

FEDERAL COURT OF AUSTRALIA

Incitec Ltd v Alkimos Shipping Corporation [2004] FCA 698

ADMIRALTY AND MARITIME JURISDICTION – PRACTICE AND PROCEDURE

– exclusive jurisdiction clause – multi-party litigation – circumstances where cross-claim will be allowed to be filed and served and not stayed in the face of an exclusive jurisdiction clause
– importance of not fostering duplication in court proceedings – importance of avoiding potential risk of inconvenience to third parties.

Civil Liability (Contribution) Act 1978 (UK)

International Arbitration Act 1974 (Cth) s 7(2)

Law Reform (Miscellaneous Provisions) Act 1946 (NSW) s 5(1)(c)

Akai v PICC (1977) 188 CLR 418

Allergan Pharmaceuticals Inc v Bausch & Lomb Inc (1985) ATPR 40-636

Ashville Investments Ltd v Elmer Contractors Ltd [1989] QB 488

Bouygues Offshore SA v Caspian Shipping Co [1998] 2 Lloyd's Rep 461

Citi-March Ltd v Neptune Orient Lines Ltd [1997] 1 Lloyd's Rep 72

Crédit Suisse First Boston (Europe) Ltd v MLC (Bermuda) Ltd [1999] 1 Lloyd's Rep 767

Donohue v Armco [2001] UKHL 64; [2002] 1 Lloyd's Rep 425

Dowell Australia Ltd v Triden Contractors Pty Ltd [1982] 1 NSWLR 508

Ethiopian Oilseeds & Pulses Export Corporation v Rio Del Mar Foods Inc [1990] 1 Lloyd's Rep 86

Evans Marshall & Co Ltd v Bertola SA [1973] 1 WLR 349

FAI v Ocean Marine Mutual (1997) 41 NSWLR 559

Francis Travel Marketing Pty Ltd v Virgin Atlantic Airways Ltd (1996) 39 NSWLR 160

Hi-Fert Pty Ltd v Kiunkiang Maritime Carriers Inc (1998) 90 FCR 1

IBM Australia Ltd v National Distribution Services Ltd (1991) 22 NSWLR 466

Leigh Mardon Pty Ltd v PRC Inc (1993) 44 FCR 88

Mahavir Minerals Ltd v Cho Yang Shipping Co Ltd [1997] 1 Lloyd's Rep 566

Oceanic Sun Line v Fay (1988) 165 CLR 197

Paper Products Pty Ltd v Tomlinsons (Rockdale) Ltd (1993) 116 ALR 163

Roose Industries Ltd v Ready Mixed Concrete Ltd [1974] 2 NZLR 246

Societe Commerciale De Reassurance v Eras International Ltd [1992] 1 Lloyd's Rep 570

Taunton-Collins v Cromie [1964] 1 WLR 633, 636.

The 'El Amria' [1982] 1 Lloyd's Rep 119

The 'Eleftheria' [1970] P 94

The 'Fehmarn' [1958] 1 WLR 159

The 'Pine Hill' [1958] 2 Lloyd's Rep 146

The Ship 'Mill Hill' (1950) 81 CLR 502

Wealands v CLC Contractors [1999] 2 Lloyd's Rep 739

**INCITEC LTD v ALKIMOS SHIPPING CORPORATION AND ANOR
N 303 of 2003
SUMITOMO AUSTRALIA LTD v ALKIMOS SHIPPING CORPORATION
N 304 of 2003**

**ALLSOP J
3 JUNE 2004
SYDNEY**

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

N 303 of 2003

**BETWEEN: INCITEC LTD
 PLAINTIFF**

**AND: ALKIMOS SHIPPING CORPORATION
 FIRST DEFENDANT**

**HYUNDAI MERCHANT MARINE CO LTD
SECOND DEFENDANT**

JUDGE: ALLSOP J

DATE: 3 JUNE 2004

PLACE: SYDNEY

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

N 304 of 2003

**BETWEEN: SUMITOMO AUSTRALIA LTD
 PLAINTIFF**

**AND: ALKIMOS SHIPPING CORPORATION
 DEFENDANT**

JUDGE: ALLSOP J

DATE OF ORDER: 3 JUNE 2004

WHERE MADE: SYDNEY

THE COURT ORDERS THAT:

1. The first defendant in N303 of 2003 be granted leave to file and serve a cross-claim against the second defendant in terms set out in the document annexed to the notice of motion filed 5 December 2003.
2. The defendant in N304 of 2003 be granted leave to file and serve a cross claim

against Hyundai Merchant Marine Co Ld (“Hyundai”) in terms set out in the document annexed to the notice of motion filed 5 December 2003.

3. The motions made orally on behalf of Hyundai in proceedings N303 and N304 of 2003 be dismissed.
4. Stand over the motions to a date to be fixed to argue costs.

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

**IN THE FEDERAL COURT OF AUSTRALIA
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N 303 of 2003

**BETWEEN: INCITEC LTD
 PLAINTIFF**

**AND: ALKIMOS SHIPPING CORPORATION
 FIRST DEFENDANT**

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SECOND DEFENDANT**

JUDGE: ALLSOP J

DATE: 3 JUNE 2004

PLACE: SYDNEY

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

N 304 of 2003

**BETWEEN: SUMITOMO AUSTRALIA LTD
 PLAINTIFF**

**AND: ALKIMOS SHIPPING CORPORATION
 DEFENDANT**

JUDGE: ALLSOP J

DATE: 3 JUNE 2004

PLACE: SYDNEY

REASONS FOR JUDGMENT

1

Before the Court are two notices of motion in the two proceedings N 303 of 2003 and N 304 of 2003. In N 303 of 2003 Incitec Ltd (“Incitec”) sues Alkimos Shipping Corporation (“ASC”) and Hyundai Merchant Marine Co Ltd (“Hyundai”). In N304 of 2003 Sumitomo Australia Limited (“Sumitomo”) sues ASC. Each proceeding arises out of the refusal in March 2002 of the Australian Quarantine and Inspection Service (“AQIS”) to permit the discharge of part of the cargo of fertilizer carried on board the *Alkimos* which had arrived in

Newcastle on a voyage from the loading port of Tampa, Florida. Incitec and Sumitomo are the relevant cargo interests. They are represented by different solicitors. Incitec has sued both owner (ASC) and time charterer (Hyundai) of the ship. Sumitomo has only sued the owner (ASC). Incitec was a voyage charterer under a contract of affreightment with Hyundai.

2 I have made orders in both proceedings for the service outside the jurisdiction of the surveyor who undertook a survey at the time of loading of the cargo in Tampa, Florida. (See [2004] FCA 348.)

3 After the cargo was in effect rejected by AQIS, the ship proceeded to Gladstone and Asian ports. She was arrested in Chittagong where she remained under arrest for a considerable period of time.

4 The claims of the plaintiffs not only concern the considerable loss of value of the cargo, but also, in the Incitec matter, millions of dollars in demurrage and detention costs for which Hyundai has asserted Incitec bears responsibility under the voyage charter.

5 In the motions before the Court, ASC, the owner of the *Alkimos* seeks leave to cross-claim against Hyundai, the time charterer of the *Alkimos*. In the Incitec proceeding the cross-claim claim is against Hyundai as an existing and present defendant. In the Sumitomo proceedings the cross-claim would have the effect of joining Hyundai to the proceeding.

6 No point was taken by Hyundai that service out of the jurisdiction was required in the Sumitomo proceedings. Hyundai, however, did oppose leave being granted to ASC to serve the cross-claims on the basis of futility. It said (and Mr Nell, who appeared for Hyundai, orally moved the Court, which course I permitted) that should leave be granted the cross-claims should be stayed on the basis of their being contrary to an exclusive foreign jurisdiction clause in the time charter. Thus, it was said, leave should not be given if the only result of the leave was the immediate staying of the cross-claims.

7 Mr Nell and Dr Bell argued the substance of the matter, being identical in the notices of motion filed by the owner (ASC) and the oral motions by the time charterer (Hyundai).

8 The relevant evidence is in narrow scope and is as follows. ASC and Hyundai executed a written time charter dated 10 January 2002 in New York Produce Exchange (“NYPE”) form (1946 version) with certain amendments and additional clauses in respect of the hire of the *Alkimos*, a single deck container bulk carrier of 25,189 tons gross register for a

period 90 days to about 5 months, the word “about” being defined as meaning plus or minus 20 days charterer’s option. Clause 17 of the NYPE form was excised and in its place the following appeared:

BIMCO/LMAA 1998 Arbitration Clause to apply

9

The 1998 arbitration clauses of the Baltic and International Maritime Council (BIMCO) were published in a special circular dated 1 July 1998. The circular noted the available choice of three BIMCO drafted arbitration clauses: the first providing for English law and London arbitration, the second providing for United States law and New York arbitration and the third providing for law and place of arbitration as mutually agreed between the parties. The reference in clause 17 of the time charter was plainly a reference to the first alternative referred to in the BIMCO circular, the acronym LMAA obviously being a reference to the London Maritime Arbitrators Association. In the circumstances, the shorthand expressions used in clause 17 plainly incorporate the first choice of clause in the circular, in particular when one looks at its terms, which are as follows:

*This Contract shall be governed by and construed in accordance with English law and **any dispute arising out of or in connection with this Contract** shall be referred to arbitration in London in accordance with the Arbitration Act 1996 or any statutory modification or re-enactment thereof save to the extent necessary to give effect to the provisions of this Clause.*

The arbitration shall be conducted in accordance with the London Maritime Arbitrators Association (LMAA) Terms current at the time when the arbitration proceedings are commenced.

The reference shall be to three arbitrators. A party wishing to refer a dispute to arbitration shall appoint its arbitrator and send notice of such appointment in writing to the other party requiring the other party to appoint its own arbitrator within 14 calendar days of that notice and stating that it will appoint its arbitrator as sole arbitrator unless the other party appoints its own arbitrator and gives notice that it has done so within the 14 days specified. If the other party does not appoint its own arbitrator and give notice that it has done so within the 14 days specified, the party referring a dispute to arbitration may, without the requirement of any further prior notice to the other party, appoint its arbitrator as sole arbitrator and shall advise the other party accordingly. The award of a sole arbitrator shall be binding on both parties as if he had been appointed by agreement.

Nothing herein shall prevent the parties agreeing in writing to vary these provisions to provide for the appointment of a sole arbitrator.

In cases where neither the claim nor any counterclaim exceeds the sum of

USD50,000 (or such other sum as the parties may agree) the arbitration shall be conducted in accordance with the LMAA Small Claims Procedure current at the time when the arbitration proceedings are commenced.
[emphasis added]

10 Both proceedings were commenced by the plaintiffs in March 2003.

11 In 2003 both principals, ASC, apparently a Liberian corporation said to be the owner of the ship, which is Greek flagged, and Hyundai, I assume, a corporation of the Republic of Korea, had London solicitors. Mr Anicich of Sparke Helmore, who acts in Australia for Hyundai in respect of the proceedings, deposed in an affidavit read by Mr Nell that the London solicitors were retained “in relation to the claims arising out of the voyage [in question] ... including the claims which are the subject of these proceedings.” Ince & Co act for ASC. More Fisher Brown act for Hyundai.

12 In September, October, November and December 2003 correspondence took place between the London solicitors varying the dispute resolution mechanism. On 5 September 2003, Mr Herring of Ince & Co (for ASC) wrote to Mr Wright of Mr Fisher Brown (for Hyundai) saying:

As you know, the Charterparty between our parties provides that disputes will be referred to arbitration in London.

Our clients would prefer, if it can be agreed, that all disputes under the Charterparty be dealt with by the High Court of Justice in London, with English law to apply.

Please let us know whether your clients would be agreeable to varying the dispute resolution provision in the Charterparty so as to provide for High Court jurisdiction and English law.

13 Mr Herring wrote again on 2 October 2003 as follows:

I refer to previous correspondence.

Have you now obtained instructions from your clients as to whether they will be prepared to refer disputes under the Charter to the English High Court rather than to London arbitration? I would be grateful for your response on this.

You will recall that amongst the security given by the West of England they gave a Letter of Undertaking for US\$1,716,687.50. The Owners would now like to replace that security with a bank guarantee (probably from the Royal Bank of Scotland) in the same amount. Please confirm that your clients would

be agreeable to such a change.

14 On 12 November 2003, Mr Herring sent an email in the following terms:

Please come back to me re the jurisdiction issue. The owners want to progress their claims and if your clients are not prepared to agree High Court proceedings then our clients will appoint an arbitrator and give notice. I thought that you had expected firm instructions a few days back.

15 On 2 December 2003, at 12.19 pm London time, Mr Wright responded to Mr Herring's email in the following terms:

*Paul-sorry have been elusive. HMM agree to Court.
As regards guarantee can it just be signed by rbs? What is status of RBS shipping centre.
Payment in club letter was on demand. Can that be changed?
Agree with you that last para poses no problem.*

16 The notices of motion seeking leave to file and serve the cross-claim were dated the next day, 3 December 2003, and filed two days later. No point was made in argument about this chronology or timing.

17 Clause 42 of the time charter was a clause in a rider to the charter and was in the following terms:

Clause 42 NYPE Interclub Agreement

Liabilities for cargo claim shall be borne by the Owners and the Charterers in accordance with NYPE Interclub Agreement in February, 1970 and its reprints of May, 1984 and amendment thereto.

18 It is unnecessary to set out the full terms of the agreement referred to in clause 42 (the "Interclub Agreement"). It did not deal with jurisdiction or choice of law. Rather, it set out rules for apportionment of responsibility for cargo claims, that is to provide a mechanism and a basis for such apportionment. Whether or not it was a comprehensive mechanism or basis for such apportionment may be a matter that the parties will debate in due course.

19 Also, by clause 74, the time charter was said to be governed by English law.

20 By a voyage charter dated 7 January 2002 Hyundai chartered the *Alkimos* to Incitec for the carriage of 31,716 MT (5% more or less in owners' option) of fertilizer in three

grades. Pursuant to this voyage charter the ship loaded three consignments of fertilizer at Tampa in February 2002 for carriage to Australian ports. These consignments were shipped under two bills of lading each of which bills was an owner's bill signed on behalf of the master and issued on behalf of the owners of the ship, that is ASC.

21 At the same time, another consignment of 5,500 MT of fertilizer was also loaded on board the ship at Tampa for carriage to Australia. This consignment was shipped by Sumitomo under another bill of lading issued on behalf of ASC. This consignment was not shipped pursuant to Hyundai's voyage charter with Incitec. There was no contract or charter party between Hyundai and Sumitomo in relation to this consignment.

22 Upon the arrival of the *Alkimos* at Newcastle, residues of barley were found by AQIS in a number of the holds. As a consequence, only part of the Incitec cargo was allowed to be discharged. The remaining cargo on board the *Alkimos*, including the Sumitomo consignment, was resold and transported from Australia on the same ship to ports in Asia.

23 The cross-claims brought by the owner, ASC against the time charterer, Hyundai, are for contribution, on two bases. The first basis is as a joint tortfeasor pursuant to s 5(1)(c) of the *Law Reform (Miscellaneous Provisions) Act 1946* (NSW) (the "LR(MP) Act"). The second basis of the claim is by way of equitable contribution. There is no claim made in the cross-claim seeking to enforce the Interclub Agreement.

24 As can be seen from the above facts, there was originally an arbitration clause. If the relevant dispute fell within that clause (as in my view it does, see below) the time charterer, Hyundai, when faced with claims such as in the cross-claims brought in a court in Australia could have invoked s 7(2) of the *International Arbitration Act 1974* (Cth) (being Australian legislation which, amongst other things, gives effect to the New York Convention 1958 on international arbitration) to seek a mandatory stay of the proceedings, subject to the satisfaction of the terms of that provision. However, as can be seen from the above facts, and as was common ground between the parties in argument, the London solicitors for the parties agreed to the release of the provision for arbitration in favour of the High Court of Justice in London, presumably intending the Commercial Court in London.

25 Some debate took place before me over whether or not what had been put in place of the arbitration clause was an exclusive or a non-exclusive jurisdiction clause. Before dealing with that matter, I should add that neither party said that the scope of the dispute resolution

clause (whether exclusive or non-exclusive) had been widened or narrowed by the variation brought about by the London solicitors from the terms contained within the BIMCO arbitration clause. Thus, whether or not the dispute in question fell within the confines of the jurisdiction clause was to be gauged by reference to the terms of the original arbitration clause, that is whether the cross-claims reflected a “dispute arising out of or in connection with” the time charter.

26 It seems to me tolerably plain that the solicitors were agreeing to an exclusive English jurisdiction clause. There was a binding arbitration clause. The shipowner (ASC) was, it would seem, at least in September, threatening to take the matter to arbitration. The communications and the agreement were in the context of the claims being made against both parties in the Incitec proceeding and against ASC in the Sumitomo proceeding. This was not a general and non-specific variation to the arbitration clause; it was in connection with those live proceedings which would plainly involve, at some point, the need to resolve the question of the responsibility as between ASC and Hyundai for any success achieved by Incitec or Sumitomo in the proceedings. In those circumstances, it seems to me to be tolerably plain that the solicitors, and through them the parties, were specifically agreeing to the substitution of arbitration by an identified and precise form of litigation process – the High Court of Justice in London applying English law and procedure. That is made plain in the first two written communications from Ince & Co.

27 That being so, the relevant issues for determination are (a) whether ASC’s claims for contribution as set out in the two proposed cross-claims fall within the scope of the dispute resolution clause that Hyundai and ASC have agreed to; and (b) in the event that the claims do fall within that clause whether the prosecution of those cross-claims as against Hyundai should be allowed to proceed in this Court.

28 I express the matter this way because I am dealing with both the applications for leave to proceed against and join Hyundai on the cross-claims and the applications for a stay. It could equally be expressed as whether the cross-claims if allowed to be filed should be stayed.

Do the cross-claims fall within the dispute resolution clause?

29 The answer to this question is: yes. My reasons for so concluding are as follows.

30 The relevant words of the clause are:

any dispute arising out of or in connection with this Contract

31 Before turning to the case law, it is apposite to note that this is a clause agreed between international commercial parties, in respect of a contract (the time charter) which might well produce through its performance and in its life disputes brought by third parties against one or other or both of ASC and Hyundai in possibly disparate and varied legal systems. That is the natural possibility to be taken to be known to both such contracting parties in the deployment and operation of a time chartered container/ bulk carrier such as the *Alkimos*. These participants in international commerce who did not share a common domestic legal system chose one of the leading dispute resolution centres in the world and one of the leading centres for maritime arbitration. These are all matters well known to the parties who chose the clause provided by BIMCO. No fact is apparent which would lead one to expect from the surrounding circumstances that the parties were intending any narrow construction to be given to the words or to conclude that the clause was directed to some part of the mutual commercial affairs of the parties reflected in the time charter, and not another. Also, the presence of clause 42 in the time charter and the consequent conclusion that the parties expressly agreed upon a clause in the time charter dealing with the resolution of the responsibility for cargo claims would lead one to be careful before one concluded that the words of the incorporated arbitration clause were not intended to cover rights and liabilities *inter se* arising out of third party cargo claims.

32 The above considerations tend in favour of giving the words in question a wide or generous construction. The words themselves also lead one to conclude that what was intended was a reach of some width and liberality. In *IBM Australia Ltd v National Distribution Services Ltd* (1991) 22 NSWLR 466 the New South Wales Court of Appeal considered the words “any controversy or claim arising out of or related to this agreement or the breach thereof” in a domestic arbitration clause. It is unnecessary to examine the precise dispute in issue there. Kirby P (as his Honour then was) at 472 noted the trend of judicial authority to give some width to arbitration clauses; his Honour noted the width of the words “related to”; and his Honour examined the relevant English and Australian authorities. His Honour was of the view that such a clause was not to be narrowly construed: 477 B. Clarke JA noted that the words “in relation to” or “related to” are of the widest import and should not, in the absence of compelling reason to the contrary, be read down: 483. Handley JA expressed similar views at 487. The same could be said about the words “or in connection

with”, in particular in the context that I have described, and with clause 42 in the agreement.

33 In *Paper Products Pty Ltd v Tomlinsons (Rockdale) Ltd* (1993) 116 ALR 163 French J after reviewing *IBM* and other modern English and Australian authorities noted the profound change in the last quarter of the twentieth century in the relationship between the courts and arbitral procedures. French J expressed the view that with elastic words in an arbitration clause (such as here) a liberal approach to assessing what fell within them should be taken: see 172. I respectfully agree.

34 In *Ethiopian Oilseeds & Pulses Export Corporation v Rio Del Mar Foods Inc* [1990] 1 Lloyd’s Rep 86 Hirst J (as he then was) considered an arbitration clause using the words “out of or under the contract”. Hirst J reviewed the English authorities at 90 ff, noting the wide construction given to “arising out of”: 95-96, which included claims in tort.

35 The phrases used in the BIMCO clause are words to which the courts have given width and amplitude. The words are plainly wider than the expression of an intention to arbitrate only disputes over the terms of the time charter. To this extent what might be seen to be the narrower expression “arising from” was not used: cf *Hi-Fert Pty Ltd v Kiunkiang Maritime Carriers Inc* (1998) 90 FCR 1.

36 The clear tide of judicial opinion as to arbitration clauses, where the fair reading of them is not confined, is to give width, flexibility and amplitude to them: see also *Ashville Investments Ltd v Elmer Contractors Ltd* [1989] QB 488; *Dowell Australia Ltd v Triden Contractors Pty Ltd* [1982] 1 NSWLR 508, 515; *Roose Industries Ltd v Ready Mixed Concrete Ltd* [1974] 2 NZLR 246; *Wealands v CLC Contractors* [1999] 2 Lloyd’s Rep 739; *Societe Commerciale De Reassurance v Eras International Ltd* [1992] 1 Lloyd’s Rep 570; and *Francis Travel Marketing Pty Ltd v Virgin Atlantic Airways Ltd* (1996) 39 NSWLR 160, 165-6.

37 The dispute between the charterer and the owner as to responsibility *inter se* for cargo claims is integral to the substance and operation of the agreement, being an agreement for the deployment of a ship for the carriage of the goods of others. The parties dealt with the subject matter of cargo claims in clause 42. Such disputes arise out of or are in connection with the time charter. The time charter is not merely the background to such disputes as could be said about the relevant agreement in *Allergan Pharmaceuticals Inc v Bausch & Lomb Inc* (1985) ATPR 40-636; and cf *Francis Travel* at 166. Here, the claims for

contribution, though not founded on the Interclub Agreement, but on the justice and equity between tortfeasors or in equity, will throw up for consideration, at the centre of the adjustment of those rights, the Interclub Agreement made contractually relevant by the time charter. The extent to which the parties have, or have not, dealt in the Interclub Agreement with the particular cargo claim present in the proceedings will in all likelihood be of significant weight in the resolution of the cross-claims.

38 The existing authorities contain examples of claims for contribution falling within an arbitration clause: *Wealands* and *Societe Commerciale Re Reassurance*. Here, the time charter is governed by English law which has a contribution statute (*Civil Liability (Contribution) Act 1978*) as wide in its reach as (and probably wider than) the LR(MP) Act. There was no suggestion in argument that that English statute would be inapplicable to the foreign parties to the time charter who chose English law to resolve their disputes if that dispute was to be resolved in the London Commercial Court.

39 Dr Bell's argument has to depend on emphasising, as he did, the fact that no right arising out of the Interclub Agreement was being enforced and that the use of the LR(MP) Act and equitable contribution raised rights divorced from the time charter, not arising from the contract but imposed by domestic statute. I cannot agree. The words of the clause are wide and liberal. Plainly, cargo claim resolution *inter se* was intended to be covered. The precise local statutory right employed to vindicate such resolution does not affect that intended coverage.

40 The proposed cross-claims fall within the clause.

Should the cross-claims against Hyundai be stayed?

41 The answer to this question is: in all the circumstances, no.

42 The principles to be applied in deciding whether to stay proceedings brought in defiance of an exclusive jurisdiction clause were not in dispute. The discretion not to grant a stay requires substantial grounds. It is not a matter of mere convenience or of *forum non conveniens*. Brandon J (as he then was) in *The 'Eleftheria'* [1970] P 94, 99 said:

(1) Where plaintiffs sue in England in breach of an agreement to refer disputes to a foreign court, and the defendants apply for a stay, the English court, assuming the claim to be otherwise within its jurisdiction, is not bound to grant a stay but has a discretion whether to do so or not. (2) The discretion should be exercised by granting a stay unless strong cause for not doing so is

shown. (3) The burden of proving such strong cause is on the plaintiffs. (4) In exercising the discretion the court should take into account all the circumstances of the particular case.

43 This can be taken as the law in Australia: *Akai v PICC* (1977) 188 CLR 418, 427-8, 444-5; *FAI v Ocean Marine Mutual* (1997) 41 NSWLR 559, 569 and *Leigh Mardon Pty Ltd v PRC Inc* (1993) 44 FCR 88, 95-99. See also *The Ship 'Mill Hill'* (1950) 81 CLR 502, 508-9; and *Oceanic Sun Line v Fay* (1988) 165 CLR 197, 229, 259. The question is one of the exercise of a discretion in all the circumstances, but recognising that the starting point is the fact that the parties have agreed to litigate elsewhere, and should, absent strong countervailing circumstances, be held to their bargain.

44 Dr Bell pointed to various matters as to why ASC should be granted leave and why a stay should not be granted. First, there was no multiplicity of suits in different countries under bills of lading, which might lend weight to the choice of a single place to resolve the *inter se* dispute without being affected by the choices of a variety of third party plaintiffs. There was one major dispute, being brought in this Court with all relevant parties joined. Thus to allow the issues to be split between two courts would be contrary to the public interest in the resolution of disputes once. Secondly, those considerations were manifested in the public interest in not having witnesses disturbed for two hearings where one court seised of the matter could deal with the dispute. Thirdly, there was a public interest in not running the risk of inconsistent *curial* findings. This, it was said, was a consideration different from possible inconsistency between private arbitral findings and this Court's findings. Fourthly, it was said that the time charterer was unfairly putting the owner to unnecessary costs in duplicating litigation costs. Fifthly, it was said that no good reason or explanation had been given for not wanting to have the whole dispute resolved in the Federal Court which had full and complete jurisdiction to hear and determine all issues. Sixthly, Dr Bell laid great emphasis on the need for courts to resolve multi-party international litigation once in an appropriate place without bifurcations, duplications, risks of estoppels and inconsistent findings.

45 Here Dr Bell submitted the time charterer was taking "an available position without any apparent merit" with the consequence of risking inconsistent curial findings, causing unnecessary costs and potentially inconveniencing third party witnesses, without explaining its conduct. With respect that is not entirely the appropriate way to look at the matter. Two international commercial parties chose London arbitration and then the London Commercial

Court. Each is entitled to enforce its bargain. It does not have to justify its choice. It may be for tactical gain. So be it. That is the fruit of its bargain. It may well put parties in an unseemly position to have to explain to a court which is not the parties' forum of choice why they did not want to arbitrate or litigate in a place other than that which they have chosen in their bargain. ASC and Hyundai may or may not have had all sorts of reasons why they wanted their time charter litigation in London or why they were prepared to agree to such. It may have been out of an abiding trust in the English arbitration system or courts or in English lawyers, or it may have been out of distrust of courts or lawyers of other countries; it may have arisen from habit; it may have arisen from one or more other reasons. Generally speaking, a party, having bargained for a place of dispute resolution, should not have to go into its private reasons for agreeing to that place and for not wanting to litigate elsewhere.

46 There will, however, be a duplication if two proceedings go on in this Court and in the London Commercial Court. Mr Nell submitted that this is not an illustration of the contract breaking down or of something going wrong, but that it is a natural consequence of what the parties have agreed. Nevertheless, it is a consequence of the position taken by Hyundai in insisting on its rights.

47 At this point, one has the intersection of two powerful considerations in international litigation: first, the desire of courts to hold commercial parties to their bargain in terms of exclusive jurisdiction clauses; secondly, the desire of courts to avoid disruption and multiplicity of litigation, in particular a desire to avoid parallel proceedings and the risk of inconsistent findings, and to avoid the causing of inconvenience to third parties.

48 Dr Bell placed significant reliance on the judgments of the members of the House of Lords in *Donohue v Armco* [2001] UKHL 64; [2002] 1 Lloyd's Rep 425, especially the leading judgment by Lord Bingham of Cornhill.

49 At the outset, it should be recognised that the second competing consideration should not be expressed too broadly. To the extent that the operation of the exclusive jurisdiction clause causes financial or forensic inconvenience to the party which bound itself to the clause, that, of itself, is to be seen as only the direct consequence of the bargain entered and, generally, can be set to one side. What really are of importance in weighing against the operation of the exclusive jurisdiction clause are: (a) the inconvenience, if any, whether financial or other, caused to third parties; (b) the effect, if any, upon the due administration of justice; and (c) any other appropriate public policy consideration that can be discerned in

all the circumstances.

50 In *The 'Fehmarn'* [1958] 1 WLR 159 (though perhaps one can, to a degree, see the approach of courts in an era past) the position of witness was not unimportant. Also, the clause was a standard form, not, as here, a clause negotiated and amended between equal parties.

51 In *Evans Marshall & Co Ltd v Bertola SA* [1973] 1 WLR 349 Kerr J viewed the presence of witnesses in England as relevant; but of greater importance to him was the presence of a third party whose joinder had been made necessary by the conduct of the party seeking to rely on the clause. See also in the Court of Appeal at 377 and 385.

52 In *The 'El Amria'* [1982] 1 Lloyd's Rep 119, the cargo interests who had agreed to an exclusive jurisdiction clause with the carrier in a bill of lading also sued the relevant Harbour Board which was not bound by the clause. This arose from the carrier's plea that the deterioration of the cargo was caused because of the unreasonably slow date of discharge. Brandon LJ (as he then was) said at 128:

*I agree entirely with the learned Judge's view on that matter, but would go rather further than he did in the passage from his judgment quoted above. By that I mean that I do not regard it merely as convenient that the two actions, in which many of the same issues fall to be determined, should be tried together; rather that I regard it as a potential disaster from a legal point of view if they were not, because of the risk inherent in separate trials, one in Egypt and the other in England, that the same issues might be determined differently in the two countries. See as to this Halifax Overseas Freighters Ltd v Rasno Export; Technopromimport; and Polskie Linie Oceaniczne P.P.W. (The Pine Hill), [1958] 2 Lloyd's Rep. 146 and Taunton-Collins v Cromie & Others, [1964] 1 W.L.R. 633.
[emphasis added]*

A stay was refused.

53 These views of Brandon LJ were not merely based on, or expressed as, questions of convenience. They were an expression of the deep and strong antipathy of courts for the promotion of circumstances allowing for inconsistent curial approaches to the same dispute. This can be seen in an examination of the judgment of McNair J in *The 'Pine Hill'* [1958] 2 Lloyd's Rep 146, 150-52 where McNair J spoke of the judicial system being brought into disrepute by the possibility of conflicting findings. This passage from the judgment of McNair J resonated in the reasons of Lord Denning MR in *Taunton-Collins v Cromie* [1964] 1 WLR 633, 636.

54 In *Citi-March Ltd v Neptune Orient Lines Ltd* [1997] 1 Lloyd's Rep 72 Colman J in effect refused to enforce an exclusive Singaporean jurisdiction clause. Of great significance was the fact that the litigation would be split. The injustice perceived was denying a plaintiff the ability to sue all defendants in the one place. Here Hyundai will be denied one cross-defendant, whilst proceeding against others: the surveyor in the Incitec proceeding and the surveyor and Incitec in the Sumitomo proceeding. Colman J not only looked at the injustice to the parties but also the public policy involved in inconsistent findings: 77 and 78. Colman J referred to and relied on what Brandon LJ had said in *The 'El Amria'*.

55 A year later, Rix J in *Mahavir Minerals Ltd v Cho Yang Shipping Co Ltd* [1997] 1 Lloyd's Rep 566 referred with approval to *Citi-March*.

56 A concern for the importance of avoiding inconsistent findings can be seen in the judgments in the Court of Appeal in *Bouygues Offshore SA v Caspian Shipping Co* [1998] 2 Lloyd's Rep 461 at 470 per Sir John Knox. A separate, but related consideration, was the question of the effect on third parties: 466 per Evans LJ.

57 All these cases were reviewed by the House of Lords in *Donohue v Armco*. Lord Bingham also referred to the procedurally complex decision of Rix J in *Crédit Suisse First Boston (Europe) Ltd v MLC (Bermuda) Ltd* [1999] 1 Lloyd's Rep 767, where orders were made which contemplated fragmented litigation. Lord Bingham noted, however, at [2002] 1 Lloyd's Rep at 434-35, that it was not possible for Rix J to make an order ensuring a trial in one forum. At 436 Lord Bingham described the splitting of litigation as of "great weight". His Lordship said at 436:

A procedure which permitted the possibility of different conclusions by different tribunals, perhaps made on different evidence, would in my view run directly counter to the interests of justice.

...

In my opinion, and subject to an important qualification, the ends of justice would be best served by a single composite trial in the only forum in which a single composite trial can be procured, which is New York, and accordingly I find strong reasons for not giving effect to the exclusive jurisdiction clause in favour of Mr Donohue.

58 The qualification referred to by Lord Bingham was a condition protecting the litigant from the claims under United States so-called "racketeering" legislation: see 437.

59 Lord Mackay of Clashfern, Lord Nicholls of Birkenhead and Lord Hobhouse of Woodborough agreed with Lord Bingham. Lord Scott of Foscote expressed similar views. Lord Scott referred at 443 to the “evident absurdity” of requiring separate hearings in different countries.

60 Similar sentiments concerning the potential costs and inconvenience in international maritime jurisdiction caused by fragmentation of litigation were expressed by Lord Goff of Chieveley on behalf of the Privy Council in *The ‘Pioneer Container’* [1994] 2 AC 324, 334-35.

61 Here, the proceedings have been brought in Australia by plaintiffs not bound by the relevant clauses. Orders have been made at the request of ASC for the service of the surveyor who, it is said, negligently undertook his task. Both parties to the clause are defendants in one proceeding. One party to the clause (ASC) has cross-claimed against the time charterer’s voyage charterer (Incitec). If the clause is enforced, the dispute over responsibility for the presence of grain and the consequences thereof will have to be litigated twice. It is impossible to state with any confidence that no third party who is involved in the proceedings in this Court, Incitec, Sumitomo or the surveyor, may not also be dragged into the London proceedings.

62 The very existence of the possibility, if not probability, of duplicated litigation is, on modern authority of the highest persuasive stature a cogent consideration in assessing the effect of an exclusive jurisdiction clause. This is for good and powerful reasons based on the cost and inconvenience of litigation and the desire not to foster the circumstances of courts coming to different conclusions about the same facts on perhaps different, or even the same, evidence. If I may be permitted to say, respectfully, the views of judges of such eminence and experience as McNair J, Lord Denning, Lord Brandon, Colman J, Rix J and the Law Lords in *Donohue v Armco* are overwhelmingly persuasive of the great importance of this consideration. Related to it, but a distinct and equally powerful consideration in the administration of justice, is the inability to be certain that third parties, whether as witnesses or as parties, will not become involved in the London proceedings as well as the Australian proceedings at duplicated inconvenience and cost. Mr Nell says that the London proceedings will only be between ASC and Hyundai. That might be able to be said with confidence if it were to be an arbitration. It cannot be said with any confidence if curial proceedings are brought. I cannot be clear who might be joined, by ASC or Hyundai, depending on the

progress and flow of proceedings there and here. The promotion of duplication may tend to encourage parties to view the interconnection and overlap of the cases as a field of potential tactical advantage. That is something which should be avoided and which can be avoided if it is possible to have all aspects of the dispute resolved in one convenient location.

63 These considerations are not conclusive but they are very persuasive.

64 Set against this is the strong consideration of holding ASC to its bargain, especially one so recently varied. It might be said, and Mr Nell submitted, that to give the need for one unified forum too much weight is to erode impermissibly the weight of the contractual bargain. Nevertheless, in all the circumstance, in particular in the light of the fact that this Court can through one of the four Admiralty and Maritime Panel Judges in Sydney promptly hear the whole controversy involving all cargo, shipping and ancillary interests and that there are not a multiplicity of pieces of litigation scattered around the world, and considering the interests of justice and in particular the undesirability of promoting potentially conflicting litigation, with the additional risk of inconveniencing third parties not party to the clause, I think that there are strong grounds not to prevent ASC litigating its cross-claims against Hyundai in this Court.

65 In coming to this conclusion I am mindful that there was an arbitration clause which, left untouched, may well have led to a mandatory stay. However, implicit within the chosen replacement, the High Court of Justice, is the potential for inconsistent *curial* findings of equivalent superior courts and the risk of inconvenience to third parties by the use of compulsory curial process, not available in arbitral proceedings.

66 The balance is a fine one, but overall in my view this Court should not promote competing and potentially conflicting litigation in circumstances where one venue can conveniently and promptly deal with the whole controversy.

67 I am mindful that my conclusion is one which permits the owner to undertake a course contrary to its contract. In particular in the light of those circumstances, and the entirely legitimate and reasonable approach adopted by Mr Nell in argument on behalf of Hyundai, I will hear the parties on costs.

I certify that the preceding sixty-seven (67) numbered paragraphs are a true copy of the Reasons for Judgment herein of the Honourable

Justice Allsop.

Associate:

Dated: 3 June 2004

Counsel for ASC: Dr A Bell

Solicitor for ASC: Middletons

Counsel for Hyundai: Mr G Nell

Solicitor for Hyundai: Sparke Helmore

Date of Hearing: 13 May 2004

Date of Judgment: 3 June 2004