

GENERAL DISTRIBUTION

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

**NG 1082 OF 1997
NG 1084 OF 1997
NG 1001 OF 1998**

**BETWEEN: HI-FERT PTY LIMITED
 APPLICANT**

**AND: UNITED SHIPPING ADRIATIC INC
 FIRST RESPONDENT**

**MARINE CARGO CARE PTY LIMITED
SECOND RESPONDENT**

**HYUNDAI MERCHANT MARINE CO LIMITED
THIRD RESPONDENT**

JUDGE: EMMETT J

DATE: 3 DECEMBER 1998

PLACE: SYDNEY

CORRIGENDUM

Substitute the file number “NG 1084 of 1997” for “NG 1984 of 1997” wherever occurring.

I certify that this is a true and
correct copy of the
corrigendum to the ex tempore
Reasons for Judgment of
Emmett J.

Associate:

Dated: 28 July 1999

IN THE FEDERAL COURT OF AUSTRALIA NG 1082 of 1997
NEW SOUTH WALES DISTRICT REGISTRY NG 1084 of 1997

BETWEEN: HI-FERT PTY LIMITED
Plaintiff

AND: UNITED SHIPPING ADRIATIC INC.
First Defendant

MARINE CARGO CARE PTY LIMITED
Second Defendant

HYUNDAI MERCHANT MARINE CO LIMITED
Third Defendant

JUDGE: EMMETT J

DATE: 3 DECEMBER 1998

PLACE: SYDNEY

CORRIGENDA AND ADDENDUM

TO REASONS FOR JUDGMENT OF EMMETT J

DELIVERED ON 3 DECEMBER 1998

1. On page 10 of judgment, thirteenth line, following the words “*Henry v Henry*” delete “(1996) 135 ALR 564” and substitute “(1996) 185 CLR 571”.
2. Page 16 of judgment, second line, insert “be” after the words “it would”.
3. Page 47 of judgment, above the heading “Conclusion as to Stay Applications”, insert the following:

DISCRETIONARY GROUNDS

Once it is accepted that section 11 has the effect which I have held it has and that there has been no *ad hoc* submission, there is no basis for contending that the Federal Court is a

clearly inappropriate forum for the claims against United. The principles enunciated in *Voth* and *Henry* have no application in the present case. That is to say, I do not consider that it would be oppressive or vexatious (as those terms are explained in *Henry* at 587) for Hi-Fert to prosecute its claim against United in the Federal Court. That is to say, it would not be “seriously and unfairly burdensome, prejudicial or damaging”. Nor would it be “productive of serious and unjustified trouble and harassment”.

4. On page 47 of judgment, in the fifth line under the heading “Conclusion as to Stay Applications”, before the words “Hi-Fert and Hyundai”, insert the following:

“However, the claims against Hyundai which can be characterised as contractual claims should be stayed.”

Replacement pages are attached.

I certify that this is a true copy of
corrigenda and addendum made
to the reasons for judgment in this
matter of the Honourable Justice Emmett.

Associate:

Dated: 30 December 1998

IN THE FEDERAL COURT OF AUSTRALIA
NEW SOUTH WALES DISTRICT REGISTRY

NG 1082 of 1997
NG 1984 of 1997
NG 1001 of 1998

BETWEEN: HI-FERT PTY LIMITED
Applicant

AND: UNITED SHIPPING ADRIATIC INC.
First Respondent

MARINE CARGO CARE PTY LIMITED
Second Respondent

HYUNDAI MERCHANT MARINE CO LIMITED
Third Respondent

JUDGE: EMMETT J

DATE: 3 DECEMBER 1998

PLACE: SYDNEY

EX TEMPORE REASONS FOR JUDGMENT

HIS HONOUR: I have before me two separate proceedings arising out of the carriage of a cargo of urea from Qatar to Australia. The plaintiff in proceedings NG 1082 of 1997 ("the Main Proceeding") is Hi-Fert Pty Limited ("Hi-Fert"). The defendants are United Shipping Adriatic ("United"), Marine Cargo Care Pty Limited ("Marine") and Hyundai Merchant Marine Co Limited ("Hyundai"). The second proceeding which I have before me is NG 1001 of 1998 ("the Injunction Proceeding"). The Injunction Proceeding involves an application by Hi-Fert to restrain proceedings which have been commenced in England by United. United has commenced arbitration proceedings in respect of its claim against Hi-Fert and has also commenced proceedings in the High Court seeking to restrain the prosecution of the Main Proceeding.

Hi-Fert was the consignee of a cargo of urea which was shipped on the MV Uljanik on 27 May 1997. United is the owner of the Uljanik. A bill of lading ("the Bill of Lading") in respect of the cargo was issued by the Master of the Uljanik at Mesaieed in Qatar. The cargo was carried pursuant to a contract of affreightment ("the Voyage Charter"), entered into between Hi-Fert

and Hyundai on 2 May 1997. The Uljanik had been the subject of a time charter (“the Head Charter”) from United to Rondeau Bulk AG (“Rondeau”) dated 12 November 1996. Rondeau in turn had entered into a subcharter (“the Sub Charter”) with Hyundai on 30 April 1997.

Marine was appointed by Hi-Fert to provide inspection services on vessels intended to load cargoes of fertilisers for importation into Australia by Hi-Fert. In particular, Marine was instructed to provide such inspection services in connection with the cargo loaded on the Uljanik.

When the Uljanik arrived at its port of destination in Port Lincoln, South Australia, the Australian Quarantine Inspection Service (“AQIS”) detained it and prevented discharge of part of the cargo. The residue of an earlier cargo of wheat was alleged to have been found in certain of the holds of the Uljanik. That earlier cargo was said to have originated in North America and, accordingly, it was said that there was a risk of a quarantinable disease known as karnal bunt. Introduction of that disease into Australia could be highly prejudicial to Australia.

By reason of the action of AQIS, the Uljanik was delayed in Adelaide. That delay has also given rise to disputes between Rondeau and United under the Head Charter, between Rondeau and Hyundai under the Sub Charter and between Hyundai and Hi-Fert under the Voyage Charter.

Because it was not permitted to unload the whole of the cargo of urea in Australia, Hi-Fert sold part of the cargo overseas to Thailand. Hi-Fert contends that, as a consequence, it has suffered a loss of approximately \$3 million. Hi-Fert claims to be entitled to recover damages from United under the Bill of Lading. It also claims to be entitled to damages from Marine as a consequence of alleged failure by Marine to discover the residue of wheat when the Uljanik was inspected at Qatar. Hi-Fert also claims to be entitled to damages from Hyundai by reason of conduct alleged to be misleading or deceptive under the *Trade Practices Act 1974* (Cth). Finally, although not unimportantly, United also claims to be entitled to recover damages from Hi-Fert arising out of the delay of the Uljanik in South Australia.

The factual matrix within which the issues arise, or are said to arise, may be significant and it is therefore necessary to consider the allegations which are made in the various proceedings. In its statement of claim in the Main Proceeding, Hi-Fert makes various allegations against

United, Marine and Hyundai. Inextricably involved in all of the allegations is the conduct of Marine in relation to the inspection which it was retained to carry out in Qatar.

I shall summarise the claims which Hi-Fert makes against the three defendants, first dealing with United:

1. On or prior to 26 April 1997, United made a representation to Hyundai that the second of the last six cargoes carried by the Uljanik was soya bean meal from Colombia River to the Philippines.
2. United intended that the representation should be communicated to Hi-Fert and be acted on by Hi-Fert.
3. The representation was false, in that the Uljanik had loaded northern spring wheat at Vancouver, Washington, USA in holds 1, 3 and 4 on her second voyage, for discharge in the Philippines.
4. The representation was made with knowledge that it was false or without belief in its truth or recklessly not caring whether the representation was true or false.
5. On 2 May 1997, acting on the faith of the representation and induced thereby, Hi-Fert entered into the Voyage Charter with Hyundai.
6. On 23 May 1997 at Bahrain, the master of the Uljanik, acting for and on behalf of United, represented to Captain Peter Fogarty, an employee of Marine, that the Uljanik had a cargo history consisting of carriage of soya beans from the USA to the Philippines.
7. On the same day, United, by its servant or agent, the master of the Uljanik, represented to Captain Fogarty that the vessel since its commissioning had not carried any grain.
8. The representations were false and were made with the knowledge that the representations were false or without belief in the truth of each representation or recklessly not caring whether each representation was true or false.

9. The representations were intended to be acted upon by Hi-Fert or its appointed surveyor, Captain Fogarty, for the purposes of leading Hi-Fert to believe that the Uljanik was in all respects seaworthy and fit to load the cargo.
10. Acting on the faith of the representations, Hi-Fert dispensed with further inspection and cleared the Uljanik to proceed from its port of inspection to the port of loading.
11. United, by its servant or agent, the master of the Uljanik, issued a bill of lading dated 27 May 1997 in respect of the cargo of urea. That bill of lading incorporated into it so much of the Voyage Charter as warranted by clause 35 that the cargo history of the Uljanik comprised in respect of its second voyage, the carriage of soya bean meal from Colombia River to the Philippines.
12. That representation was false and was made with the intention that it should be acted upon by Hi-Fert.
13. The representation alleged to have been made in the bill of lading was made by United with the knowledge of its falsity or without belief in its truth or recklessly not caring whether it was true or false.
14. Acting in reliance upon the representation by United, Hi-Fert accepted the bill of lading and paid for the cargo.
15. The contract of carriage comprising the bill of lading incorporated so much of the Voyage Charter as provided that the Uljanik's holds would be free from residues of any previous cargoes, particularly grain, such that there would be zero tolerance for grain residues before commencement of loading to the satisfaction of an independent inspector appointed and paid for by Hi-Fert.
16. In breach of that provision, the Uljanik's holds were not free from residues of previous cargoes but contained residues of wheat and, in breach of the warranty incorporated in the bill of lading, the Uljanik's prior cargo history was false and had carried wheat of United States origin.

17. In making the representations referred to, United was under a duty of care to Hi-Fert and in breach of the duty it made the representations when they were untrue.
18. By the bill of lading, United acknowledged shipment on board the Uljanik of the cargo and, accordingly, United was under a duty as carrier by sea for reward to deliver the cargo in the same good order and condition as when shipped.
19. In breach of that duty and of contract United failed to carry and deliver the cargo in the same good order and condition as when shipped.
20. The loss and damage alleged by Hi-Fert was caused by the negligence of United in breach of its duty as carrier and as bailee for reward.
21. The contract evidenced by the bill of lading was subject to the Hague-Visby rules which imposed an obligation on the carrier to make the ship seaworthy, to man, equip and supply the ship properly and to make the holds and all other parts of the ship in which the goods were carried fit and safe for their reception, carriage and preservation.
22. In breach of contract or of duty, United failed to make the Uljanik seaworthy, failed properly to man, equip and supply the Uljankik and failed to make the holds fit for reception.

It can be seen from that summary of the claims made against United by Hi-Fert that the involvement of Marine and the part played by Captain Fogarty is of some significance.

The claim made against Marine may be summarised as follows:

1. Marine agreed with Hi-Fert for reward to provide inspection services on vessels intended to load cargoes of fertilisers for importation into Australia.
2. It was an express or implied term of that agreement that Marine would carry out its vessel inspections in accordance with guidelines annexed to the agreement which included a requirement to complete a record of past cargoes form to record details of cargoes carried during the past 12 months.

3. In breach of the agreement, Marine, by its agent, Captain Fogarty, did not refer to the Uljanik's log books or manifests when preparing the record of past cargoes form, whereby the form omitted to record that the Uljanik had carried a cargo of wheat during the past 12 months.
4. It was a further term of the agreement that all surfaces of the holds to be loaded with the fertiliser and their hatches were to be physically inspected and that, in breach of that term, Marine, by its servant or agent, Captain Fogarty, did not inspect the parts of the Uljanik's holds sufficiently or at all whereby wheat in holds 1, 3 and 4 was not detected or removed.
5. It was a further term of the agreement that the inspection would be carried out to a standard whereby no contamination was acceptable and that the holds and hatches would be free from any previous cargo residue.
6. In breach of that term, Marine, by its servant or agent, Captain Fogarty, did not carry out its inspection to the required standard whereby wheat in holds 1, 3 and 4 was not detected or removed.
7. Marine owed Hi-Fert a duty of care in and about the inspection of the Uljanik and that, in breach of that duty, Marine, by its servant or agent, Captain Fogarty, was negligent in and about its inspection of the Uljanik.

In the arbitration proceedings, which have been commenced in London in circumstances which I shall describe shortly, United makes a number of allegations against Hi-Fert. I summarise those as follows:

1. The Bill of Lading contained and/or evidenced a contract of carriage between United and Hi-Fert.
2. The following were implied terms of the Bill of Lading which were said to be implied pursuant to the express terms of the Bill of Lading or as a matter of business efficacy:
 - (a) Hi-Fert would appoint a competent surveyor to carry out the inspection of the Uljanik's holds.

- (b) Hi-Fert, its servants or agents, would exercise all reasonable skill and care in and about the inspection of the Uljanik's holds in satisfying themselves that the Uljanik was fit to discharge the cargo in Australia and in particular that the Uljanik's holds would satisfy the requirements of zero tolerance and in advising United as to what measures were needed in order to ensure that the Uljanik was fit to discharge the cargo in Australia, and in particular that the Uljanik had achieved the required standard of zero tolerance.
3. In May 1997, the Uljanik proceeded to Bahrain for an inspection of her holds prior to loading the cargo in Qatar under the Bill of Lading.
 4. Hi-Fert appointed Captain Peter D. Fogarty of Marine Cargo Care as their nominated surveyor to inspect the Uljanik's holds.
 5. Captain Fogarty inspected the Uljanik's holds on a daily basis during the course of the Uljanik's stay at Bahrain.
 6. During the course of his visits, Captain Fogarty advised the chief officer of the Uljanik as to the appropriate hold cleaning procedure in order to satisfy the requirements of the Australian authorities.
 7. Those procedures were duly followed by the chief officer and crew.
 8. Captain Fogarty indicated that he was satisfied with the work carried out by the Uljanik's crew and with the condition of her holds. He also indicated that, following discussions with Hi-Fert, cleaning would have to be completed in Qatar where he would carry out a further inspection.
 9. During the course of inspection in Bahrain, Captain Fogarty inspected the Uljanik's cargo records and from that inspection was aware that the Uljanik had previously carried a part wheat cargo and expressly mentioned this to the chief officer. However, when he compiled the record of past cargoes, Captain Fogarty failed to include the wheat cargo in his record.

10. The Uljanik anchored at Mesaieed in Qatar, where her holds were subject to further inspection by Captain Fogarty who advised the master and chief officer that he was satisfied as to the cleanliness of the Uljanik's holds. He provided the Uljanik with a certificate of hold's cleanliness in which he certified that, based on careful internal visual inspection, the Uljanik's holds were found clean, dry and free from loose and flaking rust and from residues of the previous cargo.
11. As a result of the refusal of AQIS to allow the cargo to enter Australia, Rondeau have alleged the Uljanik was off hire for a period after 18 July 1997 and had withheld hire in the sum of \$US453,439 in respect of alleged off hire, together with sums of \$US12,322.89 and \$US13,763.22 in respect of alleged off hire bunkers.
12. United contends that, while it disputes Rondeau's entitlement to make the deductions, if Rondeau is held to be entitled to make the deductions in respect of hire and bunkers, United will contend that the losses which they would thereby suffer were caused by the negligence and/or breaches of contract on the part of Hi-Fert, their servants and agents in that they:
 - (a) failed to appoint a competent surveyor to carry out the inspection at Bahrain and Qatar; and
 - (b) through their surveyor, failed to exercise all reasonable skill and care in and about the inspection of the Uljanik.

Thus, again, it is apparent that the claim made by United against Hi-Fert involves the part played by Captain Fogarty in the inspection of the Uljanik in Bahrain and in Qatar.

In the Main Proceeding, United has filed a notice of motion in which it seeks the following relevant relief:

1. That the proceedings against United be stayed permanently upon the grounds:
 - (a) that Hi-Fert and United have agreed to submit disputes arising from the Bill of Lading for arbitration in London and that section 7(2) of the *International Arbitration Act 1974* (Cth) requires the Main Proceeding to be stayed;
 - (b) to the extent, if any, that the Main Proceeding is not stayed pursuant to section 7(2) of the *International Arbitration Act*, that Australia is a clearly inappropriate forum for the determination of the balance of the proceedings.

2. If United obtains a permanent or temporary stay of Hi-Fert's action against it, Hi-Fert's action against Marine and Hyundai, and Marine's cross claim be temporarily stayed until the conclusion of the arbitral proceedings in London referred to in the affidavit of Ian Peter Davis, sworn on 17 August 1998 and filed in the Main Proceeding.

In its notice of motion filed on 17 November 1998, Hyundai seeks the following relief:

1. That pursuant to section 7 of the *International Arbitration Act 1974*, the proceedings by Hi-Fert against Hyundai be permanently stayed;
2. That the proceedings on the cross claim by Marine against Hyundai be temporarily stayed pending the outcome of the London arbitration proceedings between them.

In the Injunction Proceeding, on the other hand, Hi-Fert seeks an injunction restraining United from:

- 1 Prosecuting or otherwise taking any step in the arbitration commenced by United in London against Hi-Fert; and
2. Taking any step to continue the proceedings commenced by United against Hi-Fert in which United seeks to restrain Hi-Fert from further prosecuting the Main Proceeding.

ISSUES

United contended that it is entitled to a stay on the following grounds:

1. The Bill of Lading contained by incorporation an arbitration agreement within the meaning of the *International Arbitration Act 1974* and as such United is entitled to a stay of the Main Proceeding by virtue of section 7(2) of that Act;
2. In addition, a separate agreement to arbitrate *ad hoc* has come into existence as a result of which United is entitled to a stay of proceedings pursuant to section 7(2) of the *International Arbitration Act*;
3. Alternatively, United is entitled to a stay in the Main Proceeding on discretionary grounds, pursuant to the principles enunciated by the High Court in *Voth v Manildra Flour Mills* (1990) 171 CLR 538 and *Henry v Henry* (1996) 135 ALR 564.

Those contentions and the response of Hi-Fert raise a number of issues for determination, as follows:

1. Whether the Bill of Lading incorporates clause 34 of the Voyage Charter, such that it can be said that there is an arbitration agreement between Hi-Fert and United.
2. Whether the conduct of Hi-Fert, through its London solicitors, in response to its commencement by United of arbitration proceedings against Hi-Fert in London, constituted an *ad hoc* submission to arbitration in London of all disputes under the Bill of Lading, including Hi-Fert's claim in respect of loss of or damage to the cargo. That raises, in particular, the question of whether, notwithstanding its participation in the arbitration proceedings in London, Hi-Fert effectively reserved its position so as to be able to challenge the substantive jurisdiction of the arbitrators to rule on the merits of the dispute so far as Hi-Fert is concerned.
3. Whether section 11 of the *Carriage of Goods by Sea Act 1991* (Cth) ("COGSA") applies to either of those arbitration agreements such that it has no effect insofar as it would preclude or limit the jurisdiction of the Federal Court in respect of the Bill of Lading. In particular, whether, because clause 34 provides that the Voyage Charter, and therefore the Bill of Lading, is to be governed and construed in accordance with English law, section 11 of COGSA has no application to the arbitration agreement incorporated in the Bill of Lading.
4. Whether, following the amendment of COGSA by the *Carriage of Goods by Sea Amendment Act 1997* ("the Amendment Act") and the *Carriage of Goods by Sea Regulations 1998*, section 11 of COGSA does not have any operation with respect to the arbitration agreement incorporated in the Bill of Lading.
5. Whether section 11 applies to an *ad hoc* submission to arbitration of an existing dispute.
6. Whether the effect of an undertaking given by the North of England P & I Association Limited ("North of England") on 13 August 1997 had the effect of varying the arbitration agreement incorporated from the Voyage Charter such that it was inoperative within the meaning of section 7(5) of the *International Arbitration Act*.

7. Whether it is appropriate to stay the Main Proceeding insofar as it involves determination of matters which are not capable of settlement by arbitration at least temporarily pending the resolution of the arbitration proceedings in London. That question also raises the stay of proceedings against Marine and, accordingly, the stay of Marine's cross claim against United.

INCORPORATION OF CLAUSE 34 WITH BILL OF LADING

It is necessary to say something about the various charter parties to which I have already made some reference. It was a term of the Head Charter that the captain of the vessel would prosecute his voyages with the utmost dispatch and would render all customary assistance with the ship's crew and equipment. Clause 8 provided:

The Captain (although appointed by the Owner) shall be under the orders and directions of the Charterers as regards employment and agency; and Charterers are to load, stow, trim, dunnage, lash, secure, tally and discharge the cargo at their expense under the supervision of the Captain, who is to sign Bills of Lading for cargo as presented, in conformity with Master's or Tally Clerk's receipts.

Clause 55 of the Head Charter provided:

Charterers or their agents are authorised to issue and sign Bills of Lading on Owners and Master's behalf on Charterer's usual form for cargo as presented, but always in conformity with Mate's receipt. Charterers to indemnify Owners against any consequences of Master, charterers or their Agents signing and issuing Bills of Lading as aforesaid.

Similar provisions to those are also contained in the Sub Charter. Thus it is clear that any bill of lading issued by the master was issued on behalf of United such that any contract constituted or evidenced by the Bill of Lading was a contract between United and the holder of the Bill of Lading.

The Voyage Charter provided as follows:

Clause 9

The Captain to sign Bills of Lading at such rate of freight as presented without prejudice to the Charterparty.

.....

Clause 20

Vessel's holds, hatches and working areas to be clean, dry and free from rust, rust scale and residues of any previous cargoes, particularly grain where there will be zero tolerance for grain residues, before commencement of loading to the satisfaction of an independent inspector appointed and paid for by Charterers.

.....

Clause 34

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, and any subsequent Acts, in London, each party appointing an Arbitrator, and the two Arbitrators in the event of disagreement appointing an Umpire whose decision shall be final and binding upon both parties hereto.

This Charter Party 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.

Any claim must be in writing and claimant's Arbitrator appointed within six months of the Vessel's arrival at final point of discharge, otherwise all claims shall be deemed to be waived.

The Bill of Lading is expressed to have been issued at Mesaieed, Qatar on 27 May 1997 and is signed by the master of MV Uljanik. It contains no reference to United. It names Hydro Asia Trade Pte Ltd ("Hydro") as shipper and Hi-Fert as consignee. The port of discharge is described as "Australia Port(s)". The cargo is described as granular urea in bulk and its gross weight is stated as 27,000 metric tonnes net.

On the face of the Bill of Lading there are typed the words "*Freight payable As Per Governing Charter Party*". In a printed box the following printed words appear: "*Freight payable as per CHARTER-PARTY dated*". On the reverse of the Bill of Lading the following relevant conditions of carriage appear.

- (1) *All terms and conditions, liberties and exceptions of the Charter Party dated as overleaf including the Law and Arbitration Clause are herewith incorporated.*
- (2) *General paramount clause*
 - (a) *The Hague Rules contained in the International Convention for the unification of certain rules relating to Bills of Lading, dated Brussels, 25th August 1924 as enacted in the country of shipment shall apply to this Bill of Lading. When no such enactment is in force in the country of shipment, the corresponding legislation of the country of destination shall apply, but in respect of shipments to which no such enactments are compulsorily applicable, the terms of the said Convention shall apply.*
 - (b) *Trades where Hague-Visby Rules apply.*
In trades where the International Brussels Convention 1924 as amended by the Protocol signed at Brussels on February 23rd 1968 - the Hague Visby Rules - apply compulsorily, the provisions of the respective legislation shall apply to this Bill of Lading.
 - (c) *The carrier shall in no case be responsible for loss of or damage to the cargo, howsoever arising prior to loading into and after discharge from the Vessel or while the cargo is in the charge of another Carrier nor in respect of deck cargo or live animals.*

It is common ground that a contract came into existence between United and Hi-Fert by the issue of the Bill of Lading. The first question, however, is whether, as a matter of construction, the words of the Voyage Charter, if clause 34 is incorporated with the Bill of Lading, are apt to deal with the questions which arise in the proceedings. Can it be said that the claims made by Hi-Fert against United in the Main Proceedings give rise to disputes “*arising from this charter or any bill of lading issued hereunder*”?

Hi-Fert contended that when those words are incorporated verbatim in the Bill of Lading they are not apt to describe the claims made in the Main Proceeding. That is because the expression “*this charter*” cannot refer to the Bill of Lading nor could the Bill of Lading properly be described as having been issued “*under the charter*” insofar as the charter is a reference to the Voyage Charter. It would not make sense to refer to the Bill of Lading as “*the charter*” because that would involve the Bill of Lading being issued under the Bill of Lading. Hi-Fert contended that, in those circumstances, clause 34, even if incorporated in the Bill of Lading, would not govern the claims made by Hi-Fert against United. Incorporation of the words into the Bill of

Lading would assist United in no way because those words relate to disputes between Hi-Fert and Hyundai, whereas the Bill of Lading is a contract between Hydro and United, the benefit of which was assigned, upon Hi-Fert becoming the holder of the Bill of Lading.

For clause 34 to make sense as a condition of the Bill of Lading, it would be necessary to amend the wording by deleting the words “*charter or any bill of lading issued hereunder*” and substituting “*bill of lading*” so that the clause reads:

Any dispute arising from this bill of lading shall be settled in accordance with the provisions of the Arbitration Act (1950).

As a matter of making sense of condition (1), that is the way in which it would have to be construed. Hi-Fert contended that, while it may be appropriate to manipulate a clause of a charter party relating to shipment, carriage and delivery, it is not appropriate to manipulate the words of a clause relating to arbitration insofar as the charter party is incorporated with a bill of lading.

A clause which is directly germane to the subject matter of a bill of lading, such as shipment, carriage and delivery of the goods, can and should be incorporated with the bill of lading contract, even though it may involve a degree of manipulation of the words in order to fit exactly the bill of lading. However, if the clause is one which is not directly germane in that sense, it should not be incorporated into the bill of lading contract, unless it is done explicitly in clear words either in the bill of lading or in the charter party - see per Lord Denning in *The Annefield* [1971] P 168 at 184.

The contention was that an arbitration clause is not directly germane to the shipment, carriage and delivery of goods within that test and, accordingly, such a clause should not be incorporated by general words in the bill of lading. However, it is explicit in what his Lordship said that the position will be different where there is an express reference to arbitration clauses as there is in condition (1). Thus, while it may not be appropriate, in the absence of the express words, for an arbitration clause to be incorporated in a bill of lading if, without some manipulation, the arbitration clause made no sense, it is consistent with what Lord Denning said that an express incorporation will justify some manipulation in order to give effect to the parties’ stated intention.

Once it is accepted that condition (1) is a term of the contract between United and Hi-Fert, the Court must make some effort to give sense and meaning to the express reference to the incorporation of “*the Law and Arbitration Clause*”. While there is some obscurity in the Bill of Lading insofar as there is no express identification of the Voyage Charter, it is common sense to conclude that the governing charter party intended to be referred to by the typed words was the Voyage Charter since that is the instrument pursuant to which this cargo was loaded in Qatar.

Accordingly, I consider that clause 34 of the Voyage Charter is to be taken to be incorporated as a term and condition of the Bill of Lading “*manipulated*” in order to make sense in the manner which I have suggested above. Thus, there should be taken to be a condition of the Bill of Lading that any dispute arising from the Bill of Lading should be settled in accordance with the provisions of the *Arbitration Act 1950*.

Hi-Fert also contended alternatively, or perhaps in addition, that clause 34 cannot be incorporated with the Bill of Lading because it would inconsistent with the operation of condition (2). Hi-Fert contended that the steps which would be required to be undertaken in order to give effect to condition (2) are along the following lines:

- Have the Hague Rules been enacted in Qatar? If so, then they apply by operation of condition (2)(a).
- If not, do the Hague-Visby Rules apply compulsorily by the legislation of Qatar as the country of shipment or Australia as the country of destination? If so, the respective legislation of those countries applies to the Bill of Lading under condition (2)(b).
- If not, legislation corresponding with the Hague Rules in Australia, as the country of destination, applies by the operation of condition (2)(a).

Hi-Fert contended that the Hague-Visby Rules are made applicable by the operation of section 8 of COGSA and that it is necessary, therefore, to consider whether or not Qatar has enacted the Hague Rules. Section 8 of COGSA provides that the “*amended Hague Rules*”, being the modified Hague-Visby Rules following the amendment to section 7, “*have the force of law in*

Australia". Section 10 qualifies that provision in a manner which is not presently relevant. It is necessary therefore to look to the amended Hague Rules or the Hague-Visby Rules themselves as set out in Schedule 1 to COGSA to determine whether, according to the operation of the Rules themselves, they have application to a particular case.

Article 10 of the Hague-Visby Rules, as originally incorporated in Schedule 1 of COGSA, relevantly provided as follows:

The provisions of this Convention shall apply to every Bill of Lading relating to the carriage of goods between ports in two different States if:

- (a) the Bill of Lading is issued in a Contracting State; or*
- (b) the carriage is from a port in a Contracting State; or*
- (c) the contract contained in or evidenced by the Bill of Lading, provides that rules of this Convention or legislation of any State giving effect to them are to govern the contract,*

whatever may be the nationality of the ship, the carrier, the shipper, the consignee or any other interested person.

It is common ground that Qatar is not a Contracting State. Accordingly, paragraphs (a) and (b) of Article 10 have no application. It is significant that paragraph (c) is operative only where the contract contained in or evidenced by a Bill of Lading provides that the rules of the Convention or legislation of the State are to govern the contract. It is only if, on the proper construction of the Bill of Lading, the Hague-Visby Rules were to govern the Bill of Lading, that paragraph (c) would make the Rules applicable.

Condition (2)(b) of the Bill of Lading only provides for the application of any relevant legislation to the Bill of Lading where the Hague-Visby Rules apply compulsorily. That is to say, the clear intention of the drafter of condition (2)(b) is that the Hague-Visby Rules do not apply unless they are **made** to apply. In other words, condition (2)(b) is no more than an acknowledgment of the inevitable. It is simply a recognition by the parties that if legislation makes the Hague-Visby Rules applicable compulsorily then they will apply. However, in the present case they do not.

It is therefore necessary to have regard to condition (2)(a). The question which arises is as to the proper effect of the expression “*as enacted*” in that condition. If the parties were intending to say that the Hague Rules were to apply to their contract no matter what, the first sentence and the first part of the second sentence of condition (2)(a) would be otiose. It is only if the two possibilities referred to in those provisions are not applicable that the parties agree that the terms of the Convention are to apply.

That may signify that the expression “*as enacted*” does not necessarily require literal adoption by a country. On the other hand, it probably requires that the legislation enacting the Hague Rules of the relevant country at least recognise that the Convention is the source of the substantive rules which are being enacted. Thus, I consider that the scheme of condition (2)(a) is as follows:

- Have the Hague Rules been enacted in the country of shipment? If they have, the Rules **as enacted** apply to the relevant Bill of Lading.
- If the Hague Rules have not been enacted in the country of shipment but the Hague Rules have been enacted in the country of destination, then the Hague Rules, **as enacted** in the country of destination, are to apply to the Bill of Lading.
- If the Hague Rules have not been enacted in the country of shipment or in the country of destination, then the terms of the Convention apply to the carriage under the Bill of Lading.

I have already indicated that condition (2)(b) does not apply unless the Hague-Visby Rules are **made** to apply by either the country of shipment or the country of destination.

I consider that section 11 of COGSA has nothing to do with the scheme of condition (2)(a). That is to say, even if the Hague Rules have not been enacted in the country of shipment and Australia is the country of destination, it is only the **Hague Rules as enacted** in Australia which apply. It is not the legislation which enacts the Hague Rules which applies.

Section 11 of COGSA, in my opinion, has little to do with the Hague Rules. Section 11 appears in Part 2 of the Act, which is headed “*Application of the Amended Hague Rules etc*”. It is clear,

however, that section 11 is part of the “etc” and has nothing to do with the application in Australia of the amended Hague Rules.

It follows, therefore, that Hi-Fert’s contention that there is some inconsistency between condition (2) and condition (1) insofar as condition (1) incorporates clause 34 of the Voyage Charter has no substance. That is to say, assuming that section 11 renders clause 34 of no effect (and that is a question to which I shall come shortly) insofar as clause 34 is incorporated by condition (1), there is no inconsistency with condition (2)(a) because condition (2)(a) does not render section 11 applicable. I conclude, therefore, that clause 34 is incorporated with the Bill of Lading as a term of the contract between Hi-Fert and United.

EFFECT OF SECTION 11 OF COGSA

The decision of the Full Court in the *Hi-Fert Pty Limited v Kiukiang Maritime Carriers (The Kiukiang Career)* (unreported, Federal Court, 24 November 1998) indicates that the reasoning of the High Court in *Compagnie des Messageries Maritimes v Wilson* (1954) 94 CLR 577 should be applied in respect of section 11 of COGSA. Two arguments were advanced on behalf of United, however, which were not put to the Full Court in *The Kiukiang Career*. The first can be disposed of fairly simply.

United contended that section 11 applies only in respect of an agreement the governing law of which is Australia. However, in *Wilson’s Case* it was expressly recognised by Fullagar J (at page 585) that the governing law of the document there under consideration was French law. Nevertheless, the High Court found that section 9 of the *Sea Carriage of Goods Act 1924 (Cth)* had application. In those circumstances, it is clear, in my view, that if section 11 has the effect contended for by Hi-Fert, it will have that effect in respect of any relevant agreement, irrespective of whether the governing law of the agreement is Australian or the law of some other jurisdiction.

As Kirby P observed in *Bulk Chartering & Consultants Australia Pty Ltd v T&T Metal Trading Pty Ltd* (1993) 31 NSWLR 18, protective provisions such as section 11 and its predecessor, section 9, have been part of the law of Australia since soon after Federation. Kirby P suggested (at 22) that the reasons for such provisions rest in part upon the following matters:

- considerations of national pride;

- the assertion of national jurisdiction, which had been a repeated phenomenon especially of United States jurisprudence for more than a century;
- the determination of the local legislature to protect the economic interests of local traders;
- a partial mistrust of overseas courts, tribunals and arbitrators and their laws;
- a reaction to the prevailing dominance of sea trade by certain foreign powers; and
- a recognition of the inconvenience and cost inherent in arbitrations in distant places which might effectively put the determination of disputes on their merits beyond the pocket of local traders.

If it were possible to avoid the operation of section 11(2) by the simple expedient of providing that the contract was to be governed by the law of a jurisdiction other than Australia, those objectives and reasons would be easily put at nought. United's contentions should be rejected.

The more complicated argument advanced by United as to the application of section 11 concerned the amendment of COGSA with effect from July 1998 by the *Amendment Act*. Section 7 of the *Amendment Act* repealed section 7 of COGSA and substituted relevantly the following:

- (1) *The **amended Hague Rules** consists of the text set out in Schedule 1, as modified in accordance with the Schedule of modifications referred to in subsection (2).*

.....

- (2) *The regulations may amend this Act to add a Schedule (the **Schedule of modifications**) that modifies the text set out in Schedule 1 for the following purposes.*

.....

The modifications do not actually amend the text set out in Schedule 1, however the text has effect for the purposes of this Act as if it were modified in accordance with the Schedule of modifications.

- (3) *The regulations may:*

.....

- (b) *amend the provisions of this Part to the extent necessary or appropriate, having regard to the modifications set out in the Schedule of modifications as in force from time to time.*

The *Carriage of Goods by Sea Regulations* 1998, No. 174 of 1998 inserted Schedule 1A in the *Carriage of Goods by Sea Act* containing the schedule of modifications. Schedule 1A contains the text of Schedule 1 showing the modifications that are made to the Hague-Visby Rules to produce the modified Hague-Visby Rules.

In addition, regulation 6 purports to amend section 11. Section 11(2)(c) relevantly provided, prior to the amendment, as follows:

- (2) *An agreement (whether made in Australia or elsewhere) has not effect insofar as it purports to:*

.....

- (c) *preclude or limit the jurisdiction of a court of the Commonwealth or of a State or Territory in respect of:*
 - (i) *a bill of lading, or a similar document of title, relating to the carriage of goods from any place outside Australia to any place in Australia;*

The amendment effected by regulation 6.2 was to delete the words “*a bill of lading, or similar document of title*” and substitute the phrase, “*a sea carriage document to which, or relating to a contract of carriage to which, the amended Hague Rules apply*” so that section 11(2)(c)(i) would read as follows:

A sea carriage document to which, or relating to a contract of carriage to which, the amended Hague Rules apply, relating to the carriage of goods from any place outside Australia to any place in Australia.

One of the modifications made to the Hague-Visby rules was to Article 10 so that Article 10 now would read as follows:

- (1) *Subject to paragraph 6, these Rules apply to sea carriage documents relating to the carriage of goods from ports in Australia to ports outside*

Australia regardless of the form in which the sea carriage document is issued.

- (2) *Subject to paragraph 6, these Rules apply to the carriage of goods by sea from ports outside Australia to ports in Australia unless one of the Conventions mentioned in paragraph 3 (or a modification of such a Convention by the law of a contracting State) applies, by agreement or by law, to the carriage, or otherwise has effect in relation to the carriage.*
- (3) *The Conventions are:*
 - (a) *The Brussels Convention;*
 - (b) *The Brussels Convention as amended by either the Visby Protocol or the SDR Protocol or both;*
 - (c) *The Hamburg Convention.*
- (4) *Subject to paragraphs 5 and 6, these Rules apply to a sea carriage document that contains or evidences a contract for the carriage of goods by sea from a port in a State or Territory in Australia to a port in another State or Territory in Australia.*

.....

- (6) *These Rules do not apply to the carriage of goods by sea under a charter party unless a sea carriage document is issued for the carriage.*

United concluded that the scheme of COGSA, following the amendments, is that section 11(2)(c)(i) would have no application in a case such as this because the Bill of Lading is not a sea carriage document to which the amended Hague Rules apply. While section 8 provides that the amended Hague Rules have the force of law in Australia, section 10, to which section 8 is expressed to be subject, provides that the modified Hague-Visby Rules only apply to a contract of carriage of goods by sea that is made on or after the commencement of Schedule 1A. Schedule 1A commenced on 1 July 1998. Accordingly, so the argument ran, the modified Hague-Visby Rules do not apply to the Bill of Lading and, accordingly, section 11(2)(c)(i) has no operation in the present context.

Hi-Fert's first response to that argument was that if that is the purported effect of the amendment, it purported to affect a substantive right of Hi-Fert and did not do so in clear terms. That is to say, Hi-Fert was entitled, up until 1 July 1998, to contend that it was excused by section 11 from compliance with the terms of clause 34 as incorporated with the Bill of Lading.

However, following that amendment Hi-Fert was no longer entitled to be so excused. That was said to amount to a substantive right being repealed and, in the absence of clear intention of the legislature, that substantive right was not intended to be affected by the amendment. United, on the other hand, contended that the amendment only affected a procedural matter because it did not take away Hi-Fert's right to claim damages but simply regulated or affected the place in which Hi-Fert could make such a claim. I am disposed to consider that the amendment is one affecting a substantive right of Hi-Fert. However, I prefer to base my conclusion on a different argument advanced on behalf of Hi-Fert, namely that the amendment, insofar as it has the effect contended for by United, is invalid.

Hi-Fert contended that the rule making power conferred by section 7(3) of the *Amendment Act* did not include a power to amend section 11(2)(c) of COGSA in the manner for which United contended. Hi-Fert contended that no amendment to section 11(2)(c) was necessary to give effect to the modifications made to the Hague-Visby Rules. Section 11(2)(c) and its predecessors have, since 1904, operated irrespective of the terms of any overseas Bill of Lading, whatever its content and irrespective of various Conventions.

A general rule making power of the type conferred by section 7(3)(b) does not enable the rule maker, by regulation, to extend the scope or operation of the enactment. It should be treated as strictly ancillary - see *Shanahan v Scott* (1957) 96 CLR 245 at 250. The purpose of section 11 is to ensure that a foreign jurisdiction clause in respect of a bill of lading relating to inward shipments cannot affect Australia as a proper dispute resolution forum. As I have said earlier, section 11 of COGSA is not directly concerned with the adoption of the Hague-Visby Rules in section 8; nor is it concerned with any modification to the Hague-Visby Rules.

There is nothing in the second reading speech which introduced the *Amendment Act* nor in the explanatory memorandum relating to it to indicate that it was contemplated that changes to be made to COGSA by the Regulations would impact in any significant way on the protection afforded to importers by section 11(2)(c). However, if United's contention is correct, regulation 6.2 has a very significant impact. The effect of the contention is that section 11(2)(c)(i) will not apply to sea carriage documents relating to the carriage of goods from any place outside of Australia to any place in Australia if one of the Conventions mentioned in paragraph 3 of Article 10 of the modified Hague-Visby Rules applies, by agreement or by law, to the carriage or otherwise has effect in relation to that carriage.

Prior to the commencement of regulation 6.2, section 11(2)(c)(i) applied to any bill of lading or similar document of title relating to the carriage of goods from any place outside Australia to any place in Australia irrespective of whether any of the Conventions referred to in paragraph 3 applied to the carriage or not. The effect, therefore, is a very significant restriction of the circumstances in which section 11(2)(c) has application. There was no express authority for such a change to be effected by the regulations in the terms of section 7(3)(b) of the *Amendment Act*. Power to amend the Act was given only to the extent “*necessary or appropriate, having regard to the modifications set out in the Schedule of modifications*”. The modifications do not require any restriction in the operation of section 11.

In order to maintain consistency within COGSA it may have been appropriate to amend the language of section 11 so that it employs terminology consistent with that contained in the modified Hague-Visby Rules. Such an amendment would, in my view, be authorised by section 7(3)(b) of the *Amendment Act*. However, I do not consider that section 7(3)(b) authorised an amendment having the effect contended for by United.

It may be possible to argue that the amendment, as a matter of construction, does not have the effect contended for. There is a certain disconformity between paragraphs 1 and 4 on the one hand and paragraph 2 on the other of Article 10. That is to say, paragraphs 1 and 4 speak explicitly in terms of the rules applying to a **sea carriage document**, whereas paragraph 2 speaks of the rules applying to a **carriage of goods**.

Only paragraph 2 could be relevant in the context of section 11(2)(c)(i) but paragraph 2 does not speak in terms of the rules applying to a sea carriage document. That might suggest that the drafter of the amendment did not have in mind any limitation on those sea carriage documents relating to the carriage of goods from any place outside Australia to any place in Australia which would fall within section 11(2)(c)(i), but rather intended to employ the modified Hague-Visby Rules simply as a means of definition.

Paragraph 1 of Article 1 of the modified Rules provides that certain words specified are employed in the rules with the meaning there set out. In particular, there is a definition of the expression “*sea carriage document*” that is wider than the expression “*a bill of lading or similar document of title*” as used in the original section 11. There would be a rationale for

extending the operation of section 11(2)(c)(i) to cover not only bills of lading or similar documents of title as that expression was used but any sea carriage documents within the meaning of that expression as defined in paragraph 1 of Article 1. That may have been the intention of the drafter. However, the amendment appears to go further than that.

The expression “*contract of carriage*” is also defined in the modified Rules as meaning “*a contract of carriage covered by a sea carriage document (to the extent that the document relates to the carriage of goods by sea)...*”. The definition of sea carriage document is as follows:

- (i) *a bill of lading; or*
- (ii) *a negotiable document of title that is similar to a bill of lading and that contains or evidences a contract of carriage of goods by sea; or*
- (iii) *a bill of lading that, by law, is not negotiable; or*
- (iv) *a non-negotiable document... that either contains or evidences a contract of carriage of goods by sea.*

It would be consistent with the power conferred by section 7(3)(b) of the *Amendment Act* to provide that the documents to which section 11 applies be expanded to be consistent with the definition of “*sea carriage document*” as that expression is used in the modified Rules. However, if the amendment is to be given the wider meaning than appears to follow literally, I consider that it would be invalid.

I consider, therefore, that the amendment should be read down so as to be within the power. I would read it down so that section 11(2)(c)(i) applies to a sea carriage document as that term is defined in the modified Hague-Visby Rules or a sea carriage document relating to a contract of carriage as that term is defined in the modified Hague-Visby Rules.

The result, in my view, is that the contention advanced by United concerning the operation of section 11 on the Bill of Lading should be rejected. Section 11 applies in the manner indicated by the Full Court in the *Kuikiang Career*. The effect, therefore, is that the agreement contained in clause 34, insofar as it would preclude or limit the jurisdiction of this Court to determine the dispute between Hi-Fert and United in respect of the Bill of Lading, is of no effect.

EFFECT OF UNDERTAKING BY NORTH OF ENGLAND

On 13 August 1997 the North of England delivered to Hi-Fert an undertaking which relevantly provided as follows:

In consideration of your consenting to the release from arrest ... of the ship, MV "Uljanik", ... and that you refrain from commencing and/or prosecuting legal or arbitration proceedings (otherwise than as referred to below) against the said registered owners ... for the purposes of founding jurisdiction and/or obtaining security in respect of the above mentioned claim against the said registered owners, ... WE, the North of England Protecting and Indemnity Association Limited undertake to pay to your above named solicitors on your behalf on demand such sums as may be adjudged by any competent court (including any appeal from any such court) or other tribunal or as may be awarded in any arbitration or as may be agreed to be recoverable against the said registered owners ... in respect of the said claim, interest and costs...

This undertaking shall be governed by and construed in accordance with Australian law and we submit to the exclusive jurisdiction of the Australian courts for the purposes of any action for enforcement hereof.

And for the consideration aforesaid we undertake that we will ... instruct Solicitors on behalf of the said registered owners ... to accept service of proceedings brought by you and we warrant that we have received irrevocable authority from the owners ... of the above named ship to instruct solicitors accordingly.

It is noted that nothing herein is to be construed as a waiver or limitation of any of the provisions contained in the bill of lading ... and this letter of undertaking shall be without prejudice to any rights or defences available to owners ... with respect to any claims arising out of the bill of lading or otherwise. In particular all rights are reserved to argue, inter alia, that any claim which Hi-Fert Pty Limited has against the MV "Uljanik" in respect of the above mentioned claim should be determined in accordance with the arbitration clause incorporated in the bill of lading ... and that Australia is an inappropriate forum for the resolution of any disputes arising under that bill of lading or otherwise between Hi-Fert Pty Limited and those interested in the MV "Uljanik".

Hi-Fert contended that the effect of the undertaking was to render the arbitration clause inoperative within the meaning of section 7(5) of the *International Arbitration Act*. Section 7 of the *International Arbitration Act* relevantly provides as follows:

- (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.

.....

(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.*

Section 2C of that Act also provides that nothing in the Act affects the operation of section 11 of COGSA. Since I have held that section 11 renders the arbitration agreement of no effect, the argument based on section 7(5) that the agreement has become inoperative is not decisive. I shall nevertheless deal with the matter briefly.

Hi-Fert relied on the decision of Gummow J in *Bakri Navigation Company Limited v The Ship "Golden Glory"* (unreported, Federal Court, 5 June 1991). In that case, the plaintiff sought a declaration that it had a binding contract for the sale to it of the ship "Golden Glory" and an order for the specific performance of the contract. The ship was arrested and the owners applied for release. The Court ordered the release upon certain undertakings being given by the defendant, relevantly as follows:

- (a) That the defendant will take all steps on its part as are properly necessary to prepare these proceedings for trial on 15, 16 and 17 May 1991.
- (b) That the defendant will not... sell, transfer title to, mortgage or otherwise encumber in any manner whatsoever the ship...
- (c) That it will comply... with any Orders made against it in these proceedings.

Subsequently a deed ("*the settlement deed*") was entered into between the parties whereby covenants were given to comply with the undertakings given to the Court. Gummow J referred to Mustill & Boyd, *The Law and Practice of Commercial Arbitration in England*, (second

edition, 1989) at page 464, which contains the following comment concerning the English equivalent of section 7(5):

The expression “inoperative” has no accepted meaning in English law, but it would seem apt to describe an agreement which, although not void ab initio, has for some reason ceased to have effect for the future. Three situations can be envisaged in which an arbitration agreement might be said to be “inoperative”. First, where the English Court has ordered that the arbitration agreement shall cease to have effect or a foreign court has made a similar order which the English Court will recognise. Second,... there may be circumstances in which an arbitration agreement may become inoperative by virtue of the common law doctrines and frustration and discharge by breach, etc. Third, the agreement may have ceased to operate by reason of some further agreement between the parties.

His Honour considered that, when the settlement deed is read together with the terms of the undertaking given to the Court, it was apparent that the subject matter of the covenants and undertakings was the whole of the proceeding instituted in the Federal Court, including the claim to enforcement of the alleged contract, and not merely the issue of whether such a contract existed. His Honour concluded that, insofar as the dispute was a difference between the parties to the arbitration agreement which was a subject matter capable of settlement by arbitration, there had been a subsequent agreement which effected such a variation of the arbitration agreement as was necessary to give effect to the undertakings given to the Court and to the covenants set out in the deed of undertaking.

His Honour regarded what was achieved as the rendering of the arbitration agreement “*inoperative or ineffective*” in respect of the claims involved in the proceedings in the Court. His Honour, therefore, refused an order for a stay under section 7(2) by reason of the operation of section 7(5).

A question arises as to whether the undertaking of 13 August 1997 is an agreement between Hi-Fert and United or whether it is no more than an agreement between Hi-Fert and North of England. I have some doubt as to whether United could be regarded as a party to the undertaking. The undertaking is given expressly by the North of England and is not expressed to be given on behalf of United. Further, the reference to an undertaking to instruct solicitors **on behalf of the registered owners** to accept service indicates that the undertaking was not being given by United. The purpose of the undertaking was to render North of England

accountable for any judgment or award which might be recovered by Hi-Fert against United and to impose on North of England the obligation to ensure that an Australian court has jurisdiction. That was necessary because United had no presence in Australia.

Without deciding the question of whether United was a party, however, I do not consider that the effect of the undertaking is to vary any arbitration agreement. While there is an undertaking to instruct solicitors to accept service, that does not involve any inconsistency with the arbitration clause. It would always be open to United to submit to the jurisdiction of the court and not to invoke clause 34, if it chose to do so.

On the other hand, the significance of the undertakings given to the Court in the *Golden Glory* is that the defendant was undertaking to participate in proceedings in the Court. It would have been inconsistent with an undertaking to take such steps as were necessary to prepare the proceedings for trial to contend that the proceedings should be stayed in favour of arbitration. I do not find any intent in the undertaking given by North of England to submit to proceeding in the Court. On the contrary, there is an express reservation of the right to contend that any claim should be determined in accordance with the arbitration clause.

For those reasons, I do not consider that the principles which were outlined by Gummow J have any application in this case. I do not regard the undertaking as rendering the arbitration clause inoperative within the meaning of section 7(5) of the *International Arbitration Act*.

AD HOC SUBMISSION

The question of an *ad hoc* submission requires an examination of the communications between the parties in London during 1997. On 24 July 1997, More Fisher Brown (“Mores”), the London solicitors for Hyundai, sent a facsimile to Hi-Fert saying relevantly as follows:

As disponent owners, [Hyundai] chartered the [Uljanik] to you on a Gencon form dated Melbourne 2 May 1997.

As a result of the detention of the vessel interruption of discharge, disputes have arisen and arbitrations have commenced.

We are informed that the head or registered owners of the vessel have commenced arbitration against their immediate charterers Rondeau Bulk AG...

Rondeau Bulk AG have, in turn, commenced arbitration against [Hyundai].

PLEASE TAKE NOTICE that [Hyundai] hereby commence arbitration against you. We have, on [Hyundai's] behalf, appointed Mr A. G. Scott as arbitrator in respect of all disputes arising under the charter dated 2 May 1997.

On 1 August 1997, Hi-Fert's London solicitors, Clyde and Co ("Clydes"), wrote back to Mores saying, *inter alia*, as follows:

We have been given a copy of your fax of 24th July 1997 to Hi-Fert Pty Ltd, appointing Mr Scott as your clients' arbitrator in respect of all disputes arising under the Charterparty.

Please also note that our clients have suffered loss/damage the extent of which is still to be quantified as a result of the Australian Authorities refusing to allow the cargo to be discharged in Australia as a result of contamination and they will be claiming against your clients in respect of their loss/damage to cargo.

It is our clients' contention that the Australian Courts have jurisdiction to determine these disputes and it is their intention to commence proceedings against, inter alia, your clients in the Australian Courts.

Without prejudice to our clients' position on jurisdiction, please note that we have appointed Mr Michael Baker-Harber as our clients' arbitrator in relation to your clients' claim and in relation to our clients' counterclaim in the arbitration for loss/damage to cargo which is also, of course, without prejudice to their position concerning Australian jurisdiction.

On 6 August 1997, Mores replied to Clydes attaching facsimile messages received from Holman Fenwick and Willan ("Holmans"), the London solicitors for Rondeau, and Constant and Constant ("Constants"), the London solicitors for United. The messages attached were concerned with the bill of lading proposed to be issued for the new voyage of the Uljanik from Australia to Thailand with the allegedly contaminated cargo.

The facsimile from Mores to Clydes drew attention to the following paragraph in the facsimile from Holmans:

[United's] concern that the new bill of lading should identify the "governing charterparty" is no doubt, influenced by Hi-Fert's stated intention to proceed against [United] in the Australian courts under the existing bill of lading, notwithstanding the apparent incorporation in it (at least as a matter of English law) of your clients' charter party with Hi-Fert dated 2 May 1997, including

the London arbitration clause. Australia is a party to the New York Convention. Are Hi-Fert serious?

On 6 August 1997, Clydes responded in respect of that aspect in the following terms:

For the time being it is our intention to deal with the question of the form of the Bill of Lading to be issued rather than entering into a discussion on jurisdiction issues arising in connection with the original Bill of Lading and/or the voyage Charterparty to which our clients were a party. It seems to us that these issues can be conveniently dealt with once the immediate practical problems have been resolved.

The copy of that facsimile to Mores was also sent to Holmans and to Constants. It is significant that there is a reference there to the discussion on “*jurisdiction issues*” arising in connection with the original Bill of Lading. On 7 August 1997, Holmans sent a facsimile to Clydes containing, *inter alia*, the following:

3. *Jurisdiction for bill of lading claims*
Whilst our clients are not directly involved in this discussion, we take the opportunity to say that we would recommend our clients to agree to hearing of the bill of lading disputes in London arbitration concurrent with references under the three charterparties.

A copy of that facsimile was also sent to Constants. On 12 August 1997, Clydes sent a facsimile transmission to the other three firms saying relevantly as follows:

Our clients have agreed to release a copy of the voyage charterparty and this has been sent by post today to Constants and Holmans. We look forward to receiving copies of the two time charterparties. We would also like to see copies of the notices of arbitration, as previously mentioned.

Upon receipt of the charterparties and notices of arbitration, we will consider the question of consolidation further with our clients. Our inclination is to recommend agreement to any procedure which will simplify matters save costs. We would need to be satisfied that the proposal would have this effect. We presently have an open mind on the subject. However, we think it would help if those in favour of the idea could elaborate on the suggested advantages...

The observations made above are without prejudice to our client's position with regard to the jurisdiction of the Australian Courts in respect of any claim they may have under the bill of lading.

Holmans replied on 13 August 1997, relevantly saying as follows:

We refer to your second fax of 12th August regarding the suggestion of concurrent hearings and arbitrations between the parties. We note that you maintain your clients intention to proceed in the Australian Courts in respect of any claims under the bill of lading and would be grateful to know against whom your clients would intend to proceed under the bill of lading and on what basis, bearing in mind the apparent express incorporation in the bill of lading of a charterparty arbitration clause.

We are pleased to note that you are sympathetic to the idea of concurrent hearings in London arbitration at least of disputes under the three charterparties... [W]e agree that our proposal for concurrent hearings raises a number of questions of procedural detail. For the moment, we would say that our principal concern is to ensure that there is single hearing of evidence (oral and written, factual and expert) on the issues common to all three charterparties (and the bill of lading) of causation and remoteness/mitigation.

The query by Holmans concerns the basis upon which Clydes were contending that the Australian courts had jurisdiction. That is not the language of a concern as to whether Australian Courts were a more convenient forum. Rather, the query raises a question of whether the Australian courts had jurisdiction at all, in the light of the incorporation of the arbitration clause with the Bill of Lading.

Constants also responded to Clydes' facsimile of 12 August as follows:

We refer to your "second fax" of yesterday and your client's view that the jurisdiction of the Australian Courts is appropriate in respect of any claim under the bill of lading.

The bill of lading is a Congenbill Edition 1994 incorporating the law and arbitration clause under the applicable charterparty.

Our clients have, accordingly, instructed us to appoint an arbitrator in London on our client's behalf in respect of all disputes arising under the bill of lading. We have accordingly appointed Mr T. Rayment on the owners behalf. He has accepted such appointment and we hereby give you notice of same on behalf of your clients, Hi-Fert Pty Limited.

As you will no doubt be aware Mr Rayment is also our client's arbitrator in respect of all disputes arising under the time charterparty between our clients and Rondeau Bulk AG.

We look forward to hearing the name of the arbitrator appointed by your clients.

On 4 September 1997, Constants wrote to Clydes again saying:

We refer to our fax to you of 13 August. We cannot trace having heard from you with notification as to the appointment of an Arbitrator by your clients. We hereby give you notice that, if your clients do not within 7 clear days of today's date appoint an Arbitrator and notify us of such appointment, our clients will appoint Mr Raymond (sic) as Sole Arbitrator.

The incorrect reference to the name of the arbitrator was corrected by facsimile transmission of 8 September, which also said as follows:

Our client's intention is clear from the fax and we look forward to hearing from you on or before 12th September with the name of the arbitrator being appointed by your clients, failing which our clients will appoint Mr Rayment as sole arbitrator.

On 10 September, Clydes sent a facsimile to Mr M.J. Baker-Harber referring to his acceptance to act as arbitrator under the Voyage Charter and saying relevantly as follows:

Notice of Arbitration has now been served on us by Constant & Constant on behalf of their client... in respect of all disputes arising under the Bill of Lading.

The bill of lading is a Congenbill Edition 1994 and Constants have appointed their client's Arbitrator on the basis that the Bill of Lading incorporates the Law and Arbitration Clause under the applicable Charterparty.

In addition to any claims owners may assert against our clients under the Bill of Lading, our clients will have claims in respect of loss damage to the cargo against owners under the Bill of Lading.

Our clients contend the jurisdiction in respect of disputes under the Bill of Lading lies with the Australian Courts and they reserve their right to bring proceedings relating to the cargo damage against, inter alia, United Shipping Adriatic Inc in the Australian Courts.

Without prejudice to our clients' contention relating to Australian jurisdiction, as a matter of precaution, our clients request that you accept appointment on their behalf both in relation to any claim brought against our clients by United Shipping Adriatic Inc and in respect of our clients' counterclaim for cargo loss/damage under the Bill of Lading.

Following acceptance of that appointment by Mr Baker-Harber, Clydes wrote to Constants on 11 September saying:

We refer to your fax of 13th August notifying us of the appointment of Mr T. Rayment on owner's behalf in respect of all disputes arising under the Bill of Lading.

As you know, our clients have suffered loss/damage as a result of contamination of the cargo.

As you also know, it is our clients' position that all disputes under the bill of lading are subject to the jurisdiction of the Australian courts. Without prejudice to our client's position on jurisdiction we confirm that we have appointed Mr Mike Baker-Harber as Arbitrator on behalf of our clients in relation to all disputes under the Bill of Lading including our client's claim in respect of loss/damage to the cargo.

Constants responded on the same day saying:

We thank you for your fax today and note your client's appointment of Mr M. Baker-Harber. We are aware, but do not agree with, your client's view that all disputes under the bill of lading are subject to jurisdiction of the Australian courts. We are also aware that your clients allege that they have suffered loss/damage as a result of alleged contamination of the cargo.

Nothing of significance then occurred until 4 November 1997 when Constants forwarded to Clydes points of claim in the arbitration between United and Hi-Fert. I have summarised above the claims which are made in that pleading. On 5 November 1997, Clydes responded by facsimile to Constants saying:

As you know an Arbitrator has been appointed on behalf of our clients without prejudice to their position that all disputes under the Bill of Lading are subject to the jurisdiction of the Australian courts. We are now taking our clients' instructions.

On 6 November, Constants sent a facsimile to Clydes requesting confirmation that they would receive Hi-Fert's points of defence within 21 days. Clydes responded on 10 November saying:

We are unable to give you the confirmation for which you ask as we are presently taking our clients' instructions and, as you know, the Arbitrator was appointed on behalf of our clients without prejudice to their position on jurisdiction.

On 19 November 1997, Constants sent to Clydes a copy of a letter which Constants proposed to send to the arbitrators appointed in the arbitration between United and Hi-Fert. The proposed letter relevantly said as follows:

Points of claim

We enclose copies of our letters to Messrs Clyde & Co dated 4th November, 1997, the Points of Claim in the arbitration between our clients and Hi-Fert Pty Ltd and the other enclosures with our letter.

Points of defence

As the Tribunal will note, we have requested Clyde & Co to confirm that Points of Defence would be served within 21 days of service of the Points of Claim. On 10th November they informed us that they were unable to give us the confirmation for which we asked as they were presently taking their client's instructions and, as previous correspondence will indicate, Mr Baker-Harber was appointed on behalf of Hi-Fert without prejudice to Hi-Ferts position on jurisdiction.

However, we consider that it was not unreasonable for us to request the tribunal to order that Points of Defence be filed by Hi-Fert within 21 days...

Concurrent hearings

As the Tribunal observed the dispute arises in relation to the voyage of our clients' vessel the "Uljanik" to Australia earlier this year. In addition to the arbitrations between our clients and Hi-Fert and between our clients and Rondeau Bulk AG, there are two other disputes in respect of which LMAA arbitrators have been appointed.

These are between:

- (i) Rondeau Bulk AG and sub-time charterers Hyundai Merchant Marine...*
- (ii) Hyundai and Hi-Fert.*

We are instructed to seek an order in the arbitration between our clients and Hi-Fert for concurrent hearings of the two arbitrations in which our clients are involved.

It is our and our client's view that this is clearly a case in which all four arbitrations should be heard concurrently since the evidence is common to the disputes, indemnities are being sought up and down the line and concurrent arbitrations ought in our view to achieve a significant saving in legal costs.

A letter in that form was in fact sent to the arbitrators on 24 November 1997. There was also correspondence between the various firms concerning the proposed concurrent hearings.

In addition, on 25 November 1997, Mores wrote to Clydes saying, inter alia, as follows:

When we spoke on the telephone yesterday, you reminded me that Hi-Fert have appointed an arbitrator without prejudice as to jurisdiction. You indicated there was a possibility your clients might wish to have the claims involving them determined in Australia.

.....

Would your clients be prepared to confirm that no time bar points will be taken if [Hyundai] do not issue proceedings in Australia until after any challenge to the London arbitration(s) has been determined?

Clydes responded on 28 November saying:

We refer to your fax of 25th November asking for confirmation that no time bar points will be taken if [Hyundai] do not issue proceedings in Australia until after any challenge to the London Arbitrators has been determined.

Without prejudice to our client's position regarding jurisdiction our clients are prepared to agree a general extension of time for compliance with the limitation provisions in the charterparty subject to one months written notice on either side. Please confirm your client's agreement to these terms.

Also on 28 November 1997, Clydes wrote to the other three firms saying as follows:

“Uljanik” Bill of Lading No 1 dated Messaieed, Qatar 27th May 1997.

We refer to your fax of 19th November together with your intended letter to the Tribunal. More Fisher Brown have also sent us a copy of your fax to Holmans of 19th November and your draft letter to the Arbitrators in relation to your clients’ arbitration with Rondeau.

First, we should make it clear that our clients do contest the Tribunal's substantive jurisdiction to rule on the merits of this dispute, so far as our clients are concerned. Our clients’ case is that by virtue of s 11 of the Australian Carriage of Goods Act 1991, any London arbitration clause in the bill of lading is of no effect, and the dispute with our clients should be heard in the Australian courts. The remainder of this letter is without prejudice to this objection.

The letter then went on to deal with the difficulties of concurrent hearings.

United contended that, by reason of the correspondence which I have summarised, there was an *ad hoc* submission by Hi-Fert to arbitration. United relied primarily on observations made by Goff LJ in *The Tuyuti* [1984] 2 Lloyd's Rep 51 at 58.

The plaintiffs in *The Tuyuti* were owners of a cargo shipped on the defendant's vessel. The cargo was a general cargo comprising a quantity of wool and a quantity of screws. The bill of lading in respect of the wool contained a non-domestic arbitration agreement. The bill of lading in respect of the screws contained no such agreement. It was common ground that section 1 of the *Arbitration Act 1975*, which corresponds with section 7 of the *International Arbitration Act*, applied to the arbitration agreement in the bills of lading relating to the wool. The cargo owners purported to appoint an arbitrator in respect of disputes arising under both bills. The carriers responded by pointing out that the bill of lading in respect of the screws was governed by the law and was subject to the jurisdiction of the carriers' place of business but that the carriers saw there was good reason for the decision to submit both disputes to one arbitration tribunal. The carriers, therefore, appointed the same arbitrator in respect of that bill of lading.

Goff LJ concluded that, by virtue of the nomination of the arbitrators, there had come into existence an *ad hoc* arbitration in respect of the dispute which had arisen under the bill of lading in respect of the screws. However, that appears to have been common ground. The only issue before Goff LJ was whether section 1 of the *Arbitration Act 1975* would apply in those circumstances. There is, therefore, little support in that case for the proposition relied on by United that, merely by appointing an arbitrator, there came into existence an *ad hoc* submission to arbitration.

Such a contention was advanced before Hobhouse J in *The Marques de Bolarque* [1984] 1 Lloyd's Rep 652. In that case there was a question as to whether there had been an *ad hoc* agreement to submit a matter to English arbitration. The submission was said to arise from conduct in arbitration proceedings by the ship owners. The charterers, under a charter party, appointed an arbitrator in respect of cargo damage disputes and called on the ship owners to appoint their arbitrator. In response the ship owners' solicitors said:

Without prejudice to such rights as owners may have, take notice that we have today on owners behalf nominated Mr John Potter as their arbitrator.

Hobhouse J (at 659) referred to observations of Devlin J, as he then was, in *Westminster Chemicals and Produce Limited v Eichholz & Loeser* [1954] 1 Lloyd's Rep 99, to the effect that:

...if you appoint an arbitrator you are giving him jurisdiction... You cannot at one and the same time appoint an arbitrator and not confer on him jurisdiction unless that is very clearly what you are doing.

Hobhouse J had to consider whether the words in the above communication would negative the authority which would otherwise be given. His Lordship held that the words "*without prejudice to such rights as owners may have*" must, as a matter of construction of the communication, relate, among other things, to questions of jurisdiction of the arbitrator. His Lordship held, therefore, that the communication contained a reservation of the right to object to the arbitrators' jurisdiction and did not confer jurisdiction on the arbitrators.

In *Allied Vision v VPS Film Entertainment* [1991] 1 Lloyd's Rep at 392, Potter J also considered whether or not there was an *ad hoc* submission to arbitration. On 28 February 1989, the plaintiff's lawyers gave formal written notice of arbitration pursuant to the provisions of an agreement. It was requested that the arbitral agent determine that the site of the arbitration should be London. By communication of 31 March, the defendants informed the arbitral agent that they did not agree to London and consequently did not agree to the proposed panel of arbitrators for reasons which were specified.

On 18 April, the defendants' lawyers wrote to the arbitral agent referring to the notice of demand for arbitration made by the plaintiff. They said:

...this response is made without waiver of and specifically reserving, our client's position that the so-called "standard terms and conditions" relied upon by [the plaintiffs] were not agreed to by my client and are not part of the contract between [the defendants] and [the plaintiffs].

It was contended that the proper interpretation and effect of that correspondence was that the defendants agreed to the appointment of the arbitrator without reservation as to his jurisdiction and agreed to the issues which the arbitrator should decide, including the question of whether

the contract between the parties incorporated the arbitration clause. It was argued that, by its conduct, the defendants made a clear *ad hoc* submission to the jurisdiction of the arbitrator and that the subsequent letter was a belated and ineffectual attempt to retrieve a situation by purporting to confirm an original reservation which, if made, had long since been abandoned by the *ad hoc* submission.

Potter J referred to a passage in Mustill and Boyd (at page 578) as follows:

An explicit objection is, of course, essential. Otherwise, by taking part in the reference the respondent will be held either to have waived his objection, or to have made an ad hoc submission.

After referring to the decision of Hobhouse J in *The Marques de Bolarque*, Potter J said:

Hobhouse J made clear that what matters is the clear qualification at the time of the appointment of the arbitrator and, implicitly, that if that is done then subsequent participation in the arbitration under the umbrella of the original reservation will not, without more, amount to a waiver or ad hoc submission.

Counsel for United also referred to *The Amazonia* [1990] 1 Lloyd's Rep 236 where it was held that, for various reasons, a binding arbitration agreement had been made. There was some debate before me as to whether or not the true basis of that decision was an *ad hoc* conventional submission rather than an estoppel by convention. Having regard to the view I have reached concerning Hi-Fert's reservation, it is not necessary for me to consider *The Amazonia* further.

United contended that, while there was a reservation in the appointment of Mr Baker-Harber as arbitrator, the reservation should be construed as no more than an assertion that another forum has jurisdiction to determine the disputes. It was argued that there was nothing said by Clydes about the arbitration agreement being struck down or the arbitration agreement being in some way invalid or vitiated. It was contended that the terms of the reservation were simply that there is another forum which is the appropriate forum. A contrast was drawn with the language used in Clydes' letter of 28 November 1997 in which express reference was made to section 11 of the *Carriage of Goods by Sea Act*. The question, then, is whether the reservation in question should be construed as a contention by Clydes that the arbitration could not proceed in London or whether it should be construed simply as a statement that Australian courts have jurisdiction and those courts are more appropriate.

I do not accept United's contention as to the proper construction to be put on the reservation. There would be little point for Hi-Fert to say, in a context where it was making a complaint about jurisdiction, that there was concurrent jurisdiction in Australia. There would be no point in reserving any right to maintain that Australia had jurisdiction. There could be no real doubt that proceedings could have been commenced by Hi-Fert against United in an Australian court. North of England had undertaken to procure acceptance of service in Australia.

Had such proceedings been commenced before the commencement of the arbitration proceedings it would of course have been open to United either to move for a stay immediately or, alternatively, simply to submit to jurisdiction and defend the proceedings in Australia. In other words, the attitude of Constants and Mores was that the arbitration clause was paramount. If it was effective, it bound Hi-Fert to refer the dispute to arbitration in London. A reservation that Australian courts have jurisdiction must be taken to indicate that the arbitration clause was ineffective to deprive the Australian courts of jurisdiction.

That is sufficient to dispose of this point, in the sense that United acknowledged that, by 28 November 1997, there was a reservation which would be adequate to fit within the principles laid down by Hobhouse J in *The Marques de Bolarque*. However, further contentions were also advanced in relation to this matter. It was argued that on a fair reading of the correspondence, there was no intention to be gleaned on the part of Hi-Fert to submit to an arbitration which was not otherwise contractually applicable. Those arguments involve some consideration and analysis of the doctrinal basis upon which it is said that an *ad hoc* arbitration would come into existence.

In *Bremer Vulkan v South India Shipping Corporation Ltd* [1981] 1 Lloyd's Rep 253 at 260, Lord Diplock said as follows:

[I]n the instant case the shipbuilding agreement, apart from the arbitration clause, has ceased to be executory; the time for performance of the parties' primary obligations under it was past. The arbitration clause on the other hand would continue to remain executory so long as there were outstanding any disputes between the parties as to the existence or extent of their secondary obligations under the other clauses of the shipbuilding agreement. The collateral agreement contained in the arbitration clause does not fit readily into a classification of contracts that are on the one hand or unilateral or

“If” contracts on the other. It is an agreement between the parties as to what each of them will do if and whenever there occurs an event of a particular kind.

The event is one that either party can initiate by asserting against the other a claim under or concerning the shipbuilding agreement... In that event, each is obliged to join with the other in referring the claim to arbitration and to abide by the arbitrator's award. The arbitration clause itself creates no obligation upon either party to do or refrain from doing anything unless and until the event occurs, and even then the mutual obligations that arise are in relation to the particular claim that constitutes the event.

From those observations, Mustill J in *Black Clawson International Ltd v Papierwerke Waldhof-Aschaffenburg AG* [1981] 2 Lloyd's Rep 446 drew the following conclusions (at 445):

It is, I believe, clear from this passage that there are not one, but two, sets of contractual relations which govern the arbitration of disputes under a substantive contract.

First, there is the contract to submit future disputes to arbitration. This comes into existence at the same time as the substantive agreement of which it forms part. Prima facie it will run for the full duration of the substantive agreement, and will then survive for so long as any disputes remain unresolved. Second, there are one or more individual sets of bilateral contractual obligations which are called into existence as and when one party asserts against the other a claim falling within the scope of the initial promise to arbitrate, which they have not been able to settle. For brevity I will refer to these sets of relationships as the “continuous agreement” and the “individual agreements”.

It was contended that the principles concerning “*the individual agreements*” were applicable to an *ad hoc* submission.

The question of the manner in which a submission is made and what constitutes a submission was also considered by Dowsett J in *Balfour Beattie Power Construction v Kidson* [1989] 2 QdR 105. In that case, after two weeks of hearing by an arbitrator, one party to the arbitration sought to amend the points of defence to plead that a particular issue was beyond the scope of the agreement to arbitrate. The arbitrator refused the amendment and a special case was stated for the opinion of the Court.

Dowsett J said, at 117-118:

[T]he conduct in defending in this case, even if it be taken as prima facie evidence of an agreement to arbitrate the Part II issue seems to me not to speak as strongly of such an implied agreement as did the conduct in the Westminster case. Indeed, on further consideration I am not sure that it is correct to say that such conduct bespeaks such an applied agreement at all. The conduct must be viewed in all of the surrounding circumstances. A substantial arbitration is proceeding which arbitration involves a large number of separate issue. One issue not properly the subject of the arbitration is included in points of claim and points of defence are delivered, pleading to all issues, including specifically pleading to the issue which is later said to be beyond the proper scope of the arbitration. The reply and answer in this case makes no reference to Part 11. Keeping in mind that the doctrine in the Westminster case is based upon contract, can it be said that there has been an offer and acceptance sufficient to ground such a contract? It is arguable that the points of claim comprise an offer to arbitrate the issues including the issues in Part 11 are that the defence and counterclaim comprise an acceptance of that offer. Alternatively, it may be that the conduct of the parties evidences the agreement to arbitrate without it being possible to spell out offer and acceptance.

Each of the three cases in which this notion of ad hoc submission has been considered and to which I have been referred has been a case in which the arbitration has proceeded to the point of award. It would be very difficult for the conduct of the parties to be interpreted in such a case as other than indicating a clear intention that the matter be resolved in the arbitration proceedings. It does not seem to me to be quite so clear in the present case. Indeed, it is in many ways inappropriate to speak of points of claim and defences being of the nature of an offer and acceptance sufficient to ground the contract. It would seem to follow from that sort of analogy that if the principal were to defend on any part of the claim upon a basis which omitted a defence which was available to him under the contract, that could be construed as an invitation to litigate upon that basis.

Those observations may not have much application in the present context because there was clearly an agreement to arbitrate in the case before Dowsett J.

However, what is clear in the present case is that the correspondence from 24 July 1997 onwards was conducted in the context of clause 34 of the Voyage Charter being applicable to relations between Hyundai and Hi-Fert and clause 34 as incorporated with the Bill of Lading being applicable to the relations between United and Hi-Fert. I do not consider that, objectively considered, the communications between Clydes and Constants evidence any intention to submit to arbitration an issue which was not otherwise the subject of an enforceable arbitration clause. I would not put that conclusion on the basis of a vitiating mistake but that, on the true construction and interpretation of the correspondence, there was no intention to submit to arbitration a matter which was not already the subject of arbitration. When one adds

to that the terms of the reservation concerning jurisdiction, I conclude that there was no *ad hoc* submission to arbitration.

In those circumstances, it is not necessary for me to consider the question of whether section 11 applies to an *ad hoc* submission to arbitration. That appears to me to be a matter that is not without difficulty and since it is not necessary for me to resolve it, I do not propose to attempt to do so.

POSITION OF HYUNDAI

The difference between the positions of Hyundai and United is that section 11 of COGSA does not apply to the provisions of clause 34 of the Voyage Charter since no bill of lading is involved. Accordingly, to the extent that there are claims by Hi-Fert which are the subject of the agreement to arbitrate, Hyundai would be entitled to a stay under section 7(2) of the *International Arbitration Act*. However, consistently with the decision of the Full Court in *The Kiukiang Career*, not all of the claims made against Hyundai in the Main Proceeding are within clause 34. Hyundai would be entitled to a stay of the proceedings only insofar as they involve claims which can be characterised as contractual claims within the principles in *The Kuikiang Career*.

Hi-Fert's claim against Hyundai may be summarised as follows:

1. At all material times Hyundai was a charterer of the Uljanik and represented itself to be the disponent owner of the Uljanik.
2. By the Voyage Charter, Hyundai agreed to carry in the Uljanik from Qatar to Australian ports a sole cargo consisting of bulk urea, in consideration of freight.
3. By facsimile dated 26 April 1997 to Hi-Fert's shipbroker and by clause 35 of the Voyage Charter, Hyundai made the following representations to Hi-Fert:
 - (a) that the Uljanik had not previously carried a cargo of wheat;
 - (b) that on the Uljanik's second voyage it had carried a cargo of soya bean meal from Colombia River to the Philippines;
 - (c) that the Uljanik's hold condition is very good thus owners can load charterer's urea cargo as soon as possible.

4. Induced by the representations, Hi-Fert accepted the Uljanik and entered into the Voyage Charter and accepted the Uljanik's notice of readiness to load at Mesaieed.
5. The representations were erroneous in that:
 - (a) the Uljanik had previously carried a cargo of US No. 2 or better Northern Spring Wheat on its second voyage in September/October 1996 from the United States of America to the Philippines in holds 1, 3 and 4 of the Uljanik;
 - (b) holds 1, 3 and 4 of the Uljanik were contaminated by the residue of the prior cargo of wheat carried on voyage 2 which had not been cleaned from the holds.
6. By reason of those matters, Hyundai in trade or commerce has engaged in conduct that is misleading or deceptive or likely to mislead or deceive in contravention of section 52 of the *Trade Practices Act 1974*.
7. As a result of the conduct of Hyundai Hi-Fert has suffered loss and damage.
8. Further or alternatively, by reason of the negligence of Hyundai, its servants or agents and in breach of duty as carrier and bailee for reward, the cargo was contaminated or otherwise damaged.

Particulars

- (a) Failing to advise the owner and Rondeau as time charterer of Hi-Fert's requirement that the Uljanik's holds, hatches and working areas are to be clean, dry and free from residues of any previous cargoes, particularly grain where there will be zero tolerance for grain residues before commencement of loading.
- (b) failing to check whether the Uljanik had previously carried wheat sufficiently or at all;
- (c) failing to advise Hi-Fert that the Uljanik had previously carried wheat;
- (d) offering to Hi-Fert for acceptance a vessel which was not grain free.

9. Further or alternatively, the misrepresentations referred to above were made negligently and, as a consequence of the negligence of Hyundai, Hi-Fert has suffered loss and damage.
10. Further or alternatively, by the Voyage Charter, Hyundai agreed to be responsible for loss of or damage to the cargo or for delay in delivery of the cargo in case the loss, damage or delay has been caused by the improper or negligent stowage of the cargo or by personal want of due diligence on the part of Hyundai to make the Uljanik in all respects sea worthy and to secure that she is properly manned, equipped and supplied.
11. In breach of the Voyage Charter, Hyundai improperly and negligently stowed the cargo and in relation thereto failed to act with due diligence.

Particulars

- (a) failing to make any or any sufficient inquiries as to whether the Uljanik had previously carried wheat;
- (b) loading the fertiliser into the holds of the Uljanik at Mesaieed causing contamination by wheat;
- (c) failing to give any or any adequate instructions to the Uljanik to fully clean holds prior to loading;
- (d) failing to ensure by inspection of the Uljanik or otherwise that the holds were clean prior to loading;
- (e) failing to supply the Uljanik with any adequate equipment to clean its holds;
- (f) failing to man the Uljanik with a crew competent in cleaning holds;
- (g) issuing a notice of readiness to load the cargo when the Uljanik was not ready to load the cargo.

12. Further or alternatively, by clause 20 of the Voyage Charter, Hyundai agreed that the Uljanik's holds, hatches and working areas would be clean, dry and free from residues of any previous cargoes, particularly grain where there would be zero tolerance for grain residues before commencement of loading to the satisfaction of an independent inspector appointed and paid for by Hi-Fert.
13. In breach of that clause of the Voyage Charter, the Uljanik's holds were not clean, dry and free from residue of any previous cargoes particularly grain before commencement of loading.
14. As a result of the breach of duty and breaches of contract by Hyundai, Hi-Fert has suffered loss and damage.
15. Further or alternatively by clause 35 of the Voyage Charter, Hyundai warranted that the Uljanik's second cargo was soya bean meal from Colombia River to the Philippines.
16. In breach of warranty and contract the Uljanik's second cargo comprised wheat carried from Vancouver, Washington to the Philippines.
17. As a result of the breach of warranty and contract Hi-Fert is suffered loss and damage.

Some of the claims made against Hyundai are contractual and some of them are non-contractual within those principles. The claims based on the *Trade Practices Act* would clearly be non-contractual claims. However, the claims in negligence said to be based on breach of duty as carrier and bailee for reward would appear to me to be within the concept of contractual claims. They are claims that arise from the Voyage Charter. The alleged breaches of the terms of the Voyage Charter clearly arise from the Voyage Charter and the claims based on the warranty contained in clause 34 arise from the Voyage Charter.

Hyundai would be entitled to a stay under section 7(2) of the *International Arbitration Act* in respect of the claims which I have thus characterised as contractual. However, consistently with the orders foreshadowed in *The Kuikiang Career*, it would be appropriate that, while the parties be referred to arbitration in respect of those claims, a condition of the stay should be that

Hi-Fert does not prosecute those claims in any arbitration against Hyundai until after the completion of the Main Proceeding.

CONCLUSION AS TO STAY APPLICATIONS

It follows from what I have said that the claim for a stay by United should fail. That would then leave to be litigated in the Main Proceeding all of Hi-Fert's claims against United, the claims against Marine, Marine's cross-claim against United and Hi-Fert's claims against Hyundai based on the *Trade Practices Act*, being the claims said to have induced the entry into of the Voyage Charter. Hi-Fert and Hyundai should be referred to arbitration in respect of those matters.

INJUNCTION PROCEEDINGS

Finally, there is the question of the application by Hi-Fert in the Injunction Proceeding for an injunction restraining the prosecution of the arbitration proceedings in London which have been commenced by United. I have summarised above the nature of the claims made by United. As I have indicated, it is clear that there are significant factual matters which will overlap between the claim against Marine by Hi-Fert and the claims which United makes against Hi-Fert based on the conduct of Marine. Both clearly involve the conduct of Captain Fogarty in Bahrain and Qatar.

It would be most unfortunate if there were allowed to be conducted at the same time proceedings by way of arbitration between United and Hi-Fert concerning the issues raised by United and the proceedings against United and Marine concerning the issues raised by Hi-Fert in the Main Proceeding. The question is whether that is sufficient to justify an order restraining the prosecution of the arbitration.

The effect of section 11 of COGSA is that the agreement between Hi-Fert and United to arbitrate is of no effect, in so far as United is concerned. There are, therefore, several courses open to Hi-Fert. One is to apply for a stay of the arbitration. Another is simply to ignore the arbitration on the basis that the arbitrators' award would be of no effect. That alternative seems to me to be an undesirable burden to impose upon Hi-Fert.

Costs will be thrown away unnecessarily by any prosecution of the arbitration in London. It is conceivable that the arbitrators or an English court could take a different view as to the effect of

section 11, apart from any question of issue estoppel which might arise as a result of any determination which I make. The possibility that the arbitration might be pursued and result in an award against Hi-Fert which might be inconsistent with a judgment in this Court indicates that Hi-Fert, as a matter of prudence, would be compelled to defend the arbitration proceedings.

In the circumstances, it would be vexatious and oppressive for United to pursue the arbitration so long as the proceedings in this Court are being prosecuted with due diligence by Hi-Fert. Accordingly, I propose to order that United be restrained from prosecuting the arbitration proceedings in London for so long as Hi-Fert prosecutes the Main Proceeding with all due diligence and expedition.

In a sense, the result is unfortunate from United's point of view. United began its arbitration proceedings promptly. It could hardly, in ordinary circumstances, be said to be oppressive to commence and continue arbitration proceedings which were commenced some time before the commencement of these proceedings. There have been unsatisfactory aspects in the way in which Hi-Fert has conducted itself. The matters which I find puzzling are the delay in the commencement of these proceedings and the delay in the service of the proceedings in the first place. There is no satisfactory explanation as to why the matter was not brought to a head with greater expedition. It may well be that part of the explanation is the fact that *The Kiukiang Career* was being heard during the time in question. I have taken those matters into account in reaching my conclusion. However, notwithstanding those matters, I consider that it is appropriate to restrain the prosecution of the arbitration.

I do not consider that it is appropriate that I make any order concerning the proceedings in the High Court in England. It may be that the proceedings in the High Court will become unnecessary in the light of the order which I will make restraining United from prosecuting the arbitration proceedings. There would hardly be any utility in obtaining an order from the High Court restraining Hi-Fert from prosecuting proceedings in this Court.

The order I propose is simply an order restraining United from prosecuting the arbitration in the United Kingdom until after the final determination of the Main Proceeding on terms that the Main Proceeding be prosecuted by Hi-Fert with due expedition.

I will stand the matter over so that short minutes can be prepared to effect the orders which I have foreshadowed.

I shall list the matter for further hearing on 11 December for the purposes of making orders or hearing argument concerning orders.

I certify that this and the preceding forty eight (48) pages are a true copy of the Reasons for Judgment herein of the Honourable Justice Emmett.

Associate:

Dated: 3 December 1998

Counsel for the Plaintiff: P.E. King with M.J. Watts

Solicitor for the Plaintiff: Withnell Hetherington

Counsel for the First Defendant: A.S. Bell

Solicitor for the First Defendant: Ebsworth & Ebsworth

Counsel for the Second Defendant: J.E. Marshall with G.R. Kennett

Solicitor for the Second Defendant: Clayton Utz

Solicitor for the Third Defendant: Mallesons Stephen Jaques

Date of Hearing: 25-27, 30 November, 1 & 2 December 1998

Date of Judgment: 3 December 1998