is important is that there be a record to evidence the agreement of the parties to resolve the dispute by an arbitral process.** This flexibility is important in this day and age of changing methods of communication. In my view, communication by facsimile falls within the definition. This is in keeping with a functional and pragmatic interpretation of the definition to serve the Legislature's intent to give effect to arbitral awards granted in other jurisdictions in this era of interjurisdictional and global business."*
>
> [emphasis added]

155 The words of the Convention reflect the aim and purpose of the Convention: to require the arbitration clause or agreement to be identified and assented to in a signed document or mutually exchanged documents. That assent and the conclusion that such a clause or an agreement is contained in such exchanged documents, is not denied by the fact that in the substantive agreement the parties agreed that their binding contractual relations (including in the arbitration clause) would not arise unless and until one party performed an act such as provide a bank guarantee in a particular form.

156 For these reasons, in my view, the primary judge was in error in concluding that there was no agreement in writing for the purposes of Article II and so no arbitration agreement for ss 3 and 7 of the *International Arbitration Act.*

The second asserted error

157 If the above be incorrect, and if it be necessary for a relevant document to be sent or received as the act which brings the contract into existence, that occurred here. Despite some repetition in the email of 20 April 2006, the last email of 19 April 2006 fixed the charter subject to bank guarantee. Alternatively, the two emails together fixed the charter, subject to the bank guarantee. That condition was from the terms of these communications at this end stage of negotiations a condition precedent to performance, not a condition precedent to the existence of any legal relations. The terms of the exchanges, the commercial necessity for certainty, due and full protection for Comandate Marine and Pan and common sense all would see the parties bound at that point and unable to withdraw. Pending the bank guarantee being provided, Comandate Marine was not liable to perform: see *Perri v Coolangatta Investments Pty Ltd* (1982) 149 CLR 537 at 552 and *Bakri Navigation Company Ltd v Owners of the Ship 'Golden Glory' Glorious Shipping SA* (1991) 217 ALR 152 at 157.

If the delay in the provision of the guarantee was unreasonable (which would be a relatively short time for the effectuation of such a simple commercial step) the contract could no doubt be terminated.

The third asserted error

158 The primary judge did not deal with the question of the alternative submission based on article 8 rule 1.

159 The wording of Article 7 is similar, but not the same as, that in Article II sub-articles 1 and 2 of the Convention. Importantly for present purposes the words "which provide a record of the agreement" appear in article 7(2). That plainly is the case here.

160 As I referred to earlier, article 7 is not expressly picked up by article 1(2) of the Model Law in relation to a foreign arbitration. It is not clear, if article 7 does not apply, whether the phrase "arbitration agreement" in article 8 in this context is to be understood by reference to s 3(1) of the *International Arbitration Act* and thus Article II of the Convention or as an ordinary phrase. It may not matter for the resolution of this dispute. Whether one uses Article 7 to understand Article 8, or Article II of the Convention or the ordinary meaning of the phrase, there was present here an arbitration agreement concerning international commercial arbitration. If it were necessary to decide, my view is that in order to give efficacy and content to Article 8, such parts of Articles 1, 2, 3 and 7 as are necessary for Article 8 to operate according to its terms would be picked up by the express reference to Article 8 by Article 1(2) of the Model Law.

161 Article 8 was therefore applicable. I will deal with the operation of Article 8 below in the fourth group of issues below regarding the operation of the *International Arbitration Act.*

The third group of issues: the scope of the arbitration clause

162 The ascertainment of the scope of the clause is a question of the construction of a contract. Its meaning is to be determined by what a reasonable person in the position of the parties would have understood it to mean, having regard to the text, surrounding circumstances, purpose and object of the transaction: *Pacific Carriers Ltd v BNP Paribas* (2004) 218 CLR 451 at 462 [22].

163 Subject to the effect of s 7(2) of the *International Arbitration Act*, the parties were agreed that the proper law of the contract was English law, making that the proper law of the

construction of clause 45(b). Pan submitted, however, that the process contemplated by both Article 8 and s 7 requires the Court to satisfy itself, by Australian, law that those provisions are satisfied: the "matter… is subject of an arbitration agreement" (for Article 8) and the "matter that, in pursuance of the agreement…" (for s 7). It is not necessary to resolve this debate or to find the precise state of English law of which the only evidence was the English case law which was tendered for this purpose. I will deal with the matter by reference to Australian law. This is the approach urged by Pan. My view is that, for the reasons that follow, there is no relevant difference between Australian law and English law by reference to authorities to which we were referred.

164 Relevant to the above process, as part of the surrounding circumstances, is the fact that this is a standard form international contract, often used in the commercial time chartering of working ships. The parties did not refer us to any authorities on the scope of clause 45. That is not to say, however, that that international context does not remain relevant. Regard should be had in construing clause 45 to the clear tenor of approach internationally in construing arbitration clauses in international agreements. The authorities (to which I will refer shortly) are clear that a liberal approach should be taken. That is not to say that all clauses are the same or that the language used is not determinative. The court should, however, construe the contract giving meaning to the words chosen by the parties and giving liberal width and flexibility to elastic and general words of the contractual submission to arbitration.

165 This liberal approach is underpinned by the sensible commercial presumption that the parties did not intend the inconvenience of having possible disputes from their transaction being heard in two places. This may be seen to be especially so in circumstances where disputes can be given different labels, or placed into different juridical categories, possibly by reference to the approaches of different legal systems. The benevolent and encouraging approach to consensual alternative non-curial dispute resolution assists in the conclusion that words capable of broad and flexible meaning will be given liberal construction and content. This approach conforms with a common-sense approach to commercial agreements, in particular when the parties are operating in a truly international market and come from different countries and legal systems and it provides appropriate respect for party autonomy.

166 The above general approach can be discerned in, and distilled from, many cases, most notably, *Heyman v Darwins Ltd* [1942] AC 356; *Government of Gibraltar v Kenney* [1956] 2

QB 410; *Empresa Exportadora De Azucar v Industria Azucarera Nacional SA* (*The 'Playa Larga' and 'Marble Islands')* [1983] 2 Lloyd's Rep 171; *Ashville Investments Ltd v Elmer Contractors Ltd* [1989] QB 488; *Ethiopian Oilseeds and Pulses Export Corporation v Rio del Mar Foods Inc* [1990] 1 Lloyd's Rep 86; *Dowell Australia Ltd v Triden Contractors Pty Ltd* [1982] 1 NSWLR 508; *Kathmer Investments Pty Ltd v Woolworths Pty Ltd* [1970] 2 SA 498; *Roose Industries Ltd v Ready Mixed Concrete Ltd* [1974] 2 NZLR 246; *Drennan v Pickett* [1983] 1 Qd R 445; *Harbour Assurance Co (UK) Ltd v Kansa General Insurance Co Ltd* [1993] QB 701; *IBM Australia Ltd v National Distribution Services Ltd* (1991) 22 NSWLR 466, especially 475-77; *Francis Travel Marketing Pty Ltd v Virgin Atlantic Airways Ltd* (1996) 39 NSWLR 160, especially 165-66 and 168; and *Ferris v Plaister* (1994) 34 NSWLR 474.

167 Hirst J in *Ethiopian Oilseeds* undertook an extensive examination of many cases dealing with arbitration clauses. That decision (dealing as it did with the phrase "arising out of") was referred to with unqualified approval by Gleeson CJ (with whom Meagher JA and Sheller JA agreed) as reflecting the current state of the law in New South Wales in *Francis Travel Marketing Pty Ltd v Virgin Atlantic Airways Ltd* at 165. There, Gleeson CJ said:

> *"An extensive examination of the many cases dealing with the meaning and effect of various common arbitration clauses in contracts was undertaken by Hirst J in* Ethiopian Oilseeds v Rio del Mar *[1990] 1 Lloyd's Rep 86. As his Lordship demonstrated, the expression 'arising out of' has usually been given a wide meaning. Some older cases, such as* Crane v Hegeman-Harris Co Inc *[1939] 4 All ER 68 and* Printing Machinery Co Ltd v Linotype & Machinery Ltd *[1912] 1 Ch 566, which held that arbitration agreements expressed in a certain manner or entered into in certain circumstances did not permit an arbitrator to deal with a claim for rectification, have been confined by later authorities to their special facts, and should not now be regarded as indicating the correct general approach to problems of this kind.*
>
> *When the parties to a commercial contract agree, at the time of making the contract, and before any disputes have arisen, to refer to arbitration any dispute or difference arising out of the agreement, their agreement should not be construed narrowly. They 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.*
>
> *In* Ethiopian Oilseeds, *Hirst J held that a claim for rectification of a contract gave rise to a dispute 'arising out of' the relevant agreement.*

> *That decision,* ***and the reasoning underlying it****, reflects the current state of the law in New South Wales: see also* IBM Australia Ltd v National Distribution Services Ltd *(1991) 22 NSWLR 466 at 475-477, per Kirby P."* [emphasis added]

168 The approach enunciated by Hirst J and, through him, by Gleeson CJ, Meagher JA and Sheller JA, is consistent with most modern authorities: *Heyman v Darwins Ltd* especially at 366; *HE Daniels Ltd v Carmel Exporters and Importers* [1953] 2 QB 242, 255; *Government of Gibraltar v Kenney* at 421-23; *Gunter Henck v Andre & Cie SA* [1970] 1 Lloyd's Rep 235, 240-41 (Mocatta J); *The 'Playa Larga'; Ashville Investments Ltd v Elmer Contractors Ltd;* though compare *Union of India v EB Aaby's Rederi A/S (The 'Evje')* [1975] AC 797, 814 and 817.

169 Given the unqualified approval of Gleeson CJ to the reasoning of Hirst J in *Ethiopian Oilseeds*, it is of utility to examine some aspects of that reasoning. Hirst J referred with approval to the decision of Sellers J in Government of *Gibralter v Kenney.* In that case the arbitration clause was framed, relevantly, as follows:

> *"any dispute … in relation to any thing or matter arising out of or under this agreement…"*

170 Sellers J, at 421-22, made clear that the phrase "arise out of" was wide enough to encompass claims not contractual in nature, but which had a "close association" with the contract, or were "incidental to" the contract, or which required the "same investigation of the contract and its terms and the performance under it" as claims in contract would, and which were "so closely linked with the contract". Such an approach can be seen to be conformable with the presumed intentions of the parties to have possible disputes connected with the making, the terms and the performance of the contract dealt with by one forum – the arbitration.

171 Hirst J referred to *Samick Lines Co Ltd v Owners of the 'Antonis P Lemos'* [1985] AC 711. There the issue was the meaning of a provision of the *Supreme Court Act, 1981* (UK) conferring Admiralty jurisdiction in the following relevant terms:

> *"any claim arising out of any agreement relating to… the use or hire of a ship"*

Lord Brandon (with whom Lord Scarman, Lord Diplock, Lord Roskill and Lord Templeman

agreed) said the following at 727.

> *"With regard to the first point, I would readily accept that in certain contexts the expression 'arising out of' may, on the ordinary and natural meaning of the words used, be the equivalent of the expression 'arising under', and not that of the wider expression 'connected with'. In my view, however,* ***the expression 'arising out of' is, on the ordinary and natural meaning of the words used, capable, in other contexts, of being the equivalent of the wider expression 'connected with'. Whether the expression 'arising out of' has the narrower or the wider meaning in any particular case must depend on the context in which it is used.****"*
> [emphasis added]

172 In that case the context militating in favour of the wide meaning was that it was a curial jurisdictional provision. Here, the context militating in favour of the wide meaning is the fact that it is an arbitration clause and subject to the considerations to which I have referred.

173 Hirst J's views in summary were set out at 97:

> *"I derive considerably more assistance from the* Ashville *case itself. This is authority that a claim for rectification is within the scope of 'arising thereunder or in connection therewith'.* ***I find it very difficult to make any distinction between the words 'arising out of' and 'arising in connection with', the two phrases appearing to me to be virtually synonymous****. I also respectfully agree with Lord Justice Balcombe and Lord Justice Bingham that the parties must be presumed to have intended to refer to arbitration all the disputes arising out of this particular transaction (which must include a plea for rectification), and not to have two sets of proceedings; this view seems to me to be underlined by sub-cl. (b) of the arbitration clause. The reasoning of the Queensland Court in Drennan*'s *case, approved by the Court of Appeal, and referring specifically to disputes 'arising out of or concerning' the agreement, seems to me particularly apt in the context of the present case. I also place great weight on the cases, stretching from the* Gibraltar *case to the Mantovani case, which emphasize* ***the wide amplitude of the words 'arising out of', echoed in the statement in Mustill and Boyd that they cover every dispute except a dispute as to whether there was ever a contract at all.***
>
> …
>
> *Stepping back and viewing this body of authority as a whole,* ***it seems clear*** *that while 'arising under' standing alone would probably not cover rectification for the reasons given in the Fillite case, '****arising out of' in the present context should be given a wide interpretation covering disputes other than one as to the very existence of the contract itself, so as to give effect to the parties' presumed intention not to have two sets of proceedings****."*

[Emphasis added]

174 That Hirst J did not intend "disputes … as to the very existence of the contract itself" (being disputes falling outside the phrase "arising out of the contract") to include cases of misrepresentation can be discerned from his citation with approval at 95 of Mustill and Boyd *Commercial Arbitration* (2nd Ed) where the authors in discussing the phrase "arising out of" include every dispute except a dispute as to whether there was ever a contract at all and say that the phrase "arising out of" includes amongst other things "issues of non-disclosure". In this respect, see especially *Mackender v Feldia AG* [1967] 2 QB 590 at 598 and 603.

175 If, subject of course to the context and circumstances of any particular contract, the meaning of the phrase "arising out of a contract" can be equated with "arising in connection with" (as Hirst J and Gleeson CJ say) it seems to me clear that the words "arise out of the contract" are apt, or at least sufficiently flexible, to encompass a sufficiently close connection with the making, the terms, and the performance of the contract as permit the words "arise out of" aptly or appropriately to describe the connection with the contract. These words encompass more than merely arising as a contractually classified complaint from one party's rights or another party's obligations under, or in, a bilateral juridical relationship. The width of the phrase "arising out of" in this context and its synonymity with the expression "in connection with" reflect the practical, rather than theoretical, meaning to be given to the word "contract" out of which the disputes may arise. The notion of a contract can involve practical commercial considerations of formation, extent and scope, and performance of the juridical bonds between the parties, out of which disputes may arise. In my view, there is no bright line to be drawn at the point of contract formation with all causes of action reliant on events prior to that point not being disputes arising out of the contract. It will be necessary in each case to assess the connection of the dispute with the contract – its formation, terms or performance – to see whether disputes fall within the clause, as well, of course, as the terms of the arbitration clause in the context in which they appear.

176 This being, in my view, the correct approach, it is clear that all the *Trade Practices Act 1974* (Cth) claims here arise out of the time charter in that they arise out of the formation of the contract. That this is so is demonstrated here by the equivalent evidence (as can be seen from the pleading) necessary to show (1) the falsity of the representations and the breach of the asserted contractual terms; and (2) the damage flowing from the misleading or

deceptive conduct and the breach of contract. It is also demonstrated by the fact that the conduct asserted to be misleading or deceptive was the body of negotiations that led to the formation of the contract. It is also demonstrated by the fact that the contract was entered in reliance upon the impugned conduct. Without the entry into the time charter, that is without the coming into existence of the time charter, there would have been no act of reliance upon which to found a cause of action under the *Trade Practices Act*. It is true to say that, in one sense, the claims also arise out of the *Trade Practices Act* itself; but they do arise out of the contract in the sense discussed above.

177 It is necessary to deal with the submissions of Pan to the effect that this approach and these conclusions are not open to us.

178 Pan submitted that the Court should construe clause 45(b) narrowly and that it was bound so to do by the decision of the Full Court in *The 'Kiukiang Career'*. It was submitted that, as a considered decision of an earlier Full Court, we should not depart from it. The primary judge applied it and in accordance with it construed the clause so as not to include pre-contractual representations. I had considered myself bound by the reasoning in *The 'Kiukiang Career'* in *Walter Rau Neusser Oel and Fett AG v Cross Pacific Trading Ltd* [2005] FCA 1102 at [68].

179 Comandate Marine, on the other hand, submitted that *stare decisis* had nothing to do with the matter. This was a different contract, with different words and earlier authorities on other contracts were irrelevant: *Maggbury Pty Ltd v Hafele Australia Pty Ltd* (2001) 210 CLR 181 at 188 [11] and *Pedlar v Road Block Gold Mines of India Ltd* [1905] 2 Ch 427 at 437-38.

180 *The 'Kiukiang Career'* involved the construction of an arbitration clause in a contract of affreightment concerning the carriage of fertiliser from Florida to Australia. The clause was in the following terms:

> *"Any dispute arising from this charter or any Bill of Lading issued hereunder shall be settled in accordance with the provisions of the* Arbitration Act 1950 (UK), *and any subsequent Acts, in London…*
>
> *This Charterparty shall be governed by and construed in accordance with English law.*
>
> *The Arbitrators and Umpire shall be commercial men normally engaged in*

the shipping industry."

The allegations in the pleading made by the party to the arbitration agreement (who was the consignee) included a case under the *Trade Practices Act* based on oral assurances given to it before contractual formation that the ship's holds would be completely free of grain contamination. These claims were also pleaded as claims for negligent misrepresentation and as collateral warranties. (The presence of any grain in the cargo of fertiliser would prevent its entry into Australia for quarantine reasons. This is what, in fact, occurred.)

181 There were also claims of breach of the contract of affreightment. Emmett J found the dispute under the *Trade Practices Act* and the other claims framed non-contractually, which were based on conduct before the contract, fell outside the arbitration clause. Branson J agreed with the reasons of Emmett J. Beaumont J concurred for reasons that were differently expressed.

182 The decision is distinguishable. It did not concern the words "arising out of". Also, and more importantly, the meaning of the clause was affected by particular textual and contextual aspects of the surrounding documentation. Thus, strictly, it is unnecessary to deal with the decision. However, as a matter of substance, the views expressed by Emmett J can be seen to be at variance with the approach set out above. That is why I took the view that I did in *Walter Rau*. In these circumstances, it is necessary to say something more of *The 'Kiukiang Career'*.

183 To the extent that the approach of Emmett J can be seen to exhibit a restrictive view of the text of the words before him, such difference can be accommodated by a recognition of the fact that different minds may approach the same words differently. However, more deeply than that, the approval of the views in *Mir Brothers Developments Pty Ltd v Atlantic Constructions Pty Ltd* (1984) 1 BCL 80 (distinguished by the Court of Appeal in *Francis Travel*) and the disapproval of the primary judge's reasoning in *The 'Kiukiang Career'* that had been expressly founded on *Ethiopian Oilseeds* (see 71 FCR at 179 in particular) reveals a difference in approach that may be seen to be based in part on principle. That is further reflected in the distinguishing of *Francis Travel* by reference only to the conclusion in that case without dealing in substance with the approval by the Court of Appeal of the reasoning of Hirst J in *Ethiopian Oilseeds*, and in the equation of the phrases, "arising under" and "arising from" and Emmett J's discussion at 20-21 of *Paper Products Pty Ltd v Tomlinsons*

(Rockdale) Ltd (1993) 43 FCR 439.

184 I refer without repetition to what I said in *SZEEU v Minister for Immigration and Multicultural and Indigenous Affairs* (2006) 150 FCR 214 at [185]-[192] about departing from earlier Full Courts. It may be debated whether these principles are called into operation here. However, to the extent that *The 'Kiukiang Career'*, especially at 21-22, can be seen to be authority, albeit *obiter*, for the proposition that the phrase "arising out of" cannot include a claim based on pre-contract representations and that the phrase should not be analysed (subject to any particular factual aspect of the case) by reference to the approach illuminated by Hirst J in *Ethiopian Oilseeds* and the Court of Appeal in *Francis Travel* then I am persuaded that it is wrong and inconsistent with the approach of modern authority to which I have referred. Because of the importance of the issue to commerce in this country, my view is that I should not merely expose my disagreement, but should take the step so far as it is up to me to bring the views of this Court into conformity with the Court of Appeal of New South Wales and other decisions of courts in Australia and elsewhere concerning the approach to the construction of arbitration clauses. So, to the extent that the reasoning in *The 'Kuikiang Career'* is inconsistent with that set out above, I am persuaded that it is wrong and should be departed from.

185 The decision of Beaumont J in *Allergan Pharmaceuticals Inc v Bausch & Lomb Inc* (1985) 7 ATPR 40-636 was also relied on by Pan. There the applicants manufactured and marketed in Australia fluids in connection with the use of contact lenses. The respondents made and sold contact lenses. The first applicant agreed to supply the first respondent with lens cleaning products. The contract required the packaging to recognise the first applicant as manufacturer. The contact contained an arbitration clause in respect of disputes "arising out of or relating to the Agreement". The claim included contract claims and claims that the public was being misled. Beaumont J, after a careful examination of the pleading, said in effect that the contract was only "part of the background" to the alleged contravention of the *Trade Practices Act*. To that extent what Beaumont J said can be seen to be a judgment about the degree of connection of the claim with the contract. As such it is unnecessary to consider it further. However his Honour did then go on to say this at 47,173-74;

> *"…As has been said, the statutory causes of action now sued upon exist independently of contract. They are consumer protection provisions which in no way depend upon any private agreement for their source. Conduct of the kind proscribed by Pt V of the* Trade Practices Act *will be established, if at all,*

> *irrespective of the contractual relations of the immediate parties. Nor could any contract* inter partes *constitute a defence to any alleged contravention of such legislation. In short, an alleged contravention of Pt V of the* Trade Practices Act *is not, as a mater of characterisation, a 'controversy or claim arising out of or relating to (the) Agreement' for the purposes of sec. XIX of that contract.* (*Cf.* Wyatt Earp Enterprises Inc v Sackman Inc. *157 F. Supp. 621 (1958).*)
>
> *The same observations can be made of the claimed infringement of the letters patent. Again, the cause of action is statutory only (see* N.V. Maatschappii Voor Industriele Waarden v A.O. Smith Corporation *523 F. 2d 874 (1976)).*"

186 To the extent that his Honour was saying that a *Trade Practices Act* claim can never be characterised as one "arising out of a contract", I cannot agree. Beaumont J did, however, if I may respectfully say, make a valuable point in respect of both the *Trade Practices Act* and the *Patents Act 1990* (Cth) which is of particular relevance to the question of arbitrability discussed below. To the extent that such claims may have involved in them the deception of the public (as opposed only to the party to the contract) or involve the public Patents Register, questions of characterisation as to whether the dispute arises out of a contract may arise. Also, questions of arbitrability (a concept discussed below) may arise. In such cases, it may be very important, in any given case, to understand the character of the matter and whether or not it was arbitrable or capable of settlement by arbitration in the sense discussed later in these reasons. In that assessment, the wide relief open under s 87 of the *Trade Practices Act*, potentially involving the interests and protection of the public, would need to be borne in mind. These issues do not arise here.

187 In my view, all the claims in Pan's statement of claim are encompassed within the scope of clause 45(b).

The fourth group of issues: the operation of the *International Arbitration Act* in the light of the proper construction of the arbitration clause

188 The primary judge dealt with s 7 of the *International Arbitration Act.* He did not, however, deal with the meaning and operation of s 7(2) of that Act, and in particular s 7(2)(b). Further, his Honour did not deal with article 8 of the Model Law, given the force of law by s 16(1) of the *International Arbitration Act.*

The issues for consideration

189 On the assumption that clause 45(b) encompasses the whole of the dispute between

the parties, including the *Trade Practices Act* claims, the following issues arise from the operation of the *International Arbitration Act*:

(a) the relationship between the operation of Article 8 of the Model Law and s 7 of the *International Arbitration Act*, in particular if the operation of Article 8 leads to a different result than would the operation so s 7 of the *International Arbitration Act*;

(b) the operation of s 7(5), including the meaning of the phrases "null and void, inoperative or incapable of being performed" and the role of the court and the timing of that role raised by the phrase "if the court finds";

(c) the operation of Article 8 of the Model Law including the meaning of the phrases "null and void, inoperative or capable of being performed" and the role of the court and the timing of that role raised by the phrase "unless it [a court before which an action is brought] finds";

(d) the status and effect of the doctrine of separability and the effect of this question on (a), (b) and (c) above;

(e) the content of the phrase "the determination of a matter that, in pursuance of the agreement, is capable of settlement by arbitration" in s 7(2)(b) of the *International Arbitration Act* and whether s 7 calls for a stay; and

(f) if any stay is to be granted whether any conditions should be imposed on any stay.

Introductory remarks

190 Before embarking on a resolution of the above issues, some introductory comments by way of background and context to the Convention, the Model Law and the *International Arbitration Act* should be made.

191 The proper construction and interpretation of the *International Arbitration Act*, in respect of its implementation of the New York Convention and the Model Law requires an understanding of the context of those international instruments and an understanding of the subjects of concern and debate in the Working Groups, meetings and other discussion leading up to their formation. That is expressly called for by s 17 of the *International Arbitration Act*

and the Australian common law of statutory interpretation: *Applicant A v Minister for Immigration and Ethnic Affairs* (1997) 190 CLR 225 at 230 (per Brennan CJ, agreeing with McHugh J), 240 (per Dawson J), 251-56 (per McHugh J) and 277 (per Gummow J also agreeing with McHugh J); *Morrison v Peacock* (2002) 210 CLR 274 at 279 [16]; *Newcastle City Council v GIO General Ltd* (1997) 191 CLR 85 at 112; *CIC Insurance Ltd v Bankstown Football Club Ltd* (1997) 187 CLR 384 at 408; *Network Ten Pty Ltd v TCN Channel Nine Pty Ltd* (2004) 218 CLR 273 at [11]; and see *NBGM v Minister for Immigration and Multicultural Affairs* [2006] HCA 54 at [61]. This process assists in understanding the public policy lying behind the enactment of these international instruments into Australian municipal law. It also assists in the reconciliation of the operation of the *International Arbitration Act* with another statute exhibiting important public policy, the *Trade Practices Act*.

192 The New York Convention and the Model Law deal with one of the most important aspects of international commerce – the resolution of disputes between commercial parties in an international or multinational context, where those parties, in the formation of their contract or legal relationship, have, by their own bargain, chosen arbitration as their agreed method of dispute resolution. The chosen arbitral method or forum may or may not be the optimally preferred method or forum for each party; but it is the contractually bargained method or forum, often between parties who come from very different legal systems. An ordered efficient dispute resolution mechanism leading to an enforceable award or judgment by the adjudicator, is an essential underpinning of commerce. Disputes arising from commercial bargains are unavoidable. They are part of the activity of commerce itself. Parties therefore often deal with the possibility of their occurrence in advance by the terms of their bargain. Unreliable or otherwise unsatisfactory decision making, or the fear of such, distorts commerce and makes markets less efficient, raising the cost of commerce. Similar effects can occur if parties can be forced to submit to fora of which they may have no or little knowledge, in circumstances where they have agreed to enter the overall bargain on an entirely different basis of anticipated dispute resolution. It may be of no, or little, comfort for such parties to be assured that any particular forum is reliable and otherwise satisfactory (as may be the case). It was not what was agreed. If parties can be forced to submit to fora different to those which they have chosen, a significant unstable variable is introduced into the performance of the international bargain – the uncertainty as to the legal system and the law to govern an international dispute, including doubts about venue and departure from what

may be familiar procedures, or at least procedures in which they have sufficient confidence to agree as those to govern the resolution of any dispute. These considerations are especially important in well-understood and stable markets, such as the chartering of working commercial ships as in the present case. It is another illustration of the importance of consistency in the working of international commerce illuminated so clearly by Lord Diplock in *The 'Maratha Envoy'* [1978] AC 1 at 8 in his discussion of the role and place of well-known or usual forms of contract in international commerce and the place of courts in their consistent interpretation. The above considerations ground the importance to be given to party autonomy and holding parties to their bargains in international commerce. (Nothing just said is directed to a different context of the terms of bills of lading and similar documents in liner trade operating as effective contracts of adhesion running with the sale of goods issued, often, by parties operating international cartels.)

193 The recognition of the importance of international commercial arbitration to the smooth working of international commerce and of the importance of enforcement of the bilateral bargain of commercial parties in their agreement to submit their disputes to arbitration was reflected in both the New York Convention and the Model Law. These considerations are well reflected in the terms of the Resolution adopted by the General Assembly of the United Nations on 11 December 1985 (No A/Res/40/72) in requesting the Secretary-General to transmit the Model Law to governments, arbitral institutions and other interested bodies and to recommend that all States give it due consideration:

> *"The General Assembly,*
>
> Recognising ***the value of arbitration as a method of settling disputes arising in international commercial relations****,*
>
> Being convinced *that the establishment of a model law on arbitration that is* ***acceptable to States with different legal, social and economic systems contributes to the development of harmonious international economic relations,***
>
> Noting *that the Model Law on International Commercial Arbitration was adopted by the United Nations Commission on International Trade Law at its eighteenth session,* ***after due deliberation and extensive consultation with arbitral institutions and individual experts on international commercial arbitration,***
>
> **Being convinced** ***that the Model Law, together with the Convention on the Recognition and Enforcement of Foreign Arbitral Awards and the***

> ***Arbitration Rules of the United Nations Commission on International Trade Law recommended by the General Assembly in its resolution 31/98 of 15 December 1976, significantly contributes to the establishment of a unified legal framework for the fair and efficient settlement of disputes arising in international commercial relations,***
>
> *1.* Requests *the Secretary-General to transmit the text of the Model Law on International Commercial Arbitration of the United Nations Commission on International Trade Law, together with the travaux* préparatories *from the eighteenth session of the Commission, to Governments and to arbitral institutions and other interested bodies, such as chambers of commerce;*
>
> *2.* Recommends *that all States give due consideration to the Model Law on International Commercial Arbitration, in view of the desirability of uniformity of the law of arbitral procedures and the specific needs of international commercial arbitration practice. (General Assembly Resolution A/40/72 of December 11, 1985)"*
> [emphasis added]

194 These considerations are of particular concern to a nation such as Australia so significantly involved in international trade and commerce. The national interest in the fostering and support of international commercial arbitration can be seen in the secondary material to the enactment of the *International Arbitration Act* in 1974 in its original form and the *International Arbitration Amendment Act 1989* which introduced Part III into the Act and gave the Model Law the force of domestic law. See Commonwealth of Australia Parliamentary Debates Senate, 2 and 24 October 1974 pp 1588-90 and 1973-76; House of Representatives, 2 December 1974 pp 4390-93; House of Representatives, 3 and 22 November 1988 pp 2399-401 and 2972-78; Senate, 24 November 1988 pp 2717-18 and 12 April 1989 1387-1402.

195 The *Trade Practices Act* was enacted in the same year as the *International Arbitration Act*. It is a statute of the highest importance in connection with commercial activity and behaviour in Australia and in the promotion of the welfare of Australians. The norms of conduct laid down in Part V, including in particular s 52 dealing with misleading or deceptive conduct, and the ample and flexible relief made available in Part VI, in particular the powers in s 87, illustrate the central importance of the *Trade Practices Act* to the regulation of commercial life and commerce in Australia.

196 To the extent that it is necessary to reconcile the operation of the *International*

Arbitration Act and the *Trade Practices Act*, it is well to recall that Parliament has made exceptions to the operation of the *International Arbitration Act*. Section 2C of the *International Arbitration Act* is in the following terms:

> *"Nothing in this Act affects:*
> *(a) the continued operation of section 9 of the Sea-Carriage of Goods Act 1924 under subsection 20(2) of the Carriage of Goods by Sea Act 1991 ; or*
> *(b) the operation of section 11 or 16 of the Carriage of Goods by Sea Act 1991."*

This section preserves the primacy of the Australian national interest in ensuring the availability of Australian courts or Australian arbitral tribunals in the resolution of disputes arising from the carriage of goods by sea in the circumstances set out in the provisions referred to in s 2C. These circumstances will often involve the vindication of rights under bills of lading or similar documents issued in circumstances earlier referred to. What is important for present purposes is to appreciate that Parliament has chosen one area to exclude from the operation of the *International Arbitration Act*. It has not chosen to exclude the *Trade Practices Act* or any aspect of it from the operation of the *International Arbitration Act*.

The issues for consideration: issue (a) at [189] above: the relationship between Article 8 and s 7.

197 Through s 16(1) of the *International Arbitration Act*, Article 8 of the Model Law has the force of law in Australia. It has the effect of an Act of the Commonwealth Parliament. Its command is simple. The Court should refer parties to arbitration, unless it finds the arbitration agreement to be null and void, inoperative or incapable of being performed. No provision of Part III of the *International Arbitration Act* and no aspect of the terms of Article 8 of the Model Law expressly subject the operation of Article 8 to s 7 of the *International Arbitration Act* and, in particular, to s 7(2)(b) thereof.

198 Pan submitted, however, that Article 8 did not operate independently of s 7. It gave two reasons for this. The first was the terms of Article 1(5) of the Model Law. It was said that s 7(2) of the *International Arbitration Act* answered the description, in terms of Article 1(5), of: "another law of Australia by virtue of which certain disputes may not be submitted to arbitration or may be submitted to arbitration only according to provisions other than in

[the Model Law]". I do not agree. Article 1(5) reflected the compromise to leave to national law the question of what was arbitral and what was not – both as a matter of principle and by reference to conduct of any arbitration. There were discussions in the meetings and Working Groups about the Model Law identifying and limiting such subject matters. The relevant Working Group concluded that it would not be possible to reach an agreement on this. There was also discussion about placing a reference to the subject matter being capable of settlement by arbitration in Article 7 or 8 dealing with arbitration agreements, as appeared in Article II sub-article 1 of the Convention. See generally, Holtzmann, HM and Neuhaus, JE *op cit* at 38-39.

199 The phrase "capable of settlement by arbitration" (also referred to as "arbitrability") is one having its origins in the *Geneva Convention on the Execution of Foreign Arbitral Awards 1927* where it was a condition of recognition or enforcement in Art 1(2)(b) that:

> *"…the subject-matter of the award is capable of settlement by arbitration under the law of the country in which the award is sought to be relied upon;"*

Arbitrability was also a distinct ground in Article IV(a) of the ICC Draft Convention of 1953 in relation to recognition and enforcement of an award, in substantially the same terms as in the 1927 Convention; it was also a distinct ground in relation to recognition and enforcement in Article IV(b) of the United Nations Economic and Social Council Draft Convention of 1955.

200 The notion of "capable of being settled by arbitration" or "arbitrability" is also central to the Convention and the Model Law. These words are to be understood in both the Convention and the Model Law as dealing with the question whether the dispute is of the type that comes properly within the domain of arbitration. Both the Convention (Article II sub-article 1 and Article V sub-article 2(a)) and the Model Law (Articles 34(2)(b)(i) and 36(1)(b)(i)) used the phrase. Article II of the Convention is directed to disputes that are capable of settlement by arbitration. If there is an award in respect of a dispute that is not capable of settlement by arbitration the award may be set aside or will not be enforced: Article V sub-article 2(a) of the Convention and Articles 34(2)(b)(i) and 36(1)(b)(i) of the Model Law. The types of disputes which national laws may see as not arbitrable and which were the subject of discussion leading up to both the Convention and the Model Law are disputes such as those concerning intellectual property, anti-trust and competition disputes,

securities transactions and insolvency. It is unnecessary to discuss the subject in detail. (See generally Redfern, A and Hunter, M *Law and Practice of Commercial Arbitration* (Thomson/Sweet and Maxwell 2004) at 138 *et seq*; Mustill, M and Boyd, S *Commercial Arbitration* 2001 Companion at 70-76; Sutton, D St. J and Gill, J *Russell on Arbitration* (Sweet and Maxwell 2003) at 12-15). It is sufficient to say three things at this point. First, the common element to the notion of non-arbitrability was that there was a sufficient element of legitimate public interest in these subject matters making the enforceable private resolution of disputes concerning them outside the national court system inappropriate. Secondly, the identification and control of these subjects was the legitimate domain of national legislatures and courts. Thirdly, in none of the *travaux préparatoires* was there discussion that the notion of a matter not being capable of settlement by arbitration was to be understood by reference to whether an otherwise arbitrable type of dispute or claim will be ventilated fully in the arbitral forum applying the laws chosen by the parties to govern the dispute in the same way and to the same extent as it would be ventilated in a national court applying national laws.

201 With that background, s 7 of the *International Arbitration Act* and in particular s 7(2)(b) can be seen not to be a law answering the description of Article 1(5) of the Model Law. It is not a law dealing with what cannot be arbitrated or what can only be arbitrated on specific conditions. Rather, it is a law placing Article II of the Convention into Australian domestic law, providing for the referring of parties to arbitration and involving the notion of the matter being capable of settlement by arbitration in conformity with the presence of that requirement in Article II sub-article 1.

202 The second reason given by Pan in its submissions for the subordination of Article 8 of the Model Law to s 7(2) of the *International Arbitration Act* was based on the second reading speech of the Attorney-General in 1988 which included the following (see Hansard p 2399):

> *"…The Act currently gives effect to the 1958 Convention and Recognition and Enforcement of Foreign Arbitral Awards – the New York Convention – which establishes rules governing the recognition and enforcement, in Australia, of international arbitral awards and agreements. Implementing the Model Law by amendment to this Act will ensure that all relevant Commonwealth laws relating to international arbitration are comprised in the one instrument.* ***In the event of any conflict being found to exist between the provisions of the Model Law and the New York Convention, the latter take precedence."***
> [emphasis added]

203 This general reference to the precedence of the Convention over the Model Law was particularly relevant to questions of recognition and enforcement given the somewhat differently worded provisions in the Convention and the Model Law in that regard. Indeed, a specific provision, s 20, was introduced into Part III of the *International Arbitration Act* to deal with the question of precedence in this respect:

> *"Where, but for this section, both Chapter VIII of the Model Law and Part II of this Act would apply in relation to an award, Chapter VIII of the Model Law does not apply in relation to the award."*

(Chapter VIII of the Model Law deals with recognition and enforcement of awards.)

204 In my view, the two bases put forward by Pan are an inadequate foundation to conclude that Article 8 does not operate independently of s 7 and according to its own terms. Bainton J proceeded on this basis in *Shanghai Foreign Trade Corporation v Sigma Metallurgical Company Pty Ltd* (1996) 133 FLR 417 at 427-428. This approach accords with the view of Dr Pryles in Sanders, P (Ed) *International Handbook on Commercial Arbitration* (Kluwer) at page 12 of the chapter on Australia, that s 7 and Article 8 are independent operative provisions.

205 It is not appropriate to consider, in the absence of argument, whether there are other textual and interpretive considerations which might lead one to conclude that Article 8 could not operate outside the scope of s 7. Also, it is unnecessary to explore in any detail the operation of Article 1(5) of the Model Law and the common law of Australia on the operation of Article 8 if a matter was within the scope of an arbitration agreement but was not arbitrable or contained non-arbitrable elements. It is in this context that questions of the protection of the public by the grant of relief under statutes such as the *Trade Practices Act* and the comments of Beaumont J in *Allergan Pharmaceuticals* become relevant. It is sufficient to say that there is clearly a basis to argue that if a dispute can be said by Australian law not to be arbitrable the operation of Article 8 might be seen to be limited or constrained thereby.

The issues for consideration: issues (b), (c) and (d) at [189] above: "null and void, inoperative or incapable of being performed" and the doctrine of separability

206 The primary judge's conclusion that Comandate Marine had elected to abandon or had waived the right to insist on arbitration led to his conclusion, correct on that basis, that

the arbitration agreement was inoperative or incapable of being performed. Given my view that his Honour erred in his conclusion about waiver, election and abandonment, that foundation for the conclusion that he reached is not available. No other ground was put forward by Pan for the phrase "inoperable or incapable of being performed" being met here.

207 As to the phrase "null and void", Pan's claim is that the misleading or deceptive conduct that is pleaded gives rise to a right under s 87 of the *Trade Practices Act* to have the whole time charter set aside *ab initio*. That claim may be said to be one in which the Court is asked to "find" that the agreement as a whole is "null and void" (the words used in Articles II and 8 and s 7).

208 Two matters must be considered at this point: (a) the meaning of the phrase "null and void"; and (b) the doctrine of separability.

209 As to the phrase "null and void", two major texts on the Convention and the Model Law: van den Berg, AJ *op cit* and Holtzmann, HM and Neuhaus, JE *op cit*, respectively, reveal that there was very little discussion about the meaning of the phrase in the meetings and Working Groups leading to the two instruments: see generally van den Berg, AJ *op cit* at 154-161 and Holtzmann, HM and Neuhaus, JE *op cit* at 302-307. At 156, van den Berg says the following about the phrase:

> *"The words may be interpreted as referring to those cases where the arbitration agreement is affected by some invalidity right from the beginning. It would then cover matters such as the lack of consent due to misrepresentation, duress, fraud or undue influence.*
>
> …
>
> *It may be added that the words 'null and void' etc. would also apply the question of capacity of a party to agree to arbitration, which question is to be decided under his personal law or another law which a court may hold applicable to this issue according to its conflict rules."*

210 Mustill, M and Boyd, S *Commercial Arbitration* (Butterworths 1989) at 464 express the view that the phrase "null and void" includes circumstances not only where the arbitration agreement has never come into existence, such as when there was no concluded bargain, but also the case where an arbitration agreement has come into existence but has become void *ab initio* eg by rescission on the ground of misrepresentation. These comments concerned s 1 of the *Arbitration Act 1975* (UK) which contained the following in respect of granting a stay of

court proceedings:

> *"…the court, unless satisfied that the arbitration agreement is null and void, inoperative or incapable of being performed or that there is not in fact any dispute between the parties with regard to the matter agreed to be referred, shall make an order staying the proceedings."*

211 Professor Merkin, on the other hand, in *Arbitration Law* (LLP 2004) at [8.32] says that an arbitration agreement is not null and void if it is merely voidable, at least until it has been avoided.

212 The authors of *Russell on Arbitration* (22nd Ed 2003 Sweet and Maxwell) made the following comment about the phrase as it appears in s 9 of the *Arbitration Act 1996 (UK)* at 302:

> *"The court is satisfied that the arbitration agreement is null and void. This will be case where the arbitration agreement (as opposed to the main contract) was never entered into or where it was entered into but has subsequently been found to have been void* ab initio, *…"*

213 Section 9 of the *Arbitration Act 1996* (UK) is relevantly in the following terms:

> *"On an application under this section the court shall grant a stay unless satisfied that the arbitration agreement is null and void, inoperative, or incapable of being performed."*

214 The United States courts appear to take a narrow view of the content of "null and void" conformable with a perceived declared policy in the Convention of enforceability of agreements to arbitrate. In *Chloe Z Fishing Co Inc v Odyssey Re (London) Ltd* 109 F Supp 2d 1236 (S.D. Cal 2000) Gonzalez J, applying *Oriental Commercial and Shipping Co Ltd v Rosseel* NV 609 F Supp 75 (SDNY 1985), said at 1241:

> *"[U]nder Article II, § 3, an agreement to arbitrate is 'null and void' only when it is subject to internationally recognised defenses such as duress, mistake, fraud, or waiver, or when it contravenes fundamental policies of the forum nation."*

215 No detailed argument took place before us as to whether the nullity or voidness of the agreement was a matter to be made out on the motion or whether it was a matter to be left to the exercise of jurisdiction of the Court at a final hearing, a stay not being granted in respect

of that part of the proceedings in which it was alleged that the arbitration agreement was null and void. No argument took place on the question whether the nullity or voidness was something that should exist at the time the court hears the stay application or whether it was something that could flow from the orders of the court hearing the stay application (whether on the stay application or later at a final hearing). Professor Merkin helpfully, if I may respectfully say, discusses this question in his work *Arbitration Law* (LLP 2004) at [8.28]-[8.31]. See also *Russell on Arbitration* (22nd Ed) at 302-3. The extent to which the court will undertake the enquiry called for by Article 8 of the Model Law (and Article II of the Convention and s 7(5) of the *International Arbitration Act*) may well depend upon the circumstances of the case. Certainly, the notion of the court "finding" the state of affairs, referred to in Articles 8 and II and s 7(5), assumes a responsibility of the court.

216 Where the court has before it a claim that the arbitration agreement should be set aside *ab initio* because of misrepresentation inducing it, that is not an allegation easily able to be disposed of in an interlocutory motion for a stay. Nor is it likely that the court or another court will have already given a judgment on the issue, given the hypothesis that one party seeks to send the dispute to arbitration. In such a circumstance, if there is no other ground made out to resist a stay, the court may well retain the issue of the avoidance of the arbitration agreement. If the claim for nullity or voidness is properly directed to the arbitration clause itself, the need for the court to deal with the issue can be readily appreciated, even accepting the doctrine of separability (to which I will come shortly). See in particular the comments of Steyn J (as his Lordship then was) in *Harbour Assurance Co (UK) Ltd v Kansa General International Insurance Co Ltd* [1992] 1 Lloyd's Rep 81 at 86 and see generally *Anglia Oils Ltd v Owners and/or Demise Charterers of the Marine Champion* [2002] EWHC 2407 (Adm), *El Nasharty v J Sainsbury Plc* [2003] EWHC 2195 (Comm) and *O'Callaghan v Coral Racing Ltd* [1998] EWCA Civ 1801. It is the practice of some courts to permit this question to go to the arbitrator, particularly if the issue is not clear or manifest: see the cases referred to and discussed in Merkin, R *op cit* at [8.30] especially at footnote 7 at 261.

217 The circumstances here do not require answers to these questions. I am prepared to proceed (without being taken to have decided the issue) on a basis favourable to Pan, that a claim under the *Trade Practices Act* for an order avoiding the arbitration agreement *ab initio* answers the description of "null and void" and that if a credible case for such is made out the

Court should not grant a stay and should allow that issue to be heard by the Court before any arbitration.

218 It is at this point that the doctrine of separability becomes relevant. Though a case has been propounded in the pleadings to the effect that the time charter was induced by conduct that was misleading or deceptive, no allegation of any kind is made to the effect that there was anything misleading or deceptive that concerned the reaching of agreement about the arbitration clause. If one views the arbitration clause as an agreement separate from the substantive time charter, one can see that none of the allegations of misrepresentation is directed to the separate arbitration agreement. The importance of this is highlighted by van den Berg, AJ *op cit* at 156 when he proffers an explanation for the dearth of case law on the question of the meaning of "null and void", as follows:

> *"…there are two reasons for which these matters will rarely occur in the practice, and have, indeed, not yet come up before the courts in relation to an action for the enforcement of an arbitration agreement under Article II(3). The first reason is that the lack of consent must concern the arbitral clause specifically, in those countries where the separability doctrine is applied. Under this doctrine, accepted in many countries, the lack of consent for the main contract does not necessarily constitute lack of consent for the arbitral clause contained in it. … It must therefore be proven that the arbitral clause itself is tainted by misrepresentation, duress, fraud or undue influence."*
> [footnotes omitted]

219 This doctrine of separability (or severability or autonomy) that the arbitration clause is considered to be an agreement independent from the main contract has two principal aspects of importance. First, the arbitrator can be seen to have a clear basis of jurisdiction to decide whether the substantive contract was void or voidable or should be rescinded, without destroying his or her own authority or jurisdiction to arbitrate. Secondly, and underpinning this first question, the invalidity of the substantive contract does not necessarily entail the invalidity of the arbitration clause. (For a discussion of these two interconnected notions, see Merkin, R *op cit* [5.40]-[5.45].)

220 Pan submitted that this doctrine of separability was not part of the law of Australia. It submitted that the arbitration clause and the contract to which it related stood or fell together. Thus, it was said that it was not possible for an issue or allegation relating to the validity of the main contract to be considered by arbitrators and that an attack of the kind made on the time charter as a whole based on the asserted contraventions of the *Trade Practices Act* and

the invocation of s 87 thereof was at once an attack on the arbitration clause as a constituent part of the time charter. Thus, the Court should not stay the proceedings, at least in respect of this claim to avoid the agreement.

221 In *Ferris v Plaister* (1994) 34 NSWLR 474, the New South Wales Court of Appeal decided that an arbitration clause is to be regarded as separate and severable from the main contract. The Court found that the doctrine of separability was part of the proper approach to analysing arbitration clauses and agreements: that it was part of the proper approach of the common law of Australia in that regard. The decision was unanimous, Kirby P, Mahoney JA and Clarke JA. The Court overruled its earlier decision, given only three years previously, in *IBM Australia Ltd v National Distribution Services Ltd* (1991) 22 NSWLR 466. In *Ferris v Plaister,* Clarke JA was persuaded to alter his earlier expressed view, though it had only been expressed by way of *obiter dicta* in *IBM.*

222 This approach in *Ferris v Plaister* is in conformity with the development of the common law in other jurisdictions, as demonstrated in the detailed reasons of Kirby P and in the learned judgment of the primary judge in that case, Young J, as his Honour then was; see also Jacobs, M *Commercial Arbitration Law and Practice* (Lawbook Co) at [5.160]-[5.224]. In *Harbour Assurance v Kansa General International Insurance Co Ltd* [1993] QB 701 Steyn J exposed the difficulties involved in the approach of earlier authorities (all of which he found to be *obiter dicta*) in particular in *Jureidini v National British and Irish Millers Insurance Company Ltd* [1915] AC 499 and the majority in *Heyman v Darwins Ltd* [1942] AC 356, though the felt bound to decide against any approach in accordance with separability based on what he saw as the binding *ratio* in *David Taylor & Son Ltd v Barnett Trading Co* [1953] 1 Lloyd's Rep 181. The Court of Appeal in *Harbour Assurance* [1993] QB 701, agreed with Steyn J's expression of view and overturned *David Taylor & Son v Barnett Trading Co.* The *Arbitration Act 1996 (UK)* now deals with the subject.

223 Article 16(1) of the Model Law sets out the doctrine of separability:

> *"The arbitral tribunal may rule on its own jurisdiction, including any objections with respect to the existence or validity of the arbitration agreement. For that purpose, an arbitration clause which forms part of a contract shall be treated as an agreement independent of the other terms of the contract. A decision by the arbitral tribunal that the contract is null and void shall not entail* ipso jure *the invalidity of the arbitration clause."*

Article 16(1) does not apply here, however, in circumstances of a foreign arbitration: Article 1(2) of the Model Law.

224 All three judges in *Ferris v Plaister* gave, if I may respectfully say, powerfully reasoned decisions in favour of their conclusions. I have no hesitation in following their approach in a co-ordinate intermediate appellate court dealing with an important aspect of commercial law in the common law of Australia, unless, as a matter of authority, this Court is bound not to do so.

225 Pan argued that this Court was bound not to follow *Ferris v Plaister* because of what was said by Mason J in *Codelfa Constructions Pty Ltd v State Rail Authority of New South Wales* (1981) 149 CLR 337 at 364-5 as follows:

> "Hirji Mulji *decided that an arbitrator had no jurisdiction under an arbitration clause in a charterparty when the charterparty was terminated by frustration because the arbitration clause was brought to an end with the contract of which it formed part. In* Heyman *the House of Lords decided that an arbitration clause, which provided that any difference or dispute which might arise 'in respect of' or 'with regard to' or 'under the' contract should be referred to arbitration, applied to a dispute arising out of a claim by one party that liability under the contract had been discharged by reason of repudiation which had been accepted.*
>
> *In* Heyman *their Lordships drew a distinction between a contract void ab initio, in which event there is no valid submission to arbitration, and a valid contract which is subsequently repudiated, where acceptance of the repudiation leaves the contract, including the arbitration clause, on foot for the purpose of enforcement, though performance under the contract is at an end. Viscount Simon L.C. [1942] A.C., at p. 367, Lord Wright [1942] A.C., at p. 383 and Lord Porter [1942] A.C., at p. 395 thought that the effect of frustration was similar to that of repudiation which has been accepted by the innocent party, with the consequence that the arbitration clause is left on foot. Although Lord Wright and Lord Porter did not express a concluded opinion upon the question, they nevertheless expressed reasons for arriving at a result contrary to that reached in* Hirji Mulji. *As might be expected, emphasis was given to the need to construe the relevant arbitration clause so as to ensure that it comprehends the particular dispute or difference which has arisen between the parties. In this action the Lord Chancellor expressly left open the effect of a* Scott v. Avery *clause.*
>
> *Lord Macmillan [1942] AC at p 375, who spoke for Lord Russell of Killowen as well, in putting cases of frustration to one side, expressed doubt as to the correctness of some of the views enunciated by Lord Sumner in* Hirji Mulji. *Nothing in Lord Macmillan's speech is inconsistent with the proposition that frustration does not put an end to a submission to an arbitration clause so*

> *expressed as to confer jurisdiction on an arbitrator to decide a dispute relating to frustration. Indeed, the emphasis which his Lordship gave to the special nature and purpose of arbitration clauses suggests that he would have come to the same conclusion upon the point as that reached by the Lord Chancellor.*
>
> *In my opinion, the reasoning of the House of Lords in* Heyman *is to be preferred to that of Lord Sumner in* Hirji Mulji *[1926] A.C., 497. In its application to an arbitration clause the distinction between a contract which is void ab initio and a contract which is valid but subsequently repudiated is well taken. Lord Sumner was in error in holding that the acceptance by an innocent party of the repudiation of a contract brings the contract, including an arbitration clause, to an end for all purposes. I agree with the House of Lords that the case of frustration is to be assimilated for relevant purposes to the determination of a contract by breach or by acceptance of repudiation. The fact that the Lord Chancellor proceeded on the implied term theory of frustration does not in my view affect the reasoning by which he arrived at his conclusion."*

226 Pan submitted that the approval by Mason J in this passage of the approach of their Lordships in *Heyman v Darwins*, agreed in as it was by Stephen J at 345, Aickin J at 392 and Wilson J at 392, bound this Court (as it should have bound their Honours in *Ferris v Plaister*) to reject the notion of separability; and thus, it was said, this Court should not follow *Ferris v Plaister.*

227 I reject this submission. The High Court in *Codelfa* and Mason J in this passage were not dealing with the question of separability. Mason J was, of course, dealing with the question of the jurisdiction of the arbitrator. In that context, his Honour was rejecting the notion present in the advice of the Privy Council delivered by Lord Sumner in *Hirji Mulji v Cheong Yue Steamship Co Ltd* [1926] AC 497 that acceptance by an innocent party of a repudiation put an end to the contract from the beginning, thus destroying the arbitration clause and that frustration had the same effect. Mason J was agreeing with the assimilation of frustration and acceptance of repudiation in this context made by their Lordships in *Heyman v Darwins* and with the distinction that they made between avoidance *ab initio* as a result of rescission and termination for breach, the former putting an end to the contract from the beginning, the latter not. It was only necessary for Mason J's purposes to demonstrate that frustration of the contract did not avoid the contract *ab initio*. The issue of the separability of the arbitration clause from the main contract was not before the Court in *Codelfa.* In this context, it cannot be said that the notion of separability or non-separability of

the arbitration clause was part of the *ratio* of Mason J's judgment in *Codelfa*. The judges in *Ferris v Plaister* were correct to consider themselves not to be bound by *Codelfa* in that respect.

228 The doctrine of separability is sometimes said to be based on a fiction: see Baron, A "Arbitration and the Fiction of Severability" (1999) 19 *Australian Bar Review* 49. The use of the word "fiction" is often a precursor to some criticism, or at least damning with faint praise. Fictions are not entirely without their utility. The relevance of the corporation as a separately existing entity is perhaps more than a modest example: cf Davies, M "In Defence of Unpopular Virtues; Personification and Ratification" (2000-2001) 75 *Tulane Law Review* 337. But the doctrine of separability is not so much a fiction as an approach by the law to accommodating commercial practicality and commonsense to the operation of legal rules. Commercial law and honest, practical common sense should never be far apart. The approach to construing and dealing with commercial contracts in this way, subject always of course to the particular contract at hand, is not to introduce a fiction, but to apply a legal rule or perspective borne of precedent and common sense better to facilitate the intentions (express and inferred) of the commercial parties involved: see also Mahoney JA in *Ferris v Plaister* at 496-97.

229 In my respectful view, *Ferris v Plaister* should be followed, not merely because it is not plainly wrong, but because it is correct.

230 Approaching the matter from this perspective, there is no basis put forward by Pan upon which it could be concluded that the arbitration agreement, being clause 45(b) of the time charter, as opposed to the substantive agreement, was null and void.

231 On this basis, assuming Article 8 to have an operation independent of s 7, the Court is required to refer the parties to arbitration. There was no debate that the appropriate way to achieve that command is the stay the proceedings in this Court: cf *Channel Tunnel Group Ltd v Balfour Beatty Construction Ltd* [1993] AC 334 at 353-55 and the note in (1993) 109 *Law Quarterly Review* 337.

232 The above also deals with s 7(5) of the *International Arbitration Act.*

233 I will deal with any questions of conditions on the stay shortly, when dealing with issue (f) at [189] above.

The issues for consideration: issue (e) at [189] above: the content of the phrase "the determination of a matter that, in pursuance of the agreement, is capable of settlement by arbitration" and whether s 7 calls for a stay

234 The starting point of understanding this part of s 7(2)(b) is the recognition that it is a reduction into domestic law of aspects of Article II of the Convention. I do not repeat what I said earlier about "capable of settlement by arbitration" and "arbitrability". Three aspects of this part of s 7(2)(b) are important: "a matter", "in pursuance of the agreement" and "capable of settlement by arbitration". These are elements of Article II of the Convention brought into domestic law. They are not independent elements to be understood separately from each other. Rather, they are part of one paragraph dealing with elements of Article II: the difference or differences between the parties which, pursuant to the arbitration agreement, is and are capable of settlement by arbitration.

235 The phrase "a matter" is apt to be understood at a level of generality by reference to the arbitration agreement. This conforms with the views of all the justices in *Tanning Research Laboratories Inc v O'Brien* (1990) 169 CLR 332 at 344-45 and 351-52 and McLelland J in *Flakt Australia Ltd v Wilkins & Davies Construction Co Ltd* [1979] 2 NSWLR 243 at 250. See also *Metrocall Inc v Electronic Tracking Systems Pty Ltd* (2000) 52 NSWLR 1. It is plain that the phrase "a matter" cannot have the full connotation of the phrase in the Constitutional sense: *Tanning Research* at 351. This is so because it is linked to the terms of the arbitration agreement. It is the matter, the differences between the parties, the controversy between the parties, which, under the agreement, the parties have agreed to submit to arbitration. Thus, some issue may be part of the overall controversy or matter in the sense understood in federal jurisdiction: *Fencott v Muller* (1983) 152 CLR 570 at 608 and *Re Wakim; Ex parte McNally* (1999) 198 CLR 511 at 585-86, but not fall within the scope of the arbitration clause. Recognising how the word "matter" is used in Article II sub-article 3 and the content of Article II sub-article 1, the word "matter" in s 7(2)(b) can be seen to be a reference to the differences between the parties or the controversy that are or is covered by the terms of the arbitration agreement. That is, such part (or all) of the differences that fall within the scope of the arbitration agreement. It is that body of differences which is to be capable of settlement by arbitration.

236 Here, the matter is all disputes arising out of the time charter of this particular commercial vessel that must be capable of settlement by arbitration. As I have already said, this last phrase is one which, according to the law of Australia, as the domestic law governing

the question of referral, must be of a character that is arbitrable. There is nothing to suggest that such a quintessentially commercially based dispute is not appropriate for arbitral resolution in accordance with the venue and law chosen by the parties. I see no warrant to construe s 7(2)(b) as requiring all causes of action or issues thrown up by Australian law to be dealt with by the arbitrator according to Australian law or as they would be in a suit in this Court for the "matter" in pursuance of the agreement to be capable of settlement by arbitration. The matter, being the disputes arising out of the time charter, will be heard by the arbitrator at the place and under the law chosen by the parties: see *Francis Travel* at 167. The matter in pursuance of the agreement is capable of settlement by arbitration.

237 Here, it is said that Pan's claims under ss 52 and 87 of the *Trade Practices Act* will not be agitated before the arbitrator because English law will not recognise an Australian statute in the employment of English Law to resolve the dispute. So, it is said, that matter or that part of the matter is not, in pursuance of the agreement, capable of settlement by arbitration, since it will not be heard and determined on its merits. This submission misunderstands the content of s 7(2)(b) of the *International Arbitration Act* and in particular gives a different meaning to the phrase "capable of settlement by arbitration" than is found in the Convention. Indeed, it is a meaning of the phrase which would undermine the operation of the Convention, a result which one would not reach without the clear intention of the Parliament through the words of the statute. The aim of the Convention is to accord respect and recognition to the autonomy of the parties in the choice of arbitration. It would be antithetical to the Convention to limit the reference to arbitration to those parts of the differences of the parties that would be dealt with in the same way in the arbitration as they would be in the national court in which proceedings have been begun. This is not to give the Convention precedence over the words of s 7(2)(b). Rather, it is to recognise that the *International Arbitration Act* was seeking to place the Convention into domestic law, and here s 7(2) was dealing with Article II. Section 7(2) should be understood and interpreted, if it can be, in conformity with the relevant parts of the Convention, that is Article II that it seeks to incorporate. Thus, if the words of s 7(2) can be understood as not undermining or being contrary to Article II they should be so construed. The whole point of an arbitration agreement (as indeed appears to be the case with clause 45 of NYPE 93) is to remove all relevant disputes to a defined legal regime for resolution: here, to London arbitration, under English law. To interpret legislation implementing the Convention to operate only to refer to arbitration such parts of the differences between the parties as are covered by the arbitration

agreement that will be dealt with by the arbitrator in the same way that the staying court would deal with them, would be to undermine the Convention by infringing on the autonomy of the parties recognised by the Convention in the scope of the arbitration agreement. It would be to give a meaning to the domestic law implementing the Convention contrary to the Convention, in particular by ascribing to the phrase "is capable of settlement by arbitration" a meaning in s 7(2)(b) different from that which it carries in the Convention.

238 Nothing in *Tanning Research* is inconsistent with the above approach. The above approach conforms to the requirement expressed in *Tanning Research* to ascertain the "matter" by reference to the subject matter in dispute and the substantive questions for determination in the proceedings and, necessarily, by reference to the scope of the arbitration agreement. See also *Recyclers of Australia Pty Ltd v Hettinga Equipment Inc* (2000) 100 FCR 420 at [18].

239 In *The 'Kiukiang Career'* Emmett J, however, said the following at 23-24:

> *"Arbitrators, from that point of view, would not be in any different position from the Federal Court. The reference to English law, as being the law by which the Charter Contract was to be governed and in accordance with which it was to be construed, would not exclude the operation of the* Trade Practices Act. *However, it may be an indication, when coupled with the reference to arbitration under the English legislation, that the parties did not intend that claims arising out of the statute would be resolved by arbitrators in London. In other words, there is no basis for concluding that the parties to the Charter Contract intended the implication of a term that claims under the* Trade Practices Act *would be settled by arbitration.*
>
> *Clearly, the* Trade Practices Act *confers no jurisdiction on arbitrators in London. On the other hand, it would certainly be open to the parties to a dispute as to whether or not a claim arises under the Trade Practices Act, to refer that dispute to arbitrators. That, of course, is not this case. Nevertheless, it would also be possible for two parties to agree, subject to the following proviso, that if a dispute arises between them in the future as to whether one is entitled to a remedy under the* Trade Practices Act, *they will refer that dispute to arbitration.*
>
> *The proviso is that if such a dispute did arise, and one party wished to have the dispute resolved by a court with appropriate jurisdiction, that party could not be compelled to have the matter resolved by arbitration if the effect would be a contract excluding the application of the* Trade Practices Act. *If the effect of the agreement would be to exclude a claim under the* Trade Practices Act *and to deprive the parties of the remedies which a court may grant under the* Trade Practices Act, *in favour of a determination by an arbitrator, the provision may be void by the operation of the* Trade Practices Act. *If the effect*

> *of such a provision would be to exclude the jurisdiction of the court and enable the parties to contract out of the remedies conferred by the* Trade Practices Act, *the provision may be void."*

240 With the utmost respect to Emmett J and to Branson J, who agreed with Emmett J's reasons, the proviso in the last paragraph above cannot be correct if the *International Arbitration Act* through s 7 or Article 8 applies to call for a stay. Clause 45(b) is not contrary to the *Trade Practices Act.* There is nothing inimical to Australian public policy or to the terms of the *Trade Practices Act* in commercial parties agreeing to commercial arbitration in London under English law. There is no relevant Australian statutory provision such as s 11 of the *Carriage of Goods by Sea Act 1991* (Cth) or s 52 of the *Insurance Contracts Act 1984* (Cth) that might affect its operation. Here, if a stay is mandated under s 7 or Article 8, that is because of the operation of a law of the Parliament exhibiting the public policy to which I have referred. The *Trade Practices Act* is not being undermined; rather, another law of the Parliament is in operation. If Australian public policy of the kind found in s 2C of the *International Arbitration Act* or s 52 of the *Insurance Contracts Act* were relevant then the issues would be determined in that light.

241 Taking this approach, and in the light of the undertaking to the Court by Comandate Marine, it is unnecessary to deal with the submissions of the parties on English law, the Rome Convention and how the arbitrator will approach the matter, and to resolve the question as to whether the arbitrator would, in the absence of any undertaking of the kind given here, be obliged or entitled to deal with the *Trade Practices Act* claims. It is sufficient in this context to refer to what Gleeson CJ said in *Francis Travel* at 167 and to make two points. The first is that, as Gleeson CJ said at 167, it will be for the arbitrator to decide, applying relevant principles of conflict of laws, what part the *Trade Practices Act* allegations and claimed relief will play in the arbitration and it is not for this Court to pre-empt that decision. The second is that Comandate Marine's undertaking to this Court can be viewed not as gratuitous, but as in accordance with its obligations under a term that may be seen to be implied into the arbitration agreement that the arbitrator is to have the authority to give the claimant such relief as would be available to it in a court of law having jurisdiction with respect to the subject matter: *Government Insurance Office of New South Wales v Atkinson-Leighton Joint Venture* (1981) 146 CLR 206 at 246-47 and *Francis Travel* at 167.

242 A dispute concerning the time chartering of a general cargo ship for commercial

purposes under NYPE 93 is a matter capable of settlement by arbitration whether that dispute relates to the formation or performance of that contract.

243 Thus, the Court is obliged to stay the proceedings in this Court pursuant to s 7.

The issues or consideration: issue (f) at [189] above: the imposition of any conditions

244 I see no need for any conditions on the stay. In *Walter Rau*, subject to hearing the parties on the matter, I indicated at [111] that I would:

> *"… impose a condition upon the parties to the arbitration to consent to all aspects of any TP Act claims, which would have been justiciable in this Court, being litigated in the arbitration irrespective of any conclusion as to the proper law. Such a condition would solve the potential conflict of Australian domestic statutory public policy and the operation by a foreign arbitrator of the rules of conflicts of law to set at nought governing Australian law. The arbitration agreement is a contract about submission. Its enforcement should not undermine the operation of a statute such as the TP Act."*

245 Having had the benefit of argument in the appeal here I would not impose such a condition. At least in the circumstances here, I do not see such a term as appropriate. It would, to use the expression of Gleeson CJ in *Francis Travel* at 167, pre-empt the decision of the arbitrator and the operation of the arbitration clause. In any event, here, Comandate Marine has undertaken to the Court to agree to the determination in the arbitration of the *Trade Practices Act* claims.

The fifth group of issues: other bases for a stay by reason of the arbitration clause, assuming the inapplicability of the *International Arbitration Act* and the question of discretion involved therein

246 Even if there were no agreement in writing for the purposes of s 7 of the *International Arbitration Act*, there is no debate but that there was and is a contractually binding arbitration clause in the time charter in terms of clause 45(b) of NYPE 93. Comandate Marine argued below that if s 7 did not apply a stay should be granted pursuant to s 53 of the *Commercial Arbitration Act 1984* (NSW). Section 53 is in the following terms:

> *"(1) If a party to an arbitration agreement commences proceedings in a court against another party to the arbitration agreement in respect of a matter agreed to be referred to arbitration by the agreement, that other party may, subject to subsection (2), apply to that court to stay the proceedings and that court, if satisfied:*
>
> *(a) that there is no sufficient reason why the matter should not be*

referred to arbitration in accordance with the agreement, and

(b) that the applicant was at the time when the proceedings were commenced and still remains ready and willing to do all things necessary for the proper conduct of the arbitration,

may make an order staying the proceedings and may further give such directions with respect to the future conduct of the arbitration as it thinks fit.

(2) An application under subsection (1) shall not, except with the leave of the court in which the proceedings have been commenced, be made after the applicant has delivered pleadings or taken any other step in the proceedings other than the entry of an appearance.

(3) Notwithstanding any rule of law to the contrary, a party to an arbitration agreement shall not be entitled to recover damages in any court from another party to the agreement by reason that that other party takes proceedings in a court in respect of the matter agreed to be referred to arbitration by the arbitration agreement."

247 It is unnecessary to discuss the inter-relationship between the Commonwealth and State and Territory legislation dealing with commercial arbitration and international commercial arbitration. In particular, it is unnecessary to discuss (and inappropriate given the absence of notices under s 78B of the *Judiciary Act 1903* (Cth)) the extent to which the *International Arbitration Act* covers the field for the purposes of s 109 of the *Australian Constitution.* I therefore leave s 53 to one side.

248 It was argued that there should be no stay because of the connection of the issues with Australia – the state of the ship in Australia, the local witnesses and the relevance of Australian immigration law. These matters, taken alone or together, do not outweigh the holding of the parties to their bargain.

249 It was submitted that the Court should not take a step which would stifle the ability of Pan to agitate its rights under the *Trade Practices Act* and that to do so would be giving clause 45(b) a scope effectively to exclude the operation of the *Trade Practices Act.* That is not the appropriate perspective. These commercial parties freely entered a bargain to resolve their disputes in London according to English law. No one forced Pan to do so. Through its broker, it entered the international market for the time chartering of vessels. It negotiated hire and terms on the foundation of a dispute resolution clause in clause 45(b). If it had wanted to maintain any rights by reference to Australian law governing its relationship, it

could have bargained for them. It did not. There is no provision of the *Trade Practices Act* that says the parties cannot enter a clause such as clause 45(b). There are powerful discretionary reasons why an arbitration agreement should be enforced, even if the contractually chosen venue and law give rights not entirely the same as would arise under one party's domestic law and in one party's domestic courts: see *Wealands v CLC Contractors and Key Scaffolding Ltd* [1999] 2 Lloyd's Rep 739 at 747-48 and *Société Commerciale de Reassurance v Eras International Ltd* [1992] 1 Lloyd's Rep 570 at 610-11. If Australian commercial parties desire Australian dispute resolution clauses they should bargain for them.

250 That said, given that arbitration clauses can be taken as ousting or lessening the jurisdiction of courts: see for example, *Compagnie des Messageries Maritimes v Wilson* (1954) 94 CLR 577, *Kim Meller Imports Pty Ltd v Eurolevant SpA* (1986) 7 NSWLR 269 and *Furness Withy (Aust) Pty Ltd v Metal Distributors (UK) Ltd (The 'Amazonia'*) [1990] 1 Lloyd's Rep 236, I would leave the question of the enforcement of an arbitration clause which would deny a party a chance to ventilate its rights under a statute such as the *Trade Practices Act* for a case in which it was necessary to decide that question. Here, the issue is determined by the operation of a law of the Parliament, the *International Arbitration Act.*

The sixth group of issues: the anti-anti-suit injunction

251 Given my views that there should be an unconditional stay of Pan's proceedings, there is no reason for Comandate Marine to seek an anti-suit injunction. Also, in this light, the anti-anti-suit injunction, now plays no useful purpose.

252 In these circumstances, there is no need to canvas at any length the question of the use of anti-suit injunctions in advance of the court whose processes are interfered with by the anti-suit injunction (in this case, this Court) dealing with the matter. The anti-suit injunction, in form, is not directed to the court. This much is obvious. If it were otherwise, there would be a direct interference with an arm of government of a sovereign State. Nevertheless, to order a party not to approach a court of competent jurisdiction is an indirect interference with that court. That is not to say anti-suit injunctions should not be issued. But it is to recognise that in a potentially complex exercise of discretion comity is not an "incantation", as Millett LJ put it in *The 'Angelic Grace'* [1995] 1 Lloyd's Rep 87 at 96, but a real consideration, in particular if legitimate national legislation (such as that protecting or regulating a body of commercial law eg insurance law or bill of lading carriage) applies and if parties have

conducted themselves and contracted against that background or in that framework: (cf Article 7 of the draft Hague Convention on Exclusive Choice of Court Agreements; s 11 of the *Carriage of Goods by Sea Act 1991* (Cth); *The 'Hollandia'* [1983] 1 AC 565; *OT Africa Line Ltd v Magic Sportswear Corporation & Ors Ltd* [2005] EWCA Civ 710; s 52 of the *Insurance Contracts Act 1984;* and *Akai Pty Ltd v People's Insurance Co Ltd* (1996) 188 CLR 418 a decision of the High Court of Australia ignored by Thomas J in the anti-suit injunction between the same parties: [1998] 1 Lloyd's Rep 90; cf *The 'Al Battani'* [1993] 2 Lloyd's Rep 219 at 224).

253 These considerations may be relevant to the questions of costs of the anti-anti-suit injunction. There is, however, no reason why Comandate Marine should not have its costs of the notice of motion for a stay. I would hear the parties on the costs of the anti-anti-suit injunction.

The appropriate orders

254 It is appropriate to note formally the terms of the undertaking that Comandate Marine has provided to the Court to allow the arbitration to determine all issues between the parties arising under the *Trade Practices Act.* The text of the notation below is taken from Comandate Marine's submissions on appeal. If some greater precision or some variation is required the parties should approach the Court.

255 The orders that I would make are:

1. The appeal be allowed.

2. Order 5 made by the Court on 13 July 2006 and the order made by the Court on 22 August 2006 be dissolved and set aside, respectively, and in lieu of the order made on 22 August 2006 it be ordered that:

    (a) Subject to the retention of the security provided for the release of *Comandate* remaining as security for Pan's claims against Comandate Marine in the arbitration, proceeding NSD 1330 of 2006 be stayed.

    (b) Pan pay the costs of Comandate Marine of the motion for a stay of proceedings served on 23 June 2006 and filed 4 July 2006.

3. Pan pay Comandate Marine's costs of the appeal.

4. The question of the costs of the anti-anti suit injunction and of the balance of the proceedings at first instance be stood over for argument to a date to be fixed.

5. The Court notes the undertaking to the Court of Comandate Marine Corp that it will allow the arbitration to determine all issues between the parties arising under the *Trade Practices Act 1974* (Cth).

256 It also may be necessary for a stay for a short period to allow any application that Pan might consider appropriate. Any such application should be made promptly.

I certify that the preceding two hundred and forty seven (247) numbered paragraphs are a true copy of the Reasons for Judgment herein of the Honourable Justice Allsop.

Associate:

Dated: 20 December 2006

Counsel for the Appellant:	Mr A J Sullivan QC and Mr D A McLure
Solicitor for the Appellant:	Norton White
Counsel for the Respondent:	Dr A S Bell SC and Mr C Carter
Solicitor for the Respondent:	Ebsworth & Ebsworth
Dates of Hearing:	25 and 26 October 2006
Last Submission filed:	2 November 2006
Date of Judgment:	20 December 2006